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 LV.

VICTORIA, B. C.
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1941

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

During the period of this Volume.

CHIEF JUSTICES OF BRITISH COLUMBIA:

THE HON. ARCHER MARTIN.
THE HON. MALCOLM ARCHIBALD MACDONALD.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICES:

THE HON. ARCHER MARTIN.
THE HON. MALCOLM ARCHIBALD MACDONALD.

JUSTICES:

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

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.
THE HON. SIDNEY ALEXANDER SMITH.

DISTRICT JUDGES IN ADMIRALTY:

THE HON. ARCHER MARTIN.
THE HON. MALCOLM ARCHIBALD MACDONALD.

COUNTY COURT JUDGES:

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
HIS HON. LAURENCE ARNOLD HANNA	Nanaimo

ATTORNEY-GENERAL:

THE HON. GORDON SYLVESTER WISMER, K.C.

MEMORANDA.

On the 11th of September, 1940, the Honourable David Alexander McDonald, one of the Puisne Judges of the Supreme Court of British Columbia, was appointed a Justice of the Court of Appeal.

On the 26th of September, 1940, Sidney Alexander Smith, Barrister-at-Law, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable David Alexander McDonald, promoted to the Court of Appeal.

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"COURT RULES OF PRACTICE ACT."

HIS Honour the Lieutenant-Governor in Council has been pleased to order that, pursuant to the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and all other powers thereunto enabling, the following amendments be made to the "Supreme Court Rules, 1925," and the "County Court Rules, 1932":—

1. Rule 7 of Order 63 of the "Supreme Court Rules, 1925," be repealed, and the following rule substituted therefor:—

"7. Except during vacations and on Sundays and statutory holidays and any day appointed by Proclamation or Order of the Governor-General or Lieutenant-Governor as a holiday or for general fast or thanksgiving, the offices of the Supreme Court shall be kept open from 9 o'clock in the morning until 5 o'clock in the afternoon, except on Saturdays, when the hour of attendance shall end at 12 o'clock in the forenoon. Such offices shall, however, be closed to the public until 10 o'clock in the morning and after 4 o'clock in the afternoon and on Saturdays at 12 o'clock in the forenoon. During Long Vacation and Christmas Vacation the offices shall be closed to the public after 2 o'clock in the afternoon and on Saturdays at 12 o'clock in the forenoon."

2. Rule 1 of Order XX. of the "County Court Rules, 1932," be repealed, and the following rule substituted therefor:—

"1. Except during vacations and holidays, the offices of the County Court shall be kept open daily from 10 a.m. to 4 p.m., save on Saturdays, when the hours shall be from 10 a.m. to 12 a.m."

G. S. WISMER,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., April 22nd, 1941.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

KENNEDY AND KENNEDY v. UNION ESTATES LIMITED.

McLEOD AND McLEOD v. UNION ESTATES LIMITED.

BROOKS v. UNION ESTATES LIMITED.

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Sept. 27, 28.
1940
Jan. 9.

Consd. Kennedy v Haynes [1940] 3 D.L.R. 662

Negligence—Portion of defendant's amusement park reserved for picnic—Accident in park outside of the reserved portion—Collapse of bench on which plaintiffs were seated—Licensees with an interest—Liability.

The plaintiffs were employees of the International Harvester Company of Canada Limited, and on the 14th of April, 1938, an employee of said company applied to the Union Steamships Limited to reserve a picnic ground on Bowen Island for July 3rd, 1938, for a company's picnic. The Steamship Company reserved No. 1 picnic grounds for the Harvester Company and so advised them, at the same time reporting the reservation to the defendant company. The Steamship Company and the defendant company (the same shareholders in each) had a common interest in the Bowen Island resort, which included a number of picnic grounds for reservation and other attractions for the amusement of the public visiting the island. A lump sum was paid the Steamship Company, which included transportation and the reservation of the picnic grounds. A place for concerts known as the "Shell Bowl" was built by the defendant company that was not on No. 1 picnic ground but close to it. Permission was given by the defendant to one Scott to conduct

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concerts at "The Bowl" and the public could attend the concerts without any charge, but a collection was taken up for the benefit of the performers at each concert. After being on picnic ground No. 1 the three plaintiffs, with two husbands, went to "The Bowl" and they all sat on one bench facing the platform. About ten minutes after sitting down the bench swayed sideways, collapsed and fell over backwards. The plaintiffs were injured. Examination of the bench showed that its supports were in a decayed condition. It was held on the trial that the plaintiffs were invitees, that it was the duty of the defendant to make the bench reasonably safe, and the defendant was negligent in not doing so.

Held, on appeal, affirming the decision of FISHER, J. (MARTIN, C.J.B.C. and SLOAN, J.A. dissenting), that although the "Shell Bowl" where the accident occurred is not within picnic ground No. 1, that was specially reserved for the Harvester Company, the entertainment offered by the defendant must be looked on as a whole including all the different attractions. The relationship of the plaintiffs to the occupier should be defined as at least licensees with an interest. A higher obligation should be placed on the occupier in respect to a licensee with an interest, and actual knowledge of the condition of the bench is not necessary, it is enough that it ought to have known it was unsafe, and there is liability.

Per MARTIN, C.J.B.C. and SLOAN, J.A.: That no matter what the relationship between the plaintiffs and the defendant might have been in their user of the reserved public grounds (the determination of which is not necessary in this appeal) when at the "Shell Bowl" ground, under the circumstances of this case, they were bare licensees of the defendant and no more. The obligation of a licensor extends only to those hidden dangers, the existence of which were actually and in fact known to him and unknown to the licensee. Failing proof of such knowledge the defendant as licensor cannot be held responsible for the damages suffered by the plaintiffs.

APPEAL by defendant from the decision of FISHER, J. of the 28th of April, 1939, holding the defendant liable for injuries sustained by the female plaintiffs through the collapse of a bench at Bowen Island on the 3rd of July, 1938, and awarding damages to the plaintiffs. On April 14th, 1938, one Mary Scott applied to the Union Steamships Limited to reserve a picnic ground at Bowen Island for the 3rd of July, 1938, for a picnic of the International Harvester Company of Canada Limited. The traffic superintendent of the Union Steamships Limited made reservation of No. 1 picnic ground, confirmed this reservation by letter, and reported the reservation to the superintendent of the defendant company at Bowen Island. Miss Scott then

reported to the Union Steamships Limited the number of steamship tickets required for transportation to Bowen Island, and the tickets were sent to the International Harvester Company of Canada Limited with the invoice issued to the latter company by the Union Steamships Limited. No charge was made for the reservation of the picnic ground. The plaintiffs attended the picnic of the Harvester Company. Some of the picnickers returned home on the 6 o'clock boat but the plaintiffs remained and went to an open-air concert in what is known as the "Shell." The ground on which the "Shell" is situate is not included in the No. 1 picnic ground that had been reserved, but was just outside it. A collection was taken up from the audience by those running the concert. When the plaintiffs went to the "Shell" they sat down on one of the benches which was a common park bench. After the plaintiffs had been on the bench for about ten minutes the bench swayed sideways and then collapsed. The three women fell to the ground and were injured. They were helped up and brought to the first aid station where they received treatment. About one-half hour later they returned to the concert where they remained until it was over, and then caught the 9 o'clock boat for home. Three actions were brought and they were consolidated after the close of the pleadings.

The appeal was argued at Victoria on the 27th and 28th of September, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Locke, K.C. (*Sheppard,* with him), for appellant: The learned judge was in error in finding the plaintiffs were invitees. Number 1 picnic ground was reserved for the Harvester Company, but the "Shell" grounds on which the accident occurred were not part of the picnic ground and were not reserved for the Harvester Company. The "Shell" grounds were open to the public. The plaintiffs were bare licensees when on the "Shell" grounds. Assuming the plaintiffs were invitees on No. 1 picnic ground, that ceased the moment they left the picnic ground to attend the concert as one of the public. They did not enter the "Shell" ground on a matter of business, and the relation was one of licensor and licensee: see *Hambourg* v. *The T. Eaton Co. Ltd.*,

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[1935] S.C.R. 430; *Power* v. *Hughes* (1938), 52 B.C. 492. To be invitees they must enter on a matter of business in which both plaintiff and defendant have a common interest: see *Hayward* v. *Drury Lane Theatre, Lim.* (1917), 87 L.J.K.B. 18; *Holmes* v. *The North-Eastern Railway Company* (1869), 38 L.J. Ex. 161, and on appeal (1871), L.R. 6 Ex. 123; *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50, at 55; *Cavalier* v. *Pope,* [1906] A.C. 428; *King* v. *David Allen & Sons, Billposting, Lim.* (1916), 85 L.J.P.C. 229. Number 1 picnic ground was the property of Union Estates Limited, and the Union Steamships Limited acquired the right to have their passengers enter upon the land. The Union Steamships Limited and the International Harvester Company of Canada Limited entered into a contract to reserve No. 1 picnic ground. The plaintiff must establish some contract or relation which existed between the Harvester Company and the plaintiffs, because the reservation was to that company. The plaintiffs are not entitled to intervene on a contract between the Harvester Company and the Union Steamships Limited: see *Keighley, Maxsted & Co.* v. *Durant* (1901), 70 L.J.K.B. 662. The duty to an invitee does not extend to the safety of the premises generally but only to an unusual danger of which the defendant knew or ought to have known: see *Pritchard* v. *Peto* (1917), 86 L.J.K.B. 1292. The learned judge was in error in saying the invitor's duty was to make the bench reasonably safe or fit for the purpose for which it was put there. The highest relation of the plaintiffs to the defendant is that of bare licensees, and the plaintiffs then must prove the bench was a trap: see *Gautret* v. *Egerton* (1867), 36 L.J.C.P. 191; *Power* v. *Hughes* (1938), 53 B.C. 64. Evidence was admitted of statements made by one Frank Scott who was not an employee of the defendant company as proof of knowledge of the defendant company: see *Wright* v. *Beckett* (1834), 1 M. & Rob. 414.

Bray (*Bradshaw,* with him), for respondents: The bench was of a size to accommodate seven persons, but it was in a decayed condition and the broken supports appeared to be rotten. It was found by the learned trial judge that the plaintiffs were invitees: see *Indermaur* v. *Dames* (1866), 35 L.J.C.P. 184;

Latham v. *Johnson & Nephew, Lim.* (1912), 82 L.J.K.B. 258; *Fairman* v. *Perpetual Investment Building Society* (1923), 92 L.J.K.B. 50, at p. 52; *Sutcliffe* v. *Clients Investment Co.* (1924), 94 L.J.K.B. 113; *Silverman* v. *Imperial London Hotels Limited* (1927), 137 L.T. 57; *Letang* v. *Ottawa Electric Railway* (1926), 95 L.J.P.C. 153, at p. 157; *Norman v. Great Western Railway* (1914), 84 L.J.K.B. 598, at 604; *York* v. *The Canada Atlantic Steamship Company* (1893), 22 S.C.R. 167, at p. 172. When the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. Even if it is found that the plaintiffs were mere licensees, the defendant is still liable as it knew of the dangerous condition of the bench through an employee who had reported it to the defendant: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 610, sec. 860.

Locke, replied.

Cur. adv. vult.

9th January, 1940.

MARTIN, C.J.B.C. concurred with the reasons for judgment of SLOAN, J.A.

MACDONALD, J.A.: Appeal from a judgment of FISHER, J., awarding damages for injuries suffered by respondents through the collapse of a bench at an open-air concert on Bowen Island, a summer resort not far distant from Vancouver. Appellant is the owner and occupier of a large part of Bowen Island to which crowds resort for pleasure, rest and recreation. Situate thereon were tea-rooms, picnic grounds, boating and bathing facilities, an hotel, a "Concert Bowl" (where the accident occurred) and generally all facilities for a summer resort conducted solely as a commercial venture.

The main point to determine is the relationship of the injured respondents to appellant from and after their arrival at Bowen Island until their departure later in the day and the category in which the former should be placed. They were (apart from

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a few friends) employees of the International Harvester Company of Canada, making up a picnic party, all transported to the island by the Union Steamships Limited, a sister company, as it was called, of appellant. Both companies (the same shareholders in each) had a common interest in the resort. "We all work together" appellant's manager testified. Joint profits were obtained by the Steamship Company transporting patrons to the island and appellant, Union Estates Limited, catering to their wants while there; in other words selling them rest, recreation, amusement, food, drink and hotel accommodation to the extent demanded. The lump sum of $110.40 was paid to the Steamship Company and, as its traffic assistant said:

> That included transportation and the reservation of the picnic grounds which we consider a travel inducement.

An employee of the International Harvester Company in Vancouver applied to the Steamship Company to reserve for the former's employees on Bowen Island No. 1 picnic ground and the latter company's traffic superintendent set a small area aside for their use. This was doubtless a common centre or rendezvous for the picnic party. They were of course free to move about and use all facilities at the resort upon payment of a fee, although some attractions, *e.g.*, a concert was free except for voluntary contributions.

The accident, as intimated, occurred at the "Shell Bowl" built by appellant where a concert was given, not on the reserved picnic grounds. It was open to the public, including respondents. Appellant gave permission to one Scott to conduct concerts at "The Bowl." The audience might or might not contribute to a collection: there is no evidence that any of respondents did so. I refer to these facts because it was submitted, whatever the situation might have been had the accident occurred on the picnic grounds reserved exclusively for respondents, they were mere licensees at the "Concert Bowl;" not, as found by the trial judge, invitees. That is not a broad, nor I think, with deference, a correct view of the true situation. The entertainment offered by appellant must be looked on as a whole: it cannot be said that there were separate and distinct invitations for each separate attraction, as if controlled by different owners. The concert was one feature only, an attraction associated with

others designed to lure customers to appellant's premises, not detached from but forming an integral part of one scheme of entertainment. Whether patrons were attracted to tea-rooms, the boat-house, tennis courts, etc., or the "Concert Bowl," one common purpose was served, *viz.*, profit for appellant and advancement of its commercial interests. Attractions of a varied character in their combined effect would induce the public to visit the island, repeat the visit and cause others to do so. A patron might promote appellant's interest, even though no money was spent by him except payment of his fare. Even that, as stated—and the fact is not without significance—included payment for the picnic grounds. Whether appellant arranged with Scott to conduct the concert or with others to run the tea-room or tennis court it was all part of the general business venture with appellant the true owner and occupier throughout. Having Scott in charge at "The Bowl" was a matter of policy only in no way disturbing the relationship between the interested parties herein. Appellant's relation to patrons (mere licensees, licensees with an interest or invitees) was not changed by locomotion from one attraction to another. It would not be consonant with the facts to suggest that categories changed as respondents, at liberty—and we must assume invited—to go everywhere, moved from place to place. A new relationship did not commence upon taking seats on the bench. Whatever it was it began on arrival at the island and ceased upon their departure.

It was submitted that the arrangements made with the Steamship Company for transportation is a material factor to consider. I do not think so. It matters not how, under what arrangement, or by what means respondents reached the Island. Nor can any importance be attached to the reservation of picnic grounds. As already intimated, respondents were not invited simply to occupy that restricted area: it was merely a point of contact, an accommodation.

The point for decision is this—did respondents enter upon all areas including "The Bowl" on a matter of common business interest; had they an interest in common with the appellant? Certainly if the foregoing outline of the facts is warranted by the evidence respondents occupied a higher position than mere

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licensees. That is all I desire to establish. I am not then embarrassed by the decision of this Court in *Power* v. *Hughes,* later referred to. How the occupier viewed the relationship throws some light upon it. Mr. Vosper, its superintendent, agreed that they "encourage and invite people to come to the island for amusement." If the owner of park lands permitted members of the public to enter thereupon providing benches for rest and recreation they would be mere licensees. If, however, refreshments were sold or articles exposed for sale and his purpose was not philanthropic but commercial, visitors (customers actual or potential) would be placed in a higher category; if not a new category ought to be added to increase the confusion arising from the practice of not applying to a restricted class standing in a certain relationship, the general principles of the laws of negligence. Nor is it material that the injured parties may have made no purchases. It was profitable to the owner to have potential customers on his grounds where a business primarily commercial was conducted.

The facts were not as fully elucidated at the trial as they might have been. I think, however, there is enough evidence to justify the conclusions hereinbefore referred to. A folder was produced, prepared jointly by appellant and the Steamship Company, bearing the signature of Mr. Vosper, appellant's superintendent, advertising the attractions of the place. It disclosed that canoes, rowboats, etc., were available; tennis courts and lawn bowling greens provided; dancing at a pavilion was a further attraction with the price of admission stated; light refreshments, lunches, tea, coffee and sandwiches were served, while supplies of all kinds might be obtained at a general store and accommodation at an hotel. Counsel might have shown, if possible, that respondents spent some money while on the Island. It is not material that no charge was made at "The Bowl." It sometimes pays to offer free attractions in one or more parts of a resort.

I shall not discuss the cases so often canvassed. I would define the relationship of respondents to the occupier as at least licensees with an interest. It is not necessary to reach a higher category, *viz.,* invitor and invitees to support the judgment; nor is it necessary to decide whether or not there is any substantial dif-

ference, susceptible to definition, in the degree of care an occupier must exercise in relation to the one or to the other. The findings in the Court below, that the relationship of invitor and invitees existed necessarily includes a finding of licensee with an interest; the greater includes the less. Weight should be given to the findings of the trial judge on a question of mixed law and fact. I may add that I take his Lordship's findings as to the condition of the bench. If it happened to be a rotten chair that gave way one can conceive that even more serious injuries might follow.

Must it be shown that appellant had actual knowledge of the condition of the bench or is it enough that it ought to have known it was unsafe? I speak only of the facts in this case as applied to the relationship disclosed, *viz.*, an occupier and licensees with an interest. The cases are uncertain on this point —at all events so far as mere licensees are concerned. It is discussed by my brother SLOAN in *Power* v. *Hughes* (1938), 53 B.C. 64, at 69. There the Court was concerned, in the view of the majority, with a mere licensee. It does not therefore stand in the way on the point I am now discussing. It is reasonable to say that a higher obligation should be placed on the occupier in respect to licensees with an interest: actual knowledge should not be necessary.

In the formulation of categories and in the judge-made law applied to each the ordinary principles of the laws of negligence are not applied. It is suggested that this departure should be enlarged so that arbitrarily, regardless of what the surrounding facts may be—facts possibly considered relevant by a jury or a fact-finding judge—where certain relationships are found to exist, in this case licensee with an interest, actual knowledge of the danger must be brought home to the occupier. I do not agree: ordinary doctrines of negligence should govern. Usually if one knew that a condition existed, which left unrepaired, caused injury or death to others it would be held in answer to a plea of lack of knowledge that it was no excuse; he should have known: he may not profit by his own neglect.

Where the duty exists to inspect, examine and repair, it would be surprising if one could escape liability by refusing to look;

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by declining to discharge an obvious duty to inspect in order to ensure that the premises from which revenue accrues is safe, thereby establishing lack of actual knowledge. There can be breach of duty through failure to know what one ought to know to insure the safety of others with whom one has commercial relations for a common purpose.

What would follow from the application of the view that actual physical knowledge is essential? It would favour the sluggard and reward the slothful. The most undesirable type of occupier could escape liability by establishing his own neglect. It is not too much to suggest that in modern days where high standards of efficiency are demanded an occupier doing business with the public (or with licensees with an interest) must keep his premises safe and that he cannot excuse himself by closing his eyes or by going to sleep. I know of no binding authority compelling me to hold that actual knowledge on the occupier's part is essential to support liability in respect to injured parties falling under the category disclosed herein.

I would dismiss the appeal.

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

SLOAN, J.A.: This is an appeal by the defendant from a judgment of Mr. Justice FISHER awarding damages to the plaintiffs for injuries suffered consequent upon the collapse of a bench situate upon the property of the defendant.

The defendant owns Bowen Island, a pleasure resort about one hour's sail from Vancouver. Some part of the island is developed; the rest remains in its natural state of forest and lakes. The developed area contains an hotel or inn, bungalows, lawn-bowling club, tennis courts, boating, fishing and swimming facilities, children's play grounds, dancing pavilion, picnic grounds and an area known as the "Shell." Upon this "Shell" area were two rows of common park benches facing an outdoor stage. It was the collapse of one of these benches which caused the injuries which led to this action. Upon the stage at the time in question a concert was being held, or about to be held, by permission of the defendant under the direction and control of

one Scott whose practice it was to take up a collection from the audience. The "Shell" area was open to the general public without an admission charge of any kind and members of the audience might or might not contribute to Scott's collection plates as they saw fit. The defendant made no charge to Scott for the use of the stage and what he did with any moneys contributed by the audience was his own affair. He was not an officer nor employee of the defendant.

Five of the picnic grounds were set apart, equipped and made available for exclusive reservation by organized parties.

In July of 1938 the plaintiffs were members of an organized picnic and had "picnic ground No. 1" reserved for their exclusive use. How that reservation was made and their manner of transportation to the island is of no moment, in my opinion, except, it should be noted, that there was no contractual relationship between the plaintiffs and defendant.

About 6 o'clock in the evening of the day in question some members of the picnic party returned to Vancouver by steamship, while others, including the plaintiffs, remained on the island to await a later boat. Some time after 6 o'clock the plaintiffs in a group of seven left the reserved picnic ground, went to the "Shell" area and sat upon a bench which in a few minutes collapsed.

The learned trial judge, as it was his duty to do, had to classify the injured plaintiffs as trespassers, licensees or invitees of the defendant for as Viscount Dunedin said in relation to those categories in which persons upon premises of another may fall:

> . . . the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories:

Robert Addie & Sons (Collieries) v. *Dumbreck,* [1929] A.C. 358, at 371—an expression quoted with approval by Crocket, J., in delivering the judgment of the Court in *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430, at 438.

The learned trial judge held that the plaintiffs at the time and place in question were invitees of the defendant. With great respect to the learned trial judge I have reached the conclusion that, no matter what the relationship between the plaint-

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iffs and defendant might have been in their user of the reserved picnic ground (a matter I leave open as the determination of it is not necessary in this appeal), when at the "Shell" ground, under the circumstances of this case, they were bare licensees of the defendant and no more. The law, in my understanding, is clear and settled that the relation of invitee and invitor can exist only within the scope and limitation of the invitation and within that common business interest upon which that relationship rests: *Knight* v. *Grand Trunk Pacific Development Co.*, [1926] S.C.R. 674; *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ld.*, [1936] A.C. 65, at 69; *Hambourg* v. *The T. Eaton Co. Ltd., supra; Power* v. *Hughes* (1938), 53 B.C. 64, 67.

What was the common business interest existing between the plaintiffs and defendant at the time and place in question? They did not attend the "Shell" area, in my opinion, on a matter of business common to the defendant and themselves but for an exclusive purpose of their own choosing. I can see no distinction between the collapse of a bench in the "Shell" area under the circumstances in question and the collapse of a bench which may have been placed beside a forest trail for the convenience of a tired "hiker." In both instances, in my view, the relationship of the user of the bench to its supplier is one of licensee and licensor. The right to go upon the "Shell" area or to walk the island trails and the use of either bench is a matter of tacit permission by the defendant to those members of the general public who may desire to avail themselves of it.

To say because the defendant operates certain facilities upon the island for the enjoyment of which a charge is made and from the user of which the relationship of invitee and invitor might well arise that, in consequence, all persons on the island are invitees of the defendant, is with respect, a theory to which I cannot subscribe. A person visiting the island might be, in one part of it, a trespasser, in another a licensee, and in yet another, an invitee of the defendant.

With reference to the contention that the plaintiffs at the time of the accident were licensees with an interest I may say that with deference I cannot accede to that view because to create that relationship the "interest" of the licensee must be

one in common with the licensor. *Power* v. *Hughes* (1938), 53 B.C. 64, at 67. And, as I have stated, I am unable to see what interest in common existed between defendant and plaintiffs in their use of the faulty bench.

While, in this Province, an invitor owes to an invitee, or licensee with an interest, the duty to take reasonable care that the premises are safe, which obligation extends not only to dangers of which the occupier had knowledge, but also to those dangers the existence of which he ought to have known—*Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512, at 550—the obligation owing by a licensor to a licensee is narrower in that the duty of the occupier is "not to expose him [the licensee] to a concealed danger or hidden peril the existence of which is not apparent to the licensee but known to the licensor"—*Power* v. *Hughes, supra,* at p. 70.

Thus the obligation of a licensor extends only to those hidden dangers the existence of which were actually and in fact known to him and unknown to the licensee.

The plaintiff sought to introduce in evidence statements made after the accident by Scott to the plaintiffs for the purpose of proving that Scott had admitted making some report to the defendant respecting the unsafe condition of the bench. The learned trial judge did not allow this evidence to be given by the plaintiffs in chief.

Later Scott was called by the defendant and was cross-examined on the statement he was alleged to have made to the plaintiffs and upon his denial evidence was admitted in rebuttal to contradict him. If this evidence in rebuttal was admissible at all it was an attempt to discredit Scott and cannot be substantive evidence proving that the defendant had knowledge of the defective condition of the bench. Failing proof of such knowledge the defendant as licensor cannot be held responsible for the damages suffered by the plaintiffs. *Power* v. *Hughes, supra.*

The principle upon which *Cox* v. *Coulson,* [1916] 2 K.B. 177 and *Sheehan* v. *Dreamland Margate, Limited* (1923), 40 T.L.R. 155 was decided cannot, in my view, be applied to the facts of this case, which are essentially different in material aspects.

With great deference to my brothers who hold a contrary

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view and to the learned trial judge whose judgment they uphold, I must dissent from their opinion and in consequence would allow the appeal and dismiss the action.

O'HALLORAN, J.A.: The respondents, as members of a large picnic party from Vancouver, spent the day at Bowen Island, a popular amusement and recreational resort operated commercially by the appellant. A concert or vaudeville entertainment took place in the evening without charge; it was held on the grounds of the appellant and under its control. The appellant supplied wooden benches for the use of the people who utilized its picnic grounds and attended the evening entertainment; its employees placed the benches in position daily. While the respondents were seated on one of these benches waiting for the evening entertainment to commence the bench collapsed and caused them injury. This appeal is from the judgment of Mr. Justice FISHER allowing them damages therefor. From the evidence of F. D. Brewer, branch manager of the International Harvester Company at Vancouver it appears that the seat of the bench was in good condition but that its understructure "seemed to be of rotten wood." This is confirmed by other evidence on behalf of the respondents. Linklater, foreman of the appellant in charge of construction and repair work, examined the bench the next day; he testified that one of the tenons (*viz.*, that part of the leg mortised in a hole in the seat) was broken off and showed the "first evidence of decay." He said the legs were not serviceable material to repair because they were "checked," which was stated to mean showing signs of early decay.

It is reasonable to assume that the defect while "apparent" was not "obvious" in the sense these terms are used in Lord Buckmaster's speech in *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50, at 54. The bench was not repaired; it was used eventually as firewood. There was ample evidence, in my view, to support the findings of the learned trial judge, that this bench constituted a concealed danger to the respondents; that the latter were making a reasonable and lawful use of it; and that the appellant was negligent in failing to keep the bench reasonably safe for its intended use. We have

to decide whether in the particular circumstances, the respondents were injured through negligence of the appellant for which it is liable in law; we have to determine if it committed a breach of any duty it owed the respondents. For as Lord Macmillan (with whom Lord Atkin and Lord Wright agreed) observed in *Shacklock* v. *Ethorpe, Ltd.*, [1939] 3 All E.R. 372, at p. 374:

> The word "negligence" is tending in modern legal usage to be restricted to denoting the breach of a duty owed to some other person.

Whether a duty exists in the particular case depends upon the relationship in which the parties stand to each other: *vide Lochgelly Iron and Coal Co.* v. *M'Mullan* (1933), 102 L.J.P.C. 123, Lord Macmillan at p. 129, and Lord Wright at p. 131.

The elements of relationship in the present case may be summarized thus: (1) The respondents were lawfully where they were and were making a lawful and reasonable use of the bench; (2) the bench was owned by the appellant and placed in position on the day in question by the appellant with the purpose that it should be used by the respondents and people like them to sit upon while listening to the concert; (3) the bench constituted a concealed danger to the respondents, that is to say, its defects were not obvious to people making reasonable use of it and taking reasonable care for their own safety. It should be observed that there was no duty on the respondents to examine the bench for defects; it was placed there by the appellant for their use, and they were entitled to assume that it was not a concealed danger, and that it was safe to sit upon as they did: *vide* for example *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512, where my learned brother MACDONALD said at p. 520 in speaking of a ferry wharf:

> There is no obligation on users of premises of this sort [a ferry wharf] or upon reasonably careful men to make any inspection to see that a wharf is safe before using it or while using it.

And *vide* also for example *Francis* v. *Cockrell* (1870), 39 L.J.Q.B. 291, Martin, B. at 295; Keating, J. at 296 and Cleasby, B. at 297; and also *York* v. *The Canada Atlantic Steamship Company* (1893), 22 S.C.R. 167, at pp. 171-2, in the judgment of the Court delivered by Sedgewick, J.; (4) we are concerned with a chattel upon the appellant's property, maintained and placed in position by the appellant with the purpose

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that the respondents and people like them would use it as they did; (5) the picnic grounds and concert were attractions maintained by the appellant in its business of an amusement resort, to induce people to come to Bowen Island and spend their money at the varied attractions and holiday conveniences advertised at that popular resort; (6) the collapse of the bench was due to the deterioration of the wood in one of its legs. This deterioration was betrayed by the colouration of the wood, observable on a proper inspection.

In the light of what has been said, was the appellant negligent and, if so, by what standard of duty? The method of approach to the problem is indicated by the ensuing passages from the decision of the House of Lords in *Donoghue* v. *Stevenson,* [1932] A.C. 562; 101 L.J.P.C. 119. Lord Atkin said at p. 129:

> I venture to say that in the branch of the law which deals with civil wrongs, dependent, in England at any rate, entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey, and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight of course being given to the *dicta* of the judges.

And Lord Thankerton at p. 139:

> The English cases demonstrate how impossible it is to finally catalogue, amid the ever-varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract, and each of these cases relates to its own set of circumstances, out of which it was claimed that the duty had arisen.

Therefore in weighing the relationship between the parties in the particular case, the search for the duty should not be halted by the ready appearance of what at first appears to be a convenient category; nor should the main problem of negligence be obscured in an effort to place the injured person in a rigid and exclusive category; and *vide* what was said in (1939), 17 Can. Bar Rev. 445 and 448, by the learned editor, Dr. Cecil A. Wright. The infinite variety of relationships which human beings are thrown into or place themselves in with their fellows in the daily contacts of social and business life (Lord Macmillan p. 146 *Donoghue's* case) should not be interpreted so as to "unduly restrict the inherent adaptability of English law" and thereby as Lord Atkin said also at p. 134:

Seeking to confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed to those who will be immediately injured by lack of care.

For as Lord Macmillan observed, p. 147:

The categories of negligence are never closed.

And also at pp. 146-7:

The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life.

I refer first to *Excelsior Wire Rope Co.* v. *Callan* (1930), 99 L.J.K.B. 380, decided in the House of Lords some two years before *Donoghue's* case. It is an example of what was said in the latter case of the futility of attempting to confine the concept of negligence to rigid and exclusive categories. It arose from injuries caused a five year old child by a wire rope forming part of a haulage system. Children from an adjacent playground played with it but the practice was to warn them away before the haulage system went into operation. On the day in question the men warned the child away and one of the men then went about 25 yards and gave the signal to start. If he had looked around before giving the signal he should have seen that the child had returned to the rope. The trial judge gave judgment in favour of the child; the Court of Appeal affirmed the judgment and it was sustained unanimously in the House of Lords. Throughout there was much discussion as to whether the child was a trespasser or a bare licensee. But the decision did not rest upon which of these categories the child belonged to; it turned upon the duty, which was deduced from the facts, to see that no child was where it would be hurt. Lord Buckmaster who gave the leading judgment said at p. 383:

I do not think it necessary in the least to define that it is because the children were licensees in relation to the machine, or trespassers in relation to the machine, that the obligation cast upon the appellants here exists.

Excelsior Wire Rope Co. v. *Callan* was decided about a year after *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), 98 L.J.P.C. 119, in which a four year old child was held a trespasser under circumstances bearing striking similarity, with the exception that express warning was not given in the *Addie* case. The Court of Appeal applied the *Excelsior* case, *supra,* in

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Mourton v. *Poulter* (1930), 99 L.J.K.B. 289, and allowed an appeal from a judgment which had followed the *Addie* case. Whatever may be the dividing line between the decisions in the *Addie* case and the *Excelsior* case it is not in doubt that if the child in the *Excelsior* case had been held to be a trespasser the result would have been the same as in the *Addie* case. But in the *Excelsior* case the child was given express warning almost immediately before the accident while in the *Addie* case there is no such evidence. A close analysis of the facts in the two cases warrants the conclusion that compared "categorically," the child in the *Excelsior* case was no less a trespasser than the child in the *Addie* case. But the further conclusion is not difficult to accept that the distinction in the result of the two decisions lies in this, that in the *Addie* case the application of rigid and exclusive categories was accepted as a crucial test of liability, whereas in the *Excelsior* case the liability was deduced from the duty to take care arising from the special relationship of the parties, irrespective of the category in which the injured person might have appeared. The distinction between the two decisions suggested by Scrutton, L.J. in *Mourton* v. *Poulter, supra,* at pp. 291-2 lends support to this conclusion. Speaking for myself I follow the view adopted in the *Excelsior* decision in so far as its reasoning relates to the case under review, not only as the later decision but as in accord with the principles of the common law enunciated by the House of Lords subsequently in *Donoghue's* case in 1932 and further explained and applied by the Judicial Committee in *Grant* v. *Australian Knitting Mills, Ld.,* [1936] A.C. 85.

Before discussing these last-mentioned decisions it is in point to emphasize that this case concerns the condition of a chattel as distinct from the condition of land or rented premises. Under English law as it has been interpreted in the decided cases a landlord who lets a house in a dangerous condition owes no duty apart from contract to the tenant or the latter's customers or guests. That is to say apart from fraud he is not liable in tort—*vide Cavalier* v. *Pope,* [1906] A.C. 428 and *Bottomley* v. *Bannister,* [1932] 1 K.B. 458, and also reference to these decisions by Lord Atkin and Lord Macmillan in *Donoghue's* case, *vide* also

Davis v. *Foots,* [1939] 4 All E.R. 4. It is indicated that the liability of a landlord lies at present in another chapter of the law. For example in *Bottomley* v. *Bannister,* Scrutton, L.J. said at p. 468:

> Now it is at present well established English law that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, . . . , for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence.

We are concerned in this appeal with a chattel under conditions not governed by the restricted liability of a landlord as set forth in the decisions just now cited. Scrutton, L.J. in *Bottomley* v. *Bannister, supra,* expressed the view (p. 472) that the installation there being part of the realty, the cases as to chattels did not apply. Greer, L.J. also indicated the existence of such a distinction as did Romer, L.J.; and *vide Otto* v. *Bolton and Norris,* [1936] 2 K.B. 46, at pp. 54-5. To appreciate correctly the legal problem presented we should distinguish therefore landlord and tenant cases, such as, for example, *Power* v. *Hughes* (1938), 53 B.C. 64, a decision of this Court. The premise upon which that case was decided by the majority of the Court was stated by my learned brother SLOAN at p. 68:

> They [tenant and wife] are both, in my view, under the circumstances of this case mere licensees of the landlord when paying a visit to another suite.

In such circumstances the effect of the English decisions to which I have referred is that a landlord is not liable in tort but that his liability (if any) is confined to his contract of tenancy. *Power* v. *Hughes* was decided by the majority of the Court as a landlord and tenant case, and did not concern, as here, a chattel placed in position by the appellant for the use of the respondents and people like them. Therefore the principle upon which *Power* v. *Hughes* was decided does not apply to the facts of this case. As the relation of landlord and tenant does not exist in this case it is unnecessary to discuss the bearing of *Donoghue's* case and *Grant's* case upon which such decisions as *Cavalier* v. *Pope, Bottomley* v. *Bannister* and *Davis* v. *Foots, supra.* As to *Power* v. *Hughes, vide* also *Dymond* v. *Wilson* (1936), 51 B.C. 301, reversing 50 B.C. 458; and *Fraser* v. *Pearce* (1928), 39

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B.C. 338, and *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213.

Lord Atkin in *Donoghue's* case, *supra,* at pp. 127-8 discussed *Heaven* v. *Pender* (1883), 11 Q.B.D. 503, and *Le Lievre* v. *Gould,* [1893] 1 Q.B. 491. He quoted with approval the statement of Lord Esher that the decision of *Heaven* v. *Pender* was founded upon the principle that a duty to take care arose

"when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other."

Lord Atkin then proceeded, p. 128:

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

And further at p. 128:

With this necessary qualification of proximate relationship, as explained in *Le Lievre* v. *Gould,* I think the judgment of Lord Esher expresses the law of England.

In my view this statement of the law applies aptly to the case under review. The bench was not only owned by the appellant but placed by it in position to be used on this occasion by the respondents and people like them. From these circumstances emerged a relationship which imposed a duty upon the appellant not to supply the respondents with a bench containing defects which would expose them to injury which they could not avoid by reasonable care for their own safety. That duty arose from the appellant's own action in bringing itself into direct relationship with the parties injured. That relationship, which it desired and assumed for its own ends, imposed upon the appellant a duty to take care to avoid injuring the respondents (Lord Macmillan p. 147). In creating that relationship, it assumed a duty to protect the respondents from concealed danger. That duty to protect was not then measured by the appellant's knowledge of the existence of the concealed danger; for in *Donoghue's* case Lord Macmillan said at p. 145:

I would observe that in a true case of negligence knowledge of the existence of the defect causing damage is not an essential element at all.

And in *Grant* v. *Australian Knitting Mills, Ltd.* (1935), 105 L.J.P.C. 7, Lord Wright, speaking for the Judicial Committee,

after stating that according to the evidence the method of manufacture was correct and the process was intended to be "fool proof," and that the danger of excess sulphites being left was recognized and guarded against, observed further, at p. 13:

If excess sulphites were left in the garment, that could only be because some one was at fault. The appellant is not required to lay his finger on the exact person in all the chain who were responsible, or to specify what he did wrong. Negligence may be found as a matter of inference from the existence of the defects, taken in connection with all the known circumstances.

From this it is a reasonable application that the duty to take care includes as well the duty of adequate inspection. The case under review is stronger. A bench upon which people sit without negligence does not collapse unless there is a defect in it; the defect is inferred from the collapse. But this case goes further, because there is indisputable evidence that one of the props or tenons was of decayed or rotten wood, and that the collapse of the bench was caused thereby. In fact it is not seriously disputed, for the appellant bases his appeal upon the premise that even so it is not liable because the respondents must be confined within that rigid category described as bare licensees. The appeal in *Donoghue's* case was allowed by a majority of three to two; Lord Atkin, Lord Thankerton and Lord Macmillan (who sat also in *Grant's* case) allowed the appeal; Lord Buckmaster and Lord Tomlin dissented. Their reasons for dissent may be studied with additional interest in view of the unanimous decision of the Judicial Committee four years later in *Grant* v. *Australian Knitting Mills, Ltd.* which adopted and explained the grounds of the decision in *Donoghue's* case.

Lord Wright, who spoke for their Lordships of the Judicial Committee in *Grant's* case stated, p. 14, that in *Donoghue's* case, negligence was treated as a specific tort in itself

and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract.

After pointing out that in English law it is essential that the duty to take care should be established and that it is to be deduced from the precise relationship, Lord Wright proceeds also at pp. 14-15:

In *Donoghue's* case, the duty was deduced simply from the facts relied on, namely, that the injured party was one of a class for whose use, in the

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contemplation and intention of the makers, the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting the hidden danger.

To my mind this is the principle which governs the decision of the case under review; for the injured parties (the respondents) belonged to a class for whose use the bench was maintained and placed in position in the contemplation and intention of the appellant. These facts when established (as they have been) fasten upon the appellant the duty to supply a bench free from concealed danger. If the appellant had manufactured and sold its own ginger beer at Bowen Island, and as in *Donoghue's* case a person had suffered injury from drinking a bottle of that ginger beer supplied by a friend who had purchased it from the appellant the liability would be clear.

Is that liability affected in principle because the injury results from a bench supplied by the appellant instead of a bottle of ginger beer manufactured and supplied by it to the respondents? In either case the defect is hidden and unknown to the user; in either case the defect is unknown to the appellant; but in either case the appellant is liable because the injured person belongs to a class for whose use in the contemplation and intention of the appellant the ginger beer was issued for consumption or the bench was placed in position for use. In *Grant's* case Lord Wright further observed at p. 15 that

> the distinction between things inherently dangerous and things only dangerous because of negligent manufacture cannot be regarded as significant

in the circumstances. This follows easily from the proposition that the breach of duty in regard to the thing supplied springs from the contemplated user thereof. Whether the concealed danger in the bench arose through negligent construction or from other causes, such as damage, age, lack of repair or negligent reconstruction is not material, for the duty is to supply the thing to be used in such condition that it is not a concealed danger. Lord Atkin in *Donoghue's* case, at p. 135, quotes with approval an observation of Scrutton, L.J.:

> "Personally I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf."

It is of value to note that in Lord Buckmaster's dissenting speech in *Donoghue's* case, pp. 121-2, the omission to exercise reasonable care in the discovery of a defect in the manufacture of an article where the duty of examination exists, is treated as negligence in the same degree that attaches to the negligent construction itself, and *vide* Lord Macmillan at pp. 146 and 148 in the same case.

In *Donoghue's* case the manufacturer was sued by a person who was given a bottle of ginger beer by a friend who had purchased it from a retailer. In *Grant* v. *Australian Knitting Mills, Ltd.* both the manufacturer and the retailer were sued by the person who had purchased the underwear from the retailer. The retailer was held liable in contract under the Sale of Goods Act. In each case the manufacturer was held liable. It may be contended that these two decisions apply only to the liability of manufacturers and have no application to the facts in the present case. But this is denied by the principle upon which these decisions rest, for the manufacturer was held liable not because he was a manufacturer but because his relationship to the injured person gave rise to that duty which is imposed upon A to take care for the safety of B who uses a chattel or thing as supplied to him by A and which A contemplates he shall use as supplied. This duty arises when the want of care and the injury are in essence directly and intimately associated, as explained by Lord Wright in *Grant's* case at p. 15, when discussing the application of the term "proximity" to which reference has been made *supra* in Lord Atkin's speech in *Donoghue's* case. In the present case the appellant supplied the bench with the intention that the respondents should use it as they did. It contained defects which caused injuries to the respondents without fault on their part. The defects were such that reasonable inspection by the appellant should have disclosed them. The want of care by the appellant and the injury to the respondents were therefore directly and intimately associated and fulfil the test laid down in *Grant's* case. In fact, it would seem that the present case is a more apt example of that test; for here there are no intervening transactions of sale and purchase and no intervening handling such as arose in both *Donoghue's* case and *Grant's* case or would be expected in a typical manufacturer's case. In this

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case we are freed from problems arising from intervening handling; *vide* pp. 16-17 *Grant's* case.

This test may be applied by an approach from another avenue. It was not brought out in evidence how old the bench was or who made it. The appellant's superintendent testified that benches replaced during the last ten years were built by the appellant's carpenter. The carpenter gave evidence that benches and tables were repaired and put in condition at the beginning of every season. The groundsman who was there for five years did not know of any new benches in his time. The appellant was in a position analogous to that of a "manufacturer"; if a new bench was needed, it made it; if a bench needed new legs or parts, it made them and reconstructed the bench therewith. Its employees were required to inspect the benches to see if they were safe for use; if they were not the benches were condemned, repaired or reconstructed. It was a relationship to the respondents comparable to the relationship of the manufacturer to the consumer in *Donoghue's* case and to the purchaser in *Grant's* case. It made or reconstructed the benches it supplied for use. It assumed the place and duty of the manufacturer in respect to the safety of the bench for its contemplated use. Having failed to discover the rotten wood in the understructure of the bench it is liable for the same reason that the manufacturer was held liable in *Donoghue's* case for not taking the precautions necessary to prevent a snail entering and remaining in the bottle of ginger beer, and in *Grant's* case for not taking precautions to prevent excess sulphites remaining in the underwear. As in *Donoghue's case* and in *Grant's* case, so also in the present case the injury happened because some one for whom the appellant was responsible was at fault. The respondents are not required to lay their fingers on the exact person in all the chain who was responsible or to specify what he did wrong.

Counsel for the appellant relied on *Hambourg* v. *The T. Eaton Co. Ltd.*, [1935] S.C.R. 430, where the plaintiff pianist was injured by the bursting of a lens in an overhead spotlight during a rehearsal. Mr. Justice Crocket, who delivered the judgment of the Court, found that no concealed danger existed (p. 439). That of course would have ended the case, whether Hambourg

was an invitee or a bare licensee. However, the judgment did not rest there for the Court proceeded to enquire what duty there was or might be between the parties in the circumstances. Mr. Justice Crocket reviewed the evidence with the conclusion (p. 439):

> The most thorough examination possible before the occurrence of the accident would not have revealed to the manager of the auditorium any more than to the appellant or anybody else that the lens was likely to burst.

And having thus found it was not an obvious or even an apparent danger he proceeded (p. 440):

> If it held any danger, which might reasonably have been anticipated at all, that danger was in no manner a hidden or concealed one.

And further at p. 440:

> This being so, it seems to me to be quite impossible to hold either that he (the auditorium manager) knew the lens was likely to become overheated and burst or that he ought to have known that to be the case.

Of course if it had been found in *Donoghue's* case that "the most thorough examination possible" would not have revealed the existence of the snail in the ginger beer bottle to the manufacturer, a fundamental ground of the decision would have disappeared; so likewise in *Grant's* case. *Hambourg* v. *The T. Eaton Co. Ltd.*, can have no application to the case under review unless it could be said that the most thorough examination of the bench by the appellant before its collapse would have failed to reveal the rotten wood in the understructure which caused its collapse. That cannot be said here, and is not attempted to be said.

I should observe also perhaps that the respondents should succeed as well in my view if they should be cast in the role of invitees or licensees. As invitees, because on the facts it is a proper inference that the bench was maintained and placed in position for the respondents by the appellants, as a matter of business incidental to the operation of its commercial resort. It was operating the resort as a business; the resort was not maintained as a public park by a city corporation, or by private philanthropy. The respondents were there as present or prospective customers. They were in the appellant's place of business. The appellant was operating the resort as a permanent commercial enterprise for gain. It was to its business advantage to induce as many people as possible to use its picnic grounds and attend the evening entertainments. For example one of the

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respondents that day arranged to rent a cottage at the resort from the appellant to be occupied a week or two later. The respondents would come within the description of "licensees with an interest" for the same reason. They could hardly be classed as bare licensees in the circumstances: but even if they could be, the bench was not an existing concealed danger in the land itself but was a chattel moved about and placed in position thereon by the appellant specifically for use of the respondents and people like them. The duty of the appellant at the very least was not to lay a "trap" for them. But when the appellant placed the bench in position for them containing a concealed danger it did in fact lay a "trap" for them.

In my view the inference from the facts is that the bench became gradually unsafe through use and deterioration until at the time of the accident it was in the insecure and dangerous condition which caused its collapse and attendant injuries to the respondents. That could have been avoided by proper inspection, repair and construction, the obligation for which was upon the appellant. Its failure to perform its obligation in that respect constitutes negligence for which the appellant cannot escape liability as there is no evidence of contributory negligence. In these circumstances the duty of the appellant was to supply the bench in such condition that the respondents and people like them, for whose use it was intended and placed in position by the appellants, should not be exposed to any danger in the use thereof which they could avoid by the exercise of reasonable care for their own safety.

In the view I have taken no value is attached to certain evidence relating to statements alleged to have been made by Frank Scott. Whether that evidence is admissible or not does not in my view then affect the result. I do not need to decide its admissibility.

I would dismiss the appeal.

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

Solicitor for appellant: *W. S. Lane.*
Solicitor for respondents: *H. E. M. Bradshaw.*

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March 19.

App. dism'd
Post. 977

Foreign judgment—Voluntary submission to jurisdiction—Unconditional appearance—Promise obtained by wife before dissolution of marriage—Whether enforceable—Public policy—R.S.B.C. 1936, Cap. 242, Sec. 4 (a) and (f).

The plaintiff, Margaret M. Pope, was the first wife of the defendant Edgar W. Pope, to whom she was married in 1911. This marriage was dissolved by Act of Parliament in June, 1923. The defendant Marie Pope was his second wife whom he married in May, 1924. Pope was a soldier in the Great War, and on returning to Canada in 1919 he no longer lived with his first wife. On August 27th, 1919, they entered into a separation agreement, one of the terms being that the wife should have the custody of their children and he was to pay her $125 per month for six months, and after that one-half of his pay and allowances. Payments fell in arrears and in May, 1923, a further agreement was entered into between the first wife, the husband and the second wife, whereby the second wife agreed to transfer certain property both real and personal to The Royal Trust Company as trustee, the trustee to pay from the rents and profits to the plaintiff an annual sum of $1,000, payable in consecutive monthly instalments of $150, as an alimentary allowance, the husband guaranteeing that the annual allowance be $1,800. The second wife continued to make payment of the greater part of the amounts specified until the 1st of April, 1938, when of the amount due there remained unpaid the sum of $1,658. The plaintiff then sued the defendants in Ontario for that sum under the agreement of May, 1923, and obtained judgment. Pursuant to an *ex parte* order, obtained under the Reciprocal Enforcement of Judgments Act, the Ontario judgment was registered in British Columbia. On an application by the defendants to set aside the registration of the Ontario judgment on grounds based on section 4 (*a*) and (*f*) of said Act, namely, that the original Court acted without jurisdiction and that the judgment was in respect to a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering Court:—

Held, that upon the defendant voluntarily entering an unconditional appearance he thereby submits to the jurisdiction, and accordingly that Court has jurisdiction and there is nothing in the agreement in question in this action that would render it invalid as being against public policy.

MOTION by defendants to set aside the registration of a final judgment of the Supreme Court of Ontario. The facts are

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set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 27th of February, 1940.

Clearihue, K.C., for the motion.
D. M. Gordon, contra.

Cur. adv. vult.

19th March, 1940.

ROBERTSON, J.: This is an application by the defendants to set aside the registration of a final judgment of the Supreme Court of Ontario, dated July 12th, 1939, for $1,658 and $529.25 costs, made pursuant to an *ex parte* order, obtained under the provisions of the Reciprocal Enforcement of Judgments Act, on the 8th of January, 1940. The plaintiff, Margaret M. Pope, to whom I shall refer as the first wife, is the former wife of the defendant Edgar William Pope, whom she married on the 10th of September, 1911. This marriage was dissolved by an Act of Parliament of Canada on the 30th of June, 1923. The other plaintiffs are the issue of that marriage. The defendant, Marie Pope, *nee* Marie Coursol, is Pope's second wife, whom he married on the 29th of May, 1924. It will be convenient to refer to her as the second wife. Pope was a soldier. During the Great War his wife had been in England with him. It appears that for some time before, and after, their return to Canada in August, 1919, they had not been living together as man and wife. They entered into a separation agreement dated the 27th of August, 1919, and thereafter were "completely separated." One of the terms of the agreement was that the first wife was to have the custody of their children for a certain time; another was that Pope was to pay his first wife a monthly allowance of $125 for the first six months and thereafter one-half of his pay and allowances, for her benefit, and, that of the children. The payments accruing under the agreement fell into arrears. As a result the agreement, dated May, 1923, sued on in the Ontario Court, was entered into. The parties to the agreement were the first wife described as of London, Ont., and referred to as "the beneficiary" (who entered into the agreement as well personally as on behalf of her three minor children); the second wife, then Marie Coursol, who was described in the agreement

as "the settlor" and Pope, who was referred to as "the intervenant." The Royal Trust Company appeared, as trustee, as a party to the agreement but never signed it. The applicant does not make a point of this. He relies upon the two grounds which I shall later refer to. The agreement in so far as it is necessary to refer to it for the purpose of this application is as follows:

WHEREAS the settlor is possessed of certain property and desirous to create a trust fund for the maintenance of the beneficiary and her three minor children.

NOW THEREFORE THESE PRESENTS WITNESSETH

1. In consideration of $1.00 and other good and valuable considerations, the receipt whereof is hereby acknowledged, the settlor hereby assigns, transfers and makes over to the trustee in trust, the following property, both real and personal, subject to the trusts, conditions and stipulations hereinafter contained:—

. . . . .

2. In consideration of the foregoing the trustee shall pay out of the rents, revenues, interests and profits produced by or derived from the said trust funds to the beneficiary or to her children, until the termination of the present trust, an annual sum of $1,000; payable in equal and consecutive monthly instalments of $150.00 the whole as an alimentary allowance for herself and her three children, . . .

. . . . .

7. The settlor hereby binds herself and agrees to execute, sign, seal and deliver such specific assignments, endorsements, documents and instruments as shall be necessary or incidental to the proper vesting of title in the trustee of all and singular the property, both real and personal hereby transferred.

. . . . .

11 And to these presents doth intervene the intervenant herein who in consideration of $1.00 and other valuable considerations, the receipt whereof he hereby acknowledges doth guarantee personally to the said beneficiary and or her minor sons, the said annual alimentary allowance of $1,800 per annum, . . .

The second wife continued up to the 1st of April, 1938, to make payments, through The Royal Trust, to the first wife of the greater part of the amounts specified in the agreement. On that date there remained, unpaid, the sum of $1,658. The plaintiffs sued the defendants in Ontario for that sum. They entered an unconditional appearance, filed a defence and were represented by counsel at the trial and put in evidence. The defendants disputed the jurisdiction of the Court and submitted the agreement was illegal and contrary to public policy. The evidence of the defendants was taken on commission. Pope swore that he had arranged with the plaintiffs' solicitor, Douglas,

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to furnish evidence of his adultery for the purpose of applying to Parliament for a divorce and that pursuant to this arrangement, he not only, at the instigation of Douglas, wrote untruthful letters to his wife, admitting infidelity, but also took a woman to an hotel and there occupied a room with her. It was suggested this was the evidence before Parliament on the hearing of the divorce bill. At the trial evidence was given by Douglas denying such allegations. It was also shown that in the year 1922 and prior thereto Pope had been guilty of adultery which his wife had not condoned. This was the adultery submitted in evidence at the hearing before the Senate Committee of Parliament. The learned trial judge held that the defendants failed on all grounds; that the consideration for the agreement was a legal one and that the agreement was not contrary to public policy. The defendants' grounds are based on section 4 *(a)* and *(f)* of the Act, which reads as follows:

4. No judgment shall be ordered to be registered under this Act if it is shown to the registering Court that:—

(*a.*) The original Court acted without jurisdiction; or . . . .

(*f.*) The judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering Court.

Dealing with the first point, there is no dispute about the evidence as to jurisdiction. The authorities are clear I think that if a person, not otherwise subject to the jurisdiction of a foreign Court, voluntarily enters an unconditional appearance, he thereby submits to its jurisdiction; and, accordingly that Court has jurisdiction. The case is stronger against them when, as here, they had filed a defence and appeared on the trial—*Harris* v. *Taylor,* [1915] 2 K.B. 580; Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 330.

I now turn to the second point. There is no evidence to satisfy me that the first wife, personally, or through anyone else, was a party to any arrangement that Pope should commit adultery so that she could get a divorce. I think it is clear that the reason for the present wife entering into the agreement was to facilitate obtaining the divorce by making it possible for Pope to provide for the first wife and children. The second wife had never seen the first wife. Pope wrote his wife on the 1st of September, 1921,

suggesting divorce and stating that there was no possibility of their ever living together again. His letter stated it was written after much reflection and consideration. He further stated:

> All I ask in return is my freedom from a bond which to be frank, I have long since ceased to look upon as sacred.

In the letter he made certain proposals with regard to the future and maintenance of the plaintiffs. On the 18th of May, 1922, Pope wrote her again reiterating his attitude and again suggesting a divorce. In 1922 he decided to marry Miss Coursol "if it were possible to obtain a divorce." He told his first wife that he was in love with Marie Coursol. Very considerable pressure was brought to bear on her, by Pope, by a clergyman on behalf of Pope; and by others and certain threats were made, in order to overcome the first wife's antipathy to divorce. There was no collusion as to the adultery. It is clear that from August, 1919, there was no *consortium;* and there was no possibility of reconciliation. It has been held that a wife who has obtained a judicial separation from her husband with permanent alimony, may enter into an arrangement with her husband, in consideration of an agreement to pay her much larger alimony, to apply for a divorce on account of his adultery committed prior to the arrangement—see *Scott* v. *Scott,* [1913] P. 52. Would it have made any difference if the person making it possible for the husband to pay the larger alimony—and for that purpose entering into an agreement with the wife to pay—was the one whom he hoped to marry after the divorce? I do not think so.

The defendants' counsel submits the agreement is void because it is against public policy in that it would have a tendency to make Pope do something in contravention of his marital obligations (*e.g., consortium*) owing to his wife; that it would also cause a tendency to immorality and might prevent a reconciliation. He relies on two cases—*Spiers* v. *Hunt,* [1908] 1 K.B. 720 and *Wilson* v. *Carnley, ib.* 729. In each of these cases the husband, during the lifetime of his wife, expressly, or impliedly, agreed to marry another woman on the death of his wife. In both cases the husband and wife were "living together in normal conditions." In both cases it was decided the agreement was void as being against public policy. Recently the question of

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the legality of an agreement by a married man to marry was considered by the House of Lords in *Fender* v. *St. John-Mildmay,* [1938] A.C. 1. It appeared that after a decree *nisi* had been obtained by Lady Mildmay her husband promised to marry the plaintiff after the decree absolute. He failed to do so and she brought an action for damages. A majority of the learned Law Lords who heard the appeal decided that the contract was valid. *Spiers* v. *Hunt* and *Wilson* v. *Carnley* were distinguished on the ground that in those cases *consortium* still existed and would continue to exist; or, the contracts under consideration would tend to immorality or crime, whereas, in the case before them, *consortium* was at an end and there was no hope of reconciliation. The majority of their Lordships held that, under the circumstances, there was no tendency to immorality; that there was no injury to the *consortium* as it had ceased to exist; nor could there be said to be any damage to the hope of reconciliation as that was not in the least likely. As Lord Wright said in *Fender's* case at p. 44:

> If a separation has actually occurred or become inevitable, the law allows the matter to be dealt with according to realities and not according to a fiction.

I can see no real difference, in principle, between *Fender's* case and the case at Bar. In both cases *consortium* had ceased as a matter of fact. In *Fender's* case it had ceased, as a matter of law, by reason of the decree *nisi,* and, in this case, by reason of the separation agreement. In *Fender's* case there did not appear to be the slightest hope of reconciliation as is the case here. The Supreme Court of Canada in *In re Estate of Charles Millar, Deceased,* [1938] S.C.R. 1 considered *Fender's* case. While expressing no final opinion upon it, Sir Lyman Duff, who delivered the judgment of himself and three of his learned brothers, said at p. 7 that they were disposed to think, if it were necessary to decide the question, that Lord Wright's view that "he could hardly conceive that at this date a new head of public policy could be discovered" was the preferable view. At p. 7 Sir Lyman Duff said as follows:

> It has not been argued by the appellants that the disposition in question here is void upon any particular rule or principle established by judicial decision. Such being the case, we think, taking the most liberal view of the

jurisdiction of the Courts, there are at least two conditions which must be fulfilled to justify a refusal by the Courts on grounds of public policy to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. First, we respectfully concur in these two sentences in the judgment of Lord Thankerton in *Fender* v. *Mildmay*, [1937] 3 All E.R. 402, at 414:

"Generally, it may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits."

Secondly, we take the liberty of adopting the words of Lord Atkin in his judgment in the same case (at p. 407):

. . . it [referring to Lord Halsbury's judgment in *Janson's* case, [1902] A.C. 484] fortifies the serious warning, illustrated by the passages cited above [among them is the passage, already quoted, from the opinion of Parke, B.], that the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide.

No cases have been cited to me to show that under the circumstances existing in this case, an agreement of the sort in question in this action would be invalid as being against public policy. To succeed the defendant must, then, show that it is clear that the

"prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole."

I think the defendants have failed in this.

The application must be dismissed with costs.

Motion dismissed.

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Feb. 13, 15, 16.
March 4.

REX v. EMPIRE DOCK LIMITED.

Private company—Preferred shares—"Invites the public to subscribe"—Offence—R.S.B.C. 1936, Cap. 42, Sec. 38 (3).

Section 38 (3) of the Companies Act provides "Every private company which invites the public to subscribe for any shares or debentures of the company shall be guilty of an offence against this Act."

The defendant, a private company, sent out envelopes containing three documents: the first one bearing the earmarks of the usual invitation prospectus to the public (except that the company is stated to be a private company) and included the words "you cannot obtain a better investment with as much security and a sure 6% and further participate in profits," with other information; the second, an advertisement which shows the proposed application of proceeds of sale of shares; the third, an application for shares. Eight hundred of the envelopes with enclosures were sent out to a list of shippers and investors including two-thirds of the lawyers in Vancouver. Six hundred "advertisements" (the second document above mentioned) were also sent out to other people and firms. On a charge under the above sections of the Companies Act, the defendant was found guilty and fined $25. On appeal to the County Court:—

Held, affirming the conviction, that on the evidence produced, the history of this company, and in all the circumstances of the case, the company did invite the public to subscribe for its preference shares.

APPEAL by the Empire Dock Limited from its conviction by police magistrate Wood, for Vancouver, on a charge that being a private company under the Companies Act, did unlawfully invite the public to subscribe for preferred shares of said company. The facts are set out in the reasons for judgment. Argued before LENNOX, Co. J. at Vancouver on the 13th, 15th and 16th of February, 1940.

Livingstone, for appellant.
Soskin, for the Crown.

Cur. adv. vult.

4th March, 1940.

LENNOX, Co. J.: This is a charge against the defendant company, *viz.*:

Empire Dock Limited, being a private company under the Companies Act, being chapter 42, of the Revised Statutes of British Columbia, 1936, and

amendments thereto, did unlawfully invite the public to subscribe for preferred shares of the Empire Dock Limited.

The defendant was found guilty of the charge before H. S. Wood, the learned police magistrate for the city of Vancouver and was fined $25. This is an appeal from that finding.

The crux of the whole question is as to whether certain documents, Exhibits 6, 7, 8 and 9 or any of them, were issued as an invitation to "the public," or only to those whom this private company was entitled to canvass to take shares?

This is a matter of some importance as, so far as has been ascertained, it is the first charge under section 38 (3) of the British Columbia Companies Act *(supra)*, which has been laid in British Columbia (or seemingly under any Act in the Dominion).

The section under which the charge is brought is as follows: [already set out in head-note.]
and the same wording appears in the corresponding section of the English Companies Act.

Under our Act section 2 defines a "private company" as meaning

a company which by its memorandum or articles:—

(*a.*) Restricts the right to transfer its shares; and

(*b.*) Limits its membership to fifty,

exclusive of employees unless otherwise provided and

(*c.*) Prohibits any invitation to the public to subscribe for any shares or debentures of the company.

Under the same section,

"Public company" means a company which is not a private company.

"Prospectus" means any prospectus, notice, circular, advertisement, or other document inviting the public to subscribe for or purchase, or offering to the public for subscription or purchase, any shares or debentures of a company or an intended company.

It was conceded at the trial that Exhibit 6 contains the same information as a prospectus for a public company (except in so far as the references to the company being a private company are concerned) and invited application for shares.

The words "the public" are nowhere defined and it is therefore left to the Court dealing with the matter to define the same in relation to the circumstances of each particular case; and in arriving at a decision as to whether this company issued an

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invitation to the public, the circumstances surrounding the whole transaction ought to be looked at. They are as follows:

(1) In 1930 (*vide* Exhibit 5) C. F. Miller (now president of the Empire Dock Limited and of the interrelated companies and who is in almost sole control of the company, the other directors being practically nominal directors), describes himself as "financier."

(2) In the memorandum of the original company, namely, Pacific Vegetable Oils (Canada) Ltd. (incorporated 5th June, 1930), which became the memorandum (with a few necessary amendments to conform to a private company) of Empire Dock Limited, the objects include many others over and above the acquiring and operation of docks—*e.g.*, its first object is to manufacture foodstuffs and to be retail merchants, etc.

(3) *Re* Exhibit 6 (a), it is addressed to "shippers and investors," (b) it is stated that the private company "is formed . . . to extend and operate British Empire Dock" whereas, as above, that is not the sole object of the company.

(4) This company was a late conversion from a public to a private company (March, 1939). This conversion took place because, as a public company, there had to be (by the superintendent of brokers under the Securities Act) an amount subscribed before commencing business ($100,000) which it was thought would be very difficult if not impossible to get.

(5) Exhibit 6 bears all the ear-marks of the usual invitation prospectus to the public (except, of course, that the company is stated to be a private company). For example,

you cannot obtain a better investment with as much security and a sure 6% and further participate in profits;

with information as to the amount of money to be subscribed; the remuneration of directors; how the subscriptions are to be dealt with, etc.

(6) While the private company only came into being on 18th of March, 1939, Exhibit 6 states that,—

the company holds Certificate No. 11808 dated 10th June, 1930, entitling it to commence business.

(7) Exhibit 7 is an advertisement which shows the proposed application of proceeds of sale of shares and Exhibit 9 is an application for shares.

(8) Exhibit 10 is duplicate of an envelope which enclosed Exhibits 6, 7, 8, and 9, with prepaid postage.

(9) Exhibit 15, which is a letter by Miller to the superintendent of brokers with reference to the latter insisting on a certain minimum subscription before starting business as Empire Dock Ltd. (public company), states,—

this amount ($100,000) is unnecessary for profitable operation

and yet in Exhibit 6 the offer sent out is for sale of $148,000 worth of shares.

(10) This is the first proposed issue of shares for cash.

(11) Eight hundred invitations (Exhibit 6 and enclosures) were sent out, not only to invitees whose names were taken from Exhibit 11, which (according to Miller),

is a list of shippers to which we added a list of investors,

but also to many others, *inter alia*, to about two-thirds of the lawyers in Vancouver.

Six hundred "advertisements," Exhibit 7, were sent out in addition to other people and firms.

It was submitted by the defence that all these invitations (800) were sent only to "friends, customers or connections" and therefore, not to "the public." As to the 600 "advertisements," these were sent to persons and firms

not known to Miller or the other directors—Miller told me this

(*vide* evidence of F. B. Stanley, secretary of the defendant company). Miller, shown Exhibit 7, was asked in cross-examination:

Is this pure advertising? Does it not assume an invitation to subscribe?

His answer was:

It was only a part of Exhibit 6 which was sent to the 800.

The Crown called several gentlemen who had received these (Exhibit 6) invitations and who swore that they did not know Miller or his associate directors, though they had heard of them, or one or other of them, as being associated with certain companies. There was an effort made by Miller to show that these "connections" went beyond this, but without success.

In this connection it seems to me that not only reason but all the authorities stress the point that the meaning of the words "the public" cannot be tied down to a specific quantity and that, when the term is used, it must be considered as relative to the question at issue and the circumstances of each particular case.

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Even the words "friend" "customer" and "connection" must also not be narrowed to the particular from the general. A man may call another his friend and yet he may be a mere nodding acquaintance. A man may refer to another as his customer and yet he may only have bought one article of goods from him, and that years before. A man may call another a connection and yet in a business, as well as a family sense, may be so distant a connection that the word is not suitable and conveys a wrong impression. In view, therefore, of the latitude allowed in the use of such expressions, it becomes all the more necessary to carefully distinguish the dividing line to which, in the certain circumstances of the particular case, the person seeking to define these words has to direct his attention. Taking the evidence produced by the witnesses called by the Crown, the exhibits filed and the history of the company, I cannot, in all the circumstances in this particular case come to any other conclusion but that the company did invite the public to subscribe for its preference shares.

It was further submitted that this, being a penal statute, (a) ought to be strictly construed and (b) the horizon should be extended in favour of the accused (as the words "the public" are not defined).

With the first submission there can be no objection. As to the second, the horizon cannot be extended indefinitely—there must be some point (to be decided in each case) where "private" ends and "public" begins. Counsel for the defence, in endeavouring to show that the words "the public" are broad enough to exclude even those to whom invitations were sent, cited several authorities with which I think it necessary and fair to deal. The authorities and my remarks thereon are as follows:

1. Wegenast on the Law of Canadian Companies, 701, cites the case of *Sherwell* v. *Combined Incandescent Mantles Syndicate, Limited*, [1907] W.N. 110; 23 T.L.R. 482, in which Warrington, J., says, dealing with the question as to whether the document was a prospectus, that, "the question was a pure question of fact." He goes on to say:

> The offer to the public of share capital must be made by the company itself, and not by some individual without the authority of the company.

It must be an offer of shares to any person who chooses to come in and take them.

I take it from these statements taken together that Mr. Justice Warrington did not necessarily mean that there should be a broadcast invitation to the whole world, but that in each case the pure questions of fact in the particular circumstances had to be determined.

Again in Wegenast, *supra,* at p. 702, it is stated with reference to a document being issued to the public,—

it will be seen that it is a matter of the circumstances of individual cases and that it is difficult to lay down any general rule.

2. *Nash* v. *Lynde,* [1929] A.C. 158. There the whole question was not as to whether the documents were

a statement to the world of an intention to issue share capital

(which they were), but as to whether they were "issued" to the public, and it was found by the jury that there was no "issuing." It was also decided that "on the evidence" the jury could find either way.

3. *Booth* v. *New Afrikander Gold Mining Co.* (1902), 72 L.J. Ch. 125, is of no assistance as there the shares were offered to shareholders of interrelated companies and the sole question was as to the legality of a "commission" payment.

4. *In re South of England Natural Gas and Petroleum Co.* (1911), 80 L.J. Ch. 358. There seems to me to be only one helpful clause in the judgment (Swinfen Eady, J.) namely (p. 360):

It is clear on the facts that the first prospectus was an offer to the public of shares, and none the less so because only three thousand or so copies . . . were distributed.

5. *Shorto* v. *Colwill* (1909), 26 T.L.R. 55. Here it was held that there was no offer of shares to the public for subscription because only an option had been given to one party to take up shares; but there is an illuminating *dictum* of Mr. Justice Warrington as follows (p. 57):

By "any offer of shares to the public for subscription," meant an offer contained in some form of advertisement or intimation to the public generally—through an issue by the company of something which would come within the definition of a "prospectus."

It was agreed, in the case at Bar (as above stated), that the invitation (Exhibit 6) was in the form of a prospectus. Exhibit 7

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is an advertisement to 600 of the public, and admittedly includes part of the "prospectus."

6. *Sleigh* v. *Glasgow and Transvaal Options, Limited,* [1904] 6 F. 420. There is nothing helpful in this case—it turned mainly as to whether a document (a mere memo.) was a "prospectus," and it was held not to be. The statement therein (relied on by the defendant's counsel) that "it must be an offer to the public, *i.e.,* to the "public generally" does not help us in deciding as to what "the public" means in any specific case.

The appeal therefore will be dismissed; the accused defendant company found guilty of the offence against the Act as charged and (as this is in the nature of a test case in this Province) a fine of $25 imposed.

Under the Act the penalty is a minimum of $10 and a maximum of $500 fine.

Conviction sustained.

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May 22;
June 30.

GREGSON v. CITY OF VANCOUVER.

Municipal corporation—Defect in sidewalk—Injury to pedestrian—Negligence—Damages—Extent of disrepair—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320.

The sidewalk in question was made of concrete slabs, one of the slabs being higher than the one next to it. The defect came to the knowledge of the defendant through its overseer, and some champering was done to remedy the defect, but one slab still remained about three-quarters of an inch higher than the adjoining one, when the plaintiff, who wore high-heeled shoes stumbled on the ridge and fell, breaking her arm and suffering other minor injuries. The plaintiff recovered judgment in an action for damages.

Held, on appeal, reversing the decision of MANSON, J., that liability depends upon the extent of the disrepair, and the very slight ridge and depression in this case does not constitute want of reasonable repair within the meaning of the statute.

APPEAL by defendant from the decision of MANSON, J. of the 15th of February, 1939 (reported, 54 B.C. 21), in an action for damages for personal injuries sustained by the plaintiff

through the defendant's negligence in the construction or laying of a sidewalk, and failure to keep it in repair. On the 1st of June, 1938, the plaintiff was walking southerly on the sidewalk on the west side of Alma Road between Eighth Avenue and Broadway in the city of Vancouver, when her foot struck a ridge on a raised portion of the cement sidewalk, and she fell to the sidewalk, broke her left arm and suffered other minor injuries. The evidence disclosed that one slab of the pavement was about three-quarters of an inch higher than the other. The plaintiff recovered judgment for $152.50 special damages and $700 general damages.

The appeal was argued at Vancouver on the 22nd of May, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Lord, for appellant: The accident happened on the morning of the 1st of June, 1938, on a clear, dry day. One slab of the pavement was about three-quarters of an inch above the other, and the plaintiff was walking towards the high spot when she stubbed her toe against it and fell. This woman walked over this spot about five times a week for five years. We say the sidewalk was in reasonable repair: see *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457; *Raymond* v. *Township of Bosanquet* (1919), 59 S.C.R. 452, at p. 467; *Town of Portland* v. *Griffiths* (1885), 11 S.C.R. 333, at p. 345; *Boyle et ux.* v. *Corporation of Dundas* (1875), 25 U.C.C.P. 420; *Woodcock* v. *City of Vancouver* (1927), 39 B.C. 288; *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194; *Lammers* v. *City of Vancouver* (1938), 53 B.C. 373; Dillon on Municipal Corporations, 5th Ed., 2965; 43 C.J. 1010. Where there is no jury the Court of Appeal is less bound by the decision below: see Halsbury's Laws of England, 2nd Ed., Vol. 26, p. 122; *Foley* v. *Township of East Flamborough* (1898), 29 Ont. 139; *Anderson* v. *Toronto* (1908), 15 O.L.R. 643; *Burgess* v. *The Town of Southampton*, [1933] O.R. 279; *Moran* v. *City of Vancouver* (1928), 40 B.C. 450; *Gilmour* v. *City of Toronto* (1926), 30 O.W.N. 319, at p. 320.

W. H. Campbell, for respondent: There was a defective con-

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dition and the city knew of it. They made an attempt to repair and took about one-quarter of an inch off the top to level it, but still left one-half of an inch of an elevation. Secondly, they were guilty of non-feasance. It had undertaken to repair and did not do so: see *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457, at p. 458; *Jamieson* v. *City of Edmonton* (1916), 54 S.C.R. 443; *Woodcock* v. *City of Vancouver* (1927), 39 B.C. 288; *De Teyron* v. *Waring* (1885), 1 T.L.R. 414.

Lord, replied.

Cur. adv. vult.

30th June, 1939.

MARTIN, C.J.B.C.: This appeal from the judgment of Mr. Justice MANSON again raises the question of the liability of the defendant corporation for damages arising from its alleged failure to repair a public street—here a cement sidewalk—over an inequality, or depression, in two adjoining slabs of which the plaintiff stumbled and fell sustaining substantial injury.

The statute, section 26 of Cap. 68 of 1936, now imposing and defining the duty of the defendant declares that

(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.

Whatever, therefore, the standard of defendant's duty may have been theretofore, as extracted from decisions of various Courts, it is now restricted to "keeping in reasonable repair," which means having regard to all the ever-varying circumstances of each particular case, as was held by MURPHY, J., in *Moran* v. *City of Vancouver* (1928), 40 B.C. 450, wherein the original introduction of the word "reasonable" was considered (and also by FISHER, J., in *Lammers* v. *City of Vancouver* (1938), 53 B.C. 373) and to my mind no useful purpose would be served by a discussion of said earlier decisions, each based on its own particular facts, before the said standard of "reasonableness" was fixed by the Legislature as aforesaid.

The facts herein are not in dispute and therefore it becomes our duty to weigh the evidence as a whole and draw the proper inferences therefrom, as the Appellate Division of Ontario did

in *Raymond* v. *Township of Bosanquet* (1919), 59 S.C.R. 452 and was affirmed by the Supreme Court of Canada in so doing; and after having done so on the facts before us I can only reach the conclusion that the plaintiff has failed to establish a want of reasonable repair, and therefore her action must be dismissed.

In his analysis of the evidence it was pointed out to us by appellant's counsel that the learned judge below fell under a misapprehension on an important piece of evidence in that he said in his reasons: [54 B.C. 21, at 23]

> . . . 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 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.

But the plaintiff had testified that

> I know it was the ridge.
>
> Your toe came in contact with something and it caused you to fall? Yes, over this ridge.
>
> Are those answers correct? Yes.

The height of her heels was therefore irrelevant herein, whatever may be said of them otherwise.

It is not to be overlooked that the "reasonable repair" of sidewalks must take into consideration the reasonable use of them by pedestrians, and the fact that they wear low or dangerously high heels, dangerously narrow or broad heels, or no heels at all, or have to use crutches, is one of all the circumstances that have to be taken into consideration in determining reasonable repair and also reasonable user.

In view of my opinion that the defendant was not in "default" in its duty (section 26, *supra*) it becomes unnecessary to consider the further question of the alleged contributory negligence of the plaintiff (though there is much to be said in support of it) to which that of the defendant is now made "subject" by said section —*cf. McCready* v. *County of Brant,* [1939] S.C.R. 278, at 283-4.

It follows that the appeal should be allowed and the action dismissed.

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MACDONALD, J.A.: I agree with my brother O'HALLORAN. Obviously all cases of this character will depend upon their own facts. No one should reasonably expect that sidewalks ought to be maintained with an absolutely smooth surface. Liability will depend therefore upon the extent of the hole or depression. To hold that a very slight ridge and depression or both constituted want of reasonable repair within the meaning of the statute would, I fear, encourage spurious claims.

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

SLOAN, J.A. would allow the appeal.

O'HALLORAN, J.A.: The city of Vancouver appeals from a judgment awarding damages against it for failure to "keep in reasonable repair" a sidewalk built of cement paving-blocks each four feet square. At 11.20 a.m. on the 1st of June, 1938, in bright daylight and dry weather the respondent while walking in a southerly direction along the sidewalk on Alma Road a public highway in what is described as a thickly populated area in the city of Vancouver, tripped over a "ridge" in the pavement, fell forward and was injured. A civil engineer called by the respondent stated the "ridge" was caused by the concrete slab on the south section having risen above the kerb and the one on the north section having sunk below the kerb; and that this "ridge" varied from three-quarters of an inch in depth at the kerb to seven-eighths of an inch at the other side of the sidewalk. The lower half inch of the "ridge" was perpendicular and the remainder sloping.

Under section 320 of the Vancouver Incorporation Act, 1921, prior to 1936,—

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

The word "reasonable" was inserted in 1928. It may be said to provide expressly what the Courts had already determined it to mean in cases where the statute imposed the duty of keeping in repair—*vide Jamieson* v. *City of Edmonton* (1916), 54 S.C.R. 443, Mr. Justice Idington at p. 451.

Section 320 of the Vancouver Incorporation Act, 1921, was repealed and re-enacted by chapter 68 of the statutes of 1936. This is the first appeal to come before this Court in respect thereto. It now reads in material part as follows:

(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.

(2.) No action shall be brought against the city for the recovery of damages occasioned by such default, whether the want of repair was the result of misfeasance or non-feasance, after the expiration of three months from the time when the damages were first sustained.

It will be noted that the above amendment specifically applies the provisions of the Contributory Negligence Act. In my view the effect of section 320 as amended is to impose upon the city of Vancouver a statutory duty which requires it to maintain its sidewalks in such repair that persons using the same reasonably will not be exposed to dangers which they could avoid by the exercise of ordinary care for their own safety.

To determine what is a state of reasonable repair on facts such as exist here requires consideration of the demands and user of pedestrians with ordinary eyesight, judgment, health and temperament as well as consideration of the defect in the street itself. A state of reasonable repair is not a state of perfection. It must follow therefore that a pedestrian cannot use a sidewalk in total disregard of the defects which may be reasonably therein or assume that there are no defects in it at all.

While the learned judge had evidence before him to find disrepair I am, with respect, of the view there was no evidence to support want of reasonable repair within the meaning of the 1936 amendment as aforesaid. Although the respondent had used this sidewalk some four times a week during the previous six years, she stated she had never seen the "ridge." Maxwell, a witness called on her behalf, conducts a beauty-parlour almost in front of the point at which she fell. He saw her fall, picked her up, brought her into his premises and then telephoned the city officials about the condition of the sidewalk. He stated that the ridge had existed for some six years. He knew of it because he was in the habit of cleaning off the sidewalk in front of his

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premises; he had himself tripped over it but gave no evidence of suffering injury and had not reported the condition of the sidewalk to the city officials. He describes the ridge as one-half inch higher "than ordinary" and said

> I don't suppose I did think it was dangerous enough to report until somebody hurt themselves.

The district foreman of the city of Vancouver had inspected the sidewalk several times since the 26th of April preceding, some five weeks before the accident, but saw nothing dangerous; he stated that differences in levels in sidewalks often occurred, one of the causes thereof being water freezing under the sidewalk resulting in one block being heaved up and the other dropping down wherever the soft spot might be. In his opinion a ridge of this description was not dangerous; that if it were the city would never be able to make the necessary repairs arising therefrom over some 820 miles of concrete sidewalk. While this may be evidence of disrepair, it is not in my view at least, evidence of want of reasonable repair.

In *Town of Portland* v. *Griffiths* (1885), 11 S.C.R. 333, Mr. Justice Gwynne, at p. 345, quoted these passages with approval from the judgment of the Chief Justice of the Court of Appeal for Ontario in *Boyle et ux.* v. *Corporation of Dundas* (1875), 25 U.C.C.P. 420:

> Everyone using a sidewalk must take on himself a certain amount of risk. To acquire a cause of action he must show an injury resulting from the walk being left in a dangerous state of non-repair.

And again at the same page:

> I cannot understand that it follows necessarily that because there may be a hole in a plank sidewalk, and a person accidentally trips or steps into it and is injured, that damages are recoverable. There must be some clear dereliction of duty, some unreasonable omission to fulfil a statutable requirement.

The respondent relied strongly upon *Jamieson* v. *City of Edmonton* (1916), 54 S.C.R. 443, but that case is clearly distinguishable. The injured person had stepped into a hole in a wooden sidewalk after dark and had broken a leg. For a year at least before the accident the sidewalk had been crossed at that point by heavy vehicles. The day before the accident the sidewalk had collapsed under the weight of a heavy vehicle. It was held that the city had failed to keep the sidewalk in reasonable

repair because it had permitted the sidewalk to collapse under the weight of extraordinary traffic. No such condition exists here. Furthermore in the *Jamieson* case the accident happened at night. It was not only a danger but also a concealed danger in the sense that a person exercising ordinary powers of judgment and observation would not reasonably in the circumstances be expected to see it.

In the following cases not only was the defect dangerous in the circumstances of the particular case, but in the sense used above, a concealed danger as well. In *Sandlos* v. *Township of Brant* (1921), 49 O.L.R. 142, a motor-car case, it was a hole in a culvert on a well-travelled highway. In *City of Vancouver* v. *McPhalen* (1911), 45 S.C.R. 194, a pedestrian tripped over loose planks at night; in *Jamieson* v. *City of Edmonton, supra,* a pedestrian slipped into a hole in a sidewalk at night; in *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457, Mr. Justice Idington, one of the majority of the Court in discussing the evidence in detail described the defect as "palpably an unfenced trap."

I adopt and paraphrase the language of Lord Buckmaster in *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50, at 54, that obvious defects which on the face of them show to any reasonable person that there is danger, do not give rise to liability, but if the defect, though apparent, gives rise to a danger which is not obvious to a person lawfully using the sidewalk, and exercising ordinary powers of observation, then responsibility for an accident arises. Lord Buckmaster's dissent in that case extended to the facts only. His statement of the law was applied by the whole House. To establish want of reasonable repair, the defect must be shown to be dangerous to the safety of pedestrians; but it is not enough to show it is an obvious danger; it must be shown to be a concealed danger in the sense that the danger would not be apparent to a pedestrian exercising reasonable powers of observation, and taking ordinary care for his own safety.

It is true that in the *Fairman* case the House of Lords was concerned with a defect in a stairway, whereas in the present case we are concerned with a defect in a sidewalk. But as I see

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it, the duty of the pedestrian to use ordinary care for his own safety is governed by the same principle of law in both cases. If anything the degree of care required on a stairway should be greater because of its nature, than that required on a sidewalk. The turning point of the *Fairman* case was whether the defect in the stairway was an obvious or a concealed danger. Other questions there discussed involving the *status* of the appellant as an invitee or a licensee arose, but did not affect the decision as to whether the defect in the stairway was obvious or concealed. The *ratio decidendi* of the case as I read it was whether the defect was a concealed danger or not. The House of Lords found the principle applied had equal application to the appellant whether she appeared in the role of an invitee or as a licensee. This is made manifest by the observation of Lord Atkinson at the top of page 56:

> The findings of fact of the learned judge who tried this case, . . . , [and which were adopted by the majority of the House of Lords] disentitled the plaintiff, in my view, to any relief either in the character of licensee or in that of invitee of the defendants.

The comparable facts in the two cases bear a close parallel. The defect extended the width of the stairway, and also the width of the sidewalk. The defect in each case was obvious to anyone exercising ordinary powers of observation. The person injured in both instances had used the stairway and sidewalk respectively for extended periods during which the defect was in existence. The stairway and the sidewalk had been inspected, and in neither case had the inspector considered it dangerous. The majority in the House of Lords (Lords Atkinson, Sumner and Wrenbury) after painstaking consideration of the facts (*vide* (1939), L.T. Jo. 202) accepted the findings of fact of the learned trial judge that the staircase was not dangerous and that the defect was obvious to anyone walking up and down the stairs. Lord Sumner observed at p. 58:

> The stairs were well lighted and, after slipping, the plaintiff looked and saw the cavity in the step. She could equally have seen it, and have seen it equally well, if she had looked before she slipped. She was fully familiar with the stairs. The spot was not a dangerous spot. The cavity was substantially in the same condition in which it had been for a long time. She slipped because she caught her heel, and not because the step or anything in it was slippery at the moment. These are, in effect, the learned judge's

findings, and the evidence of the model, which he found to be exact, entirely supports them. There is no misapprehension of law to be urged against his conclusion.

And further at p. 58:

In law I think that, if the place is plainly visible, as it was, the plaintiff, being in full possession of her faculties, was bound to look after herself, as she had always done before.

These observations of Lord Sumner apply with the same force as if they were directed to the facts in the present case. It is true Lord Buckmaster and Lord Carson dissented on the facts only, for they were of the opinion that the facts showed the defect in the stairway was a concealed danger. The former expressed the view that the obvious defect had brought into being a further danger which could not be reasonably expected by or apparent to a person using the stairway with ordinary care. The evidence does not permit such inference in the present case. The ridge was obvious and no further or latent danger was suggested. Lord Carson expressed the view that gradual wearing out of the concrete would not be apparent to a person using the stairway over an extended period; in effect that the plaintiff had become lulled to the danger. In the case at Bar the evidence does not permit such an inference. The ridge had remained in the same condition for several years.

The force of the present application of the *Fairman* case lies therefore: first, in the close parallel of comparable facts; secondly, there was no dissent in respect to the principle of law applicable; and thirdly, the grounds which gave rise to the dissent on the facts do not exist in the case under review. For the reasons given, I am of the opinion, with respect, that the judgment should be set aside.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *A. E. Lord.*

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

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STEWART v. THE CITY OF VANCOUVER.

Municipal corporation—Hole in sidewalk—Injury to pedestrian—Negligence —Liability—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 320.

At about 4 o'clock in the afternoon on a clear day the plaintiff was walking on a cement sidewalk on McDonald Street in the city of Vancouver when the heel of her shoe caught in a hole in the sidewalk. She fell on the sidewalk and was severely injured. She was wearing comfortable walking shoes. The hole when measured was two and one-half inches long, two inches wide and one inch deep. She had been walking on the sidewalk for about six days before the accident but had not previously noticed this hole. There was some accumulation of dust in the hole. An action for damages was dismissed.

Held, on appeal, affirming the decision of FISHER, J., that this defect in the sidewalk does not constitute such a want of repair as to render the corporation liable for negligence.

APPEAL by plaintiff from the decision of FISHER, J. of the 4th of January, 1939, in an action for damages for injuries sustained owing to the alleged negligence of the defendant in not maintaining a sidewalk on McDonald Street between Third and Fourth Avenues in the city of Vancouver, in a reasonable state of repair. On Friday, the 8th of July, 1938, at about 4 o'clock in the afternoon, the plaintiff was walking southerly on the sidewalk on the west side of McDonald Street between Third and Fourth Avenues when she caught her heel in a hole in the sidewalk and falling sustained a serious intra-capsular fracture of the neck of her right femur and other injuries. The action was dismissed.

The appeal was argued at Vancouver on the 15th of June, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Russell, K.C. (*E. N. R. Elliott,* with him), for appellant: This was a cement sidewalk and the hole in question was two and one-half inches long by two inches wide and three-quarters of an inch deep in the centre. The heel of her shoe caught in the hole. We submit that this hole was a trap: see *Moran* v. *City of Vancouver* (1928), 40 B.C. 450; *Clinton* v. *County of Hastings* (1923), 53 O.L.R. 266; *Greer* v. *Township of Mulmur* (1926),

59 O.L.R. 259, at p. 265; *Curliss* v. *The Village of Bolton*, [1939] O.W.N. 4; *Lammers* v. *City of Vancouver* (1938), 53 B.C. 373, at p. 375. We rely on *"Res ipsa loquitur"*: see *Touhey* v. *Medicine Hat* (1912), 2 W.W.R. 715; *McPhalen* v. *Vancouver* (1910), 15 B.C. 367, and on appeal (1911), 45 S.C.R. 194, at p. 230; *City of Vancouver* v. *Cummings* (1912), 46 S.C.R. 457; *Sandlos* v. *Township of Brant* (1921), 49 O.L.R. 142; *Hennessy* v. *City of Toronto* (1928), 62 O.L.R. 541; *Woodcock* v. *City of Vancouver* (1927), 39 B.C. 288.

Lord, for respondent: The learned judge accepted the evidence of one Craig as to the size of the hole. It was their duty to watch where they were walking. The principle of liability is the same as in *Gregson* v. *City of Vancouver*, [*ante*, p. 40] by this Court. The Ontario Act is precisely the same as ours. *"Res ipsa loquitur"* does not apply to this case: see *Fafard* v. *City of Quebec* (1917), 39 D.L.R. 717; *Town of Portland* v. *Griffiths* (1885), 11 S.C.R. 333.

Russell, replied.

Cur. adv. vult.

30th June, 1939.

MARTIN, C.J.B.C.: This appeal should in my opinion be dismissed for reasons, both adequate and satisfactory, given by the learned judge below: since he found the defendant was not negligent the question of plaintiff's contributory negligence does not arise. To his citations I add only the very recent and subsequent one of *McCready* v. *County of Brant*, [1939] S.C.R. 278, wherein at p. 284, Davis, J. said:

> The classic statement has always been that of Chief Justice Armour in the *Township of East Flamborough* case (1898), 29 Ont. 139, where it was stated at page 141 that a municipality must keep the highway "in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety." If that is done, "the requirement of the law is satisfied."

And see also *Raymond* v. *Township of Bosanquet* (1919), 59 S.C.R. 452, at 456, 459.

Our judgment in *Gregson* v. *City of Vancouver*, [*ante*, p. 40] this day delivered, should be considered in this relation.

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MACDONALD, J.A.: I would dismiss the appeal for the reasons given by my brother O'HALLORAN.

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

SLOAN, J.A. would dismiss the appeal.

O'HALLORAN, J.A.: This appeal concerns the liability of the city of Vancouver for injuries to a pedestrian due to alleged want of reasonable repair of a sidewalk on a well-travelled street. The statutory duty of the city of Vancouver in this respect has been discussed fully in our concurrent decision in *Gregson* v. *City of Vancouver* [*ante*, p. 40]. I refer to it to avoid repetition of the basis of my judgment therein. As to *Anderson* v. *Toronto* (1908), 15 O.L.R. 643 and *Ewing* v. *City of Toronto* (1898), 29 Ont. 197, referred to in the judgment of the learned trial judge Mr. Justice FISHER, *vide* remarks of Mr. Justice Magee, thereon in *Hennessy* v. *City of Toronto* (1928), 62 O.L.R. 541, and *vide* also *Ewing* v. *Hewitt* (1900), 27 A.R. 296.

The appellant had walked on this sidewalk, before the accident, during the six days she had been in Vancouver. There is no evidence that she had or had not noticed the hole before the accident; the inference is she had not. She states she was "looking straight ahead" when her heel caught in the hole. She was wearing comfortable walking-shoes. Her sister with whom she was walking at the time of the accident had frequently used this sidewalk—on an average of once a day for some two months previously but had never noticed the hole before the accident. The sister states "We were walking leisurely along McDonald Street when she put her heel in the hole and fell." It was a clear sunny day and the pavement was dry. Next morning the sister examined the hole and took its measurements; it was some two feet from the kerb and some two and a half inches long, two inches wide and one inch in depth. It looked to her like an old hole. Before she measured it "there was some dust" in it; and then she said "quite a bit of dust" and to measure its depth "I put in my finger and pushed the dust aside."

Mrs. McDonald whose home was close to the sidewalk at the point in question knew of the existence of the hole more than two years before. During the last two years she saw it almost daily when she drove up to the side of her house in a motor-car. She had never seen anyone trip on the hole or fall and had never reported its existence to city officials. The city district foreman testified he had inspected both sides of McDonald Street during the first week in June about four weeks before the accident and saw nothing that needed repair. When asked to explain why he did not see the hole he said:

> If the hole was there it must have been filled up with sand or grit which had blown off the road and in that case it would hardly be noticed.

In my view as stated in the *Gregson* case, *supra,* disrepair must be related to the exercise of reasonable care by the pedestrian in order to create want of reasonable repair within the meaning of the 1936 amendment to the Vancouver Incorporation Act, 1921. To establish want of reasonable repair it is not enough to show a defect existed; it must be shown not only to be a danger but also a concealed danger in the sense that the danger would not be apparent to a pedestrian exercising reasonable powers of observation and taking ordinary care for his own safety.

The appellant had not the same familiarity with the sidewalk nor was the defect as apparent as in the *Gregson* case, *supra.* If it had been shown that the hole was filled with dust and that a pedestrian might have reasonably failed to observe it on that account much strength could have been enlisted to support the contention that it was a concealed danger. The more so when the city foreman with an experienced eye for such defects, failed to detect it on his inspection four weeks before. However, the plaintiff's sister does not state that at the time she removed the dust the hole was so filled with dust as to conceal its existence. Mrs. McDonald called by the plaintiff, noticed the hole almost daily as she drove home in her motor-car. If she could see the hole in that position it would imply that it was not filled with dust in such a way as to conceal its existence, or cause it to escape the notice of a pedestrian exercising reasonable powers of observation.

On the evidence the learned trial judge found as "a fair

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inference" that the hole "had some dust or dirt in it most of the time." He does not find that the hole was filled with dust or filled to such an extent that its existence would escape the attention of a person using reasonable powers of observation. The degree of danger, and the extent to which it is concealed, is a question of fact in each case. The learned trial judge was confronted with the anomaly that evidence called by the plaintiff supported a contention fatal to her success, while on the other hand, evidence of the defendant supported a contention favourable to her success. For the evidence of the plaintiff's sister and Mrs. McDonald bears the inference that a concealed danger did not exist; but on the other hand, the evidence of the city foreman for the defendant bears an inference to the contrary. While some doubt may exist therefore as to whether the hole was or was not a concealed danger, yet, on the nature of the evidence as presented to him I am unable to say the learned trial judge could not have come to the conclusions that he did.

Appellant's counsel relied upon *Res ipsa loquitur;* but that maxim can apply only if the circumstances of the accident could be regarded as reasonable evidence that the accident arose from want of reasonable repair. For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *E. N. R. Elliott.*
Solicitor for respondent: *A. E. Lord.*

BRITISH COLUMBIA BRIDGE & DREDGING CO. LTD. v. S.S. "GLEEFUL."

In Admiralty
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Nov. 2, 3.
1940
Feb. 8;
April 25.

Admiralty law—Collision—Boom of logs swept by current against anchored dredge—Negligence contributing to the accident—Damages.

The suction dredge "Georgia," without motive power, engaged under contract with the National Government in deepening the channel of the North Arm of the Fraser River, was anchored by her port spud and two anchors to port and starboard facing down stream on a flood tide of about three knots, and lay about 75 feet from the northerly bank, the channel there being about 300 feet wide, and navigable only for vessels in general for that width. Beyond the deep water at the north bank is an extensive booming-ground over which booms requiring two feet of water could be floated. A pipe-line to discharge the material cut into by the "agitator" in front of the dredge, ran southerly from the dredge across the said channel, and after running some distance discharged said material into the gulf. This line was carried on pontoons which could be readily and without injury opened in three or four minutes, and then flowing apart and up stream with the tide would leave ample water for booms to pass the dredge in safety. The steam tug "Gleeful" came up the river from the Gulf of Georgia, towing two booms of logs abreast about 140 feet wide and 1,000 feet long. She proceeded with the intention of passing on the north side of the dredge, and when some distance down the river signalled for the assistance of the dredge's tender, the "Bug," to shove the booms northerly to clear the dredge. The "Bug" went to her assistance but did not have sufficient power, and the logs were swept by the current against the dredge, causing damages.

Held, that the tender gave what assistance it could in due time as well as in proper manner, and it follows that the tug must be found guilty of negligence.

Held, further, that as there was active participation and co-operation by the plaintiff in the handling of the boom by its own tender, and the dredge had the capacity and opportunity to open its own pipe-line quickly and without damage on its south side, it should have done so without waiting for request, when it became apparent that the efforts of the tender were not meeting with success. The failure to open the pipe-line over which it had control contributed directly to the collision. Both parties were equally at fault and each shall pay one-half the damages occasioned by their joint negligence.

ACTION for damages for injury done to the suction dredge "Georgia" when engaged in improving by deepening the channel of the North Arm of the Fraser River, by two booms of logs in

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tow up river by the steam tug "Gleeful" on the 22nd of April, 1936. The facts are set out in the reasons for judgment. Tried by MARTIN, D.J.A. at Vancouver on the 2nd and 3rd of November, 1939, and 8th of February, 1940.

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

Cur. adv. vult.

25th April, 1940.

MARTIN, D.J.A.: In this action the plaintiff company seeks to recover from the steam tug "Gleeful" (length 73.4 feet; beam 18 feet; depth 7.8 feet) damages for injury done, on 22nd of April, 1936, in the afternoon, to the suction dredge "Georgia" (length 119 feet; beam 31.2 feet; depth 8.7 feet) without motive power, being then engaged, under contract with the National Government in improving, by deepening, the channel of the North Arm of the Fraser River, the damage being caused by two booms of logs (of 14 and 11 sections respectively, about 1,000 feet long, and in width, lashed abreast, 140 feet) in tow of the tug up river on a flood tide of about three knots, being swept by the current against the dredge.

The main heads of negligence alleged are that the tug should not have entered and come up the river from the Gulf of Georgia towing the said two booms abreast with the knowledge that the dredge was at work in the channel, and that it entered the channel at the wrong side and later wrongly changed its course, and did not have sufficient power to handle the tow and so lost control of it, thereby colliding with said dredge.

There is no dispute about the position of the dredge, as shown on Exhibit 8, which, as near as may be, was at work, facing northerly down river, anchored by her port spud and two anchors to port and starboard, and lay about 75 feet from the northerly bank or "cut" of the channel, there 300 feet wide, which is navigable only for vessels in general for that width, but beyond the deep water at the bank and to the north is an extensive booming-ground (Exhibit 4) over which booms, requiring generally only two feet of water, could be floated and manœuvred: the

tug required 12 feet of water for safe navigation and got that depth along the said northerly bank.

A pipe-line to discharge the material cut into by the "agitator," fixed in front of the dredge without lateral movement (Exhibit 3), and sucked up by the pump, ran southerly from the dredge across said channel and thence for another 400 feet in shallower water to the jetty over which it discharged said material into the gulf as shown on Exhibit 4. That line was carried on pontoons which could be readily and without injury opened, within three to four minutes, and then flowing apart and upstream with the tide, would leave ample water for the booms to pass the dredge in safety.

In answer to the said charges of negligence it was first submitted for the tug that the dredge, under these conditions, must be regarded as an obstruction to navigation, but though this is true in one sense it is not so in another and main one, because it is more accurate to say that it was removing obstructions to, and facilitating navigation, by direction of the paramount authority of the Crown, and in the only way that the work, essential for the safety of navigation, could properly be carried out.

When a navigable channel becomes obstructed, by a wreck, or snags, or silt, or otherwise, that obstruction must for public safety, be removed, and the removal necessitates a temporary increase of the obstruction by the presence of the salvage plant or dredging or other machinery and equipment necessary for that purpose, and while such beneficial public operations are in progress an inevitable curtailment of the facilities of the channel results and therefore all those who make use of it must co-operate to do so in a corresponding careful and reasonable way that will conduce to the safety and benefit of all concerned.

Upon the evidence, which in several important respects is sharply conflicting and wholly irreconcilable, I find that the tug, under the circumstances, was justified in going up the river on that very strong tide the way she did with the two booms abreast, only if she could rely upon the assistance of the dredge's tender, the "Bug" as being sufficient to hold the booms to the northerly side of the channel.

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It is common ground that the tender did go to the tug's assistance and I find that she did all that she reasonably could in trying to hold the boom to the north side by pushing against it, but without success (with the result that the boom fouled and injured the dredge), and therefore she fully discharged any duty that she owed to the tug arising out of the course of co-operative conduct on several prior occasions, or otherwise.

But the tug alleges, through two witnesses, that the tender did not come to her assistance till she was within 250-300 feet of the dredge by which time the assistance that was given was so belated that it was of no avail and hence the delay was the direct cause of the collision. This raises the main, and astonishing, dispute in the case because the evidence of three witnesses is positive that the tender duly responded to the tug's signals and went to its assistance when it was a great distance off—at least 3,000 feet, the man in charge of the tender deposes and is confirmed by the lever-man on the dredge—and did all that was possible to save the dangerous situation, but could not do more because of its lack of power under the circumstances.

Though faced with such an unusual and embarrassing conflict of testimony I must nevertheless discharge an unpleasant duty which I do by finding that the weight of evidence and of probability is in favour of the tender and therefore I hold that her assistance was given in due time as well as in proper manner: it follows from this that the tug must be found guilty of negligence.

But on its behalf it is alleged that the dredge negligently contributed to the collision by (1) failing to stop her suction pumps, and by (2) failing to move the front end of the dredge away from the booms, and (3) failing to open the pipe-line.

As to (1) and (2) I find in favour of the plaintiff, but (3) raises a much more serious question because it is alternatively alleged in paragraph 6 (d) of the statement of claim that the tug was coming up on the south side of the channel and

> should have requested the said dredge to open its pontoon line so as to permit the tug and tow to proceed up the channel along the south side of the same which the said dredge could and would have done . . .

The evidence fully supports this averment of the dredge's capacity and opportunity to open its pipe-line quickly, and with-

out damage, and I can only reach the conclusion that it should have done so, and without waiting for request, when it became apparent that the efforts of the tender were not meeting with success, and the further off the plaintiff puts the scene of those efforts to be, the greater the opportunity to make provision for failure thereof. On both sides there was an unaccountable inertia: simply letting an obviously dangerous situation "drift" into disaster: so far as the dredge is concerned the reason may be found in the absence of its master.

It was submitted for the plaintiff that the dredge was in the favoured position of "a ship in her moorings in broad daylight" and therefore the tug was *prima facie* at fault—*City of Peking* v. *Compagnie des Messageries Maritimes* (1888), 58 L.J.P.C. 64, 65; but such a simple state of affairs is far removed from the present case for several reasons, *e.g.*, that there was active participation and co-operation in the handling of the boom by the plaintiff's own tender, and that the plaintiff had control of the pipe-line the failure to open which contributed directly to the collision.

The case comes in my opinion very largely within the general principle of those exceptions set out in Marsden's Collisions at Sea, 9th Ed., 40, wherein it is said:

> The rule that the mere fact of a daylight collision between a craft under way and another at anchor is *prima facie* evidence of negligence in the former, is not without exceptions. A derrick or wreck-raising craft moored in a strong and narrow tideway over or alongside a wreck, although not in an improper position or unlawfully obstructing the fairway, nevertheless presents such an obstruction to other vessels that it would not be reasonable to presume that the latter are negligent merely because they foul the former. . . .

Two of the United States Admiralty cases cited in Marsden respecting removal of wrecks from the channel are in point, *viz.*, *The Chauncey M. Depew* (1894), 59 Fed. 791, and *The Passaic* (1896), 76 Fed. 460, 462, and in the former the Court said, pp. 793-4:

> Under such circumstances, and on the flood tide, this derrick was, therefore, a very serious embarrassment, and a partial obstruction to the free and easy navigation of the East river. The question, however, is not whether the derrick was a partial obstruction to navigation, but whether it was an unlawful obstruction. Sailing vessels in that locality are often an obstruction to steamers; tows, an obstruction to both; and slow boats, an obstruc-

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tion to faster ones. But none of these are unlawful; and none are liable, except for negligence. Dredges in a channel way are partial obstructions, but lawful ones.

As to the rights of dredges in channels, generally, the decision of the Supreme Court of the United States in *The "Virginia Ehrman" and the "Agnese"* (1877), 97 U.S. 309 is instructive, and it is clear that when properly carrying out a contract with the Government to deepen a channel they are not an unlawful obstruction: the question of negligence in carrying out the contract depends upon the varying circumstances of each case, as does also the attempt of vessels to pass the dredge, pp. 314-6.

This case, viewing it as a whole in the light of its unusual circumstances, I regard as being within the second of the three "ways" in the well-known illustration of Lord Chancellor Birkenhead in delivering the unanimous judgment of the House of Lords in *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at p. 136, and also his further observations at p. 144:

> Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

And he proceeds:

> The case seems to me to resemble somewhat closely that of *The Hero,* [1912] A.C. 300. In that case, as in this, notwithstanding the negligent navigation of the first ship, the collision could have been avoided if proper action had been taken by the second ship. Indeed, that case is remarkable, because the proper order was actually given, but unfortunately countermanded. In that case this House held both vessels to blame, apparently considering the acts of navigation on the two ships as forming parts of one transaction, and the second act of negligence as closely following upon and involved with the first. In the present case there does not seem to be a sufficient separation of time, place or circumstance between the negligent navigation of the *Radstock* and that of the *Volute* to make it right to treat the negligence on board the *Radstock* as the sole cause of the collision.

The only conclusion I can reach in this difficult and unsatisfactory case is that both parties were equally at fault and therefore the liability must be apportioned equally and so my judg-

ment is that each party shall pay one-half the damages occasioned by said joint negligence and one-half the costs. If the parties do not agree upon the amount of the damages they will be assessed by the registrar, with merchants.

Judgment accordingly.

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Divorce—Desertion—Misconduct by husband justifying decree—Change of domicil by husband—Wife's suit in another Province—Jurisdiction.

The petitioner and her husband lived together at North Battleford in the Province of Saskatchewan until 1929, when the husband left her and went to live with another woman. After 1934 he left Saskatchewan to live in Manitoba, where he still resides. In May, 1934, the petitioner also left Saskatchewan and came to British Columbia. In September, 1939, she petitioned for dissolution of her marriage to respondent and for the custody of her infant child. On the hearing, counsel for respondent appeared under protest pursuant to leave obtained. The marriage was dissolved.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that the husband is domiciled in the Province of Saskatchewan or Manitoba and the wife cannot acquire a domicil different from that of her husband; she can only petition for divorce in a Court having jurisdiction in the Province where her husband is domiciled. The objection to the jurisdiction is sustained, the petition set aside and the decree vacated.

APPEAL by defendant from the order of MORRISON, C.J.S.C. of the 15th of November, 1939, whereby the respondent's application for an order setting aside the petition herein and the service on the respondent of said petition, and the order of the Chief Justice of the Supreme Court of the 12th of September, authorizing such service, was dismissed, and from the decree that the marriage had and solemnized on the 26th of September, 1926, between the petitioner and the respondent be dissolved on the ground of adultery of the respondent since the celebration of the marriage. The petitioner and respondent were married at North Battleford, Saskatchewan, in September, 1926, and they lived together in North Battleford until 1929, one child being

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born in May, 1927. The husband left his wife in January, 1929. In 1934 they entered into an agreement whereby they were to live separately, and the husband would pay her $200 in instalments for the maintenance of the wife and child, but the respondent failed to pay more than $100. In May, 1934, the wife went to Vancouver, British Columbia. The wife claims that her husband has lived in adultery with another woman since 1929, and that they are now living together in Sherridon, Manitoba.

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

Ghent Davis, for appellant: The husband and wife lived together in Saskatchewan, and in 1934 the wife came to Vancouver and the husband went to Manitoba. The husband never lived in British Columbia. He is now domiciled in Manitoba, and the domicil is there. It is the domicil of the husband and the wife cannot acquire a domicil separate from that of her husband: see Halsbury's Laws of England, 2nd Ed., Vol. 6, pp. 296-8; *Attorney-General for Alberta* v. *Cook,* [1926] A.C. 444, at p. 451; *Le Mesurier* v. *Le Mesurier,* [1895] A.C. 517; *Lord Advocate* v. *Jaffrey,* [1921] 1 A.C. 146. See also Can. Stats. 1930, Cap. 15, Sec. 2.

E. N. R. Elliott, for respondent: The respondent does not name any domicil and we say this is a very hard case that is an exception to the rule that the wife's domicil is that of her husband: see *Ogden* v. *Ogden,* [1908] P. 46; *Stathatos* v. *Stathatos,* [1913] P. 46; *de Montaigu* v. *de Montaigu,* [1913] P. 154; *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435, at p. 442; *Thornback* v. *Thornback and Thomson,* [1923] 4 D.L.R. 810, at p. 816; *McCormack* v. *McCormack* (1920), 55 D.L.R. 386; *Payn* v. *Payn,* [1924] 3 D.L.R. 1006, at p. 1007; *Chaisson* v. *Chaisson* (1920), 53 D.L.R. 360; *Harney* v. *Harney* (1926), 39 B.C. 275.

Davis, in reply: The cases referred to do not apply here as in every case the wife married a foreigner and the husband went back to the country in which he formerly had lived: see also

Harris v. *Harris and Harris* (1929), 24 Sask. L.R. 234; [1930] 1 W.W.R. 173.

Cur. adv. vult.

5th March, 1940.

MARTIN, C.J.B.C.: This appeal raises the question of the jurisdiction of the Court below to entertain the petition of a wife to dissolve her marriage (on the ground of adultery) a decree to that effect having been pronounced by MORRISON, C.J.S.C. despite respondent's objection to said jurisdiction taken originally by appearance under protest and motion to set aside the petition and renewed at the hearing to which it had been referred, and there overruled.

The marriage took place in September, 1926, at North Battleford in the Province of Saskatchewan, and the parties cohabited there till 1929 when the respondent left the petitioner and went to live with another woman and later, but not before 1934, left Saskatchewan to live in Manitoba where he is now: the petitioner also left Saskatchewan in 1934 and came to live in this Province in May, 1934, and claims to have become domiciled here, and in September last filed this petition.

It is alleged in said petition that the parties were domiciled in Saskatchewan at the time of their marriage and were so domiciled in February, 1934, but there is no evidence of the date when the respondent went to Manitoba, merely that he is "now living at Sherridon" there.

It is conceded by petitioner's counsel that by the general rule governing the domicil of a married woman she could not bring this suit in this Province, but it is submitted that because her husband deserted her she may do so as coming within the "exception" from the ordinary rule that was "made" by Evans, P., in *de Montaigu* v. *de Montaigu,* [1913] P. 154, 158-9; 82 L.J.P. 125, wherein he said, p. 159:

> I think it better to make this exception than to adhere to the rigid rule or theory of law referred to.

He founds the "making of this exception" upon the mere *dictum* of Lord Gorrell in *Ogden* v. *Ogden,* [1908] P. 46, 83, that the wife "might be treated as having a domicil in her own country which would be sufficient to support a suit," and upon the adop-

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tion of that *dictum* by Bargrave Deane, J. in *Stathatos* v. *Stathatos,* [1913] P. 46, wherein he said, pp. 50-1:

> I am now asked to exercise in this Court for the first time that suggested form of relief. It is undoubtedly giving the go-by to what has always been the rule of law and practice here, namely, that the wife's domicil is the husband's domicil whatever that may be. I should feel very much happier in the course I am going to take if I knew that my decision were going before the Court of Appeal, and that the higher tribunal would be in a position to deal with it and exercise their judgment upon it. But I always take my courage in my own hand, and act, so far as I can, according to what I feel and believe to be just and right. If I am wrong in what I am about to do in this case, I hope it will not be taken as a precedent, unless and until the Court of Appeal has had an opportunity of approving it.

Since then a Court of Appeal has, fortunately, had the "opportunity" of reviewing this "go-by to the rule of law and practice," *i.e.,* the Court of Appeal of Saskatchewan in *Harris* v. *Harris and Harris,* [1930] 1 W.W.R. 173, and has pronounced against its adoption in view of the later decisions therein mentioned, *viz., Lord Advocate* v. *Jaffrey,* [1921] 1 A.C. 146; *Attorney-General for Alberta* v. *Cook,* [1926] A.C. 444; [1926] 1 W.W.R. 742; 95 L.J.P.C. 102; and *H.* v. *H.,* [1928] P. 206; 97 L.J. P. 116; and declined to sanction the acquisition by the wife of any domicil except her husband's, or the submission that he may be estopped from asserting and proving at the trial what that domicil is.

This conclusion receives strong support from the recent decision (not cited to us) of Bucknill, J. in *Herd* v. *Herd,* [1936] P. 205, wherein, after having the assistance of the King's Proctor on the important question involved, he decided, upon a valuable review of the practice and principal authorities, that the said "suggestion" in *Ogden's* case should not be followed, and concluded, p. 213:

> One of the facts alleged [in the petition] is that the husband and wife were domiciled in this country when the petition was filed. As Scrutton, L.J. remarked in *Hyman* v. *Hyman,* [1929] P. 30: "The [Divorce] Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties." In this case I have to regard the facts as they are proved to me. I have also to consider the submission of the Solicitor-General on behalf of the King's Proctor that in this case the Court has no jurisdiction. If the facts establish, as in my judgment they clearly establish, that the respondent acquired a domicil of choice in the United States before the petitioner filed her petition, then I must apply the rule laid down in the House of Lords and the Privy Council that the Court

has no jurisdiction in such a case to make a decree of dissolution of the marriage.

In the present case it is, moreover, and in any event, to be borne in mind that no decree of nullity has been pronounced by a foreign Court as was done in the *Stathatos* and *de Montaigu* cases, *supra,* and also that this suit is defended whereas they were not; and, furthermore, that in those cases the wife was invoking the jurisdiction of the Court which had jurisdiction over the original domicil of herself and husband, whereas the present petitioner left the Province of original jurisdiction and came here and alleges in her petition that she is "now domiciled in this Province," and, without attempting to "revert to her own domicil" in Saskatchewan, invokes the jurisdiction of our Courts, but, in my opinion, upon the authorities cited, there is no legal support for that invocation.

It should be added that the petitioner does not invoke the relief afforded by the Divorce Jurisdiction Act, 1930, Cap. 15, because on the facts herein she is admittedly excluded therefrom, her husband not having a domicil in this Province.

It follows that the objection to the jurisdiction is sustained, the appeal allowed, the petition set aside and the decree vacated.

MACDONALD, J.A.: Appeal from a decree dissolving, at the suit of the wife, as petitioner, a marriage solemnized at North Battleford, Saskatchewan, in 1926. The petitioner lived and cohabited with her husband at North Battleford until January, 1929, when he deserted her. One child was born of the marriage in 1927; both were left without means of support. After this desertion, *viz.,* in 1934, while living apart but domiciled in Saskatchewan, they entered into an agreement whereby respondent agreed that the petitioner was entitled to live apart from him free from his control to the same extent as if she were a *feme sole;* he also agreed to pay her a lump sum of $200. This he failed to do. Some months later the petitioner, finding she could not make a living for herself and child in Saskatchewan moved to British Columbia. Since then she has been living at Vancouver; as she declared her intention to reside permanently in Vancouver she acquired a domicil in this Province, if it is possible to do so while the marriage tie subsists. Respondent's counsel submits,

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because of the desertion and separation agreement, she has acquired a domicil in British Columbia and that a divorce *a vinculo* was validly obtained.

The erring husband left Saskatchewan for Manitoba where he lived after deserting the petitioner and still continues to live in adultery with one Mrs. Anna Woods. He is employed as a miner; for over ten years he has lived at Sherridon in the Province of Manitoba. He has undoubtedly acquired a new domicil of choice in that Province; that is clear from the evidence.

Respondent was given 21 days after service to enter an appearance with the registrar in Vancouver; a similar period was given to the said Anna Woods to intervene. Respondent thereupon on application by his counsel to a judge in Chambers obtained liberty to file an appearance under protest as jurisdiction was questioned. An order was sought to set aside the petition and service on respondent and to discharge the order authorizing it on the ground that on the facts disclosed therein, later supported by evidence, the Courts in this Province had no jurisdiction to dissolve the marriage tie.

The petition came on for hearing before MORRISON, C.J.S.C., counsel for respondent appearing under protest pursuant to leave obtained. The learned judge proceeded with the trial. Evidence was adduced on the petitioner's behalf establishing the marriage and the facts already outlined. His Lordship reserved judgment and later dissolved the marriage; no reasons were given.

However much one may sympathize with the petitioner this appeal must be allowed. A wife cannot acquire a domicil different from that of her husband. She can only petition for divorce in a Court having jurisdiction in the Province where her husband is domiciled; this is subject to modification by a statute later referred to. The rights of married parties, not only as to divorce but also in respect to devolution of property, depend upon the laws of the country where the husband resides, having established a domicil there.

In *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146, the contracting parties married in Scotland and resided there for fifteen

years. Because of dissipated habits it was arranged at the instance of the wife that the husband should go to Australia. He resided there until his death in 1918, 25 years later. While in Australia he went through a form of bigamous marriage with a woman with whom he lived for sixteen years up to the time of his death. His lawful wife continued to live in Scotland. Upon her death in Scotland in 1916 in an estate action where legacy duties were involved it was held that at her death (because the marriage tie still existed up to that date) her domicil was in Australia not in Scotland and the laws of the former country governed. Even under the facts narrated the wife could not acquire a judicial *status* independent of her husband. It is also clear since the decision in *Le Mesurier* v. *Le Mesurier,* [1895] A.C. 517, 526, that only a full juridical domicil within its jurisdiction will enable a Court to pronounce a decree of divorce. While the parties continue married there can not be two domicils; the only domicil is that of the husband. In his country only can a divorce *a vinculo* be obtained.

In a number of cases an attempt was made to modify this doctrine because of the hardship it entailed. They were relied upon by respondent's counsel, but are no longer followed. Even a decree of judicial separation formally obtained, much less a separation agreement as in this case, would not enable a wife to acquire a separate domicil; unity of domicil is the rule until the tie is severed.

Some of the cases where attempts were made to mitigate the rigor of the rule are *Stathatos* v. *Stathatos,* [1913] P. 46; *Ogden* v. *Ogden,* [1908] P. 46; *Armytage* v. *Armytage,* [1898] P. 178; *de Montaigu* v. *de Montaigu,* [1913] P. 154 and others. These cases holding that the wife might, where the husband acted in violation of the marriage tie in the variety of circumstances therein set out were for a time followed in Canada by some judges; others declined to do so (*e.g., Chaisson* v. *Chaisson* (1920), 53 D.L.R. 360; *Payn* v. *Payn,* [1924] 3 D.L.R. 1006; *Thornback* v. *Thornback and Thomson,* [1923] 4 D.L.R. 810). No useful purpose would be served by discussing them; it is enough to say that in *Herd* v. *Herd,* [1936] P. 205, it was held that since the decision of the House of Lords in *Lord Advocate*

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v. *Jaffrey,* [1921] 1 A.C. 146, and of the Judicial Committee in *Attorney-General for Alberta* v. *Cook,* [1926] A.C. 444, there can be only one domicil, *viz.,* that of the husband in which the petition may be maintained. The wife cannot obtain a separate domicil because of desertion as in the case at Bar. The cases referred to can no longer be supported.

As the subject of marriage and divorce is within the legislative authority of the Parliament of Canada with each Province given the right to make laws with regard to the solemnization of marriage it has been suggested, whatever the rule might be where a domicil is acquired by the husband in a foreign country, that in Canada with its separate Provinces a Dominion domicil might be acquired common to both parties so long as they remained in this country. Whatever reasons might be advanced to support this view it was rejected by the Judicial Committee in *Attorney-General for Alberta* v. *Cook,* [1926] A.C. 444. One need not in fact go further than this decision to find authority conclusive against the petitioner herein. It follows that only Courts in Manitoba have jurisdiction to entertain this petition, apart from the statute later referred to.

In *Attorney-General for Alberta* v. *Cook, supra,* it was held that a decree for judicial separation would not interfere with this rule of law; it did not enable the wife to acquire a domicil different from that of the husband. The facts are somewhat similar. It also decided, as already stated, that the domicil of a person settled in one of the Provinces is a domicil of that particular Province, not of the Dominion of Canada. The English cases therefore relating to domicil in foreign countries apply where the husband is in one Province, the wife in another.

The cases I referred to, since overruled, and many others are discussed in reasons for judgment of Martin, J.A., in *Harris* v. *Harris and Harris* (1929), 24 Sask. L.R. 234, with which I fully agree. To avoid repetition I merely refer to this judgment.

In 1930 the Dominion Parliament, doubtless to afford relief to petitioners deserted as aforesaid, enacted chapter 15 of the statutes of that year. It is an Act in respect to jurisdiction in proceedings for divorce. Section 2 reads as follows:

2. A married woman who either before or after the passing of this Act

has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a Court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the Court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such Court shall have jurisdiction to grant such divorce provided that immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced.

The proviso in the last three lines is fatal to the petitioner's case herein: it does not fit the facts. Immediately prior to desertion the husband was domiciled in Saskatchewan, not in the Province in which these proceedings were commenced. While we are not called upon to decide the point it would appear clear that the Courts of Saskatchewan or Manitoba have jurisdiction: our Courts have not. The appeal must be allowed.

MCQUARRIE, J.A.: I agree with the Chief Justice that the appeal should be allowed, the petition set aside and the decree vacated.

Appeal allowed.

Solicitors for appellant: *Davis, Pugh, Davis, Hossie & Lett.*
Solicitors for respondent: *J. A. Russell, Elliott & Co.*

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MONARCH SECURITIES LIMITED v. GOLD.

Chattel mortgage—Security for loan—Subsequent absolute assignment of chattels—Then conditional sale agreement from lender to borrower—Distress for rent—Priority—Substance of transaction to be looked at—Appeal.

The defendant owned a property on Robson Street in Vancouver that was occupied by one Castellani as tenant and certain chattels were on the property owned by Castellani and his daughter. On March 15th, 1939, Castellani and his daughter borrowed $461 from the plaintiff and by way of security gave the plaintiff a chattel mortgage upon said goods which was duly registered pursuant to the Bills of Sale Act. The chattel mortgage provided that in case the plaintiff should feel unsafe or insecure he could take possession of the goods. Shortly after, the plaintiff feeling unsafe, it was agreed between them that in consideration of a release of their personal covenant contained in the chattel mortgage, the Castellanis would assign all their interest in the goods to the plaintiff, and on the 20th of March, 1939, they executed in favour of the plaintiff an absolute bill of sale of the goods which was duly delivered and registered. On the 11th of April, the plaintiff delivered possession of the goods to Castellani and his daughter pursuant to an agreement in writing for the sale thereof by the plaintiff to Castellani and his daughter dated the 11th of April, 1939, called a "conditional sale agreement" under the terms of which the property in the goods was to vest in Castellani and his daughter at a subsequent time upon payment of the whole of the purchase price of the goods. The conditional sale agreement was duly registered in the registry of the County Court. The rent for the premises was paid in full up to the 11th of April, 1939. After that date the rent became in arrears, and on the 16th of May, 1939, the defendant levied a distress therefor and seized the goods. In an action for a declaration that the defendant was entitled to sell in due course only the interest of Castellani and his daughter in the goods, the plaintiff recovered judgment.

Held, on appeal, reversing the decision of HARPER, Co. J., that placing the relevant facts in their proper relation, the successive documents in this case do not constitute anything more than a security for the original loan, although clothed finally in the form of a conditional sale. The transaction in substance was a loan with security, and there was no real sale nor was a real sale intended.

APPEAL by defendant from the decision of HARPER, Co. J. of the 7th of October, 1939, in an action for a declaration that the defendant is entitled to sell in due course only the interest of Rene Castellani in the goods on the store property in the city of Vancouver, known as 754 Robson Street, or alternatively only

the interest of the said Rene Castellani and Jeanette Castellani in said goods. The defendant Gold is the owner of the premises referred to and he rented said premises to one Rene Castellani and his daughter Jeanette Castellani. On March 10th, 1939, Castellani and his daughter were in occupation of the premises upon which there were certain chattels that were owned by them. On the 15th of March, 1939, the Castellanis borrowed $461 from the plaintiff and they gave the plaintiff as security a chattel mortgage on the goods upon the premises which was registered under the Bills of Sale Act. The chattel mortgage provided that if the plaintiff felt unsafe he could take possession of the goods. Feeling unsafe the Castellanis executed in favour of the plaintiff an absolute bill of sale of the goods dated the 20th of March, 1939, which was duly registered on the 24th of March, 1939. On the 11th of April, 1939, the plaintiff delivered possession of the goods of the Castellanis pursuant to an agreement in writing for the sale thereof by the plaintiff to the Castellanis dated April 11th, 1939 (hereinafter referred to as the "conditional sale agreement"), and under the terms of which the property was to vest in the Castellanis upon payment of the whole of the purchase price named therein. The rent on the premises was paid in full up to the 11th of April, 1939, but after that date the rent became in arrears, and on the 16th of May, 1939, the defendant levied a distress therefor and seized the goods on the premises. The purchase price under the conditional sale agreement was never fully paid up. The defendant asserted and still asserts the right to sell the goods in due course pursuant to the terms of the Distress Act.

The appeal was argued at Victoria on the 18th of January, 1940, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

P. J. McIntyre, for appellant: The tenant had the goods on the premises under a conditional sale agreement. The rent fell in arrears and we seized the goods under section 4 of the Distress Act. We have a right to seize the goods. The tenant's interest in them are subject to seizure. Monarch Securities got a bill of sale of the goods on the 23rd of March which was registered on March 24th. The mortgage was then released. It having been

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given on a loan of $457. On March 28th Castellani gave a promissory note to Monarch Securities for $457 to cover the loan. On April 11th the conditional sale agreement was executed by which Monarch Securities agreed to sell to Castellani upon payment of the debt. On May 10th we distrained for $130, and on June 22nd for $150. This action was then commenced and the question is whether Monarch Securities is protected by section 5 of the Distress Act: see *Farr* v. *Annable,* [1926] 2 D.L.R. 127; *Libby et al.* v. *Laird and Grundy* (1916), 10 W.W.R. 473. They had a chattel mortgage interest in the goods and we can sell both the interest of the mortgagee and the tenant under section 5 of the Distress Act. Section 4 is only to protect a *bona fide* purchaser. Section 5 is the more recent and governs: see *In re Watson. Ex parte Official Receiver in Bankruptcy* (1890), 25 Q.B.D. 27; *Madell* v. *Thomas & Co.,* [1891] 1 Q.B. 230; *Mellor (Trustee of)* v. *Maas,* [1903] 1 K.B. 226; *Maas* v. *Pepper,* [1905] A.C. 102. There is no conditional agreement as contemplated by section 4 of the Act: see *R. P. Rithet & Co.* v. *Scarff* (1920), 29 B.C. 70; *W. J. Albutt & Co. Ltd.* v. *Riddell* (1930), 43 B.C. 74. The conditional sale agreement is a fictitious one: see *Taeger* v. *Rowe* (1909), 10 W.L.R. 674.

Bull, K.C., for respondent: There was an absolute bill of sale of these goods to the plaintiff on the 20th of March, 1939, and on the 24th of March, when it was registered, the plaintiff was the absolute owner thereof. On the 28th of March the conditional sale agreement was executed with the Castellanis and registered. This was a perfectly proper bill of sale and in accordance with the Conditional Sales Act. On the 11th of April the situation was that of vendor and purchaser, and there were no arrears of rent until after the 16th of April, 1939. The rent was $150 per month. Under the plaintiff's security he had a right to enter and sell, but instead of doing so he arranged with the Castellanis to sell the goods to them at a fair price: see *Pierce* v. *Empey,* [1939] S.C.R. 247 at pp. 250-1; *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Company* (1888), 13 App. Cas. 554. With reference to sections 4 and 5 of the Distress Act, we say the vendor's interest is protected by section 4, under which we have a higher right, and

section 5 does not interfere with section 4. The conditional sale agreement is strictly in accordance with the Act.

McIntyre, replied.

Cur. adv. vult.

5th March, 1940.

MARTIN, C.J.B.C.: This appeal should, in my opinion, be allowed, and I concur with the judgment of my brother O'HALLORAN.

SLOAN, J.A.: I agree in allowing the appeal for the reasons given by my brother O'HALLORAN.

O'HALLORAN, J.A.: This appeal concerns the right of the appellant landlord to distrain for rent upon chattels held by his tenant under a registered conditional sale agreement with the respondent loan company. Counsel for the appellant contended that the conditional sale agreement, while in form an agreement for sale of chattels to the tenant, is not so in substance, but is in fact security for a loan advanced the tenant by the respondent.

One Rene Castellani conducted a delicatessen business in premises which he rented from the appellant at 754 Robson Street in Vancouver for $150 monthly payable in two equal monthly instalments at the middle and end of each month. On the 14th of February, 1939, he borrowed $400 from the respondent. As security he gave a chattel mortgage upon his shop furnishings and implements of trade for $457.50 (the difference of $57.50 was described as "solicitor's charge") payable on demand and carrying 12 per cent. interest. It was discovered that Castellani's daughter had an interest in the chattels, so a new chattel mortgage was entered into on the 15th of March following. Eight days thereafter the Castellanis gave the respondent loan company an absolute bill of sale of the chattels secured by this chattel mortgage. The consideration for the bill of sale, as declared in the affidavit of *bona fides* sworn by the respondent's secretary was the release of the Castellanis from liability under the chattel mortgage.

Five days later, on the 28th of March, the Castellanis gave the respondent a promissory note for $454 payable $35 monthly

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"for value received." The evidence does not disclose why it was given. But it was not suggested it was for an additional advance of $454. In fact it represented the chattel mortgage indebtedness supposedly released by the bill of sale given five days before. On the 11th of April, fourteen days thereafter, the respondent purported to sell the goods and chattels to the Castellanis under a conditional sale agreement for the same amount plus $35, but payable at the rate of $35 per month. The promissory note was referred to therein as evidence of the terms of payment. Throughout this successive signing of the chattel mortgage, the bill of sale, the promissory note and the conditional sale agreement through a period of some 27 days, the Castellanis remained in sole possession of the chattels at the rented premises and carried on their business as usual. No suggestion was made of their going out of business, or of their having to move because their business could not afford the monthly rent. The principal amount involved throughout was the same, with some slight variation for interest, and the chattels were the same. The appellant landlord distrained for $100 rental on the 11th of April; $75 thereof was for the half-monthly period ending the 31st of March and $25 was the balance owing for the half-monthly period ending on the 15th of March.

The Court did not have the assistance of the evidence of the two Castellanis. In the special circumstances it is difficult to imagine they regarded the successive documents as anything more than additional security for the loan. When the secretary of the respondent company was asked on discovery if the reason for the bill of sale and conditional sale agreement was to prevent a distress for rent, he answered: "Well, that was in our minds, no doubt." It is hard to know what other reason the respondent could have had to make it "feel unsafe or insecure and deem that the goods and chattels were in danger of being removed." There was no suggestion that the Castellanis would remove them. No secured creditor was suggested. A judgment creditor would be subject to the chattel mortgage. The respondent would not be paid its money any sooner, for it purported to sell the goods back to the Castellanis almost immediately on more extended terms of payment. The only danger left was the landlord. If

there was anything else the evidence does not disclose it. In the circumstances the whole of the evidence points to the conclusion, and on that evidence the proper conclusion is, that this method was adopted in an attempt to defeat his priority.

Counsel for the respondent contended that the Court must gather the true arrangement of the parties from these duly executed and registered documents. But the Court will go through these documents to arrive at the truth. It is not prevented by the form of the documents from going into the true facts. In *In re Watson. Ex parte Official Receiver* (1890), 59 L.J.Q.B. 394, the learned county court judge found that the transaction was in fact one of loan with security—a mortgage and not a sale with a right of repurchase—but held that in the light of the authorities he could only look at the form of the documents and not at the substance of the transaction. The Divisional Court upheld him but the Court of Appeal unanimously allowed the appeal; and *vide* also *Matheson* v. *Pollock* (1893), 3 B.C. 74; *Madell* v. *Thomas & Co.*, [1891] 1 Q.B. 230; *Maas* v. *Pepper*, [1905] A.C. 102, and *Taeger* v. *Rowe* (1909), 10 W.L.R. 674. The duty of the Court is to consider the substance as well as the form of the transaction. As Lord Esher said in *In re Watson, supra,* at p. 398:

> The question as to the reality of the transaction is one of fact, and although the document may be looked at, it is only a part of the truth.

Placing the relevant facts in their proper relation, I must conclude that the successive documents in this case do not constitute anything more than a security for the original loan, although clothed finally in the form of a conditional sale. The transaction in substance was a loan with security and there was no real sale nor was a real sale ever intended; therefore section 4 of the Distress Act, Cap. 74, R.S.B.C. 1936, does not apply to the circumstances disclosed in this case.

The appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *P. J. McIntyre.*
Solicitor for respondent: *W. W. Walsh.*

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Mar. 13, 29.

SHOU YIN MAR v. THE ROYAL BANK OF CANADA.

Practice—Discovery—Chinaman employed by bank—Discharged—Application to examine him as a past officer of the bank—Rule 370c (1).

Mar Leung had been employed by the Douglas Street branch of the defendant bank but was convicted of theft from the bank and was serving his sentence. The plaintiff applied for an order for the examination of Mar Leung as an alleged former officer of the bank. The manager of said branch deposed that although when employed Mar Leung was given the title of "Chinese manager" he was never an officer but merely an employee and never had any more authority than an ordinary teller. It was held that apparently Mar Leung had some authority and the order should be granted.

Held, on appeal, affirming the decision of ROBERTSON, J., that whether or not a person sought to be examined is an officer depends on all the circumstances of the case, and "having regard to all the circumstances of this case" the learned judge came to the right conclusion.

APPEAL by defendant from the order of ROBERTSON, J. of the 23rd of February, 1940, on an application by the plaintiff for an order that Mar Leung, a former officer of the defendant bank, at present undergoing sentence at Oakalla Prison Farm, do attend at the Court House, New Westminster, B.C., and be orally examined for discovery. The order was granted.

The appeal was argued at Vancouver on the 13th of March, 1940, before MACDONALD, MCQUARRIE and O'HALLORAN, JJ.A.

Bull, K.C., for appellant, referred to *King Lumber Mills* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 26; *Toronto General Trusts Corporation* v. *The Municipal Construction Company Ltd.* (1912), 5 Sask. L.R. 126; *Manchester Val de Travers Paving Company* v. *Slagg*, [1882] W.N. 127.

Higgins, K.C., for respondent, referred to the Bank Act, R.S.C. 1927, Cap. 12, Secs. 31 (7), 132, 140 and 141 (*a*); *O'Neil* v. *The Attorney-General of Canada* (1896), 26 S.C.R. 122, at p. 130; *Bryant, Powis, & Bryant* v. *La Banque du Peuple*, [1893] A.C. 170, at p. 180.

Bull, in reply, referred to *Great West Wire Fence Co.* v. *Judson* (1916), 26 Man. L.R. 425.

Cur. adv. vult.

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MACDONALD, J.A. (oral): This appeal will be dismissed for the reasons given by my brother O'HALLORAN. I merely add that while the evidence, as disclosed by affidavits, is not satisfactory, it reveals enough to justify the finding in the judgment under review that having "regard to all the circumstances of the case," as stated in *McDonald* v. *United Air Transport, Ltd.* (1939), 54 B.C. 101, Mar Leung was a former officer of the bank within the meaning of the rule. What witnesses do is evidence as well as what they say. Here the bank gave Mar Leung a certain *status, viz.,* "Chinese manager" doubtless for good business reasons. It may readily be inferred from the evidence that this was not a meaningless gesture on its part.

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

O'HALLORAN, J.A.: This appeal lies from an order of Mr. Justice ROBERTSON directing the examination for discovery of Mar Leung, formerly "Chinese manager" of a branch of the appellant bank in Victoria. The plaintiff (respondent) is the wife of Mar Leung and has sued the appellant bank, *inter alia,* for conversion of two cheques for $8,000, under circumstances alleged to be peculiarly within the knowledge of Mar Leung as former "Chinese manager" of the said bank. We have to decide if he is a former "officer" of the bank within the meaning of rule 370c (1). Under that rule an "officer or servant" of a corporation may be examined without special order. But in the case of former employees of a corporation it enables the Court or judge to order the examination of a former "officer" but not a former "servant."

Counsel for the appellant contended Mar Leung had been a "servant" but not an "officer" of the bank. The affidavit of the manager of the branch bank disclosed that Mar Leung,

> though given the title of "Chinese manager" . . . , never was an officer of the bank but merely an employee. He never had any more authority than an ordinary teller; he was at all times subordinate to the accountant at his branch as well as to the branch manager, and he at no time had any other employee of the defendant under his control or authority.

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In *Johnson* v. *Solloway, Mills & Co. Ltd.* (1931), 45 B.C. 35 this Court held that the rule should be construed liberally in determining what constitutes a former "officer." That case concerned the "chief trader" of a brokerage firm, whose duties had included the handling or filing of buying and selling orders for clients and the firm. In *King Lumber Mills* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 26, a fire warden to whom subordinates had reported was held to be a former officer. In *McDonald* v. *United Air Transport, Ltd.* (1939), 54 B.C. 101 involving the meaning of "officer" under rule 370u a pilot in sole charge of an aeroplane at the time of the accident was held to be an "officer."

Counsel for the appellant contended the decision of *McDonald* v. *United Air Transport, Ltd., supra,* reaffirming that the meaning of "officer" is to be determined with "regard to all the circumstances of the case," must be limited to persons having some position of control or at least supervision of subordinate employees, as exemplified in the three cases cited. He argued Mar Leung did not come within the rule illustrated in those cases. The distinction between an officer and a servant of the appellant bank was not indicated in the material before us. We were not informed as to Mar Leung's duties in the bank, or for example if he had a private office. Clearly, however, he must have been something more than a teller or clerk, else why describe him as "Chinese manager"? The term "manager" in itself implies certain control and authority. That he had no subordinates does not imply he had not certain control and authority in respect to Chinese business. That he was subordinate to the branch manager and the accountant is not inconsistent with the possession of certain control and authority in respect to Chinese business. For example the chief trader in *Johnson* v. *Solloway, Mills & Co. Ltd., supra,* would naturally be subordinate to the manager; and *vide Hyslop* v. *Board of School Trustees of New Westminster* (1930), 43 B.C. 201. Mar Leung's apparent authority should be regarded as his real authority, at least for the purpose of determining whether he may be examined for discovery as a former "officer" of the bank.

The plaintiff (respondent) seeks to examine that agent of the bank, whatever his position or *status,* who reasonably may be supposed in the special circumstances to have knowledge upon an important question in the action, *viz.*, the disposition of two cheques. This is alleged to be peculiarly within the knowledge of Mar Leung as a former agent of the bank. That interpretation of "officer" was adopted by Mr. Justice Ferguson in Ontario in *Schmidt* v. *Town of Berlin* (1894), 16 Pr. 242, where the caretaker of a municipal building was allowed to be examined concerning the condition of the building. It was adopted also by Mr. Justice MACDONALD in *Elliott* v. *Holmwood & Holmwood* (1915), 22 B.C. 335. In my view his remarks at p. 336 which I quote now are within the rule applied in this Province in *King Lumber Mills* v. *Canadian Pacific Ry. Co.; Johnson* v. *Solloway, Mills & Co. Ltd.* and *McDonald* v. *United Air Transport, Ltd., supra*:

> It [the term "officer"] has been given the liberal construction usually applied to such a remedial provision and may include employees of a company who are usually termed "servants," as distinguished from officials. It is not limited to the higher or governing officer only. The object of the rules is to discover the truth relating to the matters in question in the action, and the examination ought to be of such "officer" of a defendant company as is best informed as to such matters.

Then it is contended this discretionary order should not be made because the plaintiff (respondent) is Mar Leung's wife and he is now in prison, convicted on proceedings initiated by the appellant bank. It is urged he will be prejudiced against the bank. Against that it is said his wife has made allegations against him in the action which if true, indicate he has been guilty of a number of forgeries. This objection goes to the weight of his evidence rather than to the right to examine him. Each case must stand on its own facts. In the affidavit in support of the application below it is sworn that Mar Leung is the only person who can tell what disposition was made of the cheques in question. The affidavit of the local branch manager in reply does not deny or question this statement. Moreover, as pointed out by the learned judge appealed from, Mar Leung's discovery examination may be used as evidence at the trial only if and to the extent the trial judge shall order.

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I am of the view "having regard to all the circumstances of the case" that the learned judge below came to the right conclusion. The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Crease & Crease.*
Solicitor for respondent: *Frank Higgins.*

TURNER'S DAIRY LIMITED *ET AL.* v. WILLIAMS *ET AL.*

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Oct. 20, 25, 26.
1940
March 5.

Practice—Discovery—Natural Products Marketing (British Columbia) Act —"Scheme" passed by order in council—Lower Mainland Dairy Products Board constituted—Orders of board—Attacked for lack of bona fides—Examination of member of board for discovery—Whether subject to examination—Appeal—R.S.B.C. 1936, Cap. 165.

Under the provisions of the Natural Products Marketing (British Columbia) Act the Lieutenant-Governor in Council passed an order in council creating a scheme to regulate the transportation, storage and marketing of milk within the lower Fraser Valley area, and constituted a board known as the Lower Mainland Dairy Products Board, to administer the scheme, and the defendants *Williams* Barrow and Kilby were made the members thereof. The Milk Clearing House Limited was incorporated by the milk producers of the area and the Board designated the Clearing House as "the agency" to market milk. The Board passed by-laws or orders which are compulsory upon the Clearing House, the producers and the dealers and manufacturers within the area. In an action by certain producers against *Williams* Barrow and Kilby, constituting the said Board, the said Board and Milk Clearing House Limited, it was averred that there are two markets for milk, namely, the fluid-milk market and the manufacturing market; that the price for the fluid market is substantially higher than the price paid for milk in the manufacturing market, that there is a large excess of milk produced in said area over and above the requirements for the fluid market, that the purpose and intention of the orders of the said Board are to provide for equalization of returns to all the farmers producing milk for sale in said area, that the orders were not made *bona fide* by the Board but that said orders constituted a colourable attempt to disguise the true purpose of the said Board which is to provide for the equalization of returns to all farmers producing milk in said area, that the real purpose and effect of the said orders are to take from the producer supplying the fluid market a portion of his real returns and to contribute the same to other producers for the purpose of equalization, and the so-called sales and resales by the agency are colourable and the orders of the said Board are *ultra vires* of the Board.

On the refusal of the defendant *Williams* (being chairman of said Board) on his examination for discovery to answer certain questions as to the purpose and intent of the Board in passing said orders, it was ordered by McDONALD, J. that he should answer them.

Held, on appeal (MARTIN, C.J.B.C. dissenting), that this action was launched for a declaration that certain orders of the Board are *ultra vires*. The relief sought could be obtained by suing only, the said Board. By section 10 of the scheme the Board was given all the powers of a body corporate, and it is not necessary or proper to make the individual

Apld Nelan v. McCulloch [1941] S.C.R. 324

Apld Fed. Co-ops Ltd. v. Claude Neon Ruddy etc. 55 W.W.R. 113

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members of the Board separate defendants. As against *Williams* and the other members of the Board not a single allegation is made. *Williams* is not a necessary or proper party to this action, he is added as a defendant solely for the purpose of securing evidence thought to be binding upon the Board. He is not subject to examination for discovery and the appeal is allowed.

Decision of MCDONALD, J. reversed.

APPEAL by defendant *Williams* from the order of MCDONALD, J. of the 5th of October, 1939 (reported, 54 B.C. 241), whereby it was ordered that the defendant *Williams* do appear and answer certain questions upon his examination for discovery held on the 18th of September, 1939. *Williams* was the chairman of the defendant the Lower Mainland Dairy Products Board. Pursuant to the provisions of the Natural Products Marketing (British Columbia) Act, an order in council was passed providing a scheme to regulate the transportation and carrying of milk and certain milk products produced in the lower mainland of the Province, and by said order in council the defendant Lower Mainland Dairy Products Board was established and the defendants *Williams* Barrow and Kilby were made members of said board. The defendant board pursuant to said scheme had passed certain orders for the regulation of the sale of milk. The plaintiffs allege that the defendant board 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 said 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 Limited 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 is the 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. The defendants take the position that no such examination or cross-examination can be held on discovery or at the trial, that the 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, and that the board is on the same plane as a Parliament or Legislature. It was held that the board is not a legislative but an administrative body and does not stand on any higher ground than the council of a municipal corporation, and it has been held that 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, and Mr. *Williams* was ordered to attend and answer the questions he declined to answer.

The appeal was argued at Victoria on the 20th, 25th and 26th of October, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

Locke, K.C., for appellant: The action is for a declaration that certain orders of the board are *ultra vires,* that the milk marketing scheme is *ultra vires,* and for an injunction. Only an injunction is claimed against *Williams* to prevent him from taking steps to compel the plaintiffs to comply with the orders. There are no allegations against him personally. The board has all the powers of a body corporate. The Act itself was declared to be *intra vires*: see *Shannon* v. *Lower Mainland Dairy Products Board* (1938), 107 L.J.P.C. 115. The examination must be confined to the issues: see *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23; *Whieldon* v. *Morrison* (1934), 48 B.C. 492, at pp. 497-8 and 501; *Bank of B.C.* v. *Trapp* (1900), 7 B.C. 354. Here the defendants are not charged with anything; only an injunction is asked for. They are the officers or agents of the Crown: see *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357, at p. 362; *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C.

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284; *Wright* v. *Peters and The Soldier Settlement Board,* [1920] 2 W.W.R. 696. When the thing done is authorized and within the discretion of the board there is no power to interfere with the mode in which it is exercised: see *Westminster Corporation* v. *London and North Western Railway,* [1905] A.C. 426, at p. 427. The questions are not relevant. There are the orders and the Court can construe them: see *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at pp. 763 and 778; Craies's Statute Law, 4th Ed., 120-22; *Re Campbell and Village of Lanark* (1893), 20 A.R. 372; Robson & Hugg's Municipal Manual, 408. These orders are not ambiguous: Meredith & Wilkinson's Municipal Manual, 302; *Re Fenton* v. *County of Simcoe* (1885), 10 Ont. 27; *Scott* v. *Corporation of Tilsonburg* (1886), 13 A.R. 233; *Re Davis and Village of Creemore* (1916), 38 O.L.R. 240; *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274, at pp. 288-9; *Inland Revenue Commissioners* v. *Herbert,* [1913] A.C. 326, at pp. 345 and 352. There is a great difference between a municipal corporation and a body corporate such as this, and for a declaration that section 10 of the scheme is *ultra vires,* we say (1) There is no issue between the plaintiff and *Williams* except the injunction; (2) the board not being subject to examination for discovery, it is an abuse of the process of the Court to add a party to obtain discovery; (3) it is not relevant to an action to set aside an order as *ultra vires* to ask what was the policy, intention or motive of the board. You cannot add a party solely for obtaining discovery: see *Wilson* v. *Church* (1878), 9 Ch. D. 552. They say the orders are not *bona fide.* There is no authority in the English law for asking what he had in the back of his head. The only case is where there is an ambiguity. Their purpose cannot affect the validity of the orders. The intention of framing rules cannot be gone into: *Danford* v. *McAnulty* (1883), 8 App. Cas. 456, at p. 460. The orders when made become a part of the statute: see *Institute of Patent Agents* v. *Lockwood,* [1894] A.C. 347, at pp. 359-60; *Willingale v. Norris,* [1909] 1 K.B. 57, at p. 64. In considering these orders only the same thing can be gone into as if it were a statute itself: see *Kruse v. Johnson,* [1898] 2 Q.B. 91, at pp. 98-100; *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, at p. 452.

J. W. deB. Farris, K.C. (*J. L. Farris,* with him), for respondents: *Williams* is a necessary party to the action. There is a difference between being a corporation and having the powers of a corporation, and there is a difference between powers and obligations. We can only sue an unincorporated body by suing the individuals: see *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426, at p. 430. Anything less than a corporation is properly suable as individuals. Section 13 of the Natural Products Marketing (British Columbia) Act does not apply, it only has reference to mistakes members of the board might make during their term of office. It is a protection from civil actions for damages: see *Bell & Flett* v. *Mitchell* (1900), 7 B.C. 100, at pp. 102-3; *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1901), 70 L.J.K.B. 905, at pp. 913-14; *Western National Bank of New York* v. *Perez & Co.* (1890), 60 L.J.Q.B. 272, at p. 278. Next is proof of facts to show intent and effect of legislation on issue of *ultra vires.* You cannot do indirectly what you cannot do directly. As to the validity of the statute, you are entitled to look at its purpose and intent: see *Union Colliery Company of British Columbia* v. *Bryden,* [1899] A.C. 580; *Lower Mainland Dairy, Etc.* v. *Crystal Dairy, Ltd.* (1932), 102 L.J.P.C. 17. He has set up an agency to buy and sell milk. We are seeking to show this is a dummy agency. It is not a profit-making agency at all. They must buy the milk and they must resell it by order of the board. It does not get the milk and has not the facilities for getting it. They are doing indirectly what they cannot do directly. We must get at the facts, and we come back to the basic principles laid down in *Bryden's* case. They intend to equalize prices, which is in reality an indirect tax. Many things are brought out on discovery that cannot be asked on the trial: see *McKergow* v. *Comstock* (1906), 11 O.L.R. 637; *Cunningham* v. *Tomey Homma,* [1903] A.C. 151, at p. 157; *Attorney-General for Ontario* v. *Reciprocal Insurers,* [1924] A.C. 328, at p. 337. We distinguish between Parliament and an administrative body to learn the pith and substance of the orders passed by that body: see *In re Grain Marketing Act, 1931,* [1931] 2 W.W.R. 146, at p. 147; *John Deere Plow Company, Limited*

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v. *Wharton*, [1915] A.C. 330, at p. 339. On the question of intent see *In re Insurance Act of Canada*, [1932] A.C. 41, at p. 52. You can go to the intent of the legislation, and if the intent is outside the power of the Legislature it is not good. You must look to see what it is really doing. What we say as to the statute applies to the orders of the board. It is a creature of Parliament and can have no more jurisdiction than Parliament. The orders cannot invade the field of indirect taxation: see *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 355, at pp. 363 and 367; *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1925] A.C. 561; *Madden* v. *Nelson and Fort Sheppard Railway*, [1899] A.C. 626, at pp. 627-8; *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91, at p. 100; *Reference re Alberta Statutes*, [1938] S.C.R. 100; [1939] A.C. 117, at p. 130. In that case the intent and effect of the legislation was such that they entered into the Dominion field. We are entitled to get the facts before the Court: see *Ladore* v. *Bennett*, [1939] 2 W.W.R. 566, at p. 573; *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, [1931] A.C. 310, at p. 319; *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.*, [1930] A.C. 357, at p. 363; *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1937] A.C. 368, at p. 376. It is the pith and substance of what Parliament is trying to do that must be obtained. The next heading is the sources from which the facts may be obtained. Assuming you may introduce evidence to supplement the meaning of the statute in order to arrive at the intent and purpose of the legislation you may ask directly as to purpose and intent, and secondly questions relating to the history of the order and to the conditions under which the order would operate. We want to show this agency is a pure dummy set-up. It has no equipment whatever for buying or selling milk. The board is an administrative body: see *Scott v. Corporation of Tilsonburg* (1886), 13 A.R. 233, at p. 235. In dealing with a by-law the Court can deal with the method and procedure by which it was passed, but they cannot do that to an Act of Parliament except in a case of want of jurisdiction: see *Re Campbell and Village of Lanark* (1893), 20 A.R. 372.

The issue here is whether what they were doing was a direct tax. When he takes the oath he is no different from any other party, and must answer: see *Re Imperial Tobacco Co. and Imperial Tobacco Sales Co.*, [1939] 3 D.L.R. 754. Parliament and the administrative board part company as to this, and *Williams* is subject to the same rules as ordinary witnesses.

Locke, in reply: In the case of an unambiguous order you cannot ask the chairman of the board what he intended in passing it.

Cur. adv. vult.

5th March, 1940.

MARTIN, C.J.B.C.: This is an appeal by one of the defendants, *Williams,* the chairman of the Lower Mainland Dairy Products Board, consisting of three members only, the said *Williams* and defendants Barrow and Kilby and so "constituted" and named by and under clauses 5 to 10 of the "Scheme to regulate the transportation, storage and marketing of milk and certain milk products produced in a described area" *i.e.,* "the Lower Mainland of British Columbia"; and it is taken from an order of Mr. Justice MCDONALD requiring said appellant to answer certain questions put to him on his examination for discovery.

It is to be noted that said "scheme" was not only duly established by order in council on the 31st of March, 1939, but it is expressly and properly set forth and embodied in the pleadings by paragraph 13 of the statement of claim and therefore forms in its entirety, and with all its relevant facts, a part of the issues raised by the pleadings: the effect whereof, which has been apparently overlooked, shall later appear.

From the facts alleged in said statement two distinct causes of action arise, the first of which is against the board itself (assuming it to be a "legal entity," as to which later) for making certain specified orders and regulations:

Par. 24. . . . not . . . *bona fide* . . . but . . . [in] a colourable attempt to disguise the true purpose of the said defendant and effect of providing for equalization of returns to all the farmers producing milk . . . in the said area.

Par. 25. The real purpose and effect of the said orders are to take from the producer supplying the fluid market a portion of his real returns and to contribute the same to other producers for the purpose of equalization.

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The so called sales and resales to and by the agency so called are colourable.

Par. 26. The orders of the defendant board referred to in paragraphs 15 to 18 inclusive of the statement of claim herein are *ultra vires* of the said board.

It is beyond question that if these allegations are established at the trial, then the board (if a legal entity) has been guilty of exceeding and abusing the powers conferred upon it by the Legislature in a way that is not *bona fide,* and hence those perverted powers have been "fraudulently used," as Lord Chancellor Halsbury puts it in the leading case of *Westminster Corporation* v. *London and North Western Railway,* [1905] A.C. 426, 428, and its acts done under "colour and pretence" are a "gross breach of public duty" (Lord Macnaghten, pp. 430, 432) and as the board "must take care not to exceed or abuse its powers" it will be

> treated as a wrong-doer from the first, and not only as a wrong-doer in respect of what can be proved to have been an excess of his authority. It is presumed against him that the abuse of his authority shows an intention from the first to commit an unlawful act under colour of a lawful authority

(Lord Lindley, pp. 439-40).

In *Municipal Council of Sydney* v. *Campbell,* [1925] A.C. 338 their Lordships of the Privy Council upheld a judgment of the Supreme Court of New South Wales restraining by injunction the city of Sydney from abusing the powers to "resume" lands conferred upon it by the Legislature, their Lordships saying *per* Mr. Justice Duff (now Chief Justice of Canada) pp. 343-4:

> The legal principles governing the execution of such powers as that conferred by s. 16, in so far as presently relevant, are not at all in controversy. A body such as the Municipal Council of Sydney, authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere. As Lord Loreburn said, in *Marquess of Clanricarde* v. *Congested Districts Board,* [(1914)] 79 J.P. 481: "Whether it does so or not is a question of fact." Where the proceedings of the Council are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the Council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object.
>
> Their Lordships think that the conclusion of the learned Chief Judge in Equity upon this question of fact is fully sustained by the evidence . . . their Lordships think there is great force in the argument that the course of the oral discussion, as disclosed in the shorthand note produced, shows, when the events leading up to the second minute of the Lord Mayor are

considered, that in November the Council was applying itself to the purpose of giving a new form to a transaction already decided upon, rather than to the consideration and determination of the question whether the lands to be taken were required for the purpose of remodelling or improvement.

The second distinct cause of action that arises, in my opinion, upon the pleadings is one against said three individual defendants who being in absolute control of the board as the sole members thereof have brought about *mala fide* an unauthorized use of its powers and for that "breach of public duty" (*supra*) they are personally liable, as, indeed, this Court has in principle held, even in the case of a minister of the Crown (the Postmaster-General) in *Literary Recreations Ltd.* v. *Sauve* (1932), 46 B.C. 116, at p. 121 (the Chief Justice) p. 122 (myself) pp. 127-8 (my brother MCPHILLIPS) and pp. 130-3 (my brother MACDONALD) who at p. 130 says:

> The point turns solely on the construction of the Post Office Act and the regulations. Unless the act complained of, *viz.*, prohibition of the use of the mails can be justified by the statute (R.S.C. 1927, Cap. 161) respondents are liable in damages as two individuals who stepped outside the ambit of their official duties to commit a tort, one for ordering the commission of the act, the other for implementing it. . . .

And at p. 131:

> . . . Where, however, authority is defined by statute or by a commission we must look in that quarter for justification for the act attempted or performed. Even if acting for the Crown the agent would be responsible for tortious acts. He might be indemnified but the right to compensation by the party injured is beyond question (*Rogers* v. *Rajendro Dutt* (1860), 13 Moore, P.C. 209, at 236). The sanction of the State will not protect the agent for the commission of a tort.
>
> "The doer of a wrongful act cannot escape liability by setting up the authority of the Crown": Newcombe, J. in *Rattenbury* v. *Land Settlement Board*, [1929] S.C.R. 52, at 64. To hold otherwise would be to seriously interfere with the rights and liberty of the subject.

And at p. 132:

> . . . It is, therefore, no answer to say that the Postmaster General in any event presumed to act officially or that want of authority—if it existed —was due to mistake.

And at p. 133 concludes:

> . . . If, however, a judge steps outside his judicial functions and commits an illegal act he is answerable in law and it is no defence to say that when the tort was committed he was in fact a judge nor yet that he erroneously thought he was acting in that capacity.

But since it was pressed upon us by appellant's counsel that the averments in the statement of claim are directed against the

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board alone and not against its individual members I have scrutinized them very carefully with the result that I find in it every fact alleged necessary to found an action against them personally for illegally employing their "powers in furtherance of some ulterior object" than that justified by the Natural Products Marketing (British Columbia) Act and amending Acts (paragraph 27) and the scheme under which they are operating amounting, indeed, to a fraud upon the Legislature. In *Williams's* defence it is admitted, paragraph 1, that he and his co-defendants Barrow and Kilby are members of the board and the scheme itself 35-7 (forming part of the statement of claim as aforesaid) declares that the "constitution" of the board "up to and including the 31st day of March, 1940, shall consist of" said *Williams,* Barrow and Kilby, naming them, and that the board "shall have authority to administer this scheme."

These three persons, therefore, the appellant being their chairman, being shown to be in fact the sole directing mind and absolute authority in control of the policy and the actual operation of the scheme, can no more escape the personal consequences of their illegal actions in "administering" that "authority" than the board itself can (assuming it to be answerable therefor as a distinct legal entity as it admits, paragraph 9 of defence) and if those powers are exceeded or abused it is the combined action of their individual minds which has brought about that breach of duty.

Under such unusual circumstances it is not necessary, indeed is not artistic pleading, for the plaintiff, after setting out fully the said individual "constitution" of the board (and also in its writ specifically suing and naming them as "constituting the Lower Mainland Dairy Products Board") to continue uselessly to repeat after each reference to the board the words—"constituted by the said *Williams* Barrow and Kilby"—though had that inartistic course of pleadings been adopted the plaintiffs' position would have been beyond question.

Furthermore, it is to be noted that the appellant in his defence paragraph 11 justifies in terms his *bona fides* by alleging that the orders referred to in the statement of claim were passed by the said board and these defendants say that their actions in the premises have been

done in good faith and plead the provisions of section 13 of the Natural Products Marketing (British Columbia) Act in answer to the plaintiffs' claim.

The effect of this averment is that the appellant not only set up a new defence of *bona fides* at large by which he invoked the statute to escape liability in general for his personal actions, but by so doing he "pleaded over" (to use the ancient and appropriate expression of pleaders) to the plaintiffs' averments and thereby removed any uncertainty therein, respecting his personal liability being involved, if any existed. And also it must not be overlooked that in said statement of claim the plaintiffs specifically asked for

> An injunction restraining the defendants *Williams* Barrow and Kilby and the defendant Lower Mainland Dairy Products Board, its servants or agents, from taking any steps or proceedings to compel the plaintiffs to comply with the provisions of orders numbered 10, 12, 13, 14 and 15 of the said board.

And in addition asked for a similar injunction against the board as regards the scheme in general.

It follows from my opinion upon said issues that the appellant should have answered all the questions asked him thereupon because, after a careful examination of them all, they must be regarded as being within the scope of a cross-examination at the trial.

Such being my opinion, it is not strictly necessary for me to go into the difficult question of the exact nature and constitution of the board which by clause 10 of the scheme is declared "shall have all the powers of a body corporate," but no attempt is made to define those powers, and subsection (13) of section 23 of the Interpretation Act, Cap. 1, R.S.B.C. 1936, applies only to corporations created as such; and so the matter of corporate powers is thrown back upon the common law with results of the vaguest and most uncertain kind involving prolonged consideration in the light of the particular circumstances and limited to "what this statutory creature is and what it is meant to do": on this point I shall refer only, *e.g.,* to the well-known judgment of Bowen, L.J. in *Baroness Wenlock* v. *River Dee Company* (1887), 36 Ch. D. 685 (n) and to the historic *Dartmouth College* case (1819), 17 U.S. 517.

It is to be remembered that to confer the powers of an office is

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something quite distinct from an appointment to or creation of that office—*cf. Bell & Flett* v. *Mitchell* (1900), 7 B.C. 100, and the latest and highest illustration of this is the recent Proclamation in the Canada Gazette, 17th February, 1940, No. 34, consequent upon the death of the late Governor-General, reciting that "all and every the powers and authorities granted to him shall be vested in . . . the Chief Justice of Canada until His Majesty's further pleasure be known."

Simply to create a "board" without definition is also to create uncertainty because that word is employed in so many ways that it is an expression of the loosest kind, ranging from a well-defined board and duly incorporated as such as, *e.g.*, in *Rattenbury* v. *Land Settlement Board,* [1929] S.C.R. 52, to the Board of Railway Commissioners for Canada which is a Court of Record, and to an endless number of intermediate and hybrid bodies of all descriptions bearing that name. But whatever this board may be held to be, it is not, in my opinion, a "legal entity" of any kind, but merely a "collection of individuals"—*cf. Monkwearmouth Conservative Club Ltd.* v. *Smith* (1940), 189 L.T. Jo. 116; 104 J.P. 106; *Wurzal* v. *Houghton Main Home Coal Delivery Service Ld.* (1936), 100 J.P. 503, 507, 510, and the article thereon in 104 J.P. 116, and other cases therein cited.

Having regard, then, to this doubt about the legal nature of this unincorporated board, and also the resulting uncertainty respecting the personal liability of its members, who are not protected by limited liability provisions such as are to be found in modern company and "friendly society" legislation (*e.g.*, our "Societies Act," Cap. 265, R.S.B.C., 1936), in my opinion the submission of respondents' counsel that it was in any event proper to join the said three members as co-defendants is sound, and that difficult question is one which should be determined at the trial: no application, be it noted, has been made to strike them off the record as being improperly joined.

In conclusion I cite the cases referred to in my judgment in *McGee* v. *Pooley* (1931), 44 B.C. 338, at 348-50 in support of the right of the plaintiffs to invoke the assistance of the Court by appropriate action—injunction or prohibition as the case may be (which I note was granted "in one respect" in the *West-*

minster Corporation case, *supra,* p. 440) to protect themselves *ab initio* and immediately from the very grave consequences, financial, inquisitorial, of search and seizure, and of penalty, including fine and imprisonment, that they are exposed to under the sweeping powers of this scheme (paragraph 10) and section 12 of the Natural Products Marketing (British Columbia) Act. The following expressions of Lord Justice Brett, in *Reg.* v. *Local Government Board* (1882), 10 Q.B.D. 309, 321 (cited in *McGee's* case, *supra*) are, as at present appears upon the pleadings before us, applicable to this case, *viz.*:

> My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

The appeal, therefore, should in my opinion, with every respect for other views, be dismissed.

MACDONALD, J.A.: This appeal concerns the right, if any, to examine for discovery the appellant *Williams,* chairman of the Lower Mainland Dairy Products Board, a co-defendant in the action. Appellant and two fellow members were added as defendants in an action brought by a number of dairymen for a declaration that certain orders passed by the board were invalid: also for an injunction. Another defendant, Milk Clearing House Limited is an agency through which the milk was to be marketed.

After refusal to do so on advice of counsel appellant *Williams* was ordered by a judge in Chambers to answer certain questions. From that order this appeal was brought. I am not concerned with the nature of the questions for reasons presently appearing. In my opinion *Williams,* the chairman of the Marketing Board referred to, is not a necessary or proper party to this action: he was added as defendant together with two other members of the board solely for the purpose of obtaining discovery evidence. The decision may rest on this point of practice. If I am right in this view much of the extended argument at the hearing was irrelevant. I am not precluded from reaching this conclusion because no steps were taken to have appellant dismissed from the

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action. Respondents' counsel contested this view: he submitted that the members of the board including the chairman were properly joined as defendants: he further asserted that if discovery cannot be obtained from that source no other evidence may be available. Presumably interrogatories were not delivered to the defendant board. One hesitates to reach a conclusion that might prevent an action, possibly meritorious from proceeding at least in its present form; one cannot, however, depart from sound principles to suit the exigencies of this case. I am convinced that to decide the only points in the action, two in number, the board is the only necessary and proper defendant. We need not be concerned with Milk Clearing House Limited. If the orders of the board are declared to be *ultra vires* its functions would cease.

Respondents' difficulty if any, in obtaining evidence may arise because the action was started before they were hurt; in other words before anything was done by the board under the impugned orders. Had they waited until the orders were implemented the *modus operandi* would be revealed and the necessary evidence disclosed. I say this subject to Mr. *Locke's* submission that the orders speak for themselves and must be construed without reference to evidence. I suggest, without deciding it, that as in the case of a statute sought to be declared, *ultra vires* evidence may be given, and has been given, disclosing what was done under it to enable the Court to say whether or not a direct or indirect tax was levied: so also with these orders. Respondents hoped to establish their case by prophetic evidence concerning future acts and intentions elicited from the added defendants.

The appellant *Williams* and his fellow members, it should be observed, are sued as individuals; one would expect therefore that definite allegations would be made against them as such, and specific relief sought not obtainable from the other defendants or more particularly not obtainable from the Lower Mainland Dairy Products Board. The members of the board do not lose their proper designation as individuals by the addition in the style of cause of the descriptive words, *viz.*, "constituting the Lower Mainland Dairy Products Board." If I am wrong in

saying so, and, if it is true that these additional words show that they are not to be treated as individuals but rather as a public body or entity of some sort we have one defendant on the record under two names. There cannot be any intermediary body between these defendants and the board. The only public bodies we are concerned with are created by the Act: not by the pleadings. They are sued in their personal capacity as individuals or not at all.

The defendant Lower Mainland Dairy Products Board was created pursuant to a scheme framed under the Natural Products Marketing (British Columbia) Act, Cap. 165, R.S.B.C. 1936. It passed five orders to carry out the purposes of the Act and in particular to equalize returns to milk producers. Upon their enactment, as stated, this action was launched for a declaration that all five orders were *ultra vires*: in addition an injunction is sought to restrain the appellant *Williams* and the defendants Barrow and Kilby, from taking any steps to compel respondents to comply with the terms of the orders. The five orders referred to were orders of the board; not of any individuals.

The point is this—was it necessary to add *Williams* and his fellow members as defendants to obtain all the relief sought? Could it be obtained by suing only the Lower Mainland Dairy Products Board? The answer is "no" to the first question; "yes" to the second. No other, or different relief is sought against *Williams*. An injunction order could be made against the board; a declaration of invalidity in respect to its orders could also be secured if the facts warranted it. Although the board functions through its officials the orders are acts of the board, not of its officials. All respondents need do when, and if an injunction is obtained against the board is to serve it on *Williams* as chairman or for greater certainty on all three members. It follows that this appellant is not a necessary party.

The foregoing would appear to be elementary. When an action is brought against an incorporated company it is not necessary or proper to make its board of directors separate defendants. It will be said at once "that is not this case." The Lower Mainland Dairy Products Board is said to be in a different position. It is not an incorporated company. The

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answer is that by section 10 of the scheme (Exhibit 1) this board was given "all the powers of a body corporate." The legislative right to confer these powers on the board is not questioned. A joint-stock company may sue or be sued; so also the defendant board: it is in fact sued in this action. Liability to be sued does not mean that an action may be brought against such a body only in conjunction with some other person or persons as co-defendants who may hold executive positions. I do not suggest that *Williams,* under no circumstances, could be a co-defendant. Had he, as agent for the board, committed illegal overt acts, or acted *mala fide* in the discharge of his duties doubtless relief in the way of damages or an injunction could be obtained; he is not so charged in this case. The injunction and declaration sought may be obtained without his presence as a party. He is added therefore for another purpose, *viz.,* as the event proved to obtain discovery evidence.

Although not necessary to decide it much could be said in support of the view that even if a corporate *status* had not been conferred a board exercising the wide powers given to it under the Act could sue and be sued. In the *Taff Vale Railway* case (1901), 70 L.J.K.B. 905, where the judgment of Farwell, J., reversed by the Court of Appeal was restored by the House of Lords, it was held that a trade union registered under the Trade Union Act of 1871 might be sued in its registered name. It was neither a corporation nor an individual but merely a group of individuals united together to regulate relations between them and their employers. Counsel for respondents referred to this case to show that although the union was sued an injunction was also obtained against individual defendants, *viz.,* the general secretary of the union, and the local organizing secretary. This was advanced in support of the view that it was proper to seek an injunction against the defendant *Williams.* These defendants, as agents of the union were in charge of the strike and personally engaged in overt acts, doubtless of violence or intimidation. No wrongful personal acts of this or of a similar character is charged against *Williams.* It is merely sought in this action to restrain the board from implementing its own orders after they are

declared *ultra vires*. Our point of practice was not, of course, dealt with in the *Taff Vale* case.

It follows that *Williams* was not a necessary party to this action. This is apparent even from the pleadings. I have examined the statement of claim and find that as against him and the other members of the board not a single allegation is made. All allegations, properly enough, are made against the board. True *Williams* tried to repair that situation by denying in the statement of defence allegations not made against him. That did not create issues; he did plead that no cause of action was disclosed. As one would expect, having made all necessary claims against the board in the statement of claim, a defendant with full capacity to answer them *qua* board, there was nothing left to allege against the appellant *Williams*. It is not stated that he acted *mala fide* or engaged in illegal acts. Had that been alleged issues would have been raised upon which he could have been examined for discovery. In the absence of such separate and distinct issues it is to my mind clear that he was added to secure evidence thought to be binding upon the board. He was not examined as an officer of the board: he was served with an appointment to appear for examination as an individual defendant. This fact, with deference, was overlooked in the judgment under review. References are made to the board throughout the reasons for judgment; it was thought that plaintiffs sought to examine the chairman of the board in that capacity. Had an attempt been made to examine him as an officer of the board no doubt different steps would have been taken either to obtain it or to prevent it. Here, as intimated, we are concerned with an examination of a personal defendant where we have the singular situation that no allegations are made against him. Counsel for respondent realizing this emphasized the word "wherefore" in the prayer; that word *qua* this appellant has no place to lay its head. It is a clear case of an attempt to obtain evidence against one defendant by adding another party without colour of right. I might add that had the appellant been a proper defendant with separate issues raised against him an examination could not extend to discovery in respect to matters between the plaintiffs

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and the other parties to the action, *viz.*, the board and Clearing House. *Whieldon* v. *Morrison* (1934), 48 B.C. 492.

I would allow the appeal.

O'HALLORAN, J.A.: The discovery questions in dispute are directed essentially to the purpose and object of Lower Mainland Dairy Products Board in the passing and proposed carrying out of five orders. The ensuing analysis of *Williams's status* in the action has led me to the conclusion reached by my learned brother MACDONALD that the appeal should be allowed.

The respondents commenced action against "*W. E. Williams,* E. D. Barrow, Acton Kilby constituting the Lower Mainland Dairy Products Board the said Lower Mainland Dairy Products Board and Milk Clearing House Limited" to set aside five orders of the said board as a colourable attempt to do what it was alleged it has no power to do, *viz.*, to provide equalization in financial returns to milk producers in the area affected. From the style of cause as quoted it would appear that the plaintiffs (respondents) had elected to sue two entities as distinct defendants (excluding the other defendant Milk Clearing House Limited with which we are not now concerned); *viz.*, (1) Lower Mainland Dairy Products Board as such, and (2) the three defendants *Williams* Barrow and Kilby as "constituting the Lower Mainland Dairy Products Board." That is to say the Marketing Board charged with the administration of the milk scheme appears to be sued in two ways: (1) Lower Mainland Dairy Products Board as the administrative legal entity; and (2) the three members of that board as collectively constituting the administrative legal entity. Sued in the second way Lower Mainland Dairy Products Board is not regarded as the administrative entity, but as a descriptive term applied to the three individual members when they act collectively.

The Natural Products Marketing (British Columbia) Act, Cap. 165, R.S.B.C. 1936, by section 4 (2) thereof empowers the Lieutenant-Governor in Council to establish schemes for the control and regulation of natural products and to

> constitute marketing boards to administer such schemes, and may vest in those boards respectively any powers considered necessary or advisable to enable them effectively

to do so. Pursuant thereto on the 31st of March, 1939, the Lieutenant-Governor in Council established the "Milk Marketing Scheme of the Lower Mainland of British Columbia." By paragraphs 5 and 6 of the scheme it was provided:

5. There shall be a Marketing Board named the "Lower Mainland Dairy Products Board," and it shall have authority to administer this scheme.

6. The Marketing Board shall consist of three members.

By paragraph 7 thereof *William Edward Williams, K.C.* (the appellant), Edward Dodsley Barrow and Acton Kilby were named the three members of the board up to the 31st of March, 1940. Paragraph 8 provided that annually thereafter two members should be chosen, one each from two groups of producers, while the third should be appointed by the Provincial Minister of Agriculture on the nomination (or without if they could not agree) of those two members. By paragraph 9 the head office of the board was fixed in Vancouver, and by paragraph 10 it was provided:

The Marketing Board shall have all the powers of a body corporate. . . .

Lower Mainland Dairy Products Board was clothed with wide powers including the power in paragraph 10 (p) to borrow raise or secure the payment of money to carry out the object of the scheme; its borrowing was limited to $15,000. It should be said at once that perusal of the parent statute and the milk scheme leaves no room for doubt that the defendant "Lower Mainland Dairy Products Board" is the administrative entity contemplated and authorized therein. By no straining of the language can it be said (as implied in the style of cause) that the three members collectively are created the administrative entity, and the "Lower Mainland Dairy Products Board" is only a name or descriptive term to be applied to the three individual members when they act collectively. For example it would not be said the directors of that form of legal entity known as a corporation, constitute in themselves collectively, a legal entity which supplants the corporation. The existence of the directors, like the existence of the members here, springs from and is consequent to the antecedent existence of a legal entity, in the form of a corporation (in the case of directors), or, as here, in the form of the defendant Marketing Board. Lower Mainland Dairy Products Board is constituted the legal entity to admin-

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ister the scheme. It has been made a legal person. As such it is responsible for its acts and may be sued. In the scheme it was given all the powers of a body corporate. I express no opinion upon the power to do so, or the meaning or effect thereof. I mention it only as another indication that Lower Mainland Dairy Products Board itself, and not its members, was intended to constitute the administrative entity.

If it has acted contrary to law and inflicted injury on the respondents they have in it a responsible legal entity whom they may sue without bringing in its members as defendants. In the *Taff Vale Railway* case, [1901] A.C. 426, the Lord Chancellor the Earl of Halsbury said at p. 436:

> 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.

Williams and his two fellow members are not the Marketing Board. They are its officers and agents. For it and it alone has been created "the thing," *viz.*, the legal entity to administer the milk scheme. This is emphasized by paragraph 11 of the scheme which provides:

> No member of the Marketing Board acting in good faith shall be personally liable for any acts of the Marketing Board or of the members thereof acting as such

(*viz.*, as members of the board). And *vide* also section 13 of the parent statute. It is not contended that *Williams* has failed to act in good faith. As said previously, there is no authority in the parent statute or in the scheme to bring into being a legal person of the nature envisaged in a fictional entity embracing the three board members.

No pretence of this fictional entity is found in the statement of claim. It does not describe the defendants except to allege in paragraph 14 "the defendant Lower Mainland Dairy Products Board was established," and "the defendants *Williams*, Barrow, and Kilby were made members of the said board." "Said board" must be read to mean "said defendant board." This destroys at once any suggestion that there is an administrative entity other than the defendant board. All allegations in the statement of claim are directed against the defendant board

alone. There are no allegations against "*Williams,* Barrow and Kilby constituting the board," nor against *Williams,* Barrow and Kilby in any capacity, individual, collective or representative. It is not even alleged that *Williams,* Barrow and Kilby "constitute" the board. The prayer for relief relates to the defendant board alone. True an injunction is sought against "the defendants *Williams,* Barrow and Kilby" as well as the defendant board, but it relates only to the carrying out of orders already passed by the defendant board. The statement of claim treats the three members as defendants separate and distinct from the defendant board. But it does not support the existence of that fictional entity, which has found its way into the style of cause. Neither directly nor by implication is it alleged in the statement of claim that the defendant board is not a legal entity with full administrative powers. Neither the statute nor the scheme was attacked in the action.

The solicitors for the respondents took out an appointment to examine *Williams* for discovery as "one of the defendants herein." At the outset of the examination this occurred:

Locke: Before we start, and to avoid any misunderstanding later, I wish to say that I am appearing for the defendant *Williams,* who has been served with an appointment as an individual defendant to appear for an examination for discovery. I will contend at the trial that the examination of Mr. *Williams* is not admissible as evidence on discovery against the defendant Marketing Board. Subject to that, Mr. *Williams* is here, and if you will agree with my objection covers your questions——

Farris: Yes.

I must gather from this, that both counsel accepted the defendant board as the administrative entity. The parent statute, the scheme and the statement of claim to which I have already referred, do not permit another conclusion. It must exclude any suggestion that the plaintiffs sought to examine *Williams* as a constituent of that fictional entity discussed previously, or that he could be so regarded when examined as "one of the defendants herein." *Williams* is left with two capacities (1) As a member of the board, *viz.,* an officer or agent of the board, bearing the analogous relation to the defendant board that a director bears to his corporation; and (2) his personal or individual capacity wherein he is immune from action by section 13 of the parent statute

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for anything done by him in good faith in the performance or intended performance of his duties . . . as an officer or servant of the defendant board.

There is no allegation in the statement of claim that *Williams* did not act in good faith in the performance or intended performance of his duties. Counsel for the respondents at this Bar disclaimed any such contention. Then can it be said that there is such an allegation against him by implication, because of the allegations against the defendant board? To my mind it cannot, unless *Williams* may be regarded as a constituent of the board, *viz.*, as part of a legal entity embracing the three board members acting collectively as the administrative entity. But that concept of his *status* has been excluded by the previous analysis of the parent statute, the scheme and the statement of claim. It follows therefore that there is no issue in this action between *Williams* and the respondents concerning his good faith in the performance or intended performance of his duties as a member of the board. On the examination it became manifest from many of the questions asked *Williams,* that counsel for the respondents was seeking to examine him as an officer of the defendant board concerning its purpose and object in the passing and proposed carrying out of the five impugned orders. On the advice of counsel he refused to answer some 50 questions of that nature. As the respondents elected to take out an appointment to examine *Williams* for discovery as an individual defendant, that examination should not be extended to include his examination in another capacity as an officer of the defendant board.

In the light of the foregoing analysis of *Williams's status* the questions in dispute cannot be regarded as relating to him in his personal or individual capacity. They did not relate to issues between him and the respondents but did relate to issues between the respondents and the defendant board. For this reason the questions should not be allowed. *Williams* cannot be examined on discovery as a "witness" in general. In *Whieldon* v. *Morrison* (1934), 48 B.C. 492, this Court decided that discovery is limited to relevant issues between the applicant and the party examined, and does not extend to issues relevant only between the applicant and other parties to the action. In that case five defendants

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were sued for conspiracy for inducing two other defendants to commit a breach of contract. The two latter defendants were not sued for conspiracy but for damages for breach of contract. On his discovery examination one of these latter defendants admitted the breach of contract but refused to say why he committed the breach. This Court upheld him, on the ground that the disputed questions related to the conspiracy, an issue between the applicant and the five defendants, but not between the applicant and that defendant.

It may be that *Williams* did answer certain questions which he may not have been legally compellable to answer on discovery. But it does not follow he could not refuse to answer other questions of the same character: *vide The King* v. *The Ontario Power Co. and The Toronto Power Co.* (1919), 19 Ex. C.R. 329, at p. 333. As these conclusions are decisive of the appeal, I refrain from determination of other questions argued. The appeal should be allowed.

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

Solicitors for appellant: *Williams, Manson & Rae.*

Solicitors for respondents: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

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Criminal law—Manufacturer—Bill rendered for services to customer including sales tax—Bill paid by customer—Amount of sales tax not paid to Crown—Charge of "false pretences"—R.S.C. 1927, Cap. 179, and amendments—Criminal Code, Sec. 404.

The accused operated a cannery near Vancouver in which he canned mushrooms for customers, including W. T. Money & Company Limited. On the 8th of May, 1936, he billed W. T. Money & Company Limited for the sum of $386.02 for his services, and added thereto the sum of $30.88 for Federal sales tax. On the 15th of May, 1936, he sent a further account to W. T. Money & Company Limited for $285.71 for canning services, to which account was added $22.86 for Federal sales tax. W. T. Money & Company Limited paid the two accounts in full to the

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accused, but the two sums amounting to $53.74 were never turned in to the proper Crown officials. The accused was charged that "between the 7th and 16th days of May, A.D. 1936, [he] unlawfully with intent to defraud did obtain by false pretences the sum of $53.74 from W. T. Money & Company Limited." He was convicted.

Held, on appeal, reversing the decision of police magistrate Wood (MACDONALD, J.A. dissenting), that there were no representations made by the appellant to the Money Company other than what appears on the face of the accounts rendered. It is clear from the evidence that the appellant did not make any representation known to him to be false. One cannot be guilty of a false pretence when the representation he makes is at best a mixed question of law and fact, and he has valid and reasonable grounds for believing it to be true. A representation or a promise that something will be done in the future is not within the contemplation of section 404 of the Criminal Code, which is limited to representations of fact either "present or past." The appeal is allowed and the conviction is set aside.

APPEAL by accused from his conviction by police magistrate Wood for the city of Vancouver, on the charge

that at the city of Vancouver between the 7th and 16th days of May, A.D. 1936, [he] unlawfully with intent to defraud did obtain by false pretences the sum of $53.74 from W. T. Money & Company Limited.

The appellant was operating a cannery near the city of Vancouver and he canned mushrooms for a number of people in the business, including W. T. Money & Company Limited. On the 8th of May, 1936, the appellant billed W. T. Money and Company Limited for the sum of $386.02 for his services as a canner, and added thereto the sum of $30.88 for Federal sales tax. On the 15th of May, 1936, the appellant sent another account to W. T. Money & Company Limited for $285.71 for canning services, to which account was added $22.86 for Federal sales tax. The accused collected the sales tax in both cases as a manufacturer, but did not turn over to the Crown the amount so collected.

The appeal was argued at Victoria on the 19th of April, 1940, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: The accused's business included both the acquiring mushrooms for himself and also canning mushrooms for others in the business, including W. T. Money & Company Limited. In the two shipments to Money & Co. of the canned mushrooms, he billed them for the cost of

canning and the sales tax of 8 per cent. They both assumed Thimsen was a manufacturer and should therefore collect the sales tax. If Thimsen does not pay the tax he is subject to a penalty. It is a promise to pay in the future and cannot be a false pretence. It must be a present or past fact. The representation that he was a manufacturer is not false, and if false accused did not know it was false. He believed he was a manufacturer. The falsity alleged must be proved: see *Rex* v. *Leach* (1928), 21 Cr. App. R. 44. The magistrate misdirected himself.

Carew Martin, for the Crown: The charge is based on the fact that he did not have a licence: see section 96 of the Special War Revenue Act. When he billed Money & Co. for the sales tax and received it, he represented that he had complied with the provisions of the said Act: see *Rex* v. *Potter*. *Rex* v. *Van Oudenol* (1936), 51 B.C. 361, at p. 364.

McAlpine, replied.

Cur. adv. vult.

29th April, 1940.

MACDONALD, J.A.: The charge, really brought, as Mr. *Orr* stated, by the Department of National Revenue with W. T. Money as informant, was that, with intent to defraud, the accused by false pretences obtained $53.74 from W. T. Money & Company Limited. This amount was due His Majesty for sales taxes on commercial transactions between the accused and W. T. Money & Company Limited; the former delivered to the latter a quantity of canned mushrooms upon which a tax was payable. This tax was collected by the accused from the Money Company and no account therefor was ever given by him to the Department of National Revenue. It will be disclosed by evidence presently referred to that the accused had no intention at the moment he demanded it from the Money Company or later to turn it over to the rightful owner. The false pretence therefore was that under the guise of an honest demand he secured moneys capable of being stolen with intent to defraud the Government. W. T. Money & Company Limited parted with it but its consent was secured by a false pretence evidenced by conduct that if it did so the moneys would in due course reach, not the pocket of the accused, but that of the proper Government department.

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The department was defrauded of approximately $1,100 by this appellant; the charge was laid in respect of two transactions only. It was most material, however, on the question of intent to defraud to show that the two transactions in question were part of a series of similar acts extending over several months. We were asked to strike out this evidence from the appeal book; for obvious reasons we did not do so. An appellant would always succeed if he could induce the Court to eliminate the evidence upon which the conviction in part, at least, is based.

A false pretence of another kind, not within section 404 of the Code was made by the accused, *viz.*, that although he did not pay the amount in question, or the larger amount retained by him to the proper Government department he always intended to do so. He was represented as an honest business man who fell into financial difficulties and having mixed trust funds with his own was not able to account. This even if true would be serious but it is not true; the magistrate found that "he obviously didn't have any intention of paying it" and the evidence supports this conclusion. This is a basic finding in supporting the conviction. When he was approached by an excise tax auditor he said to him: "He [accused] had been doing no taxable work to his knowledge excepting a little mayonnaise." This as he knew was untrue: far from any intention to account when able to do so he denied that any sales taxes were collected by him at all "excepting a little mayonnaise" not worth considering. Further Mr. Money, president of the W. T. Money Company—and his evidence was accepted by the magistrate—testified that the accused advised him to destroy his records and thus remove all traces of the tax. It would appear unnecessary to say that this conduct in counselling a crime was inconsistent with any intention to pay. After this act it is not difficult to infer that his own records were burned to conceal his defalcations: they were, in fact, burned but he said it was accidental: rats too, he testified, accounted for the disappearance of other records that would disclose he collected this tax.

Again when sometime later Money found that he would have to pay this tax over again because of the failure of accused to turn it over to the department he advised him "not to pay it and

to tell the sales department to go to hell." At one stage also, to reassure Money, he told him that auditors had audited his books and found them in order. All of these facts established intention to defraud and absence of any intention to account.

It was also established that the accused did not have a sales-tax licence and in its absence no right to collect it. It cannot be said, however, that he made any representation to Money arising out of that fact, or that the money was parted with under the belief that he had a licence; the evidence does not support it. All that may be said is that, in fact, he had no legal right to collect a sales tax. The gravamen of the charge is, not that he collected it—any honest man might do that wrongly, believing he had a legal right to do so—but that he kept it.

It was said, the act of the accused in collecting the tax was due to confusion and lack of knowledge on the part of both parties of the true legal position. This is a diversion from the true subject of inquiry. There was no confusion on the only question we are concerned with, *viz.,* that whoever collected it had no right to keep it, knowing—that is common ground—that it belonged to the Government. Do the foregoing facts bring the case within section 404 of the Code? I think they do. The false representation was made by conduct when the accused rendered accounts to W. T. Money & Company Limited, in which a demand for a sales tax was included. This was a continuation of similar false representations made to this company and to others because it is not an isolated transaction. He resorted to this scheme to secure moneys that did not belong to him for many months before May, 1936. This view is based upon the finding already discussed that at the moment he rendered these accounts to the Money Company he had no intention of accounting. This would be clear beyond all doubt if he had continued this practice for several years undetected. It continued long enough to justify the magistrate's finding; even without such a finding the evidence I referred to should be sufficient to disclose his *mala fides* throughout.

It follows that intent to defraud is fastened upon him at the moment he made out accounts directed to the Money Company requesting it to pay to him a sales tax; that being so the demand

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was a false representation by conduct. A false pretence may be by words, or acts "or otherwise." A statement, in effect, that something exists which does not exist—in this case a representation that he could safely be entrusted with this money—the offender knowing at the time that this was not so and the money being parted with on the faith of that representation it is within the meaning of section 404 of the Code and the principles applicable thereunder.

Is it true that Money would not have parted with it on any other basis, in other words if he had known that the conduct of the accused in rendering the account was not what it professed to be? His evidence on that point is explicit. He said "I wouldn't have paid him if I had known he wasn't turning it in to the Government." No one would believe for a moment that he would do so. He had a vital interest in seeing that this reached the Department of National Revenue. The accused in fact swindled W. T. Money & Company Limited of a large sum of money: that company had to pay this tax twice although some rebate was allowed by the department to an honest business man. The false representation impliedly given, *viz.*, that the accused would account when there was no intention of accounting was, as intimated, a continuing representation repeated for many months. Money testified that this was only one transaction among many that he had with the accused: he had business relations with him for two and one-half years. He only discovered the defalcations in September, 1936. It is idle to say that doubt as to whether or not the accused or the Money Company should collect the tax robs the conduct of the accused of all sinister aspects: it is equally idle to say that in the infinite variety of ways that false pretences may arise it is not a false representation by conduct to indicate to another that if the latter will part with money it will reach, not the pocket of the accused, but that of the proper custodian.

The trouble is that attention was not directed to the true nature of the false pretence, that induced W. T. Money & Company Limited to part with the amount involved and much larger sums even though he testified to the obvious fact that if this

representation by conduct had not been made he would not have paid it.

I would dismiss the appeal.

SLOAN, J.A.: The appellant was convicted by police magistrate Wood on a charge that

between the 7th and 16th days of May, A.D. 1936 [he] unlawfully with intent to defraud did obtain by false pretences the sum of $53.74 from W. T. Money & Company Limited.

The facts may be briefly recited as follows: The appellant a Dane, and logger by calling, was operating a cannery near Vancouver in which he canned mushrooms for W. T. Money & Company Limited and others. The appellant billed W. T. Money & Company Limited on the 8th of May, 1936, for the sum of $386.02 for his services and added thereto the sum of $30.88 for Federal sales tax (Exhibit 1). On the 15th of May, 1936, a further account was sent by the appellant to W. T. Money & Company Limited for $285.71 for canning services to which account was added $22.86 for Federal sales tax (Exhibit 2). It is these two sums of $30.88 and $22.86 totalling $53.74, which the appellant is charged with obtaining by false pretences from W. T. Money & Company Limited.

The evidence is clear and counsel for the Crown conceded below and before us that there were no other representations made by the appellant to the Money Company other than what appears on the face of the accounts rendered. I reproduce Exhibit 1 as a sample:

CIMBRIA PACKING COMPANY LTD.
1918 Pandora St.
Vancouver B. C.

SOLD TO W. T. MONEY & CO. LTD.
Vancouver, B. C. DATE May 8th, 1936

71 c/s 285 8/12 doz. Hotels @ 60c	171.40	
60 c/s 240 10/12 doz. Choice @ 65c	156.54	
11 c/s 47 8/12 doz. Creamed @ 80c	38.13	
11 c/s 22 2/12 doz. Grilled @ 90c	19.95	
	386.02	
S. T. 8%	30.88	
W.T.M.		$416.90

(The "S. T." thereupon appearing stands for "sales tax.")

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In the Court below counsel for the Crown (Mr. *Orr*) in an opening statement to the magistrate submitted, in effect, that the accused represented by these accounts and others in like form that he was as a manufacturer a person entitled to collect the sales tax as an agent of the Crown pursuant to the relevant provisions of the Special War Revenue Act, Cap. 179, R.S.C. 1927, and amendments; that he was in fact not such a person and in consequence his representation was false and was acted upon by W. T. Money & Company Limited who paid the tax to the accused.

A false pretence is defined by section 404 of the Code as follows:

> A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

On an analysis of this section four essentials are found necessary to meet its requirements. These essentials are in my view correctly stated in Crankshaw's Criminal Code, 6th Ed., 472, as follows:

> 1. There must be a representation, by words or otherwise, that something exists which does not exist, or a representation, as having happened or having existed, something which has not happened or has not existed.
> 2. The offender must have known, at the time of making the false statement or representation, that it was false;
> 3. The goods or money in question must have been parted with in consequence of and through the false representation; and
> 4. The false statement or representation must have been made with intent to defraud.

With respect it is my view of the evidence that it falls far short of complying with these essentials of proof. In the first place the evidence is by no means certain as to whether or not the appellant was a "manufacturer" within the meaning of the said Act, nor is it clear that in law he was a person who would not have the right, as a manufacturer, to collect the sales tax. There is indeed a marked difference of opinion on that point between the Crown officials. George V. Brown an officer of the Department of National Revenue in charge of excise collections (which includes sales tax) at Vancouver, gives the following evidence:

> Do you know this that there has been just an awful fuss kicked up

between your department in Vancouver and the department at Ottawa about this transaction, and a great number of letters have passed? Yes.

You people here were maintaining there was no offence and Ottawa was maintaining there was? Yes, but I still haven't any knowledge of it, of the details.

William B. Anderson, excise auditor with the Department of National Revenue Sales Tax Department billed the appellant for the amount of sales tax he had collected not only from the Money Company but from others to whom he had sold canned mushrooms. The appellant had not paid over the sales tax to the department and in billing him for the amount owing the departmental auditor must be taken to have treated him as a manufacturer who had rightfully collected the sales tax as an agent of the Crown. With respect to this bill (Exhibit 3) which amounted to $939.76 for "sale tax arrears per audit" Anderson said:

That bill includes nothing, in my opinion, for which the Cimbria Packing Company [the appellant's company] wasn't responsible.

—that is as an agent of the Crown entitled to collect the tax. However, whether or not the appellant was a person, entitled in law to collect the sales tax he was, in my reading of the evidence, amply justified in concluding that such was his real position. In consequence heading 2 of the above analysis of said section 404 is in point. In my view it is clear from the evidence that the appellant did not make any representation known to him to be false. In support of that proposition I refer to the evidence of Brown and Anderson already mentioned and in addition draw attention to the following passages.

W. T. Money, president of W. T. Money & Company Limited testified as follows:

Witness, what representations do you say that Mr. Thimsen made to you that induced you to pay that money to him? I don't remember any representations other than the agreement on the price.

The price? The sales tax.

THE COURT: The price of what? The price and the sales tax.

An agreement on the price and the sales tax. What had the agreement been about the sales tax? We had no written agreement.

What was the agreement? The different classes of goods were to be charged at the price which we agreed at; the price they are charged at with the addition of six per cent. sales tax up to the time it was changed to eight per cent. and afterwards that was the verbal understanding between us.

That you would pay him the sales tax? Yes.

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Whenever it was in September that you paid this amount? No, I paid this within a week I would say of the date of the invoice.

Now, at that time you thought—did you not, that Thimsen had the right to make an invoice out in this way, advising you of the amount of sales tax? That's correct.

. . . . .

You certainly must have thought he was the manufacturer and was selling them to you and was required to pay [collect?] the sales tax? That's correct.

Isn't it just entirely that? We thought that was correct.

The said William R. Anderson testified as follows:

. . . Isn't it reasonable to suppose that when two men Money and Thimsen get together and there is this complicated position as to who is the manufacturer and who isn't, and they make an agreement, isn't it reasonable to suppose both these men were under a misapprehension as to their real position under the Act? Through mere ignorance on the part of both, I think.

The said George V. Brown said in his evidence:

And both Money and Thimsen agree that he did that because they thought that's what the law required? I can't say that.

You found that out in your department didn't you, that that was the real trouble? Yes.

The appellant himself testified (and he is not contradicted on this point) that he interviewed an official of the Department of National Revenue with respect to the matter of sales tax and his evidence is as follows:

Did they tell you how to do it in Mr. Money's case? [*i.e.*, how to invoice the sales tax]. They told me right there that the manufacturer is responsible for the sales tax in all events whatsoever.

Did you believe that at that time you were the manufacturer? Certainly.

The question then really comes to this as I see it: Can a man be guilty of a false pretence when the representation he makes is at best a mixed question of law and fact and he has valid and reasonable grounds for believing it to be true? I think not.

I do not consider it necessary to deal with the remaining heads of the requirements of the section at this juncture.

Counsel for the Crown contended before us that the conviction could be maintained on the ground that the false pretence was the representation of the appellant that he was a licensed manufacturer whereas in fact he was not so licensed. It is to be noted that the Department of Internal Revenue regarded him as a person who was entitled to be licensed for in the bill rendered to him (Exhibit 3 above referred to) he is charged with a licence fee for the years 1934-35-36. However, in my view the evidence

of the complainant Money does not permit us to support the conviction on that ground even if open to us. When asked about the licence Money replied:

> The question of the licence really doesn't make much difference? When I buy from him canned goods, I am not concerned with whether he had a licence or not, I am not responsible.

That is to say he did not act upon any suggested representation of the appellant that he was in fact the holder of a licence. That leaves for consideration the ground upon which the learned magistrate convicted below. That ground appears to be that the appellant did not turn over to the Crown the sales tax collected but put it in his company's bank account and used it to pay his employees' wages. The magistrate when convicting the appellant said in part:

> I find the accused guilty. I do not think he is a recidivist or anything like that. Here is a man who commits a crime and the reason he commits a crime is because he is not honest, and the reason he was not honest was because he needed the money, like all the other people who get in trouble because they have control of some money sometimes which belongs to somebody else; and they are hard up and use it; intending, of course, to put it back, and they are not able to put it back. The result is a charge of theft.

As Mr. *Orr* pointed out below, the case was not one of misappropriation and in my view, with respect, the magistrate has fallen into error when he convicted the appellant of obtaining money from the complainant by false pretences because the appellant did not turn over the sums collected to the Crown. Counsel for the Crown did not attempt to support such a contention before us, and no doubt for the obvious reason that the appellant was not charged with defrauding the Crown but of defrauding the complainant. There are other good and sufficient reasons why such a position could not be supported, some of which I propose to elaborate. In the first place a representation or a promise that something will be done in the future (*i.e.*, that the appellant would pay over the tax to the Crown) is not within the contemplation of said section 404 which is limited to representations of fact either "present or past." That seems to me to be a conclusive answer but assuming that we may consider the matter further then in my view there is nothing in the evidence to support the contention advanced that when the appellant billed the complainant with the sales tax he had the then present

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intention of not turning it in to the proper Crown officials. But assuming that he did have that intention I cannot find anything in the evidence to suggest that he made any representation to the complainant and upon which the complainant acted, to the effect that he (the appellant) would pay over the tax collected to the Crown. I have not lost sight of the magistrate's comment that "he [the appellant] obviously didn't have any intention of paying it," but this observation was made when refusing the motion of appellant's counsel to dismiss at the close of the Crown's case and before the appellant had given any evidence. It is difficult for me to understand how at that stage of the case the magistrate could make any finding as to the state of the mind of the appellant but be that as it may a perusal of the remarks of the magistrate when convicting (quoted above) and after hearing all the evidence indicates to my mind that he did not altogether adhere to that view at the end of the trial.

Again I would refer to what Money has sworn to as the false representation upon which he acted, set out above, and to which I would add the further excerpts from Money's evidence:

> Now, is there anything on that bill, Exhibit 1, which shows that he is going to turn that money over to the Sales Tax Department? No, it is only an invoice.
>
> . . . .
>
> The real crux of the matter is that he wasn't paying it in apparently, that's what brought it to a head, it wasn't so much that he didn't have a licence? I wasn't concerned with whether he did or not, it wasn't any of my business, I didn't enquire if he was turning in the sales tax any more than I enquired if he paid his rent. It never entered my head.

True he stated that if he had known the appellant was not turning in the sales tax he would not have paid him but that is not of evidentiary value, in my view, in considering what representations the appellant made upon which the complainant acted. According to Money's own evidence he did not pay the tax to the appellant upon any representation of what were the intentions of the appellant. As he said it never entered his head.

Considerable evidence was adduced below with respect to the destruction of appellant's books, and his denial to the taxation officials that he had done any taxable work "except a little mayonnaise" to which was added for good measure his suggestion to the complainant that he (the complainant) destroy his records.

This conduct on the part of the appellant months after the date of the offence charged is dishonest and reprehensible and was designed to defeat the Crown officials in their efforts to collect from him the sales tax he had collected from others.

Such evidence might be relevant in another proceeding if the Crown sees fit to lay another and different charge against the appellant but in my opinion it is valueless in the determination of the present charge now under review. In allowing himself to be influenced thereby the magistrate with deference, confused the real and essential issue before him with another quite foreign to the charge he was trying.

The pretence which Money said induced him to pay the sales tax was that the appellant represented by the account rendered that he had the right and responsibility of collecting it. The retention of it was and is a question, in their present relations, between the appellant as debtor and the Department of National Revenue as creditor, and although Mr. *Orr* advised the magistrate in his opening remarks that the Department of National Revenue was the real prosecutor of this charge Money, the complainant, when giving evidence said as follows:

> Then they [the department officials] asked you to lay this charge against Thimsen didn't they? I don't know whether the Sales Tax Department asked me. I did it.

As Money said in his evidence I previously quoted above, the matter of the retention of the moneys by the appellant was none of his business.

The language of my brother MACDONALD in *Rex* v. *Jones and Manlove* (1935), 49 B.C. 422, at pp. 426-7, is appropriate to this case. I quote:

> A careful perusal of the record and the oral reasons for judgment of the trial judge show that the only representation alleged to be false relied upon by the complainant was that she was buying treasury stock rather than stock owned by Jones either personally or in a representative capacity. Crown counsel in his opening statement, speaking of the purchase of shares by the complainant, said: "The main representation—the misrepresentation which the Crown alleges was made to Miss Church is that she was told those were treasury shares."
>
> It is true that particulars were given of twelve other false representations but four or five of them were abandoned and only in respect to one of them is there a finding by the trial judge. While he refers to different statements made to the complainant he finds that on one only did the complainant rely.

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Any number of statements might or might not be false. That is not material. It must be shown that she relied on the statement complained of and parted with her money on the faith of it. As stated the trial judge based his judgment on one allegation only as I read his reasons and as it conforms with the Crown's position in opening I am not disposed on the evidence of the complainant to find *de novo* that she parted with her money on the strength of any other representation.

One other matter remains to be mentioned. When the appeal was opened before us counsel for the Crown and the appellant requested that we eliminate from our consideration certain material appearing in the appeal book. This material consisted of a certain number of accounts rendered by the appellant to customers other than the complainant and from which it appears that he in a course of conduct not only billed the Money Company with the sales tax but in like manner had consistently billed his other customers as well. It was pointed out to us that while Mr. *Orr* in police court had touched upon these other accounts in cross-examination of the appellant (notwithstanding objection by appellant's counsel) it does not appear from the record that the said accounts were ever marked as exhibits, and filed below. We advised counsel that their request would be dealt with after we had had an opportunity of perusing the record to ascertain what use had been made below of this material. I have considered the request for the exclusion of this material and have concluded that both counsel were right in asking us to disregard it as part of the record. I consider that no valid criticism can be levelled at counsel for their action. To my mind Crown counsel is to be commended bearing in mind (as my brother MACDONALD said in *Rex* v. *Jones and Manlove, supra,* p. 427) "the necessity for precision in criminal matters." When dealing with questions of evidence of this nature in criminal trials where the liberty of the subject is at stake I would not hesitate to exclude from the record anything concerning which any doubt is raised by responsible Crown counsel as to the right of its inclusion. If the Crown wishes to rely upon documentary evidence then it should be properly and not irregularly put upon the record.

On the other hand if this material is to be considered then, in my opinion, it assists the appellant and not the Crown because

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it indicates a course of conduct consistent with his view that he was, in fact and law, a manufacturer responsible for the collection of the sales tax.

In the result and with deference to contrary views I would allow the appeal and set aside the conviction on the ground that it is unreasonable and cannot be supported, having regard to the evidence.

O'HALLORAN, J.A.: In my view the evidence falls far short of establishing that the representation upon which the prosecution relied was false to the knowledge of the appellant. His conviction for obtaining money under false pretences should be quashed accordingly. If anything further need to be said, I am in agreement with the judgment of my learned brother SLOAN.

Appeal allowed, Macdonald, J.A. dissenting.

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April 1, 9.

Case stated—Appeal—Offence under Government Liquor Act—Jurisdiction—R.S.B.C. 1936, Cap. 160, Sec. 104; Cap. 271, Sec. 77 et seq.

Followed R. v. National Cafe [1943], D.L.R. 153 [1943] 1 W.W.R. 141

The accused was declared an interdicted person under the provisions of the Government Liquor Act on June 29th, 1937. On the 21st of July, 1939, said interdiction order was set aside in the County Court of Yale. On the 9th of August, 1939, accused was convicted by the stipendiary magistrate for Yale "for that he unlawfully did, as an interdicted person, have in his possession or under his control, liquor." On appeal by way of case stated, it was held that in the absence of an affidavit of merits under section 104 of the Government Liquor Act, he had no jurisdiction to entertain the matter.

Held, on appeal, reversing the decision of MANSON, J., that an appeal contemplated by said section 104 must be interpreted as limited to an appeal to the county court under the provisions of section 77 *et seq.* of the Summary Convictions Act. An appeal by way of case stated is limited to questions of law, and in the absence of precise statutory requirement it is not a condition precedent to the determination of a question of law that an appellant must take his oath as to what the law is on the subject before the Court.

MACDONALD, J.A., while agreeing that an affidavit of merits was not required dissented as to the disposal of the case.

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APPEAL by accused from the order of MANSON, J. of the 7th of December, 1939, dismissing an appeal, by way of case stated, and that the conviction made by the stipendiary magistrate for the county of Yale "for that he, the said Albert Edward Carmichael on the 26th day of July, A.D. 1939, at or near Oliver, in the county of Yale, . . . , unlawfully did as an interdicted person have in his possession or under his control, liquor," be affirmed.

The appeal was argued at Vancouver on the 1st of April, 1940, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: In this case the defendant was interdicted in June, 1937, but on the 21st of July, 1939, the interdiction order was set aside by His Honour Judge KELLEY. On the 9th of August following, Carmichael was convicted for that he, an interdicted person, had liquor in his possession. An appeal was taken by way of case stated, and it was held by MANSON, J. that in the absence of an affidavit of merits under section 104 of the Government Liquor Act, he had no jurisdiction. As an appeal by way of case stated is confined to a question of law only, it does not come within said section 104 of the Government Liquor Act.

H. W. McInnes, for the Crown, referred to *Rex* v. *Macdonald,* [1922] 2 W.W.R. 166; *The Queen* v. *Robert Simpson Company, Limited* (1896), 2 Can. C.C. 272.

Cur. adv. vult.

9th April, 1940.

MACDONALD, J.A.: The appeal is allowed, and the matter remitted to Mr. Justice MANSON to answer the questions submitted in the case stated, as, contrary to the view expressed by him, he had jurisdiction to do so.

I dissent from this disposal of the case on the ground that we ought to do now what the trial judge should have done and dispose of it finally; there can be no question of our right and power to do so. Two questions of law remain to be dealt with: or rather one only because one of them, *viz.,* the alleged necessity of an affidavit on the merits has been decided; it was necessary to do so to decide that the judge had jurisdiction. One question

of law therefore alone remains, *viz.*, the effect of an order made by a county court judge setting aside the interdiction order: is it effective when pronounced or only when notice of the decision was given under the provisions of the Government Liquor Act? We have all the facts before us in the case stated, and it is only a question of the construction of a section in the Act and a decision on a point of law. Our decision would determine whether or not the conviction should be affirmed or set aside. To send it back for determination by MANSON, J., possibly involving another appeal is, I think, with deference, an unnecessary delay and expense in respect to a very trifling appeal. As it is to be remitted, however, I will not state my own conclusion on this question of law.

SLOAN, J.A.: This appeal comes before us under the following circumstances: On the 29th of June, 1937, Albert Edward Carmichael the appellant herein was by order of J. H. Mitchell, Esquire, stipendiary magistrate, declared an interdicted person pursuant to the relevant sections of the Government Liquor Act (now R.S.B.C. 1936, Cap. 160). On the 21st of July, 1939, the said interdiction order was set aside by His Honour Judge KELLEY. On the 9th of August, 1939, the said Carmichael was convicted by stipendiary magistrate Mitchell

for that he, the said Albert Edward Carmichael on the 26th day of July, A.D. 1939, . . . , unlawfully did as an interdicted person have in his possession or under his control, liquor. . . .

From this conviction an appeal was taken by way of a case stated which came before Mr. Justice MANSON who held that in the absence of an affidavit of merits under section 104 of the said Government Liquor Act he had no jurisdiction to entertain the matter. The appellant now invites us to say that MANSON, J., was in error. With deference I think he was.

True, as the learned judge below said, a proceeding by way of case stated is an appeal. The Legislature states it to be so in the Summary Convictions Act sections which deal with the subject of stating a case (see *e.g.*, section 89, subsection (4) of Cap. 271, R.S.B.C. 1936), but that does not end the inquiry. The substantial question is whether an appeal by way of case stated is an appeal within section 104 of the said Government Liquor Act which reads as follows:

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104. 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. Where the party appealing is a corporation, the affidavit may be made by any officer or director of the corporation having a personal knowledge of the facts.

In my opinion with deference it is not. An appeal by way of a case stated is limited to questions of law. In the absence of a precise statutory requirement compelling me to do so I am unwilling to believe that the Legislature insists as a condition precedent to the determination of a question of law by a Court that a lay appellant must take his oath as to what the law is on the subject. The "appeal" contemplated in said section 104 must be interpreted in my view as limited to an appeal to the county court under the provisions of section 77 *et seq.* of the said Summary Convictions Act. In that kind of appeal, which is a hearing *de novo,* the affidavit of merits puts the facts in issue and the possibility of a perjury charge may well act as a deterrent to frivolous and groundless appeals on fact. However, to bar an appellant from his appeal on a question of law alone unless he swears to what the law is as a condition precedent to being heard is a theory to which I will not subscribe unless forced to do so by unmistakable legislative direction. That direction is absent in said section 104 of the Government Liquor Act.

Counsel drew our attention to *Rex ex rel. McDougall* v. *Army & Navy Veterans Association of Regina,* [1926] 3 W.W.R. 695. If in point at all it is of assistance to the appellant because in the Saskatchewan Liquor Act it is specifically enacted that an affidavit of merit is a condition precedent to a case stated on a point of law alone. In the absence of a statutory definition of "appeal" in our Act it must be construed, in my opinion, in a manner favourable to the subject and not as an impracticable limitation of the right of appeal on questions of law alone.

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The learned judge below after holding that he had no jurisdiction to entertain the appeal affirmed the conviction. I take it that his affirmation of the conviction is to be regarded under the circumstances as inadvertent and I content myself by saying that the appeal must be allowed and the case stated referred back to him so that he may hear and determine the question of law stated in the case in the exercise of that jurisdiction which he, with respect, in error held he did not possess.

O'HALLORAN, J.A.: I am in agreement with the reasons for judgment of my learned brother SLOAN.

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

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Mar. 5, 6, 7, 8, 11, 12, 13; April 12.

Criminal law—Conspiracy—Evidence—Unlawful common design—Rule as to evidence consistent with innocence or guilt of accused—Question of fact—Appeal.

On a conspiracy charge the question is not whether there has been participation in acts, but a common design. The acts are links in a chain of collateral circumstance from which the common design may be inferred. They are merely incidental to the object or means of effecting it; the external manifestation of the intent and purpose of each conspirator.

The evidence adduced by the Crown is of such a character that the learned trial judge could legally and properly draw therefrom the inference of a common unlawful design between the accused and one McLeod to manipulate the two companies in question to the detriment of the shareholders and the public, and to their own wrongful advantage and gain. When once this is established the further question whether guilt ought to be inferred in the premises is one of fact within the province of a jury, and the trial judge by virtue of section 835 of the Criminal Code was sitting as a jury. The appeal should therefore be dismissed.

APPEAL by accused from his conviction by MCINTOSH, Co. J. on the 1st of December, 1939, on the charge that he, the said S. W. Miller, between the 1st day of January, A.D. 1936, and the 31st day of December, A.D. 1938, at the city of Vancouver, . . . British Columbia, unlawfully did agree and conspire with J. W. R. McLeod, and with each other, and with divers other persons unknown, to defraud

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the public and the shareholders of Freehold Oil Corporation Limited and Hargal Oils Limited, public companies, by deceit, falsehood and other fraudulent means, to wit: By manipulating the stock, credit and assets and by causing to be made false entries in books, balance sheets and records of the said Freehold Oil Corporation Limited and the said Hargal Oils Limited, to their own wrongful advantage and gain and to the detriment of the shareholders of the said Freehold Oil Corporation Limited and the said Hargal Oils Limited, and the public, contrary to the form of the statute in such case made and provided.

The appeal was argued at Vancouver on the 5th to the 8th and on the 11th to the 13th of March, 1940, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

McCrossan, K.C., for appellant: This is a charge under section 444 of the Criminal Code. Accused is charged with conspiracy with one McLeod to defraud Freehold Oil Corporation and Hargal Oils. No one of the overt acts was criminal in itself, but it is alleged that when accumulated they constituted an offence. As to discharge of debt of Miller, Court & Co. to Hargal Oils, and acceptance by Hargal Oils of the collateral security see *Burland* v. *Earle*, [1902] A.C. 83; *Foss* v. *Harbottle* (1843), 2 Hare 461; *Low* v. *Bouverie*, [1891] 3 Ch. 82, at p. 105; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 472; *Begley* v. *Imperial Bank of Canada*, [1935] S.C.R. 89; *Clarke and Chapman v. Hart* (1858), 6 H.L. Cas. 633, at p. 656; *La Banque Jacques-Cartier* v. *Le Banque d'Epargne de la Cite et du District de Montreal* (1887), 13 App. Cas. 111. On the question of misdirection and non-direction see *Brooks* v. *Regem*, 48 Can. C.C. 333, at p. 358; [1927] S.C.R. 633; *Rex* v. *Nicholson* (1927), 39 B.C. 264, at p. 270; *Rex* v. *Broadhurst* (1918), 13 Cr. App. R. 125, at p. 130. On the loss of a document see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 648; Phipson on Evidence, 7th Ed., 518 and 525. There is no fraud proven and no conspiracy, everything was done openly. There was no *mens rea*: see *Rex* v. *Bowen* (1930), 43 B.C. 507, at p. 511; 1 Sm. L.C., 13th Ed., 140-2; *Allen* v. *Flood*, [1898] A.C. 1, at p. 96; *Mayor, &c., of Bradford* v. *Pickles*, [1895] A.C. 587. As to the cancellation of underwriting agreement between Miller, Court & Co. and Freehold Oil Company and the payment of a refund, that there is a guilty mind in this transaction is clearly beyond the ordinary layman: see *Abrath*

v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 440, at p. 455; Halsbury's Laws of England, 2nd Ed., Vol. 22, pp. 20-1; *Bostock* v. *Ramsey Urban District Council* (1899), 16 T.L.R. 18, at p. 19; *Johnson* v. *Emerson* (1871), L.R. 6 Ex. 329. If he was wrong he was wrong on a point of law: see Russell on Crimes, 9th Ed., Vol. 1, pp. 44-5. *G. Roy Long* was employed and there was error in his failing to pass upon the legality of the agreement: Brice on Ultra Vires, 3rd Ed., 60-1; Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 404; *Ooregum Gold Mining Company of India* v. *Roper,* [1892] A.C. 125, at p. 133; *The North-West Electric Co.* v. *Walsh* (1898), 29 S.C.R. 33, at p. 47; Wegenast on Canadian Companies, p. 154, as to *ultra vires* transactions; *Sinclair* v. *Brougham,* [1914] A.C. 398; *Union Bank of Canada* v. *A. McKillop & Sons Limited* (1913), 30 O.L.R. 87, at p. 97; *Niagara Public School Board* v. *Queenston Women's Institute,* [1926] 4 D.L.R. 13; *Irish Provident Assurance Co., Ltd.* v. *Kavanagh,* [1930] I.R. 231 (*n.*); *Gnaedinger & Sons* v. *Turtleford Grain Growers Co-operative Ass'n., Ltd.* (1922), 63 D.L.R. 498; *Trades Hall Co.* v. *Erie Tobacco Co.* (1916), 29 D.L.R. 779, at pp. 789-91; *Andrews* v. *Gas Meter Company,* [1897] 1 Ch. 361; *Waverley Hydropathic Co., Limited* v. *Barrowman* (1895), 23 R. 136, at p. 141. It was not an executed contract. It was executory in terms. That is the outstanding point: see *Buck* v. *Robson* (1870), L.R. 10 Eq. 629. As to McLeod's trading transactions, Miller was not connected with them. Miller was an underwriter. There is no proof of conspiracy: see Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 581; *Richards* v. *Verrinder* (1912), 17 B.C. 114, at p. 120; *Fraser* v. *Regem,* [1936] S.C.R. 296; *Rex* v. *Segal,* [1925] 4 D.L.R. 762, at p. 765; *Rex* v. *Nahirniak,* [1931] 2 W.W.R. 604, at pp. 618-9; *Rex* v. *Newbery* (1931), 23 Cr. App. R. 105; *Reg.* v. *Boulton* (1871), 12 Cox, C.C. 87, at p. 93; *Rex* v. *Goodfellow* (1906), 11 O.L.R. 359.

A. Alexander, on the same side: There was nothing irregular in obtaining control of Freehold Oil, and an investigation was necessary in the course of putting the company on its feet. The expenditures were justified. As to sale of Hargal Oils shares, there is direct evidence that Miller knew nothing of the trading

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transactions of Hargal Oils. As to the Court option, there was evidence that accused asked one Logan to assign the agreement to McLeod, but there is nothing to connect Miller with any benefit McLeod received from this.

Soskin, for the Crown: Drawing inferences is a question of fact and not of law: see *Gauthier* v. *Regem* (1931), 56 Can. C.C. 113. Where the set of facts are such that an inference can be drawn of guilt, the burden is cast upon the accused: see *Rex* v. *Bottomley* (1922), 16 Cr. App. R. 184, at p. 191; *Picariello et al.* v. *Regem* (1923), 39 Can. C.C. 229, at p. 237; *Rex* v. *Primak* (1930), 53 Can. C.C. 203, at p. 205. In March, 1929, Miller agreed to purchase 100,000 shares of Freehold Oil at $1.50 per share. He paid $78,000 and took 52,000 shares. There was a balance of $72,000 due and 48,000 shares to be taken up. Subsequently on getting control of Freehold Oil the company released him from taking up the balance, and later gave him a refund on the stock he had purchased. In 1936, by means of getting proxies, he and McLeod got control of Freehold Oil at a meeting of the company at Calgary. The control of Freehold Oil was obtained through proxies obtained by nominees who had no beneficial interest in the shares registered in their names. When in control a resolution was passed authorizing an investigation at a large expenditure, which was unnecessary, and Miller and McLeod received over $5,000 between them for their services in connection with the investigation. There was no authority for the investigation: see *Paradis* v. *Regem,* [1934] S.C.R. 165, at p. 168; *Rex* v. *Simington et al.* (1926), 45 Can. C.C. 249. On the findings of the learned trial judge see Palmer's Company Law, 16th Ed., 181; *Belyea* v. *The King,* [1932] S.C.R. 279, at pp. 286-8; *Reg.* v. *Connolly and McGreevy* (1894), 1 Can. C.C. 468, at p. 484. That inferences may be drawn from the evidence see *Reinblatt* v. *Regem* (1933), 61 Can. C.C. 1, at p. 3; *Fraser* v. *Regem* (1936), 66 Can. C.C. 240, at p. 244. Miller made the balance sheet of Freehold Oil show money that the company did not have, and he knew that Freehold Oil had a block of Hargal Oils stock: *Ashhurst* v. *Mason* (1875), L.R. 20 Eq. 225, at p. 234. On the Court option, leave was given to list 800,000 shares of Freehold Oil

for sale and an option was given to one Court who assigned it to one Logan, who on the request of Miller assigned it to McLeod. Sales were made of all but 155,000 shares, which could not be sold and were unloaded on Hargal Oils. McLeod received $6,000 in commissions and there was a loss of $9,000 to Freehold Oil: see *In re London and Globe Finance Corporation Ltd.*, [1903] 1 Ch. 728, at p. 732; *Rex* v. *Newton and Bennett* (1913), 23 Cox, C.C. 609; *Rex* v. *Hopley* (1915), 11 Cr. App. R. 248; *Girvin* v. *Regem* (1911), 45 S.C.R. 167, at p. 169. On the drawing of inferences from the evidence see *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1, at p. 10; *Rex* v. *Kolberg* (1935), 51 B.C. 535. There were the many matters in which they were interested, namely, control of Freehold Oil, the transactions surrounding the Marjon well, using Freehold Oil to control Hargal Oils trading transactions, remuneration received by Miller when a director, false balance sheet of Freehold Oil. They all combine to establish conspiracy.

McCrossan, in reply, referred to *Woolmington* v. *Director of Public Prosecutions* (1935), 25 Cr. App. R. 72, at pp. 94-5; *Paradis* v. *Regem,* [1934] S.C.R. 165; *Rex* v. *Bowen* (1930), 43 B.C. 507.

Cur. adv. vult.

On the 12th of April, 1940, the judgment of the Court was delivered by

SLOAN, J.A.: The appellant Miller was convicted by His Honour the late Judge MCINTOSH of conspiring with one McLeod to defraud the public and shareholders of Freehold Oil Corporation Limited and Hargal Oils Limited (two Dominion public companies) "by deceit, falsehood and other fraudulent means" to wit:

> By manipulating the stock, credit and assets and by causing to be made false entries in books, balance sheets and records of the said Freehold Oil Corporation Limited and the said Hargal Oils Limited, to their own wrongful advantage and gain and to the detriment of the shareholders of the said Freehold Oil Corporation Limited and the said Hargal Oils Limited, and the public, contrary to the form of the statute in such case made and provided.

The Crown adduced in evidence a great mass of circumstance relevant to and connected with the various transactions which

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form the subject of the accusation. From this evidence which included independent but co-operative and circumstantial acts the Court below was satisfied that Miller and McLeod acted in concert in furtherance of and consequent upon an unlawful common design.

The submissions of counsel for the appellant may be compendiously summed up to mean that in so far as there was direct and immediate participation between Miller and McLeod in any overt acts such acts were lawful both in the means used and the ends achieved. On the other hand it is said that, so far as the falsification of the Freehold balance sheet is concerned, such was not done with fraudulent intent or, alternatively, that it was McLeod's act and not Miller's.

With respect, in my view, the submissions of the appellant, while ably argued, cannot succeed before us. On a conspiracy charge the question is not whether there has been participation in acts but in a common design. The acts are links in a chain of collateral circumstances from which the common design may be inferred. They are merely incidental to the object or means of effecting it; the external manifestation of the intent and purpose of each conspirator. As Rinfret, J. said in delivering the judgment of the Court in *Paradis* v. *Regem,* [1934] S.C.R. 165, at p. 168:

> Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. Ordinarily the evidence must proceed by steps. The actual agreement must be gathered from "several isolated doings," (Kenny—"Outlines of Criminal Law," p. 294) having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.

As McLeod is facing his trial upon charges arising out of the circumstances enquired into in Miller's trial I deem it inadvisable to enter into a close analysis of the facts. It is sufficient to say that in my opinion the evidence adduced by the Crown is of such a character that the learned judge below could legally and properly draw therefrom the inference of a common unlawful design between Miller and McLeod to manipulate these two companies to the detriment of the shareholders and the public

and to their own wrongful advantage and gain. When once that is established

the further question whether guilt ought to be inferred in the premises is one of fact within the province of the jury:

Fraser v. *Regem,* [1936] S.C.R. 296, at p. 301. The learned trial judge by virtue of section 835 of the Code was sitting as a jury—*Rex* v. *Bush* (1938), 53 B.C. 252. And see *Rex* v. *McDonald,* [1939] 4 D.L.R. 377; *Rex* v. *Hanna,* [1940] 1 D.L.R. 487.

With reference to the appellant's submission that it was not shown that the Freehold balance sheet was falsified with fraudulent intent the law presumes an intention to defraud if it was intended, as it was here, that such false balance sheet should influence and be acted upon by those it was designed to reach. *Reg. v. Birt* (1899), 63 J.P. 328; *Girvin* v. *Regem* (1911), 45 S.C.R. 167, at 169. In addition and apart from any such presumption there was evidence in my opinion from which the learned trial judge could find, as he did, that one reason at least for the falsification of the Freehold balance sheet was to induce the Vancouver Stock Exchange to permit the listing of a certain issue of treasury shares of Freehold for public trading. The use of a delusive balance sheet in the successful effectuation of that purpose would be clearly fraudulent. *The Queen* v. *Aspinall* (1876), 2 Q.B.D. 48.

The Freehold balance sheet disclosed cash assets of some $40,000 which it did not possess, and did not disclose its holding of some 203,000 Hargal shares which it did possess. This untrue cash position was made possible by crediting the company with the sum of $40,000 which McLeod borrowed from Miller, his co-director in the two companies and his associates with whom he acted jointly in obtaining control of the two companies, and in carrying out certain stock-trading transactions of and between the two companies. Viewed in the light of all surrounding circumstances the inescapable inference is that the falsification of the Freehold balance sheet formed part of the concerted purpose and unlawful common design upon which the Crown relied in proof of the conspiracy charged. True the Crown called Mrs. Lytle, Miller's former secretary, and her evidence was to the effect that she advanced the said sum of $40,000 to

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McLeod during Miller's absence from Vancouver and in furtherance of a long distance telephone conversation she had with Miller, the details of which she does not remember. She testified, however, that McLeod did not tell her for what reason he requested the advance. This evidence of Mrs. Lytle's, standing alone, does not, in my opinion, go far enough to displace "in the light of all surrounding circumstances" the "presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement." (*Paradis's* case, *supra*).

It is also submitted by counsel for the appellant that the learned trial judge misdirected himself on the facts in that he ought to have held that as they were of a circumstantial character they were as consistent with innocence as with guilt and in consequence the accused was entitled to the benefit of the doubt. However, in my opinion, when the learned trial judge found the appellant guilty beyond a reasonable doubt it must be implicit in that finding that he eliminated all possibility of Miller's innocence as a rational inference to be drawn from the facts believed by him. *Fraser* v. *Regem, supra,* at 302. As Rinfret, J. said in that case and on the same page:

> . . . [his] verdict is equivalent to a finding that the inferences to be drawn from the evidence were consistent with the guilt of the [appellant], and inconsistent with any other reasonable conclusion, and that is to say: with the absence of guilt.

And as I pointed out above what inferences ought to be drawn are questions of fact for him.

We cannot assume that the "innocent hypothesis rule" was not present in the mind of the learned trial judge—*Rex* v. *Bush, supra,* and *Rex* v. *Tolhurst,* [1939] 4 D.L.R. 696. And it is not without interest to note his familiarity with it for in *Rex* v. *Cameron, Celona and Barrack* (1935), 50 B.C. 179, at p. 193 he applied the rule and acquitted the accused who, in that case, had been charged with conspiracy.

As I can find no substantial misdirection, and as the evidence amply supports the reasonable inferences drawn by the learned trial judge, I can see no ground which would justify our interference with his verdict. I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Tiffin & Alexander.*
Solicitor for respondent: *M. Soskin.*

REX v. LEE SHA FONG.

C. A.
1940
April 1, 12.

Natural Products Marketing (British Columbia) Act—Order in council—Scheme to control marketing vegetables—Order of B.C. Coast Vegetable Marketing Board—Charge of transporting potatoes without a licence—Accused carrying potatoes for his own use—R.S.B.C. 1936, Cap. 165, Sec. 4

The accused visited a farm in Point Grey and there obtained three sacks of potatoes which he had in his passenger car when he was stopped by an inspector of the B.C. Coast Vegetable Marketing Board in the city of Vancouver. The three sacks of potatoes in the car were for accused's own use and for the use of two men who were driving with him. The accused was charged that he unlawfully did transport potatoes without first having obtained a licence so to do. The charge was dismissed by the magistrate, and an appeal by way of case stated to a judge of the Supreme Court was dismissed.

Held, on appeal, reversing the decision of FISHER, J. (MCQUARRIE, J.A. dissenting), that order 9 (c) of the B.C. Coast Vegetable Marketing Board 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." By section 4 of the Natural Products Marketing (British Columbia) Act and section 19 of the scheme to control and regulate marketing, the board has legislative sanction for the making of said order 9 (c) which in effect is the regulation of the transportation of a natural product by way of a licensing system in aid of the effectuation of the "scheme," and on its fair construction it covers the breach complained of herein.

APPEAL by the Crown from the order of FISHER, J. of the 9th of February, 1940. The accused was charged that he at the city of Vancouver, and within the area described in the British Columbia Coast Vegetable Scheme authorized under the Natural Products Marketing (British Columbia) Act, on the 6th day of July, 1939, unlawfully did transport potatoes without first having obtained a licence so to do.

Section 4 of said Act gives the Lieutenant-Governor in Council authority to establish schemes for the control and regulation of the transportation, packing, storage and marketing of natural products, and to constitute boards to administer such schemes, and may vest in the boards any powers considered necessary to enable them effectively to control and regulate the transportation, packing, storing and marketing of any natural product within the Province, and to prohibit such transportation, packing, storage and marketing. By section 19 of said scheme the B.C. Coast

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Vegetable Marketing Board is empowered 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. Order 9 (c) passed by the board 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.

The accused had been out to somebody's farm in Point Grey in his car, a passenger-car, and not a truck, where he had obtained three sacks of potatoes, which three sacks he had in his car when he was stopped by an inspector of the board while driving along a street in the city of Vancouver, and within the area described in the scheme. The accused had no licence from the board to transport potatoes. The three sacks of potatoes in the accused's car were for his own use, and for the use of the two men who were with him in the car. He was not in the business of buying and selling or trucking or storing potatoes. It was ordered that the charge be dismissed.

The appeal was argued at Vancouver on the 1st of April, 1940, before MACDONALD, MCQUARRIE and SLOAN, JJ.A.

Norris, K.C., for appellant.
Mellish, for respondent.

Cur. adv. vult.

12th April, 1940.

MACDONALD, J.A.: There is ample authority under section 4 of the main Act (R.S.B.C. 1936, Cap. 165) for the order of the board No. 9 (c) and on its fair construction it covers the breach complained of herein. That section provides for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products. Any powers necessary or advisable to enable the board to effectively exercise such control is given. It cannot be effectively controlled if all inclined to do so may obtain potatoes in small or large quantities to an unlimited extent for their own use. This conceivably might include hundreds of users obtaining their supplies direct, and not through ordinary marketing channels thus seriously interfering with regulation and control. By section 19

of the scheme also the board may control transportation "in any respect or in all respects." It is doing so by enacting order 9 (c). Two classes are affected and provided for, *viz.*, those engaged in "transporting," etc., and those who merely transport for their own use or for other purposes. Order 9 (c) deals with the latter class.

I would allow the appeal.

McQUARRIE, J.A.: With deference I must dissent from the judgment of the majority of the Court. I would dismiss the appeal for the reasons stated by FISHER, J.

SLOAN, J.A.: This is an appeal from an order of FISHER, J., dismissing an appeal by way of a case stated by police magistrate Wood for the city of Vancouver. This same matter came before us on November 28th, 1939, on appeal from FISHER, J., when we directed that the case be remitted to Mr. Wood for restatement. Mr. Wood having complied with our direction the questions for determination were again referred to FISHER, J., who affirmed his previous view of the matter and it now reaches this Court for the second time. During the argument I was somewhat critical of the course pursued by the appellant in taking the restated case back to Mr. Justice FISHER. Upon further consideration it is my present opinion that such criticism was undeserved and that the course adopted was quite proper. As I understand the practice two courses are open to us—the one to remit the case for further particulars to be supplied to us by the magistrate, the other to remit it for restatement without specific direction that it remains in our Court. I find on examination of the judgment that we followed this latter course herein thereby making the order ourselves for restatement that we thought the learned judge below ought to have made: thus the restated case was properly brought before him for further adjudication.

The respondent Lee Sha Fong was charged that he

at the city of Vancouver, and within the area described in the British Columbia Coast Vegetable Scheme authorized under the Natural Products Marketing (British Columbia) Act, on the 6th day of July, 1939, unlawfully did transport potatoes without first having obtained a licence so to do, contrary to the form of the statute in such case made and provided and orders pursuant thereto.

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Magistrate Wood dismissed the said charge holding that on the facts the respondent did not in law require a licence. Mr. Justice FISHER affirmed the ruling of the magistrate.

The facts are simple. The respondent visited a farm at Point Grey and had there obtained three sacks of potatoes which he had in his passenger-car when he was stopped by an inspector of the British Columbia Coast Marketing Board in the city of Vancouver. Two men were with the respondent and the potatoes were for their own use. It was conceded that we must view this case on the understanding that the potatoes in question were to be used as food by the respondent and his companions and that the respondent was not engaged in the business of buying, selling, storing nor transporting potatoes. The respondent in fact has no licence from the board to transport potatoes.

The relevant order of the board is 9 (c) which reads as follows: [already set out in statement.]

The respondent in support of the finding below contended that said order 9 (c) in the absence of legislative sanction was *ultra vires* the board. Alternatively it was submitted that if authorized by the said Act the order is limited in its application to persons who are engaged in the business of marketing and transporting potatoes as a step in such marketing process.

Counsel for the appellant submitted that ample authority is delegated to the Lieutenant-Governor in Council and by it vested in the board to make such order and that such order must be given its plain meaning otherwise if potatoes are permitted to be transported to Vancouver from contiguous farms by unlicensed consumers orderly marketing of that natural product would be imperilled.

With great deference to the learned judge below and to Mr. Wood it is my opinion that the contentions of the appellant must succeed.

Section 4 of the said Act arms the Lieutenant-Governor in Council with authority to vest in the board:

> any powers considered necessary or advisable to enable them effectively to control and regulate the transportation, packing, storage, and marketing of any natural products within the Province, and to prohibit such transportation, packing, storage, and marketing in whole or in part.

By section 19 of the scheme the board is empowered by the Lieutenant-Governor in Council 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. . . .

By section 4 of the Act and section 19 of the scheme the board has in my opinion legislative sanction for the making of order 9 (c) which in effect is the regulation of the transportation of a natural product by way of a licensing system in aid of the effectuation of the "scheme." As pointed out by Lord Atkin in *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708, at 721:

> A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential.

I now turn to a consideration of the second contention of respondent, *i.e.,* that order 9 (c) under the circumstances cannot apply to him because he was not engaged in the business of transporting potatoes but merely taking them to his home for his domestic use. The respondent submits that "transporting" must be regarded as an integral part of "marketing" and that as the respondent was not engaged in marketing the potatoes his transport of them does not necessitate a licence.

In my view this contention cannot succeed. The orders passed pursuant to the authority vested in the board by the scheme divide those requiring a licence into two classifications, *i.e.,* those engaged in the business of transporting, marketing and so on (for which class a licence fee is charged) and those transporting a natural product who are not engaged in so doing as a business (for which class no licence fee is charged). For example section 19 (c) of the scheme empowers the board:

> 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.

Pursuant to this authority order B (2) was passed reading as follows:

> (2) 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 unless exempted by order of the Board, and if such person is a wholesaler, broker, or retail dealer or trucker, he shall obtain a licence for or in respect of

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each place or branch or business or vehicle operated by him within the area, and shall pay therefor to the Board the sum or sums specified hereunder: [here follows schedule of prices].

"Trucker" is defined to mean:

"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.

Order 9 (c) set out above deals with the non-trading transport classification and I am unable to distort the plain meaning of the language used in order to say that the said order must also be construed as referring only to transport in the commercial sense and as a part of a marketing process.

The respondent contends that to give to the language of order 9 (c) its literal and plain meaning will lead to abuse and injustice but in the absence of any reasonable alternative interpretation

> a sense of possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction. . . . :

Maxwell on the Interpretation of Statutes, 8th Ed., 177.

Counsel for the appellant points out that the exercise of the power is necessary to prevent "bootlegging" in potatoes and that in the words of Lord Russell, C.J. in *Kruse* v. *Johnson,* [1898] 2 Q.B. 91, at p. 99,

> credit ought to be given to those who have to administer [the orders] that they will be reasonably administered.

If the power is vested in the board to pass order 9 (c) as I think it is and if it applies to the respondent under the circumstances of this case, as I think it does, then another and different tribunal than the Court must in due course pass upon the matter of its exercise.

With great respect I would allow the appeal and answer the questions in accordance with the views I have herein expressed.

Appeal allowed, McQuarrie, J.A. dissenting.

THE ROYAL BANK OF CANADA v. QUADRA GREENHOUSE COMPANY LTD.

S. C.
In Chambers
1940
April 8, 11.

Discovery—Examination of corporation's past officer—Not of right—Not allowable where officer's interests not same as corporation's — Rule 370c (1).

The opposite party cannot examine the past officer of a corporation for discovery as of right; the Court has a judicial discretion as to allowing examination even in the first instance. Leave to examine should be refused where the past officer would likely be antagonistic to the corporation, either from personal prejudice or from pecuniary interest.

Leave refused to examine the past officer of a bank, who had been convicted on the bank's information, and who when the cause of action arose had been an officer and shareholder of the opposite party, who wished to examine him.

APPLICATION by defendant for leave to examine one Mar Leung, as a former officer of the plaintiff. The action was upon certain notes signed for the defendant by Mar Leung as director of the defendant and alternatively for money lent thereon. The defence denied his power to sign for the defendant and also attacked as illegal an equitable mortgage given to the plaintiff. Heard by MURPHY, J., in Chambers at Victoria on the 8th of April, 1940.

D. M. Gordon, for plaintiff.
Higgins, K.C., for defendant.

Cur. adv. vult.

11th April, 1940.

MURPHY, J.: Application by defendant to examine for discovery one Mar Leung as a former officer of plaintiff under rule 370c (1). The said Mar Leung is now in Oakalla Gaol having been convicted of theft of moneys belonging to plaintiff. The information which resulted in his conviction was laid by the manager of the Douglas Street branch of the plaintiff bank at Victoria, in which branch the transactions in question in this case took place. The said Mar Leung is the registered owner of one-half the issued shares of the defendant company and was up to the time of his conviction a director of the defendant com-

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Murphy, J.

pany and so far as appears from the material filed in support of this application shows is still a director of the defendant company. Plaintiff opposes the application first on the ground that the said Mar Leung was not at any time an officer of the plaintiff bank. In another action the Court of Appeal has held that the said Mar Leung was a former officer of the plaintiff bank and I find nothing in the material before me that distinguishes the situation herein from the one passed on by the Court of Appeal. For the purpose of this decision therefore I am taking it for granted that he was a former officer of the plaintiff bank. Next the plaintiff contends that because the said Mar Leung has been convicted on an information laid by one of its officers of theft from the plaintiff bank and because he is the owner of one-half of the issued shares of defendant company and is so far as the material shows still a director of defendant company, the order for his examination as a former officer of plaintiff bank should not be made. Under said rule 370c (1), the former officer of a corporation may be examined by order of the Court or a judge. Such examination therefore is not a matter of right as is the case where the person proposed to be examined is a present officer or servant of the corporation. My view of the language of this rule is that the Court in considering an application such as the one before me must exercise judicial discretion in deciding whether or not the order should be made. The matter is not one of mere form but one in which the Court or a judge applied to must exercise judicial functions. This being so I am of the opinion that it would be against natural justice to make the order asked for. It would appear that Mar Leung would be likely to be antagonistic to plaintiff bank as the result of his being convicted of theft from it on the information of one of its officers. He is clearly interested in having the defendant succeed in this action inasmuch as he is the owner of one-half of its issued shares. My view is I think supported by the language used in *Pelican Oil & Gas Co.* v. *The Northern Alberta Gas & Development Co.*, [1918] 1 W.W.R. 957, and in the cases there cited in the judgment of Beck, J. These decisions while not made on rules identical with said rule 370c do deal with discovery either on examination or on interrogatories and as I read them indicate

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that where an application has to be made to a judge in order to obtain discovery the order should not be made where hostility or adversity of interest may exist in the person proposed to be examined.

The application is dismissed with costs.

Application dismissed.

HOY v. GIBSON.

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1940
March 14, 15, 18; *April* 9.

Commission—Sale of timber holdings—Agreement to share the commission on a sale—Allegation of fraudulent misrepresentation in obtaining a share—Questions of fact—Findings by trial judge—Parties to the action.

The defendant Gibson was agent for Broughton Straits Timber Company Limited, owners of timber leases on Vancouver Island near Broughton Straits, and was to receive seven and one-half per cent. commission in the event of bringing about a sale. Meehan Brothers had cruised the holdings and being otherwise interested, Gibson agreed with them that in the event of a sale the commission would be equally divided among the three of them. The plaintiff received an option to purchase the holdings from Gibson, contemplating a sale to Pioneer Timber Company Limited, but the option expired. Hoy then approached Gibson with a view to getting a share of the commission for his services in case a sale was made. Hoy, Gibson and the two Meehans then met and on the 17th of February, 1937, they agreed in writing to share the commission, Gibson two per cent., Hoy two per cent. and the Meehans one and three-quarters per cent. each. Gibson alleges this division was made on the statement of Hoy that he would not receive any commission from the Pioneer Timber Company Limited in case of a sale to that company. Hoy denies this, that Gibson knew of his relations with Pioneer Timber Company Limited, which was that he was to get five cents per thousand feet of timber cut, and that the consideration was that he was engaged in logging operations in the vicinity of the timber sold, and in the case of a sale he would have to close down his camp and suffer great loss, and that Gibson said he would look after that in case of a sale. A sale was made to the Pioneer Timber Company Limited and Gibson paid Hoy $300 when the first payment was made, as his two per cent. share, but refused to make further payments. On Hoy's action to recover his two per cent. commission, the trial judge accepted his evidence as to consideration in that Gibson was desirous of having Hoy assist in making the sale that eventually went through,

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and he accepted Hoy's evidence as to Gibson's allegation of fraud in relation to his commission from the Pioneer Company, and the plaintiff recovered judgment.

Held, on appeal, affirming the decision of MURPHY, J. (O'HALLORAN, J.A. dissenting), that Hoy testified that Gibson was fully aware of his relations with the purchasers and the learned trial judge accepted his evidence. Based on deductions from the letters, apart from other evidence, the trial judge was justified in reaching the conclusion that no fraud was committed by the respondent, and the appeal should be dismissed.

On the appellant's claim that the action in its present form must be dismissed on the ground that the Meehans should have been joined as party defendants:—

Held (O'HALLORAN, J.A. dissenting), that this is raised as a question of law that should not be given effect to at this stage (a) because on the facts outlined and other facts later referred to, the action is properly constituted and no question of law arises; (b) in any event the decision as to whether or not any question of law emerges depends upon facts that could have been elicited at the trial if properly raised in the pleadings.

APPEAL by defendant from the decision of MURPHY, J. of the 23rd of November, 1939, in an action for a declaration that the plaintiff is entitled to receive from the defendant two per cent. commission on the sale of groups 1 and 2 of the Broughton Straits Timber Holdings on Vancouver Island, by virtue of an agreement between the plaintiff and the defendant of February 17th, 1937. In 1936 the plaintiff obtained an option from the defendant to purchase the above holdings, and later obtained an extension of the option in order to give the Pioneer Timber Company Limited an opportunity to examine the holdings. The defendant claims that in February, 1937, the plaintiff informed the defendant that he was no longer associated with the Pioneer Timber Company Limited, and that in the event of a sale to the Pioneer Timber Company Limited he would receive no commission from the Pioneer Timber Company Limited, and he pleaded with the defendant to allow him a portion of the defendant's commission in case of a sale, as otherwise he would get nothing for his work or services rendered to bring about a sale. In the case of a sale the defendant was to receive seven and one-half per cent. commission, so on the 17th of February, 1937, he agreed to give the plaintiff two per cent. of the commission, retaining two per cent. for himself and giving two of

his associates, J. P. Meehan and W. M. Meehan, one and three-quarters per cent. each. In July, 1937, the defendant alleges he found that the plaintiff had arranged with the Pioneer Timber Company Limited for a commission on the purchase price of the said holdings, and he refused to carry out the agreement of February 17th, 1937, and demanded repayment of $300 that he previously paid the plaintiff under said agreement.

The appeal was argued at Vancouver on the 14th, 15th and 18th of March, 1940, before MACDONALD, MCQUARRIE and O'HALLORAN, JJ.A.

Bull, K.C. (*P. A. White,* with him), for appellant: The agreement to give part of the commission to Hoy was obtained by fraud and should be enforced: see *Barron* v. *Kelly* (1918), 56 S.C.R. 455, at p. 476. The defendant Gibson was acting for the vendors in conjunction with the two Meehans, and the Meehans brought Hoy to see Gibson and Hoy obtained an option on the property in question. Gibson always looked upon Hoy as a purchaser. After Hoy's option expired an option was given to the Pioneer Company. Hoy then told Gibson he was getting nothing from the Pioneer Company and he pleaded for a share of Gibson's commission from the vendors. Then the agreement of February 17th, 1937, was entered into as to the division of the commission. The agreement between Hoy and the Pioneer is dated July 28th, 1937, but the arrangement was made in 1936, and prior to the agreement of February 17th, 1937, that he was to get five cents per thousand feet measurement when cut. Fraud was undoubtedly proved in this case. The story of Gibson taking care of Hoy's loss by the sale going through is a trumped-up story: see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243, at pp. 263 and 267. The action is bad because if he had an action at all he has it against three persons, namely, Gibson and the two Meehans. A point of law can be taken at any time: see *McKelvey* v. *Le Roi Mining Co.* (1902), 32 S.C.R. 664, at p. 666; *Canadian Pacific Rway. Co.* v. *Kerr* (1913), 49 S.C.R. 33, at p. 40; *Gale* v. *Powley* (1915), 22 B.C. 18.

Lennie, K.C., for respondent: On the question as to whether there should be an amendment making the Meehans parties see

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Moser v. *Marsden*, [1892] 1 Ch. 487; *Stone* v. *Rossland Ice and Fuel Co.* (1906), 12 B.C. 66, at p. 70; *Banbury* v. *Bank of Montreal*, [1918] A.C. 626, at p. 659; *Fordham* v. *Hall* (1914), 19 B.C. 80; *Bancroft* v. *Montreal Trust Co.* (1937), 52 B.C. 54; *Spencer* v. *Field*, [1939] 1 D.L.R. 129, at p. 135; *Scott* v. *Fernie* (1904), 11 B.C. 91. The trial judge accepted Hoy's evidence as to the facts and he should not be disturbed: see *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1936] A.C. 206, at p. 220. The *onus* is on the defendant in this case: see *Nanoose Wellington Collieries Ltd.* v. *Adam Jack*, [1926] S.C.R. 493.

Bull, replied.

Cur. adv. vult.

9th April, 1940.

MACDONALD, J.A.: Respondent sought a declaration that he was entitled to two per cent. of a total commission of seven and one-half per cent. due appellant on the sale of a tract of timber owned by Broughton Straits Timber Holding Company. His claim is based upon an agreement reading as follows:

February 17, 1937.

It is agreed by the parties hereto signing that in the matter of the sale of Groups 1 and 2 of the Broughton Straits Timber Company holdings, Vancouver Island, as per map and plans of J. P. Meehan & Company, negotiations for which are presently pending with the Pioneer Logging Company and/or associates, that the commission of 7½% to be paid by the vending company in the event of a sale shall be divided as follows: 2% to L. F. Hoy 2% to G. F. Gibson 1¾% to J. P. Meehan 1¾% to W. M. Meehan same to be paid as and when moneys are received for sale of timber.

[Signed] L. F. Hoy J. P. Meehan
G. F. Gibson W. M. Meehan.

One would not assume from this document that appellant, in the first instance, was alone entitled to the full commission payable by the vendor: it must, however, be construed in the light of that fact. He was sole agent for the Broughton Straits Timber Company Limited: the seven and one-half per cent. commission was payable to him alone. We are concerned therefore with an agreement by appellant to pay part of his commission to respondent and another part to the Meehans. To assure a sale appellant secured the assistance of two independent parties (the Meehan brothers are treated as one party) each bearing a contractual

relation to him but in substance bearing no relation to each other. Appellant could perform his covenant with the Meehans under the agreement aforesaid and commit a breach of his covenant with respondent. That occurred in this case. Respondent's cause of action therefore lies against appellant: he has no cause of action against the Meehans. The latter have no moneys in their hands under their control claimed by respondent. I state my opinion concerning the true nature of the contract—its dual aspect—because for the first time on the hearing of this appeal we were asked to say that this action in its present form must be dismissed: it was urged that the Meehans should have been joined as party defendants. This is raised as a question of law. I would not give effect to it at this stage firstly because on the facts outlined and other facts later referred to the action is properly constituted and no question of law arises; secondly in any event the decision as to whether or not any question of law emerges depends upon facts that could have been elicited at the trial if properly raised in the pleadings.

The Meehans were timber cruisers; their knowledge of the timber would be useful in discussions with prospective purchasers. Appellant therefore agreed to pay to each of them one and three-quarters per cent. of his total commission. That part of the agreement concerned appellant and the Meehans only; respondent had no interest in it; there is no pretence in the evidence that he had any part in arranging it. Respondent on the other hand could assist appellant from another standpoint; he had a logging operation near this timber and business relations with the ultimate purchaser. Appellant therefore, in full control of the commission, and under no obligation to share it with anyone also agreed to pay respondent two per cent. Although the Meehans were present when the agreement was signed this term of the contract was concluded between appellant and respondent; the Meehans had no interest in it; this is none the less true because appellant's agreement with both parties is contained in one document. Nor does the circumstance that, according to the evidence (not fully developed), the Meehans are loosely represented as parties to this branch of the contract alter the fact that it was concluded between appellant and

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respondent. As stated in paragraph 5 of the statement of defence, "the plaintiff . . . pleaded with the defendant to allow him, the plaintiff, some portion of the defendant's commission." No one else could do it. Had two agreements been prepared, one between appellant and the Meehans and the other between appellant and respondent confusion would have been avoided and the double relationship made clear.

It was stated in evidence that before respondent appeared upon the scene appellant had an agreement with the Meehans to share his seven and one-half per cent. commission equally with them—one third to each. Three parties therefore, not one, it is said, were the owners of the seven and one-half per cent. commission on February 17th, 1937; hence the need of suing all of them. This alleged prior agreement was not a subject of inquiry at the trial; had it been put forward evidence could have been directed not only to that point, but, as intimated, to all material points to show the dual nature of the contract. Certainly there is no reference to a written agreement of this nature. However, it is no longer material; when the Meehans signed the contract of February 17th, 1937, any prior agreement, if ever made, would become *non est.* Attention therefore may be directed to the written agreement alone without reference to anything that may have preceded it.

Additional facts justify the view, even without evidence that might have been obtained at the trial had this point been raised, that respondent's contractual relations were with appellant; the agreement therefore should be so interpreted. The trial, based on the pleadings, was conducted by appellant on the basis of a relationship with respondent only. Negotiations, it is alleged, were carried on by appellant with "him." Appellant alone later repudiated the agreement: he did not consult the Meehans before doing so; he alone sought by counterclaim a declaration of invalidity. Wherever reference is made to the Meehans in the pleadings their names are added in brackets indicating that it is a mere formality. Appellant speaks in the evidence of the sale of timber,—"I made"; also "he" was getting seven and one-half per cent. commission. He speaks of "his" contract with respondent; "I gave him" (respondent), he said "an option on

Division 2," etc.; again "I explained to him [respondent] I was only getting seven and one-half per cent. and had to include the Meehans in it." This makes it clear that it was appellant alone who "had to include the Meehans." He said "I [not the Meehans and I] could not give him [respondent] very much." When he wrote to respondent in July—a letter later referred to —mildly complaining of the latter's conduct and suggesting a division of joint earnings he did not consult the Meehans before doing so. They were properly treated throughout as strangers to the Hoy-Gibson part of the agreement of February 17th, 1937. The purchase price when paid and the full commission was received by appellant alone. It follows that respondent's contractual relations were with appellant only: the trial was conducted on that basis and the agreement should be so construed. No question of law therefore arises. In any event it is enough to say that we are not obliged after the controversy is over, doubly so where the point raised is technical and no injustice is occasioned, to give effect to an alleged point of law that might disappear if properly raised in the first instance and evidence directed thereto.

Dealing with the merits; largely, if not entirely, through respondent's efforts (he was first given an option to purchase) the timber was sold to the Pioneer Timber Company Limited. The commission of seven and one-half per cent. due from the vendors to Gibson was payable at intervals on receipt of instalments of the purchase price. When the first payment was received appellant paid $300 to respondent Hoy as his two per cent. share. Later on receipt of further payments he refused to perform his contract with respondent; hence this action.

Appellant by counterclaim alleged that he entered into the agreement because of fraud on respondent's part: he also alleged that upon learning of this fraud practised upon him he repudiated the contract. The alleged fraud was this—at the time the agreement was entered into, the respondent, according to appellant, assured him that he "would receive no commission or remuneration from the Pioneer Timber Company Limited" to whom the property was sold: whereas he did in fact receive or would in the future receive five cents a thousand under the

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terms of an agreement between him and the purchasers. Respondent testified that appellant was fully aware of his relations with the purchasers on and before February 17th, 1937, and the trial judge believed him.

Unfortunately for appellant his evidence was not accepted. The learned trial judge said "I accept the evidence of the plaintiff as to consideration" (later referred to): also when dealing with fraud said "I again accept the evidence of the plaintiff." We do not pass upon the credibility of witnesses: we satisfy ourselves that the trial judge was not clearly wrong. I would not disturb the findings of fact.

The trial judge based his view largely on a letter already alluded to, written by appellant to respondent on July 29th, 1937, at a time when he knew—if such were the fact—that respondent had deceived him. Far from upbraiding him and repudiating the contract appellant addressed him as "My dear Frank." This ingratiating salutation addressed to one whom it is now alleged committed a fraud upon him was doubtless employed to secure results presently referred to. The letter, while stating that appellant entered into the agreement "under the distinct and definite belief" on my part "that you [respondent] had no other commission or reward in prospect or expectation," closed with the suggestion that respondent should share with him the fruit of his agreement with the purchaser. It concluded with these words:

"I am suggesting now that a division of commissions which gives you 6.3 as against my 2.92 will not strike you as being equitable or reasonable. You and I are likely to be closely associated in business matters from now on and I am submitting this matter in this form to you for your consideration and quite hope you will consider my interests as I considered yours.

Please turn the matter over and let me know your views on the subject.

Appellant disputed the obvious interpretation of this clause: certainly it is not the letter of one who to his knowledge had been defrauded.

After several months passed without any response to the suggestions contained in the letter referred to appellant wrote again to respondent. This letter is dated November 3rd, 1937. It is written in a lowered temperature; respondent is now addressed as "Dear sir." In this letter appellant said:

I refuse to be held by the joint document under date of February 17th,

1937, by which it was agreed that you should share in the commission to the extent of 2%.

It will be observed he gave his "reason for repudiating the agreement," saying:

You repeatedly represented to me that you were getting nothing from either [the] purchaser or [the] vendor . . . in connection with the deal.

He goes on to say:

On your unqualified assurance to this effect, I arranged to protect you to the extent of 2% of the purchase price.

The statement in this letter about "an unqualified assurance" that respondent was to receive nothing from the purchaser contrasts sharply with the statement in the letter of the 29th of July, 1937. In that letter appellant said he was "under the impression" that respondent was not getting any remuneration from the Pioneer Company. He spoke then only of the "belief on my part" as to respondent's position; the suggestion that there might be a misunderstanding was clear: now it disappears.

Based upon deductions from these letters, apart from other evidence, there is no question that the trial judge was justified in reaching the conclusion that no fraud was committed by the respondent. I have referred to it at length as we were asked to set that finding aside. We would not be justified in doing so: it is supported by the evidence.

It was submitted, as the contract is not under seal, that it is without consideration. I cannot agree. The consideration is set out in the evidence of respondent, accepted by the trial judge. The facts are not fully developed but enough consideration is disclosed to support the promise. Respondent as stated had been engaged in logging operations in the vicinity of the timber sold since 1936. He told appellant that a sale would compel him to close down his camp and suffer a loss of from $8,000 to $10,000. How that loss would occur was not explained but according to respondent's evidence it was appreciated by appellant; he stated that "[he would] take care of that. I will cut you in on my commission. I am getting seven and one-half per cent. commission." He did so by the agreement in question. This evidence, accepted by the trial judge, discloses consideration. It was also disclosed, as intimated, that respondent would in the future receive five cents a thousand from the purchasers as the timber was cut. Mr. *Bull* submitted therefore that respond-

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ent was solely promoting his own interests in effecting a sale and that no consideration flowed to appellant. That, however, was not the consideration found: it was the loss referred to through the closing down of logging operations.

I would dismiss the appeal.

MCQUARRIE, J.A.: I agree with my brother MACDONALD that the appeal should be dismissed.

O'HALLORAN, J.A.: The appellant and the respondent were two of four persons signing this agreement: [already set out in the reasons for judgment of MACDONALD, J.A.].

The seven and one-half per cent. commission amounted to $39,000. The respondent Hoy received $300 on account of his two per cent. and subsequently sued the appellant Gibson alone for a declaration that he was entitled to receive from him two per cent. of the latter's alleged seven and one-half per cent. commission, by virtue of the said agreement between the two of them and "others"; for an account of moneys received and for payment of the amount found due in respect thereof. Gibson pleaded in defence that he "and others" were induced to enter into the said agreement by the fraudulent misrepresentation of Hoy. The learned trial judge gave judgment in favour of Hoy. The formal judgment as entered provided:

THIS COURT DOTH ORDER DECLARE AND ADJUDGE that the agreement sued on and set forth in the statement of claim, is a good, valid and subsisting agreement,

and that Hoy was "entitled to share" with Gibson to the extent of two per cent. of the latter's seven and one-half per cent. commission. Counsel for the appellant raises the point for the first time (by an amendment to the notice of appeal) that there is a non-joinder of parties, since J. P. Meehan and W. M. Meehan, two of the four parties to the said agreement, were not before the Court as parties to the action.

Although, since the Judicature Act, an action may not be defeated for non-joinder of parties, *vide* rule 133—yet as Lord Chancellor Viscount Cave said in *Performing Right Society* v. *Theatre of Varieties* (1923), 93 L.J.K.B. 33, at 38:

This does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case.

We have to determine therefore if there has been non-joinder; are J. P. Meehan and W. M. Meehan necessary parties to the action?—necessary within the meaning of rule 133:

> In order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.

To reach an answer it is in point to consider (1) what the agreement was; and (2) what led up to the agreement; and (3) what are the questions involved in the action.

First, as to the agreement itself. It is not an agreement between Gibson of the one part, and the Meehans and Hoy of the other part, containing a covenant by the former with each of them severally, or jointly and severally, to pay them the percentages stipulated. But it is an agreement between the four of them jointly, that the $39,000 commission would be divided in a certain way "in the event of a sale." Their individual claims to the stipulated percentages arise not from an agreement with Gibson but from an agreement between the four of them. Gibson's right to his two per cent. commission arises in the same way. If it did not, and the agreement had provided Gibson was to pay each of the others a stipulated percentage it would have been unnecessary to provide for Gibson's own two per cent. share in this manner. Of course if Gibson had entire control of the $39,000 he could have made an agreement with Hoy alone, concerning the latter's share, without consulting the Meehans at all. The $39,000 (the seven and one-half per cent. commission) became by that agreement the joint moneys of the four of them: it could be disbursed only by their joint authority. That Gibson as an accountant should act as their agent in collecting the money and disbursing it, instead of placing it in their joint account and issuing cheques signed by the four of them is a matter of form, and not of substance. To regard Gibson as solely responsible is to ignore entirely the agreement as made, and assume that Gibson had covenanted therein with Hoy and each of the Meehans to pay them individually.

Then secondly as to what led up to the agreement. In *Charrington & Co.* v. *Wooder* (1913), 83 L.J.K.B. 220, Lord Dunedin said at pp. 224-5:

> In order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same

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position as that in which the parties to the contract were placed, in fact, when they made it—or, as it is sometimes phrased, to be informed as to the surrounding circumstances.

From the evidence of how the agreement came to be made I cannot escape the conclusion that Hoy had reason to know he could not be admitted to a share of the $39,000 commission without the joint agreement of Gibson and the two Meehans. Although the $39,000 commission was payable to Gibson alone by the vendors, yet the conversations between Hoy and Gibson show the necessity of consulting the Meehans before Hoy could obtain a share in it. Hoy admitted Gibson told him the Meehans were interested in the commission. Hoy and Gibson went to the Meehans' office to discuss Hoy sharing in the commission and to ascertain if the Meehans would permit it. That is what they did there. As a result the agreement was drawn up there in the presence of the four of them in the form set out and signed there by the four of them. Hoy testified that when he arrived at the Meehans' office:

> I thought they had been fighting, the Meehans and Gibson, and that bothered me a lot, and Meehan threatened to kill the whole deal if they didn't get theirs.

This confirmed and epitomized what he had already learnt from Gibson, and which explains his presence in the Meehans' office, *viz.*, that if he was to share in the $39,000 commission the Meehans would have to be parties to the agreement. It must have been clear to him that Gibson could not do it alone. Of course if Gibson could, there would have been no need to go to Meehan's office at all, and the agreement could have been entered into between the two of them, without joining the Meehans therein or even consulting them.

At that meeting before the agreement was made, Hoy admits that the Meehans asked him directly if he was receiving any commission or profit from the purchasers. Hoy could not fail to recognize that his answer to this question would decide whether the Meehans would agree to his sharing in the $39,000 vendors' commission. The significance of this question should be understood. Hoy was asking Gibson and the Meehans to allow him to share with them to the extent of $10,400 in the $39,000 vendors' commission, which if the sale "presently pending" was made, they were then dividing $26,000 to the two Meehans and

$13,000 to Gibson. The consideration for their sharing with him (according to Hoy's evidence) was a $10,000 logging loss he alleged he was incurring by selling his option (on the timber out of which the $39,000 vendors' commission arose) to the Pioneer Logging Comany. The Meehans naturally asked him if he were not making a profit out of the sale of his option to the Pioneer Logging Company. He would know that if they knew he was making a profit of $40,000 thereon (as he was), both Gibson and the two Meehans would be apt to ask him why they should bear his $10,000 logging loss when he was in fact himself making $40,000 by incurring that very logging loss. Irrespective of the answer he might give them he can have had no doubt of its important bearing upon the decision the Meehans would reach in determining whether they would reduce their share of the vendors' commission by $7,800 (Gibson's reduction would be $2,600) to enable him to share with them to the extent of $10,400.

Prior to the agreement, the Meehans were entitled to five per cent. and Gibson to two and one-half per cent. of the seven and one-half per cent. commission of $39,000. Gibson's two and one-half per cent. would amount to $13,000. It would be clear to Hoy that Gibson alone could not give him two per cent. for that would have left Gibson with only one-half of one per cent. or $2,600. A study of the evidence leaves me convinced that a man in Hoy's position reasonably should have known that whether he shared in the $39,000 commission or not was largely dependent upon the way in which the Meehans would regard it. Hoy knew his $10,400 share would have to come largely from the Meehans. He would know also that a part of it would have to come from Gibson. With that knowledge he should not be heard to say, if a dispute arises as to the validity of the agreement, that the Meehans are not necessary parties in any resulting legal proceedings. The nature of the discussion prior to the agreement is pictured in the form of the agreement entered into between the four men.

Then thirdly as to the questions involved in the action. It seeks a declaration that Hoy is entitled to receive from Gibson two per cent. of his (Gibson's) seven and one-half per cent.

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commission "by virtue" of the agreement already discussed. That is based on the assumption that the agreement provided the $39,000 belonged solely to Gibson and that it contained a covenant by Gibson to pay Hoy two per cent. thereof. As explained already that is not the agreement and could not be the agreement in view of what led up to it. It is an agreement between the four parties jointly and not an agreement between Gibson and the other three. If this conclusion is correct, then it is in the form it is, because Gibson, by reason of the Meehans' interest in the commission, could not make a separate agreement with Hoy. Gibson could have made a separate agreement with Hoy in regard to the two and one-half per cent. he (Gibson) was entitled to before the agreement was made, but the action is not so founded.

The action is in substance one for specific performance. The prayer for relief in the statement of claim asks for a "declaration" that Hoy is "entitled to receive" two per cent. of Gibson's seven and one-half per cent. "by virtue" of the said agreement between them and "others"; this is followed by a claim for an account and then for payment of the moneys found due on such account. The formal judgment as already pointed out declares that the said agreement is "a good, valid and subsisting agreement" and that Hoy is "entitled to share" with Gibson to the extent of two per cent. aforesaid and that Gibson do pay him accordingly. Hoy did not bring his action for a sum of money owing by Gibson. He brought an action involving the validity of an agreement which affected the legal and equitable rights of all the four parties to that agreement.

The Meehans were two of the four parties to that agreement. A judgment that it was a good, valid and subsisting agreement and in effect that it should be specifically performed cannot be regarded as having any force in law unless it involved the rights and interests of all the four parties, who expressed their common intention in the words

> it is agreed by the parties hereto signing . . . , that the commission . . . to be paid by the vending company in the event of a sale, shall be divided as follows . . . "

It cannot be said, in my opinion, that the Court can "effectually and completely adjudicate upon" the validity of such an agree-

ment and its specific performance without the presence of the two absent parties. In the exercise of the equitable remedy of specific performance the Courts have been careful from its very nature, to have all parties represented.

Furthermore in his statement of defence Gibson pleaded that he "and others" (*viz.*, the two Meehans) were induced to enter into the agreement by the fraudulent misrepresentation of Hoy. Fraud goes to the root of the contract. If substantiated the contract is vitiated—it ceases to exist; it is void *ab initio*. Any rights the Meehans had thereunder would cease with it. To contend there is not non-joinder is to contend that the Meehans are not necessary parties to an action, which might destroy a contract by which they have acquired substantial legal rights and which they may have assigned to a bank or other third parties in the ordinary course of business.

It is true that in letters to Hoy months after the agreement was made and also in his evidence in the Court below, Gibson often used the personal pronoun in a manner which would imply the agreement was between the two of them only. To the extent that it occurred, it may be regarded as a misconception of the legal rights of the Meehans under the agreement. That such a misconception existed is borne out in a marked degree by the failure to raise the issue of non-joinder at any time in the Court below. But that does not prevent it being raised and acceded to in a Court of Appeal. Non-joinder was raised in *Gale* v. *Powley* (1915), 22 B.C. 18 for the first time in this Court. In *Ferguson* v. *Wallbridge,* [1935] 3 D.L.R. 66, on appeal from this Court, it was raised for the first time in the Judicial Committee. Before the Court is able to "effectually and completely adjudicate upon" the validity of this agreement involving fraudulent misrepresentation and specific performance it must have the issues presented in a properly constituted action wherein the four parties to that agreement are represented. That is why in my opinion there should be a new trial. Findings of law and fact involving these issues cannot be made in their absence.

In *Dix* v. *Great Western Rail. Co.* (1886), 55 L.J. Ch. 797, the railway company in an agreement with X, Y and Dix, to purchase their respective lands, covenanted with each of them

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severally, that it would build a road on their lands. Dix brought an action for specific performance without adding X and Y as parties. The railway company applied to add them. Mr. Justice Kay made the order. It was indicated it might be necessary to specify how and where the road was to be built. In the case at Bar, even if there were covenants to pay which could be regarded as several (which there are not) yet the defence of fraud goes to the root of the rights of the four parties to the agreement. Gibson also counterclaimed for a declaration that the said agreement between the plaintiff and the defendant "and others" was void and of no effect. This went to the root of the rights of the four parties to the agreement. It sought a declaration that an agreement to which "others" (the Meehans) were parties was void and of no effect, even though those "others" were not parties to the action before the Court. This was a matter for a joint counterclaim with the Meehans. In *Norbury Natzio & Co., Lim.* v. *Griffiths* (1918), 87 L.J.K.B. 952, the Court of Appeal in England regarded it as an additional ground for the joinder, that the defendant desired to have his alleged joint contractor added as a co-defendant in order that they might thereupon bring a joint counterclaim against the plaintiff.

In the *Dix* and *Norbury* cases cited, the order for joinder of absent parties was made before the actions came to trial. Here the matter is broached for the first time on appeal. That happened in *Gale* v. *Powley* and also in *Ferguson* v. *Wallbridge, supra.* In my view the appeal should be allowed and the judgment set aside, but as rule 133 directs that "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties," we should give leave now for the necessary amendment which should have been made below. This amendment to be made within one week from the service of the order of this Court allowing the appeal, and thereafter a new trial should be had. If the amendment be not made as allowed, the action to stand dismissed. In any event the costs of this appeal and of the abortive proceedings below should be paid by the plaintiff (respondent); *vide King* v. *Wilson* (1904), 11 B.C. 109, applied in *Gale* v. *Powley, supra.* The respondent should have the costs

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occasioned by the amendment to the notice of appeal raising the issue of non-joinder.

For these reasons, with great respect, I am of opinion that the appeal should be allowed and a new trial directed in a properly constituted action.

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

Solicitor for appellant: *A. D. Wilson.*
Solicitor for respondent: *R. S. Lennie.*

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CHOLBERG v. M.S. "SILVER HORDE."

Admiralty law—Master of ship—Lien for wages—Resisted by mortgagees of ship—Evidence—Estoppel.

The plaintiff who was master of M.S. "Silver Horde" for five successive fishing seasons (1934-1938), brought action claiming $4,800 as a lien for wages against the ship. The Canadian Fishing Company Ltd., as mortgagees of the ship, intervened after arrest to resist the plaintiff's claim on the ground that he was the real owner of the ship, although registered in the name of his father, as the plaintiff was under age at the time of said registration, and further that the plaintiff was estopped from setting up any lien for wages. The defence raised questions of fact of an exceptionally difficult kind, covering the complicated relations of the plaintiff and his father with the Fishing Company for the above-mentioned period.

Held, after careful consideration of the whole matter, that the plaintiff's claim is a genuine one and his lien must be upheld and not made subject to the company's mortgages, because upon the facts the plea of estoppel against him has not been established.

ACTION by the master of the ship "Silver Horde" to recover $4,800 as a lien for wages against the ship. The claim is resisted by the Canadian Fishing Company Ltd. as mortgagees of the ship. The facts are set out in the reasons for judgment. Tried by MARTIN, D.J.A. at Vancouver on the 20th to the 23rd of December, 1939, and the 13th to the 17th of February, 1940.

Griffin, K.C., and *W. C. Thomson,* for plaintiff.
Hossie, K.C., and *Ghent Davis,* for Canadian Fishing Co.

Cur. adv. vult.

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MARTIN, D.J.A.: In this action the plaintiff claims $4,800 as a lien for wages, as master, against the M.S. "Silver Horde," and the claim is resisted by the mortgagees of the ship, the Canadian Fishing Company Ltd., which intervened after arrest to resist the plaintiff's claim on the ground that he was the real owner of the ship and was working for himself though it was "registered in the name of his father as the plaintiff was under age at the time of said registration" (born on 30th August, 1915); and further that "the plaintiff is now estopped from setting up any lien for wages."

This defence raised questions of fact of an exceptionally difficult kind covering the complicated relations of the plaintiff and his father with the Fishing Company for five successive fishing seasons, 1934-8, and many witnesses were examined and a great mass of documents and correspondence put in evidence in the course of a protracted trial, lasting eight days. This has necessitated a very careful consideration of the whole matter with the result that I can only reach the conclusion that the plaintiff's claim is a genuine one and his lien must be upheld and not made subject, as was submitted, to the company's mortgages, because upon the facts the plea of estoppel against him has not been established.

It is not, I may say, in this very unusual case, without some reluctance that I am forced to this conclusion because there is much in the conduct of the plaintiff's father that does not meet with my approval and such conduct misled at the first both his own son and the company, and created a situation that was, at best, obscured and difficult of elucidation. That his strong wish to promote what he thought was his son's interest led him to write letters which should not have been written there is no doubt, but that he was deliberately dishonest in the ordinary sense of that word, I do not find, but rather that in his excessive and misconceived zeal for his son he acted "muddle-headedly and illogically" as Lord Russell of Killowen recently put it in the House of Lords in *British Plastics v. Ferguson,* [1940] 1 All E.R. 479, at 480, and not "with a fraudulent mind."

It was strongly submitted by the company's counsel that his

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important letter to his son, Exhibit 17, should be adjudged a spurious one, concocted for ulterior motives, but the evidence does not support that grave charge.

But whatever are the father's shortcomings, the son was not implicated therein, nor answerable, under the circumstances therefor. He made a favourable impression on me after many hours in the witness box, and regard must be had to his minority, inexperience, and situation in a remote locality: his father's misguided peculiarities placed him in a trying indeed painful situation.

Speaking of the witnesses as a whole on both sides they, I am pleased to say, impressed me as being respectable persons desirous of giving their evidence as best they could in a very unusual situation, only too easy to be misconceived.

Since I have come to the conclusion that the plaintiff has established that he is not the owner, and is not estopped, it is unnecessary to pass upon the objections taken by his counsel to the company's *status,* on which judgment was also reserved.

It follows that the plaintiff is entitled to judgment with costs of suit.

Judgment for plaintiff.

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Nov. 22, 23, 24; *Dec.* 1, 12.

Criminal law—Murder—Voluntary confession—Charge to jury—Conviction—Appeal—Misdirection—New trial—Criminal Code, Secs. 259 (b) and (d) and 260.

Ref'd To.
R. v. Harrison
[1948] 3 D.L.R. 122
54 C.C.C. 79

On the alleged confession of the accused made to the police, the accused and a girl went to the hotel room of a Chinaman for the purpose of robbing him. They entered the room and accused hit the Chinaman with a piece of wood. The first blow did not stun him, and the girl said "Hit him again" which he did, and the girl then went through his pockets and got some silver. The Chinaman was found dead shortly after. The accused was convicted on a charge of murder. In the charge to the jury the learned judge stated "If they went up to this man's room and assaulted him and his death ensues, that of course is murder—there cannot be any doubt about that." It was submitted by counsel for accused that an assault from which death ensues is murder only if and

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when, on proper direction, the jury has considered and found against the accused those relevant elements defined in section 259 of the Code. *Held*, that the jury in this case was not asked to pass upon the relevant and essential elements in section 259, in order to determine whether or not the accused was guilty of murder. The jury must be instructed that before convicting the accused of murder under subsection (*b*) of section 259, it must be satisfied that the bodily injuries inflicted by the offender were known to him to be likely to cause death and he was reckless whether death ensued or not. In like manner the jury must be instructed to pass upon the essential elements of subsection (*d*) of section 259. The failure of the learned judge to instruct the jury in the proper definition of murder under section 259 must, under the circumstances of this case, necessitate a new trial. It is impossible to say that if the jury had been properly directed a conviction of murder must have been the inevitable result.

APPEAL from the conviction by MANSON, J. and the verdict of a jury at the Fall Assize at Vancouver on the 18th of October, 1939, on a charge of murder. On the 11th of April, 1939, the accused and a girl named Dolores Brooks went to the hotel bedroom of one Woo Dack for the purpose of robbing him. The girl knocked at the door of the room and went in, followed by accused. Accused struck Woo Dack on the head twice with a stick of wood and killed him. The girl then went through his pockets and took what money he had. The jury found him guilty of murder and he was sentenced to be hanged.

The appeal was argued at Vancouver on the 22nd, 23rd and 24th of November, and the 1st of December, 1939, before MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Nicholson, for appellant: The confession of accused should not have been admitted, and secondly there was no proper charge amounting to misdirection and non-direction. No warning was given by the police on both interviews before the confessions were made. One McMillan was convicted and got a life sentence for killing this man: see *The Queen* v. *Thompson*, [1893] 2 Q.B. 12, at p. 18. As to accused's mentality, there was no trial within a trial: see *Rex* v. *Knight and Thayre* (1905), 20 Cox, C.C. 711, at pp. 713-14; *Rex* v. *Voisin* (1918), 87 L.J.K.B. 574, at p. 577; *Rex* v. *Godwin*, [1924] 2 D.L.R. 362; *Rex* v. *Thauvette*, [1938] 2 D.L.R. 755, at pp. 774-8; *Sankey* v.

Regem, [1927] S.C.R. 436, at pp. 440-1; *Chapdelaine* v. *Regem,* [1935] 1 D.L.R. 805. As to the charge, there are two sections of the Code to be explained, namely 259 and 260. The crime of murder was not defined to the jury and it is only sub-sections (*b*) and (*d*) of section 259 that need be considered. An intention is necessary to constitute the crime: see *McAskill* v. *Regem* (1931), 55 Can. C.C. 81, at p. 84; *Rex* v. *Kovach* (1930), *ib.* 40, at p. 42. The learned judge must put the issue: see *Rex* v. *Harms* (1936), 66 Can. C.C. 134, at pp. 136-7; *Rex* v. *Sampson* (1934), 63 Can. C.C. 24, at p. 35. On instruction to the jury see *Rex* v. *Willett* (1922), 16 Cr. App. R. 146; *Rex* v. *Cooper* (1927), 49 Can. C.C. 87; *Rex* v. *Deal* (1923), 32 B.C. 279; *Rex* v. *Averill* (1927), 48 Can. C.C. 121. It is necessary to put the defence adequately and fairly: see *Rex* v. *West* (1925), 57 O.L.R. 446, at pp. 449-50; *Rex* v. *Smith* (1910), 5 Cr. App. R. 77; *Rex* v. *George* (1936), 51 B.C. 81, at p. 94; *Rex* v. *Kirk* (1934), 62 Can. C.C. 19; *Rex* v. *Mills* (1935), 25 Cr. App. R. 138.

Sears, for the Crown: The confessions were entirely voluntary: see *Rex* v. *Pattison* (1929), 21 Cr. App. R. 139. If a statement is voluntary it is admissible, whether cautioned or not: see *Prosko* v. *Regem* (1922), 37 Can. C.C. 199, at p. 207; *Rex* v. *Miller* (1895), 18 Cox, C.C. 54; *Rex* v. *Colpus and Boorman. Rex v. White,* [1917] 1 K.B. 574; *Ibrahim* v. *Regem,* [1914] A.C. 599, at pp. 610 and 614; *Rex* v. *Godinho* (1911), 28 T.L.R. 3, at p. 4. Without the confession there is other evidence upon which the jury could convict: see *Rex* v. *Hampton* (1909), 2 Cr. App. R. 274; *Eberts* v. *Regem* (1912), 47 S.C.R. 1; *Rex* v. *Burgess and McKenzie* (1928), 39 B.C 492. Whether the confession is voluntary is a question of fact and the judge below so found: see *Rex* v. *Voisin,* [1918] 1 K.B. 531, at pp. 537-9; *Rex* v. *Bellos* (1927), 48 Can. C.C. 126; *Rex* v. *Kong* (1914), 20 B.C. 71; *Prosko* v. *Regem* (1922), 63 S.C.R. 226.

Nicholson, replied. *Cur. adv. vult.*

12th December, 1939.

MARTIN, C.J.B.C.: There will be a new trial for the reasons given by my brother SLOAN.

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MACDONALD, J.A.: I agree.

McQUARRIE, J.A.: I agree.

SLOAN, J.A.: The appellant Rennie, a youth of 17 years (with a mental age of slightly more than 12 years) was convicted of murder at the Vancouver Assize for the killing of Woo Dack, a Chinaman. On December 12th last my Lord the Chief Justice handed down *per curiam* reasons directing a new trial

> because of misdirection to the jury prejudicial to the appellant in that, primarily, the crime of murder with which he was charged was not, with every respect to the learned judge below, properly and adequately defined under the circumstances of the case.

I deem it expedient to state specifically what in my opinion was that misdirection. To do so it is necessary to make a brief reference to the facts. These I extract from an alleged confession that Rennie made to the police as it is the only evidence in the record before us directly linking him with the killing. It appears that Rennie and a girl named Dolores Brooks went to the hotel bedroom of Woo Dack for the purpose of robbing him. Rennie in his said confession states, in part, as follows:

> She knocked at the door and the Chinaman opened the door while lying in bed. Dolores went in leaving the door open and I went in after her. Then I hit the Chinaman who was lying in bed, with the piece of wood that I had picked up in the lane. The first blow did not stun him so Dolores said hit him again. Dolores went through his pockets and got a bit of silver. A note book fell out of his pocket to the floor and I picked it up and got a $1 bill out of it. Dolores kept on hunting and got some silver out of his pockets and said "The money isn't here." She had told me before that he should have about $150. We went downstairs and I dropped the piece of wood in a basket in the hallway.

It is apparent that, under the circumstances of this case, in defining murder to the jury two sections of the Criminal Code were in point, *i.e.*, sections 259 and 260. By section 260 culpable homicide is also murder when in facilitating the commission of the crime of robbery the offender, whether he means death to ensue or not or knows or not that death is likely to ensue, means to inflict grievous bodily injury and death does ensue from such injury.

The learned trial judge did not direct the jury on the elements of section 260 but in fact excluded that section from its consideration by saying in his charge:

I do not care whether they went there to rob him or not. Gentlemen that is not necessary. The Crown does not even have to suggest they went there to rob.

It does not lie in the mouth of the appellant to complain that section 260 was not put to the jury. The omission to do so militates against the Crown and in his favour. What he does contend is misdirection prejudicial to him is that instruction in the charge immediately following the passage just quoted. The learned judge continued as follows:

If they went up to this man's room and assaulted him and his death ensues that of course is murder—there cannot be any doubt about that.

The appellant submits that an assault from which death ensues is murder only if and when, on a proper direction, the jury has considered and found against the accused those relevant elements defined in section 259 of the Code which constitute the death of the person killed murder.

With every respect to the learned trial judge this submission is sound.

The relevant subsections (*b*) and (*d*) of section 259, are as follows:

Culpable homicide is murder,

(*b*) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*d*) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

The jury in this case was not asked to pass upon the relevant and essential elements in section 259 in order to determine whether or not the accused was guilty of murder. To illustrate: The jury must be instructed that before convicting the accused of murder under (*b*) of section 259, it must be satisfied that the bodily injuries inflicted by the offender were known to him to be likely to cause death and he was reckless whether death ensued or not. In like manner the jury must be instructed to pass upon the essential elements of (*d*) of section 259.

The failure of the learned trial judge to instruct the jury in the proper definition of murder under section 259 must, under the circumstances of this case, necessitate a new trial for it is impossible for us to say that if the jury had been properly

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directed a conviction of murder must have been the inevitable result.

O'HALLORAN, J.A.: I agree there should be a new trial. Having excluded section 260 in the manner stated by my learned brother SLOAN, the failure of the learned judge to instruct the jury in the elements of murder under section 259, constituted misdirection. This misdirection conjoined with the unsatisfactory proof of the voluntary character of the statement of the accused to the police, referred to by my Lord the Chief Justice, renders me unable to say that a substantial wrong or miscarriage of justice did not actually occur (section 1014 (2)), and the more so in the circumstances of this case when the jury did not have before it the evidence of McMillan and the girl Brooks which I am led to believe might have had a material bearing on the crime of murder with which the accused was charged.

New trial ordered.

Solicitor for appellant: *Ronald Howard.*
Solicitor for respondent: *J. Edward Sears.*

REYNARD AND REYNARD v. THE MUTUAL LIFE ASSURANCE COMPANY OF CANADA.

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March 28;
April 9.

Insurance, life—Restrictions as to aeronautics in the policy—Interpretation.

R.'s life was insured in the defendant company by a policy issued on the 22nd of June, 1933, and provided for payment of $2,500 to R. at the expiration of 37 years. The policy further provided that if the assured died within the 37-year period and while the policy was in force, the $2,500 would be paid to his parents. R. was killed while flying a plane on October 9th, 1938. The assured had paid all the insurance premiums required by the policy. One clause in the policy provided "this policy shall be free from all restrictions as to aeronautics, provided the life insured does not make an aerial flight as a pilot or student pilot within a period of two years after the date of issue. If the life insured makes an aerial flight within the said period as a pilot or student pilot he must first give written notice to the company and must pay such extra premiums as the company shall determine, the first of such extra premiums to be paid before the flight is made, unless the flight is made in the active service of the militia of Canada, in which case notice must be given and the first extra premium paid within ninety days of such flight; but if he fails to comply with these conditions and death occurs either within the period or subsequently, as a direct or indirect result of his having made an aerial flight as a pilot or student pilot, the liability of the company shall be limited to the return of all premiums paid." R. did not give any notice of flying during the two-year period nor did he pay any additional premiums. It was found on the trial that R. made an aerial flight as a student pilot within the two-year period, and that he was killed while making an aerial flight as a pilot on the 9th of October, 1938, but it was held that the interpretation of the said clause was that if the assured made an aerial flight as a pilot or student pilot within two years from the date of issue without accident and without having given written notice or having paid additional premium, then the said insurance policy was in full force and effect until maturity, even though the insured was, after the expiration of the two-year period, killed as a result of making an aerial flight as a pilot or student pilot.

Held, on appeal, affirming the decision of ROBERTSON, J., that the true effect of the clause is disclosed by the latter part, beginning with the words "but if he fails to comply with these conditions," etc. "These conditions" are set out in the earlier part of the clause and refer to flying within the two-year period without written notice. The breach followed by death from another flight four years after the expiration of the two-year period does not go to the root of the contract and does not limit the company's liability.

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APPEAL by defendant from the decision of ROBERTSON, J. of the 3rd of October, 1939, whereby he awarded the plaintiffs judgment for $2,500 and costs. The plaintiffs are the parents of Arthur Reynard whose life was insured by the defendant company on June 22nd, 1933. The policy provided for payment to Arthur Reynard of $2,500 at the expiration of 37 years, when he would be 55 years old, if then living, otherwise payable to his parents. Reynard was killed while flying a plane on October 9th, 1938. The assured had paid all the premiums required by the policy. The defendant's refusal to pay the insurance is based solely on clause 5 of the policy which is set out in the judgment of MACDONALD, J.A. The defendant claims that without giving written notice to the defendant company or paying the additional premiums as required by said clause 5, Arthur Reynard made aerial flights as a pilot or student pilot within two years of the date of the issuance of the said policy. On the trial it was held as to said clause 5 that if the assured made an aerial flight as a pilot or student pilot within two years from the date of issue without accident and without having given written notice or having paid an additional premium, then the said insurance policy was in full force and effect until maturity, even though the assured was, after the expiration of the two-year period, killed as a result of making an aerial flight as a pilot or student pilot.

The appeal was argued at Vancouver on the 28th of March, 1940, before MACDONALD, MCQUARRIE and O'HALLORAN, JJ.A.

Clark, K.C., for appellant: The case turns solely on the interpretation of clause 5 of the policy. There is error in saying that the insurance is not affected when he flies within the two years without accident. There was a breach because he flew within the two years; secondly, he gave no notice of intention to fly; thirdly, he paid no extra premium; fourthly, he died subsequently in flying a plane. The learned judge found that he flew within the two years. Nothing can be inserted in the policy in conflict with the words used: see *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651, at p. 655. The consequence of a breach of warranty is to discharge the insurer from liability from the

date of the breach: see *Thornton* v. *Knight* (1849), 16 Sim. 509; *Brooking* v. *Maudslay, Son & Field* (1888), 38 Ch. D. 636; *The India and London Life Assurance Company* v. *Dalby* (1851), 15 Jur. 982; *Newcastle Fire Insurance Co.* v. *McMorran and Co.* (1815), 3 Dow 255; *Hambrough* v. *Mutual Life Insurance Co. of New York* (1895), 72 L.T. 140. Warranty must be taken to be a condition precedent, the breach of which voids the policy: *Barnard* v. *Faber,* [1893] 1 Q.B. 340; *Douglas et al.* v. *Knickerbocker Life Ins. Co.* (1881), 83 N.Y. 492; *Sparenborg* v. *Edinburgh Life Assurance Company,* [1912] 1 K.B. 195. The assured is not entitled to recover the premiums paid: see *Arundell* v. *Provident Mutual Life Assurance Association* (1934), 78 Sol. Jo. 319. The company must base its rates on the risk involved: see *Duckworth* v. *Scottish Widows' Fund Life Assurance Society* (1917), 33 T.L.R. 430.

T. Todrick, for respondent: The defendant must prove (1) That flights were made by Reynard within the two years; (2) that no written notice was given and that no extra premium was paid; (3) that death resulted from a flight made as a pilot or student pilot; (4) that death resulted from a flight within the two years. In attempting to prove flights within the two years hearsay evidence was allowed in: see *Price* v. *The Dominion of Canada General Insurance Co.,* [1938] S.C.R. 234. The plaintiffs say that it is only where the flight is made within the two-year period and death results therefrom that the defendant can escape liability, although the death may not have occurred until after the two-year period had expired. Where there is ambiguity the provision must be construed against the company: see *Woodward's Ltd.* v. *United States Fidelity and Guaranty Co.* (1927), 38 B.C. 171, at p. 179; *In re Etherington and Lancashire &c. Accident Insurance Co.* (1909), 78 L.J.K.B. 684, at pp. 686-7 and 689; *In re Bradley and Essex Accident Indemnity Society, Lim.* (1911), 81 L.J.K.B. 523, at pp. 525-6; 530-1.

Cur. adv. vult.

18th April, 1940.

MACDONALD, J.A.: Appeal from the judgment of ROBERTSON, J., in favour of the plaintiffs for the sum of $2,500 due under a

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policy of life insurance issued in June, 1933, to one Arthur Reynard since deceased. The action was brought by the beneficiaries under this policy. This sum was payable to the assured at the expiration of 37 years if then living; otherwise to the plaintiffs (respondents).

Arthur Reynard, the assured was killed while flying in 1938. The policy had been in effect for over five years and the ordinary premiums called for by the policy were paid. Appellant's refusal to pay upon death is based upon the provisions of two clauses in the policy, numbered 4 and 5. They read as follow:

4. RESIDENCE AND OCCUPATION—After this contract takes effect there is no restriction upon the person whose life is insured in respect of residence, travel or occupation except as provided in the clause respecting aeronautics or as provided in any Total Disability or Double Indemnity provision forming a part of this contract.

5. AERONAUTICS—Except for the provisions relating to aeronautics in any Disability or Double Indemnity Accident Benefit forming a part of this contract, this policy shall be free from all restrictions as to aeronautics, provided the Life Insured does not make an aerial flight as a pilot or student pilot within a period of two years after its date of issue. If the Life Insured makes an aerial flight within the said period as a pilot or student pilot he must first give written notice to the company and must pay such extra premiums as the company shall determine, the first of such extra premiums to be paid before the flight is made, unless the flight is made in the ACTIVE service of the Militia of Canada, in which case notice must be given and the first extra premium paid within ninety days of such flight; but if he fails to comply with these conditions, and death occurs either within the said period or subsequently, as a direct or indirect result of his having made an aerial flight as a pilot or student pilot, [within that two-year period] the liability of the company shall be limited to the return of all premiums paid, without interest, or the principal sum assured, whichever is the smaller, adjustment being made in either case for any indebtedness under the policy.

For greater clarity I have inserted in brackets after the line in clause 5 "an aerial flight as a pilot or student pilot" the words "within that two-year period." These words of course are not contained in clause 5. I insert them to indicate clearly the true construction of the clause. We are not permitted to add words to the clause: it is our right, however, to give the clause the reading assigned if the sense and context justify it.

As stated the assured Reynard was killed while flying a plane on the 9th of October, 1938. His father now sues as administrator together with deceased's mother as a beneficiary under the

policy. The only question to determine is whether or not the policy was vitiated for non-compliance with clause 5 or the liability of appellants reduced. It will be observed that the flight undertaken on the 9th of October, 1938, when the assured was killed, was not made "within a period of two years" after its date of issue; the policy was issued in 1933.

I am assuming for this decision that the following findings of fact made by the learned trial judge in these words were justified by the evidence:

> I find on the evidence of J. A. Wright that the assured made an aerial flight as a student pilot in 1934 within the two-year period. Plaintiff suggested that there was no definition of the word "student pilot" and that therefore it might mean a pilot who was taking further lessons. In my opinion Reynard, who was taking lessons in flying from a duly qualified flying pilot, was a student pilot. I also find that he was killed while making an aerial flight as a pilot on the 9th October, 1938.

My acceptance of these findings does not mean that we have concurrent findings of fact by this Court and by the trial judge. I merely assume that facts as stated because on that basis, in my opinion, appellant cannot succeed. In general I am in agreement with the views of the learned trial judge. As stated by him the only restrictions placed upon the occupation of the deceased are contained in paragraph 5. That is clear when read with the provisions of paragraph 4. The company doubtless, in framing this policy had in mind that special risks attend flying, either by pilots or by student pilots during the first two years: it is a testing period. After that time the danger would abate because of experience gained. There is no doubt that in making flights within the two-year period a breach of the first part of clause 5 was committed. The deceased should have given written notice to the company; an extra premium would then have been exacted if the company decided to impose it. The assured took the risk of ignoring this provision in the policy. We are not now concerned with speculations as to the result of the breach had death occurred from flying within that period; nor are we concerned with whether or not the breach, apart from fatal consequences, gave rise to an action for damages or otherwise. The point is, did this breach followed by death from another flight four years later go to the root of the contract and limit the company's liability as defined therein?

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The true effect of the clause is disclosed by the latter part beginning with the words "but if he fails to comply with these conditions," etc. "These conditions" are set out in the earlier part of the clause and refer to flying within the two-year period without written notice. No other condition can be found, such, for example, as flying at any time without notice during the whole life of the policy. It is clear therefore that all the consequences to follow are attendant upon that specific breach and upon that breach only. If death occurred either within the two-year period or later as a result of injuries received while flying during that period with no notice given, appellant's liability would be limited to the return of premiums, etc., not so otherwise. It follows that when the clause speaks of an "aerial flight as a pilot or student pilot" near the end of the clause an unlawful flight or one in breach of the only prohibition the clause contains is referred to.

On the construction submitted by appellant, as it was an endowment policy extending over a period of 37 years, had the assured been killed 20 years hence, as the trial judge points out, paying premiums in the meantime, it could take the ground that its liability was limited to returning the premiums.

I would dismiss the appeal.

MCQUARRIE, J.A.: I agree with the reasons for judgment of my brother MACDONALD. The appeal should be dismissed.

O'HALLORAN, J.A.: I would dismiss the appeal. I am in agreement with the reasons and the conclusions of Mr. Justice ROBERTSON the learned judge who tried the case.

Appeal dismissed.

Solicitor for appellant: *J. A. Clark.*
Solicitor for respondents: *Thomas Todrick.*

CAMERON v. DAVID SPENCER, LIMITED.

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Mar. 13, 14; *April* 15.

Negligence—Escalator in departmental store—Customer ascends from first to second floor—Her heel catches in slot on landing plate—Shoved violently from behind—Back injured—Damages—Appeal.

The plaintiff entered the defendant's store as a customer and used the escalator running from the first to the second floor. When she reached the top the heel of her shoe caught in one of the slots in the metal landing plate into which the moving cleats enter and disappear downward. The plaintiff being held fast, she was pushed violently forward by those behind her. Her heel broke away from the aperture and falling, her back was severely injured. She was awarded $3,000 damages on the trial.

Held, on appeal, affirming the decision of McDONALD, J., that the slot in which her heel was caught must be regarded as a concealed danger to the respondent, in the sense that the danger of catching her heel cannot be said to have been obvious to her. There is no evidence of negligence on her part. In these circumstances the appellant must be held to be responsible for her injuries arising from catching her heel as she did.

APPEAL by defendant from the decision of McDONALD, J. of the 6th of October, 1939, granting the plaintiff $3,000 damages in an action alleging that on the 14th of December, 1936, while engaged in shopping, she suffered personal injuries when ascending by the escalator from the ground floor to the first floor in the department store of the defendant company. She claims that when she reached the top and was about to step off, the heel of her shoe caught in one of the slots of the escalator, and being held fast she was pushed violently forward by those behind her. This pulled her free from the escalator but her back was severely injured.

The appeal was argued at Vancouver on the 13th and 14th of March, 1940, before MACDONALD, McQUARRIE and O'HALLORAN, JJ.A.

H. I. Bird, for appellant: The finding of negligence by the defendant is not supported by the evidence. The mere occurrence of an accident does not warrant an inference of negligence: see *Welfare* v. *London and Brighton Railway Co.* (1869), L.R. 4 Q.B. 693, at pp. 698-9; Beven on Negligence, 2nd Ed., 135.

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Twenty-five years of safe operation of a machine, carrying 5,000 persons daily, is an answer to the suggestion that the machine was defective or the defendant negligent in the operation of it. As to the duty of the occupier of a premises to an invitee see *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, at pp. 387-8. The invitee must use reasonable care on her part for her safety and to prevent damage from unusual danger which she knows or ought to know: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 604; Pollock on Torts, 9th Ed., 524; *Elliott* v. *Toronto Transportation Commission* (1926), 59 O.L.R. 609; *Crafter* v. *Metropolitan Railway Co.* (1866), L.R. 1 C.P. 300; *Alexander* v. *City and South London Railway Company* (1928), 44 T.L.R. 450; *Kester* v. *The City of Hamilton,* [1937] O.W.N. 162. The escalator was of a standard design of a type in common use. The plaintiff assumed the risk of using the escalator while wearing shoes of the type she was wearing: see *Levita* v. *T. Eaton Co. Ltd.* (1937), unreported, discussed in 6 F.L.J. 294.

J. A. MacInnes, for respondent: It was found by the trial judge that a hidden danger to customers using the escalator did exist. The heels of shoes generally used now being small, were liable to slip into and be caught in the slots of the landing-plate. She had no warning of the risk she ran while wearing these shoes. This was a finding of fact and will not be disturbed: see *Granger* v. *Brydon-Jack* (1919), 58 S.C.R. 491; *McCoy* v. *Trethewey* (1929), 41 B.C. 295. The defendant knew of the danger from experience: see *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274. The heel was caught and the marking on the heel shows this. The plaintiff was pushed by passengers following her on the escalator: see *Cooil* v. *Clarkson* (1925), 35 B.C. 308, at 310. The defendant should have foreseen the accident and should have taken steps to have avoided it: see *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at p. 222; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358; *Willis* v. *Coca Cola Company of Canada Ltd.* (1933), 47 B.C. 481; *The European* (1885), 10 P.D. 99. The evidence shows negligence and the finding was justified and should not be disturbed: see *Scott* v. *London Dock Co.* (1865), 3 H. & C.

596; Salmond on Torts, 9th Ed., 470; *Hayward* v. *Drury Lane Theatre and Moss' Empires,* [1917] 2 K.B. 899, at p. 914.

Bird, replied.

Cur. adv. vult.

15th April, 1940.

MACDONALD, J.A.: Appeal from the judgment of MCDONALD, J., awarding respondent $3,000 damages for injuries sustained while riding on an escalator running from the first to the second floor of appellant's department store in Vancouver.

We are not trying this action: our duty is to ascertain if proper legal principles were applied and the evidence warranted the finding. On the first branch the trial judge was right in applying the principles of the well-known decision in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, where in an oft-quoted passage Willes, J., said at p. 288:

> . . . with respect to such a visitor [an invitee as in this case] at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; . . .

The approach, therefore, was right; the only other question is—do the facts bring the case within these principles? The trial judge found that a place of "hidden danger" existed at the top of the escalator and that appellant knew of its existence: that is one element. The evidence justifies the finding of knowledge. Accidents of a similar nature occurred before: the heels of ladies' shoes were wrenched off or damaged while riding upon it. It was not shown that these accidents occurred at the precise spot in question, *viz.,* at the top of the escalator. The fact, however, that they did occur should have called appellant's attention to the general need for care and the necessity of repairing, altering, or guarding. If not possible to eliminate the danger, later discussed, by alterations it should at least be guarded by signs or by means of an attendant.

The trial judge also found that respondent was not negligent: that is another necessary element. As the accident occurred when she was about to step on the landing-plate at the top it was urged that she did not exercise due care: had she done so, she might easily have avoided the cavity presently referred to:

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that was the submission. The answer is that large numbers, during a working day, ascend and descend this escalator: the greater the number the more difficult it would be to observe the precise spot under foot where care ought to be exercised. At least one passenger, her daughter, was in front of respondent: that would obscure her view to some extent: others were crowding behind her. As her right foot reached the solid part of the landing-plate on the second floor the heel of the left foot was caught in a cavity or space between fingers extending out from the solid plate of sufficient width to permit the heel to enter it when pressure was applied and deep enough to prevent it from being readily withdrawn. Another passenger would conceal it wholly or partially from view; it follows that at least, means should have been taken to call attention to the necessity of stepping across this intervening space in safety. On the whole, I do not think it possible to say that the trial judge was clearly wrong in not finding negligence on respondent's part; she used therefore "reasonable care for her own safety."

There is a further finding—at all events it is necessarily implied—that the place where the injury occurred was one of "unusual danger." Does the evidence support it? One can get little assistance in comparing facts in many cases with the facts herein: each must be considered on its own special facts. Had the accident occurred, for example, midway while the respondent was in the act of ascending through the heel being caught between shallow cleats the result might well be different. This appears from other decisions. I doubt if the heel of a boot could have been firmly caught in any other part of the escalator. The finding that in this case a place of "unusual danger" existed can be supported because of special facts, not applicable to all escalators. It is defective at the spot where an accident would likely occur if at all, *viz.*, while stepping off a moving stairway on to a solid metal plate imbedded in the floor and on a level with it. There is no special danger in ascending or descending the escalator; the likelihood of danger occurs in quitting it. It is unsafe at the top where the turn is made at the landing-platform. This was a defect in original construction. It is the cleat type escalator consisting of two mechanically operated

inclined planes, one for use in ascending, the other in descending. Where the customer stands it is studded with wooden cleats or blocks. There is, as indicated, a solid metal plate about eighteen inches square (the precise size is not material) imbedded in the floor at the top of the escalator upon which passengers step on quitting it. Eight metal fingers nineteen and one-half inches in length extend outwards therefrom with enough space between each to catch the heel of a lady's shoe; these fingers after extending horizontally a short distance from the plate are bent downwards to conform with the inclined runway. In the space between them the moving cleats pass and disappear below. These cleats would completely fill the space between the fingers were it not that a circular turn is made thereunder before the solid plate is reached. This leaves a cavity or space between the fingers in that area between the point where the turn begins and the landing-plate, with the depth increasing as the turn is completed. It is this unnecessary cavity somewhat difficult to describe that creates the danger; it should have been so designed that the moving cleats would pass snugly under the solid part of the metal plate before making the turn; in that event no space would be left for a heel to become impaled.

While there is no evidence on the point one can readily perceive that with the step type of escalator where mechanical action creates steps as one ascends the horizontal part of the last step would pass snugly under the metal plate leaving no intervening space to invite an accident such as this.

The trial judge did not take a view and, as stated, it is not easy to appreciate the true situation, or to succinctly describe it. I draw my conclusions as to the nature of this place of "unusual danger" from the evidence, some photographs and particularly a diagram or sketch drawn by the witness Edmunds and marked Exhibit 1. The turn should not have been made at the point indicated; it should have been carried far enough forward under the solid part of the metal plate before turning downward to avoid creating the situation revealed. As the trial judge decided—and I think he was right in doing so—it constituted a place of "unusual hazard." That is a finding of fact and it is supported by the evidence.

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The safety of customers visiting a store is not guaranteed. They must, in general, accept conditions as they find them. Nor are appellants obliged to keep their premises in such a condition that no one can possibly get hurt. That is not our situation. It is sometimes said (*Elliott* v. *Toronto Transportation Commission* (1926), 59 O.L.R. 609) that one is not bound at once to adopt the latest improvements and appliances. This escalator was designed 30 years ago. I have no doubt, although it is not disclosed by the evidence, that in later designs this cavity does not exist. It would be unreasonable to impose liability because newer and probably more efficient escalators are now turned out by manufacturers, thus requiring that equipment reasonably satisfactory should be discarded when an improvement in design appears. It is difficult, however, to make a positive declaration on this point subject to no exceptions. Certainly as in this case if an escalator still in use contains a part or place of "unusual danger" known to the occupier and unknown to the visitor using reasonable care it would be no answer to say that to impose liability would compel the merchant to discard it for more modern equipment. If this escalator installed 30 years ago is defective in the respect indicated the merchant retains it at his own risk. Negligence is absence of care according to circumstances and I would add according to accepted standards demanded by reasonable men at the time an accident occurs. It would, I think, be possible for a jury 30 years ago on the facts existing to exonerate the occupier while another jury today on the same facts might impose liability. Standards of safety may change with the times particularly where the population has greatly increased.

We were directed to an unreported decision in *Levita* v. *T. Eaton Co. Ltd.*, discussed in 6 F.L.J., May 1st, 1937, where a Court consisting of Latchford, C.J., Masten and Macdonnell, JJ.A., the latter dissenting, reversed a decision of a county court judge in favour of the plaintiff who suffered injuries through a shoe being caught between the cleats of an escalator while descending. Assuming only, in the absence of an official report, that it is correctly reported it does not follow that in my view it was wrongly decided. This decision is based on its own

special facts. I would be surprised to find in modern escalators the depression referred to herein. One need not be a mechanic to observe that if properly designed this accident would not have occurred.

I would dismiss the appeal.

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

O'HALLORAN, J.A.: The respondent was injured while being carried up an escalator in the appellant's department store in the city of Vancouver. When it reached the top she could not lift her left foot. Her heel was caught in one of the slots in the metal landing-plate into which the moving cleats enter and disappear downward. She was lawfully there for the purpose of shopping in the appellant's store. She was the only person to give evidence of the actual happening.

These slots are stated to be nineteen and a half inches long. It appears the moving cleats fill these slots "flush" with the surface of the floor, for about half their length. But at about the half way point the moving cleats begin to turn downward, leaving holes in the remaining length of the slots, of increasing (but unstated) depth. This factual synopsis is taken from the oral evidence read with the photographs and sketch filed. It is the factual situation accepted by counsel before us. In answer to the Court, counsel for the appellant admitted there were holes of this description in the metal slots, but added there was no evidence as to their length or depth. Although the slots themselves may have been reasonably apparent to the respondent (there was one child in front of her), yet one may easily understand that the holes in the final half of the slots would not be obvious to her. When standing on the moving escalator she would have no reason to expect her heel to be carried into and caught in a hole in the landing-plate at the top. The large number of people using the escalator would in itself be a factor to imbue her with confidence that she could use it without danger.

The circumstances recited compel the conclusion that the slot in which her heel was caught must be regarded as a concealed danger to the respondent, in the sense that the danger of catching her heel cannot be said to have been obvious to her. There is no

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evidence of negligence on her part. In these circumstances the appellant must be held responsible for her injuries arising from catching her heel as she did. *Vide Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50. The decision of the House of Lords in that case as I read it, turned on the question of fact whether the hole in a stairway was or was not a concealed danger. The appellant's duty here was to maintain its escalator in such condition that the persons using it would not be exposed to dangers which they could avoid by the exercise of reasonable care for their own safety. It failed in that duty. The truth appears to be that accidents of this nature have been so rare, that the appellant has not troubled to guard against them. It has taken the chance.

Furthermore it appears from the appellant's answers to interrogatories Nos. 11 and 12 that it was aware there were current fashions in women's and girls' footwear with heels of a size and shape narrower than the width of the slots. The appellant sold shoes of this type in the ladies' shoe department of its own store. Since the respondent's heel was caught in the slot, it follows she was wearing shoes of this type. The escalator was placed there —as were the stairways and elevators—for use by all persons in the store to enable them to pass from one floor to another. These slots as already stated, constituted a concealed danger to the respondent and people like her wearing shoes with heels which could be caught therein. Yet the appellant did not warn such persons of that concealed danger. There was a duty upon it to do so. That duty is deduced from the facts stated, *viz.*, that the respondent was one of a class for whose use in the contemplation and intention of the appellant the escalator was placed where it was, and it was so used by the respondent without knowledge of and without reasonable opportunity of detecting the concealed danger. The failure to warn and the injury to the respondent are in essence directly and intimately associated. *Vide Grant* v. *Australian Knitting Mills Ltd.* (1935), 105 L.J.P.C. 6, Lord Wright speaking for the Judicial Committee at pp. 14-15. Also *Donoghue's* case (1932), 101 L.J.P.C. 119, Lord Atkin at pp. 127-8.

The failure of the appellant to warn the respondent, raised a

presumption that this breach of duty contributed to the accident. At this point the *onus* was on the appellant to rebut that presumption by showing a way in which the injury could have happened to the respondent without this breach of duty contributing to it. The appellant has failed to do so and there is no evidence of contributory negligence on the respondent's part. In such circumstances, it must be held that the appellant is guilty of negligence attaching to it on a proper inference from the facts stated: *vide Ballard* v. *North British Railway Co.* (1923), S.C. (H.L.) 43, Lord Dunedin at pp. 53-54. Negligence is found as a matter of inference from the appellant's breach of duty in conjunction with all the known circumstances. Even if the appellant could by apt evidence have rebutted that inference it has not done so: *vide Grant* v. *Australian Knitting Mills Ltd., supra,* at p. 13. Lord Macmillan (with whom Lord Atkin and Lord Wright agreed) observed in *Shacklock* v. *Ethorpe, Ltd.,* [1939] 3 All E.R. 372, at p. 374:

> The word "negligence" is tending in modern legal usage to be restricted to denoting the breach of a duty owed to some other person.

Counsel for the appellant pressed us with an unreported oral decision of the Ontario Court of Appeal in *Levita* v. *T. Eaton Co. Ltd.,* and also a Divisional Court decision (Branson and MacKinnon, JJ.) *Alexander* v. *City and South London Railway Company* (1928), 44 T.L.R. 450, as discussed in a contributed article in (1937), 6 F.L.J. 294, entitled "Liability for accidents on Escalators." As to *Levita* v. *T. Eaton Co. Ltd., supra,* counsel were unable to furnish us with the oral reasons (although so requested), so reference thereto must be confined to the statement of the case discussed in 6 F.L.J. *supra.* In the statement of facts there, it appears "it was obvious" that heels such as the plaintiff wore "could go down between the cleats on the escalator and occasionally heels of this sort were torn off." The learned county judge found the escalator "constituted an unusual danger," for which the Eaton Company was responsible and awarded her $225 damages.

The Court of Appeal allowed the appeal (Macdonnell, J.A. dissenting), on the ground that in so finding the learned county judge went beyond what the evidence warranted. This conclu-

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sion of the Court of Appeal eliminated all question of concealed danger such as exists here. In the *Levita* case the plaintiff had given evidence

> that there was a clear space in front of her with nothing to prevent her seeing where she was placing her feet.

That is not this case. For if the respondent here had given evidence that she had placed her heel in a hole which she could see, the whole aspect of this case would be changed. The respondent's foot was caught, not by an act of hers in placing her foot in a hole which nothing prevented her seeing, but by the motion of the escalator carrying her left heel into a hole which she had no reason to believe was there.

In *Alexander* v. *City and South London Railway Company, supra,* the plaintiff caught her heel in an escalator at South Clapham Station; she fell and sprained her ankle. She was awarded £25 damages. An appeal to the Divisional Court was allowed, it being held

> there was no duty imposed on a railway company to keep everything at its stations in such a condition that nobody could by any possibility hurt himself.

It appears the decision turned on the design of the escalator and not its condition. Counsel for the respondent submitted the railway company ought to make it impossible for such an accident to happen. From the brief report of the judgment it would appear there was no evidence to support a finding of concealed danger. That case is of no assistance therefore to the decision of the case at Bar.

I am of opinion, with respect, that the learned trial judge reached the right conclusion. I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *H. I. Bird.*
Solicitor for respondent: *George F. Cameron.*

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June 8, 9, 12, 13, 14; *Sept.* 12.

Charterparty — Loading in British Columbia for Shanghai — Hostilities between China and Japan—Notification by charterer of cancellation of charterparty—Action for damages—Frustration.

Rel'd to Galt v. Waterhouse [1944] 2 DLR. 158

Appld Robbins v. Wilson [1944] 4 DLR. 663

On the 13th of March, 1937, the Sheaf Steam Shipping Company Limited chartered their steamship "Sheaf Crown" to the plaintiff for voyage from British Columbia to Japan, or at charterer's option to Shanghai direct. By sub-charterparty of June 25th, 1937, the plaintiff chartered the vessel to the defendant for a similar voyage, namely, from British Columbia to Japan, or at charterer's option, Shanghai direct. By a further sub-charterparty of June 25th, 1937, the defendant chartered the vessel to the Ocean Shipping Company Limited for a similar voyage, namely, from British Columbia to Japan, or at charterer's option, Shanghai direct. By telegram of August 17th, 1937, the Ocean Shipping Company Limited exercised the said option and elected for a voyage to Shanghai direct. Between March 4th and August 6th, 1937, the Ocean Shipping Company Limited entered into five freight contracts for assembling cargo for said vessel. About the 13th of August, 1937, hostilities commenced between China and Japan, centering in and about Shanghai, although trouble had been brewing for some time previously to the knowledge of the parties. On the 12th of August, 1937, the "Sheaf Crown" was in mid-Pacific on her way from Japan to British Columbia to fulfil her chartered voyage. As hostilities increased, on the 20th of August, 1937, the defendant notified the plaintiff in writing as follows: "We hereby notify you that on account of the war between China and Japan, our charterparty on the S.S. Sheaf Crown dated San Francisco June 25th has become impossible of performance and we hereby declare it cancelled." The plaintiff recovered judgment in an action for damages for breach of the charterparty.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that on the 20th of August, 1937, the Ocean Steamship Company Limited notified the defendant that on account of said war its charterparty on the "Sheaf Crown" became impossible of performance and declared it cancelled. On receipt of this notice, and on the same day, the defendant notified the plaintiff in similar terms, declaring its charterparty cancelled. On receipt of this notice, and on the same day, the plaintiff notified the owner of the vessel in similar terms cancelling the charterparty. The cancellation was accepted by the owner, who five days later rechartered the vessel for another voyage. It must be inferred that the plaintiff, the defendant and the Ocean Shipping Company Limited were united in the common conclusion that the outbreak and continuance of hostilities between China and Japan at Shanghai so profoundly affected their respective charterparties that the contract could

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not be performed. In the result therefore, whether or no the contract was frustrated by reason of the hostilities between Japan and China, yet all the parties interested in the voyage, including the plaintiff and defendant, treated it as frustrated on that account, and are bound by the legal consequences of their own conduct in doing so.

Held, further, that even if this were not so, and if the appellant did commit a breach of contract by its notice of termination on the 20th of August, nevertheless the judgment should be set aside; for in refusing on the 21st of August to accept the appellant's notice of termination, the respondent thereby kept the contract alive at its own risk until the time for performance on 15th September, 1937; having done so it proceeded to incapacitate itself from performing its part of the contract on that date by enabling the owner of the S.S. "Sheaf Crown" to terminate its charterparty and possess the vessel on 25th August, 1937.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 9th of February, 1939 (reported, 53 B.C. 408, and see p. 401), in an action for damages for breach of a contract contained in a charterparty of the steamship "Sheaf Crown" made between the plaintiff as chartered owner and the defendant as sub-charterer on the 25th of June, 1937. By charterparty of March 13th, 1937, the Sheaf Steam Shipping Company Limited chartered this ship "Sheaf Crown" to the plaintiff for voyage from British Columbia to Japan, or at charterer's option, Shaghai direct. By sub-charterparty of June 25th, 1937, the plaintiff chartered the vessel to the defendant. By a further sub-charterparty of the 25th of June, 1937, the defendant chartered the "Sheaf Crown" to the Ocean Shipping Company Limited for a similar voyage, namely, from British Columbia ports to Japan, or at charterer's option, Shanghai direct. The Ocean Shipping Company Limited exercised the option and elected for a voyage to Shanghai direct, and so notified the plaintiff. Between March 4th and August 6th, 1937, the Ocean Shipping Company Limited arranged for and assembled its cargo for the voyage. On August 13th, 1937, the "Sheaf Crown" was in mid-Pacific on her way to British Columbia to fulfil her chartered voyage, and at about this time war broke out between China and Japan, the Japanese landing troops in Shanghai Harbour. In view of the hostilities and the substantial closing of the port to vessels, and the probability that these conditions would prevail for a long time, all contracts involving

the proposed voyage of the "Sheaf Crown" were alleged to be immediately and unconditionally frustrated, and on August 20th, 1937, the Ocean Shipping Company Limited notified the defendant to this effect, and the defendant then so notified the plaintiff and the plaintiff then notified the owners. The "Sheaf Crown" never reached Vancouver.

The appeal was argued at Vancouver on the 8th and 9th, and the 12th to the 14th of June, 1939, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Griffin, K.C. (*Sidney A. Smith,* with him), for appellant: The important question is whether the circumstances which arose in August, 1937, amounted to a frustration of the charterparty. Hostilities commenced August 13th, 1937. On August 20th the Ocean Shipping Company Limited notified us that their charterparty on the "Sheaf Crown" had become impossible of performance and they declared it cancelled. We then declared its charter from the respondent had also come to an end. The respondent then notified the owners that it was at an end. The Shanghai hostilities rendered the unloading of lumber impossible at that port for an unreasonable length of time from August 20th, 1937: see *Kawasaki* v. *Bantham S.S. Co.,* [1938] 3 All E.R. 80, and on appeal [1939] 1 All E.R. 819; [1939] 2 K.B. 544; *W. J. Tatem, Ltd.* v. *Gamboa,* [1938] 3 All E.R. 135; *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *Jackson* v. *Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; *Krell* v. *Henry,* [1903] 2 K.B. 740; *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404; *Horlock* v. *Beal,* [1916] 1 A.C. 486; *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited,* [1916] 2 A.C. 397; *Bank Line, Limited* v. *Arthur Capel & Co.,* [1919] A.C. 435; *Hirji Mulji* v. *Cheong Yue Steamship Co.,* [1926] A.C. 497; *Dahl* v. *Nelson, Donkin, & Co.* (1881), 6 App. Cas. 38; *The Penelope,* [1928] P. 180; Carver's Carriage by Sea, 8th Ed., sec. 232. The circumstances existing in Shanghai were such as to frustrate the adventure within the meaning of the principles set out in the above cases, and the evidence is overwhelming to this effect. No lumber was discharged from any ship in Shanghai during this

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period and the "Sheaf Crown" could not have unloaded at Shanghai at any time up to the end of December, 1937.

Clyne (*Macrae, K.C.*, with him), for respondent: A party to a contract who has made an absolute promise is not discharged from liability if it afterwards appears that it is impossible for him to perform the contract, even though this is not due to any fault on his part: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 209; *Paradine* v. *Jane* (1647), Aleyn 26; 82 E.R. 897; *Atkinson* v. *Ritchie* (1809), 10 East 531; *Matthey* v. *Curling*, [1922] 2 A.C. 180, at p. 234. They seek to apply the doctrine of frustration although not expressed in the contract. The power of implying terms in a contract is exercised sparingly and only in cases of necessity: see *F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited*, [1916] 2 A.C. 397, at p. 403; *In re Comptoir Commercial Anversois* v. *Power, Son and Company*, [1920] 1 K.B. 868, at pp. 878-9, and 902. To apply the doctrine performance must have become physically or legally impossible, not merely unprofitable: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 208; *Blackburn Bobbin Company* v. *T. W. Allen & Sons*, [1918] 2 K.B. 467. The frustrating event must not be in contemplation of the parties: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 215; *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497, at p. 507; *Metropolitan Water Board* v. *Dick, Kerr and Company*, [1918] A.C. 119, at 130. If a substantial portion of the contract is not frustrated, the entire contract is not cancelled: see *Leiston Gas Company* v. *Leiston-cum-Sizewell Urban Council*, [1916] 2 K.B. 428; *Dominion Coal Co. Ltd.* v. *Lord Strathcona S.S. Co. Ltd.*, [1926] 1 W.W.R. 273, at p. 275. Clause 4 of the charterparty shows the parties had in mind the possibility of interference due to hostilities, but there must be actual restraint for the clause to operate: see *Bolckow, Vaughan, and Co. (Limited)* v. *Compania Minera de Sierra Minera* (1916), 32 T.L.R. 404; Scrutton on Charterparties, 12th Ed., 254. Clause 47 deals with circumstances similar to those which arose in Shanghai, but the circumstances in Shanghai were not so aggravated as those contemplated in the clause, and if the circumstances in Shanghai were

less aggravated than the circumstances referred to in clause 47, it was the intention of the parties that the voyage should be completed: see Scrutton on Charterparties, 12th Ed., 31. Dealing generally with frustration, anticipation of danger or fear of delay is not sufficient: see *The Svorono* (1917), 33 T.L.R. 415; *Watts, Watts and Company, Limited* v. *Mitsui and Company, Limited,* [1917] A.C. 227; *Becker, Gray and Company* v. *London Assurance Corporation,* [1918] A.C. 101. The appellant knew of the conditions in Shanghai before it made its election to go there and therefore frustration was self-induced: see *Bank Line, Limited* v. *Arthur Capel & Co.,* [1919] A.C. 435, at p. 452. The essence of frustration is that it shall not be due to the act or election of one of the parties: see *Maritime National Fish, Ld.* v. *Ocean Trawlers, Ld.,* [1935] A.C. 524; *Aktieselskabet Olivebank* v. *Dansk Svovlsyre Fabrik,* [1919] 2 K.B. 162; *Ogden* v. *Graham* (1861), 1 B. & S. 773, at p. 781; *Medeiros* v. *Hill* (1832), 8 Bing. 231. The amount of damages is the difference between the two charterparties. The appellant wrongfully cancelled its charterparty. The *onus* of proving failure to mitigate damage is on the appellant who has offered no evidence in support of such submission: Gahan on Damages, p. 140; Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 95, sec. 118; *Jones* v. *Watney, Combe, Reid, & Co. (Limited)* (1912), 28 T.L.R. 399; *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; *Banco de Portugal* v. *Waterlow & Sons, Ld.,* [1932] A.C. 452. Where one party repudiates a contract the contract remains in force until the other party elects to treat the contract as rescinded: see *Michael* v. *Hart & Co.,* [1902] 1 K.B. 482, at p. 490.

Griffin, replied.

Cur. adv. vult.

MARTIN, C.J.B.C. agreed in allowing the appeal.

SLOAN, J.A.: I have had the advantage of reading the reasons for judgment of my brother O'HALLORAN and as I am in such substantial agreement therewith do not find it necessary to extend my reasons for reaching the conclusion that this appeal, with respect, should be allowed.

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O'HALLORAN, J.A.: Anglo Canadian Shipping Company Limited appeals from a judgment in favour of Australian Dispatch Line for $9,837.50 loss of profit and damage when the steamship "Sheaf Crown" did not make a chartered voyage from Vancouver to Shanghai owing to the outbreak of hostilities between Japan and China in August, 1937. The charter was terminated before the time for loading had expired, and in fact before the vessel began loading, or had taken any cargo aboard. Neither party to this appeal owned the vessel or the cargo to be carried by it on that voyage. The S.S. "Sheaf Crown" was owned by Sheaf Steam Shipping Company Limited of London. On the 13th of March, 1937, for a lump sum of £9,500 British sterling, the owner chartered the vessel to the respondent Australian Dispatch Line of San Francisco for a voyage between British Columbia ports and Yokohama/Moji range "or in charterer's option Shanghai direct"; the vessel was to be ready to load by noon 15th September, 1937. On the 25th of June, 1937, the respondent in turn chartered the vessel to the appellant for this voyage for a lump sum of £11,250. On the same day the appellant in turn at Vancouver chartered the vessel for this voyage to Ocean Shipping Company Limited of Vancouver for the lump sum of £11,250. The latter company then allotted and sold space contracts in the said vessel for logs and lumber to be delivered at Shanghai.

On the 17th of August, 1937, some four days before the S.S. "Sheaf Crown" reached British Columbia waters, Ocean Shipping Company Limited pursuant to a stipulation in the charterparty, wirelessed the captain of the vessel to proceed to Vancouver and load a full cargo of logs and lumber for Shanghai. Hostilities had broken out at Shanghai between Japan and China on the 13th of August, 1937. War was not then or later formally declared, but that did not detract from the intensity of the conflict engaged in by air, naval and land forces in the Shanghai area. Ocean Shipping Company Limited notified the appellant on the 20th of August, 1937, that on account of the war between China and Japan its charterparty on the S.S. "Sheaf Crown" had become impossible of performance and declared it cancelled. On receipt of this notice and on the

same day the appellant notified the respondent in similar terms declaring its charterparty cancelled. On receipt of this notice and on the same day the respondent also notified the owner of the vessel in similar terms cancelling its charterparty.

On the 20th of August, 1937 therefore it must be inferred that the appellant, the respondent and Ocean Shipping Company Limited (which had sold space contracts for a full cargo on the vessel for that voyage) were united in the common conclusion that the outbreak and continuance of hostilities between Japan and China at Shanghai so profoundly affected their respective charterparties that these contracts could not be performed. The Sheaf Steam Shipping Company Limited, the owner of the vessel, accepted this common conclusion beyond doubt five days later on the 25th of August, when it rechartered the S.S. "Sheaf Crown" for a voyage to Australia; the vessel commenced loading on the 30th of August and sailed for Australia on or about the 11th of September, some four days before the time would have expired for her to commence loading for the voyage to Shanghai. It is manifest that the charter for the Australian voyage could not have been entered into, unless the charter for the Shanghai voyage had been terminated. Neither the owner of the S.S. "Sheaf Crown" nor the holders of cargo space for the cancelled Shanghai voyage were called to give evidence.

Counsel for the appellant contended the learned Chief Justice of the Supreme Court who tried the case erred in not finding that the charterparty between the respondent and appellant had been "frustrated." The bulk of the evidence—much of it taken on commission in Shanghai—related to shipping conditions at Shanghai as affected by the hostilities between Japan and China. The appellant maintained that the circumstances which arose were not within the contemplation of the parties when the contract was entered into, and as no clause in the charterparty applied, a condition must be implied therein, that the contract could not be performed in the particular circumstances as intended and was therefore frustrated. The principle of frustration or impossibility of performance enunciated in *Taylor* v. *Caldwell* (1863), 32 L.J.Q.B. 164 (where a music hall was

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destroyed by fire) when applied to charterparties, extends beyond the destruction or non-existence of the subject-matter; it includes cases in which some supervening event modifies the circumstances affecting a contract so profoundly as to justify it being said there is an implied condition in the contract that it shall be treated as at an end—*vide F. A. Tamplin Steamship Company Limited* v. *Anglo-Mexican Petroleum Products Company Limited,* [1916] 2 A.C. 397; *Bank Line, Limited* v. *Arthur Capel & Co.,* [1919] A.C. 435; *Larrinaga and Co., Limited* v. *Societe Franco-Americaine des Phosphates de Medulla, Paris* (1923), 39 T.L.R. 316 (H.L.); *Hirji Mulji* v. *Cheong Yue Steamship Co.,* [1926] A.C. 497. In other words the principle applies also where there is

> cessation or non-existence of an express condition or state of things, going to the root of the contract:

vide Horlock v. *Beal,* [1916] 1 A.C. 486, at 513, and *The Penelope,* [1928] P. 180, at 194. In *Horlock* v. *Beal, supra* (relating to repairs to a ship), Lord Atkinson, at p. 499, approved what was said by Mr. Justice Maule:

> "In matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost."

The point for determination here is briefly was the outbreak of hostilities at Shanghai inconsistent with the further prosecution of the adventure, *viz.,* the chartered voyage to Shanghai? If so frustration was then complete: *vide Hirji Mulji* v. *Cheong Yue Steamship Co., supra,* at p. 509. How is the Court to determine this in the case under review? The vessel was not detained or requisitioned; Shanghai was not blockaded, and neither Britain nor Canada were then at war. By what criteria may it be decided whether or no the conflict between Japan and China at Shanghai modified the circumstances affecting the charterparty so profoundly that it may be concluded there was an implied condition therein that the chartered voyage of the S.S. "Sheaf Crown" should be terminated thereby? The doctrine of frustration is not to be extended for the purpose of assisting a party to escape from a bad bargain. The criteria must be gathered from what reasonable men would be presumed to do. The implied condition must be founded upon the presumed

intention of the parties and upon reason. In *Dahl* v. *Nelson, Donkin, & Co.* (1881), 6 App. Cas. 38, at p. 59, Lord Watson pointed out that

> when the parties to a mercantile contract . . . , have not expressed their intentions in a particular event, but have left these to implication, a Court . . . , in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract.

Lord Watson continued:

> The meaning of the contract must be taken to be, . . . that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

In this case we are not required to speculate what reasonable men would presumably have agreed to do. They did in fact agree what should be done for they terminated the contract, and it is made clear on the record. What the parties did in the circumstances is convincing demonstration of what they would have agreed to if it had been made a matter of express contract when the charterparties were entered into. It is manifest that once the real effect of the conflict between Japan and China was appreciated there was complete unanimity of view among the four parties interested in the voyage to Shanghai, that the outbreak of hostilities affected the circumstances surrounding the voyage so profoundly that there was an implied condition in their respective charterparties that the voyage should be cancelled and their charterparties terminated by reason thereof. Counsel for the respondent admitted it cancelled its charterparty with the owner of the vessel. He contended, however, that it was "compelled" to do so by the action of the appellant in first declaring its charterparty impossible of performance. It is not apparent and I fail to perceive any substantial reason why the respondent should be so "compelled," except on grounds fatal to the respondent's success in the action, *viz.*, that if the charterparty between the Ocean Company and the appellant was impossible of performance then the two previous charterparties were affected in the same way. The three charterparties were concerned with the same voyage and the same vessel upon the same relevant terms; they stood or fell together.

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The four parties interested in the Shanghai voyage having treated it as frustrated, their contractual relations were terminated accordingly, and no loss or damage as claimed can be recovered under the contract before us. The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were and relieves them both from further performance of the contract, and further responsibility under it. *Vide Chandler* v. *Webster,* [1904] 1 K.B. 493, at pp. 498-9, a decision of the Court of Appeal in one of the Coronation cases; and by example also a decision of this Court in *Garrard* v. *Lund,* [1921] 1 W.W.R. 329, Mr. Justice MARTIN (as he then was) at p. 334. In this connection refer *Horlock* v. *Beal, supra,* Lord Shaw of Dunfermline at p. 513, and Lord Wrenbury, p. 526; *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz,* [1921] 2 A.C. 494, Lord Parmoor at p. 523, and *Cantiare San Rocco, S.A.* v. *Clyde Shipbuilding and Engineering Co.,* [1924] A.C. 226; Viscount Finlay, pp. 240-1, Lord Dunedin, p. 248, and Lord Shaw of Dunfermline, pp. 258-9. In *Lloyd Royal Belge Societe Anonyme* v. *Stathatos,* the Court of Appeal as reported in (1917), 34 T.L.R. 70, held there was an interruption of the common object of the parties which caused frustration of the commercial adventure and therefore the charterers were not entitled to recover back the hire which was paid in advance for the vessel. Lord Dunedin discussing this latter decision in *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz, supra,* said at p. 512:

> There is no liability in respect of non-performance in the future, but accrued rights remain untouched and enforceable.

And refer Lord Parmoor at p. 523. It follows therefore that the contracts having been treated as frustrated, there is no right of action for loss or damage as claimed.

Counsel for the respondent contended that there was no frustration of the contract but that the appellant had committed a breach thereof when it declared the contract frustrated on the 20th of August. As we have seen, the respondent on receipt of appellant's notice of frustration on the 20th of August, gave similar notice to the owner of the vessel on the same day. Despite this, on the 21st of August the respondent notified the appellant

it refused to accept the latter's notice of frustration and demanded that it fulfil its charterparty; on the 24th of August it wrote the appellant:

> We are not clear just what the present situation in connection with the above vessel [S.S. "Sheaf Crown"] and your charterparty with the Australian Dispatch Line may be; but we wish to reserve the rights of the Australian Dispatch Line by holding you liable for loss and/or damages if the cancellation of charter is unjustified.

The respondent had some cause for stating it was "not clear" what the situation was; for on the 20th of August it had informed the owner the voyage was frustrated while the next day it had informed the appellant it was not. However, the owner clarified the situation on the 25th of August by chartering the vessel for a voyage to Australia, and thus actively accepting the respondent's notice of frustration and cancellation given the owner on the 20th of August. The result was the respondent having refused on the 21st of August to accept the appellant's notice of termination, yet four days later by its own act put it out of its power to perform its part of the agreement which it insisted should be kept alive and thereby became unable to supply the S.S. "Sheaf Crown" to the appellant for loading not later than 15th September. The respondent having made it impossible to perform its contract before the time for performance arrived created the same legal effect as though it had renounced the contract, *vide Omnium d'Enterprises* v. *Sutherland,* [1919] 1 K.B. 618, at 621; and Anson on Contracts, 17th Ed., 347-8.

If the respondent on the 21st of August instead of refusing to accept the appellant's renunciation, had accepted it as a breach terminating the contract, the contract would have been terminated and the respondent free to enable the owner to possess the ship. But the respondent's letter of the 21st of August refusing to accept its termination kept the contract alive until the date for its performance on 15th September, 1937, and gave the appellant until then to fulfil it. *Vide Avery* v. *Bowden* (1855), 5 El. & Bl. 714; *Reid* v. *Hoskins* (1855), *ib.* 729; *The Danube, Etc., Railway Co.* v. *Xenos* (1863), 13 C.B. (N.S.) 825; 143 E.R. 325; *Dalrymple* v. *Scott* (1892), 19 A.R. 477, at 488-9; *Michael* v. *Hart & Co.,* [1902] 1 K.B. 482, at 490-2;

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Anson on Contracts, 17th Ed., 344-6; Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 229. If the respondent had decided to terminate the contract on account of breach, it would not have written the letter of 21st August, demanding its fulfilment. Having elected to keep the contract alive the contract remained in force until the time for its performance on the 15th of September; the respondent was therefore compelled to keep its own contract with the owner of the vessel alive as well so that it could deliver the vessel to the appellant on the 15th of September. However, the respondent failed to do so, when it permitted the owner to cancel its contract and repossess the ship on the 25th of August. In taking that course the respondent treated the appellant's notice of termination as inoperative, and placed it beyond its own power to carry out the contract. After the time for performance had passed the respondent attempted to hold the appellant responsible without proof of performance of or its ability to perform a condition precedent on its own part, *viz.*, that it was ready, able and willing to supply the S.S. "Sheaf Crown" for loading on the 15th of September; *vide* Mr. Justice Osler at p. 489, *Dalrymple* v. *Scott, supra.* In fact the respondent was not able to deliver the S.S. "Sheaf Crown" on the 15th of September, according to its contract with the appellant which it had elected not to terminate but to keep alive until that date.

In the result, therefore, whether or no the contract was frustrated by reason of the hostilities between Japan and China, yet all parties interested in the voyage including the appellant and respondent treated it as frustrated on that account and are bound by the legal consequences of their own conduct in doing so. Even if it were not so and if the appellant did commit a breach of contract by its notice of termination on the 20th of August nevertheless the judgment should be set aside; for in refusing on the 21st of August to accept the appellant's notice of termination, the respondent thereby kept the contract alive at its own risk until the time for performance on the 15th of September, 1937; having done so it proceeded to incapacitate itself from performing its part of the contract on that date by enabling

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the owner of the S.S. "Sheaf Crown" to terminate its charter-party and possess the vessel on the 25th of August, 1937. For these reasons I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Griffin, Montgomery & Smith.*
Solicitors for respondent: *Macrae, Duncan & Clyne.*

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Practice—Discovery—Action for libel—Refusal to answer questions or produce documents—Tendency to incriminate—Privilege—R.S.C. 1927, Cap. 59, Sec. 5 (2)—R.S.B.C. 1936, Cap. 90, Sec. 5—Criminal Code, Sec. 317—Rule 370c.

In an action for damages for libel the defendant Isaacs, on his examination for discovery, refused to answer questions relevant to the issue on the ground that if given it would tend to criminate him. He also refused to produce certain documents on the same ground. Upon the application of the plaintiff, an order was made directing him to answer the questions and produce the required documents.

Held, on appeal, reversing the decision of ROBERTSON, J., that the alleged libel falls within section 317 of the Criminal Code. Under the common law no person can be compelled to answer questions that would incriminate him. Section 5 of the Provincial Evidence Act compels a "witness" to answer questions, but protection is given from the reception of the answer in a criminal trial or criminal proceedings. Owing to the limited jurisdiction of the Province, this relates only to Provincial crimes. On the authorities it is clear that a person being examined for discovery is not a "witness." But assuming that by virtue of rule 370c a person being examined for discovery is a "witness" within the meaning of section 5 of the Provincial Evidence Act (but not deciding that he is) then he is only a witness in strict relation to those limited matters to which said section applies, *i.e.*, Provincial crimes. On the contention that the defendant is protected by subsection 2 of section 5 of the Canada Evidence Act, whatever effect rule 370c may have on section 5 of the Provincial Evidence Act, it cannot be invoked to extend the operation of section 5 of the Canada Evidence Act so as to include a person being examined for discovery within the term "witness" as used in subsection 2 thereof. On said defendant being examined for discovery he was not a "witness" within said subsection and therefore not entitled to its protection. He cannot be compelled to answer on discovery those questions the answer to which will tend to criminate him, nor can he be compelled on such examination to produce documents which will have the same effect.

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APPEAL by defendant Isaacs from the order of ROBERTSON, J. (reported, 54 B.C. 403) of the 10th of October, 1939, that said defendant do produce for inspection a certain document referred to in the transcript of his examination for discovery, and that he do attend before the registrar at Kelowna and answer certain questions which he refused to answer on the first examination. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 21st and 22nd of November, 1939, before MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

J. W. deB. Farris, K.C. (*Clyne,* with him), for appellant: This is a libel action. He made a speech from a manuscript at Kelowna and the defendant Harris published it. The first ground is that the answers tend to incriminate him. Criminal libel is an offence under section 317 of the Criminal Code. Under the common law no person is compelled to answer questions tending to incriminate him, but section 5 of the Canada Evidence Act and section 5 of the British Columbia Evidence Act must be considered. Isaacs is not a witness but a defendant under examination for discovery under rule 370c. The rule does not compel him to answer questions where the answer makes him liable for a criminal offence. Section 5 of the Provincial Act would not release the witness in case of a prosecution under any charge other than a charge under a Provincial statute. We say the defendant is not a witness: see *Harrison* v. *King,* [1925] 2 W.W.R. 407; *Webster and Kirkness* v. *Solloway Mills & Co., Ltd.* (1930), 3 W.W.R. 445, at p. 448. The Federal Act relates only to witnesses, and the defendant is not a witness. Rule 370c does not supply protection from a Federal Act: see *Bell & Flett* v. *Mitchell* (1900), 7 B.C. 100, at p. 103; *Chambers* v. *Jaffray* (1906), 12 O.L.R. 377. The compulsion should go only as far as the protection goes. Discovery is a compulsory method of extracting admissions. The next point is that the order below compels us to produce a document that tends to incriminate. This is under rule 370j: see *Blumberger* v. *Solloway, Mills & Co. Ltd.* (1931), 44 B.C. 41; *Campbell* v. *Woods, Imrie and Canadian Press,*

[1926] 2 W.W.R. 99; *Lockett* v. *Solloway Mills & Co., Ltd.*, [1931] 3 W.W.R. 389. As to fishing expeditions regarding others who may be liable see *Barham* v. *Lord Huntingfield*, [1913] 2 K.B. 193; *Hamilton* v. *Quaker Oats Co.* (1919), 46 O.L.R. 309; *Hennessy* v. *Wright* (1888), 21 Q.B.D. 509. A "witness" would be protected by the Canada Evidence Act when another would not. The Federal Act is confined solely to a "witness": see *Rex* v. *Demark*, [1939] 2 W.W.R. 501.

Bull, K.C., for respondent: Our law in relation to examination for discovery is borrowed entirely from the Province of Ontario. In this Province a party being examined for discovery is a witness: see *Blumberger* v. *Solloway, Mills & Co. Ltd.* (1931), 44 B.C. 41. Our rules are the same as Ontario and the Evidence Act is the same except that the words "no person" is in the Ontario Act and in our Act, and in the Dominion Act it is "no witness": see *Regina* v. *Fox* (1899), 18 Pr. 343, at p. 348. The Provincial statute is the compelling statute: see *Chambers* v. *Jaffray* (1906), 12 O.L.R. 377, at pp. 381 and 385. The defendant is called to testify and when sworn and examined he is a witness to all intents and purposes. They have not our rule 370c in Alberta. By rule 370c he is called a witness. On the next point involving the manuscript, this is under rule 370j. The document itself will not incriminate him, no harm is done by him producing it. The publication is an issue and the question as to "Who typed it" is relevant. As to the English Rules see *Triplex Glass Co.* v. *Lancegaye Glass, Ltd.*, [1939] 2 All E.R. 613.

Farris, in reply, referred to *Chambers* v. *Jaffray* (1906), 12 O.L.R. 377, at p. 380, and Gatley on Libel and Slander, 2nd Ed., 632, sec. 5.

Cur. adv. vult.

1st February, 1940.

MARTIN, C.J.B.C.: After having had the benefit of considering the judgment prepared by my brother SLOAN herein, I feel that I cannot add anything of value in support thereof.

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

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SLOAN, J.A.: The action herein is for damages for libel. Upon the plaintiff seeking to prove publication thereof by examination of the defendant Isaacs for discovery he was met by the refusal of Isaacs to answer questions relevant to that issue. Isaacs claimed that such answers, if given, would tend to criminate him. Refusal to produce certain documents was based upon the same ground. Isaacs also refused to answer certain questions upon the additional ground that they were irrelevant in that they were not questions "touching the matters in question." Upon application the learned judge below directed him to answer the questions and produce the required documents. From that order Isaacs appeals to us.

Taking up these matters in their order I propose to examine the basis of Isaacs's refusal to answer questions upon the ground that he would by his answers criminate himself.

It is not disputed that the alleged libel falls within section 317 of the Criminal Code. It is therefore one to which the language of Field, J., in *Lamb* v. *Munster* (1882), 52 L.J.Q.B. 46, at 47 might well be applied when he said:

> If a vindictive man got affirmative answers to such questions as these he might go before a grand jury and indict the person who had answered them. These interrogatories, if answered, have a direct tendency to criminate the defendant by eliciting from him an admission of the publication of what is alleged to be a libel.

No authority is required to support the common-law principle that no person can be compelled to discover that which would criminate him. That principle has been made the subject of legislative action.

Section 5 of the Provincial Evidence Act, R.S.B.C. 1936, Cap. 90, reads as follows:

> 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.

By this section the compulsion to answer has as a concomitant full protection from the reception of the answer in a criminal trial or criminal proceeding. Thus the answer which in the absence of the statute would tend to criminate the witness now, by virtue of the same statute which compels the answer, no longer can render the witness liable to criminal prosecution.

Two aspects of this section must be noted. The first: By reason of the limited legislative jurisdiction of the Province (as recognized in section 3), it relates only to Provincial crimes, *e.g.*, breach of municipal by-laws or violations of the Provincial Government Liquor Act. This section can thus afford no protection to a witness in prosecutions for offences under the Criminal Code, *i.e.*, Federal crimes.

The second: The section exerts compulsion upon and extends protection to a "witness."

Putting to one side for a moment Order XXXIA., r. (1) (rule 370c) it is clear that a person being examined on discovery is not a witness—*Harrison* v. *King*, [1925] 2 W.W.R. 407; *Webster and Kirkness* v. *Solloway Mills & Co., Ltd.*, [1930] 3 W.W.R. 445.

Turning then to rule 370c, it reads as follows:

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.

The learned judge below said in relation thereto [54 B.C. at p. 406]:

"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 witness loses his immunity by virtue of section 5 of our Evidence Act." . . .

I do not find it necessary in this appeal to determine whether or not by virtue of rule 370c a person being examined on discovery is a "witness" within the meaning of section 5 of the Provincial Evidence Act. A person may be treated as a witness and be made subject to certain rules of practice as if he were a witness and yet not be a witness in the true sense of the term—*Bell & Flett* v. *Mitchell* (1900), 7 B.C. 103.

Assuming, however, without deciding so, that a person being examined on discovery is by virtue of rule 370c to be deemed to

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be a witness within section 5 of our Evidence Act such person must be regarded as a witness in strict relation to those limited matters to which said section 5 applies, *viz.*, Provincial crimes.

To apply what I have said to the facts of this case it is clear that Isaacs cannot be compelled by section 5 of the Provincial Evidence Act to answer questions the answers to which may tend to criminate him because, for one reason, he can get no protection from our Evidence Act in relation to a prosecution under the Criminal Code. In my view it was never intended by the Legislature to abrogate the common-law principle so as to compel a witness to answer without affording him, at the same time, protection from the penal consequences that might flow therefrom and where there is no protection there can be no compulsion.

Counsel for the plaintiff submits that while the compulsion is found in the Provincial Evidence Act the witness is protected from prosecution under the Code by reason of section 5 of the Canada Evidence Act, R.S.C. 1927, Cap. 59. Subsection 2 of section 5 of that Act is as follows:

> 2. If with respect to any question a 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 Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, 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 the giving of such evidence.

With respect I cannot accede to the contention of counsel for the plaintiff that said subsection 2 affords Isaacs protection. Whatever may be the effect of rule 370c upon the operation of section 5 of the Provincial Evidence Act that Provincial Rule of Court cannot be invoked to extend the operation of section 5 of the Canada Evidence Act so as to include a person being examined on discovery within the term "witness" as used in subsection 2 thereof.

When construing "witness" in subsection 2 of section 5 of the Canada Evidence Act, the principles enunciated in *Harrison* v. *King; Webster and Kirkness* v. *Solloway Mills & Co., Ltd.*,

supra, are to be applied. The result is that when Isaacs was being examined on discovery he was not a "witness" within said subsection 2 of section 5 of the Canada Evidence Act and therefore is not entitled to its protection. When not entitled to protection under the Federal Act he cannot be compelled to answer under the Provincial Act.

Counsel for the plaintiff relied upon *Chambers* v. *Jaffray* (1906), 12 O.L.R. 377, a judgment of the Divisional Court of Ontario. The (then) Ontario consolidated rule 439 was the same as our rule 370c, and it was held that by virtue of its provisions a person being examined for discovery in a libel action was in the same position as a witness at the trial and that therefore within the compulsion and protection of section 5 of the Ontario Evidence Act. That that protection only extended to "the trial of any proceeding under any Act of the Legislature of Ontario" and did not purport to protect the person examined in a prosecution for criminal libel under the Code does not appear to have been considered. True, Mulock, C.J. was of the opinion below that the examinee was protected not only by the Provincial but by the Canada Evidence Act but he, with respect, seems to have assumed that the terms of a Federal statute may be defined for Federal purposes by Provincial Rules of Court.

With great deference I am unable to arrive at the same conclusion as that reached in *Chambers* v. *Jaffray, supra.*

As I am of opinion Isaacs cannot be compelled to answer on discovery examination those questions the answer to which would tend to criminate him I am also of the view that he cannot be compelled on such examination to produce documents which will have the same effect.

Campbell v. *Woods, Imrie and Canadian Press,* [1926] 2 W.W.R. 99, at 103; *Lockett* v. *Solloway Mills & Co., Ltd.,* [1931] 3 W.W.R. 389.

With respect to the contention of counsel for Isaacs that certain questions are not only of an incriminating character but are irrelevant as well I do not find it necessary to deal with this additional submission having found his first objection well taken.

I have considered the possible effect of section 35 of the

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Canada Evidence Act upon this matter but in my view it is of no application. Rule 370c is not "a law of evidence" within the meaning of that section.

With deference to the learned judge below I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Macrae, Duncan & Clyne.*
Solicitor for respondent: *H. V. Craig.*

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GIBSON MINING COMPANY LIMITED *ET AL.* v. HARTIN.

Bankruptcy Act—Right of appeal under—Whether future rights involved—Res judicata—Objection in point of law—R.S.C. 1927, Cap. 11, Secs. 142 and 174.

Appeal from the dismissal of an application made under rule 142 of the Bankruptcy Rules. It was made by petition but all concerned dealt with it as an application made to a judge in Chambers by notice of motion as required by that rule. The petition sought a declaration with ancillary relief that certain mineral claims were the property of the appellant. Counsel for the respondent took the preliminary objection that this Court is without jurisdiction to entertain the appeal, contending that no future rights are involved within the meaning of section 174 (*a*) of the Bankruptcy Act, and the dismissal of the petition disposed finally of the appellant's cause of action.

Held, that in this instance the appeal does not relate merely to a matter of procedure but involves future rights within the meaning of said section, and the preliminary objection is overruled.

On the hearing below counsel for the respondent submitted as a preliminary objection that the issues involved had been determined between the parties in a previous action. The learned judge sustained the objection and dismissed the petition forthwith. It was contended on this appeal that he should have regarded that objection not as a preliminary objection to the hearing of the petition, but as a matter of defence to the allegations in the petition.

Held, that it was an objection in point of law, that the petitioner was precluded from advancing allegations which were contrary to that which had been decided against it in a previous action, and the learned judge was therefore right in proceeding as he did to decide this objection in point of law, and in the circumstances the learned judge could not do otherwise than sustain the objection on the point of law taken by

counsel for the respondents that the Gibson Mining Company Limited was precluded from raising issues before him which had been decided against it in the previous action.

APPEAL by plaintiffs from the decision of MCDONALD, J. of the 2nd of October, 1939, on the plaintiff's petition for a declaration that certain mining claims are the property of the Gibson Mining Company Limited, and that the defendant Hartin be ordered to convey the said claims to the petitioners. In October, 1928, under the direction of the plaintiff Minnie M. May, as one of the plaintiffs, an action was brought in the Supreme Court of British Columbia against the Daybreak Mining Company Limited and other defendants, claiming the recovery of certain mineral claims and all other assets of said company. The action was dismissed and notice of appeal given by the plaintiff was subsequently dismissed for want of prosecution. In August, 1933, under direction of said Minnie May, a subsequent action was commenced in the Supreme Court of British Columbia against the setting aside of the judgment in the 1928 action and claiming for the second time the recovery of said mineral claims. Judgment was given in favour of the plaintiffs by MCDONALD, J. in May, 1934, but on appeal to the Court of Appeal said judgment was set aside in November, 1934. An application by the plaintiffs for leave to appeal to the Supreme Court of Canada was dismissed, and a subsequent application for leave to appeal to the Privy Council was dismissed. The costs awarded the Daybreak Mining Company Limited in the above actions were taxed but never paid. The Daybreak Mining Company Limited or a trustee of said company has held title to the mineral claims referred to continuously since 1923. In February, 1937, Mrs. May with the Gibson Mining Company Limited as plaintiffs, brought action raising the same main issue as in the present petition, namely, ownership and possession of the same mining claims known as the Gibson mines. The plaintiffs obtained judgment by default against all the defendants except Hartin as trustee of the Daybreak Mining Company Limited. In January, 1938, Hartin moved for an order (1) dismissing the action or staying all further proceedings against him on the ground that the action was frivolous and vexatious and an

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abuse of the process of the Court; and (2) striking out the statement of claim as against him on the ground it disclosed no reasonable cause of action. The motion was refused by FISHER, J. but on appeal the appeal was allowed and the action against Hartin was dismissed. An application to the Privy Council for leave to appeal thereto *in forma pauperis* was refused.

The appeal was argued at Vancouver on the 13th and 14th of December, 1939, before MARTIN, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

Minnie M. May, in person.

Unverzagt, trustee of Gibson Mining Company, in person.

H. C. Green, for respondent, raised the preliminary objection that there was no jurisdiction to hear the appeal. It is a bankruptcy matter and governed by the Bankruptcy Act. An appeal may be taken as provided in section 174 of the Act, but this appeal does not come within any of the four subsections of section 174. The only possible subsections it might come under are (*a*) and (*c*). This is a matter of procedure and they proceed under rule 142 of the Bankruptcy Rules. There is no jurisdiction to hear the appeal: see *Winter* v. *Capilano Timber Co.* (1926), 37 B.C. 91; *In re Coast Shingle Mill Co.* (1926), 7 C.B.R. 553. As to section 174, subsection (*c*) that more than $500 is involved see *Cushing Sulphite-Fibre Co.* v. *Cushing* (1906), 37 S.C.R. 427; *In re Motherwell of Canada* (1924), 5 C.B.R. 107, at pp. 108-9.

May: The property in question here is worth more than $90,000: see *May* v. *Hartin* (1938), 53 B.C. 411. There is no question that future rights are involved in this appeal.

Green, in reply, referred to *Eastern Trust Co.* v. *Lloyd Manufacturing Co.* (1923), 3 C.B.R. 710; *Viscount Grain Growers Co-operative Association* v. *Brumwell* (1923), 4 C.B.R. 340; *Re Kurtz and McLean Limited* (1908), 11 O.W.R. 437; *In re Tremblay* (1922), 3 C.B.R. 488.

Cur. adv. vult.

8th March, 1940.

MARTIN, C.J.B.C.: Under the circumstances of this appeal I agree with my learned brothers that the objection to our juris-

diction to hear it should be overruled: to the cases cited to us on section 174 of the Bankruptcy Act I add one just decided—*In re Transportation and Power Corporation et al.* (1940), 21 C.B.R. 209. I am, however, not, with every respect, without doubt as to the conclusion they have reached "upon the merits" (if such they can appropriately be styled in this unusual and distressing case) but my doubt is not sufficient to warrant my dissent from said conclusion.

It follows that the appeal (which, I may say, was well argued by the appellant, Mrs. May in person) is dismissed, the costs following the event, excepting those of the unsuccessful motion to quash for said lack of jurisdiction which must be borne by the respondent.

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

O'HALLORAN, J.A.: This appeal lies from the dismissal of an application made under rule 142 of the Bankruptcy Rules. Although it was made by petition all concerned dealt with it as an application made to a judge in Chambers by notice of motion as required by that rule.

Counsel for the respondent took the preliminary objection that this Court is without jurisdiction to entertain the appeal. It was contended that no future rights are involved within the meaning of section 174 (*a*) of the Bankruptcy Act, Cap. 11, R.S.C. 1927, and amending Acts. The petition sought a declaration with ancillary relief that certain mineral claims were the property of the appellant. The dismissal of the petition disposed finally of the appellant's cause of action. It did not relate merely to a matter of procedure preliminary to such final disposition as occurred in *Brown* v. *Cadwell*, [1918] 2 W.W.R. 229 and *Winter* v. *Capilano Timber Co.* (1926), 37 B.C. 91. For examples of final orders held to involve future rights *vide Marsden* v. *Minnekahda Land Co.*, [1918] 2 W.W.R. 471 (appeal from a refusal to grant a winding-up order) and *In re Philippe Dubrofsky et al.* (1933), 14 C.B.R. 359 (appeal from a bankruptcy order). In this instance I must hold the appeal does not relate merely to a matter of procedure, but does involve future rights within the

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meaning of section 174 (*a*) of the Bankruptcy Act, *supra*. The preliminary objection should be overruled.

Then as to the merits of the appeal. When the matter came before Mr. Justice MCDONALD sitting as a judge in Bankruptcy on 2nd October, 1939, counsel for the respondent submitted as a preliminary objection to its hearing, that the issues involved had been determined between the parties in a previous action. The learned judge sustained the objection and thereupon dismissed the petition forthwith. It was contended at this Bar that he erred in doing so; that he should have regarded that objection not as a preliminary objection to the hearing of the petition, but as a matter of defence to the allegations in the petition. But the appellant has misconceived the nature of the objection. It was an objection in point of law that the petitioner was precluded from advancing allegations before Mr. Justice MCDONALD, which were contrary to that which had been decided against it in a previous action. The learned judge was right therefore in proceeding as he did to decide this objection in point of law. If he sustained it that would dispose finally of the petition. If he did not sustain it, the petition would be heard in proper course.

The next point is, having sustained the objection, was he right in doing so? The petition in question was brought on behalf of Gibson Mining Company Limited (N.P.L.) in liquidation. That company had been a party plaintiff in the previous action commenced on 2nd February, 1937, *sub nom. May* v. *Hartin* (1938), 53 B.C. 411. On 21st December, 1937, the Gibson Company obtained judgment in default of defence against all the defendants in that action except Hilyard Hartin as trustee of the Daybreak Company. That judgment left for decision between the Gibson Company and Hartin, in that action, the same main issue raised between them in the present petition, *viz.*, the ownership and possession of what may be called the Gibson mines. What occurred in the previous action is important. Hartin moved in that action on 10th January, 1938, for an order (1) dismissing the action or staying all further proceedings against him on the ground the action was frivolous and vexatious and an abuse of the process of the Court; and (2)

striking out the statement of claim as against him on the ground it disclosed no reasonable cause of action against him. Mr. Justice FISHER refused the motion on 5th April, 1938. An appeal therefrom to this Court (MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A., but MARTIN, C.J.B.C. dissenting) was allowed on 2nd December, 1938. The action of the Gibson Company against Hilyard Hartin as trustee of Daybreak Mining Company Limited (N.P.L.) in bankruptcy was thereby dismissed: *vide* 53 B.C. 411, *supra*.

On 10th January, 1939, this Court (MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.) granted conditional leave to appeal therefrom to the Judicial Committee, upon the ground the decision of this Court on 2nd December, 1938, was a final judgment. My Lord the Chief Justice in giving the judgment of the Court said:

> . . . We have reached the conclusion that this is a final order, because it entirely and for all time disposes of this action in this Province. . . . And therefore since it is impossible to reagitate the question between these parties in this Province, we think that it must be regarded as a final judgment.

An application to the Judicial Committee for leave to appeal thereto *in forma pauperis* was refused. When the appellant applied by petition to Mr. Justice MCDONALD subsequently on 2nd October, 1939, it was asking him to reagitate the same issues anew upon the same grounds, and not to accept the judgment of this Court on 2nd December, 1938, as a final disposition thereof between the Gibson Company and Hartin. It was asking him to adjudicate upon allegations against Hartin by the Gibson Company which this Court had declared did not disclose a reasonable cause of action. Of necessity that judgment was decisive of the matter. For a judgment that no reasonable cause of action is disclosed, must be based on a finding on the case as then presented, that there were no merits to be tried between the parties. It requires examination of the case put forward, to ascertain if anything has been advanced which in law demands an answer. In the circumstances the learned judge could not do otherwise than sustain the objection on the point of law taken by counsel for the respondents, that the Gibson Company was

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precluded from raising issues before him which had been decided against it in the previous action.

In *Lemm* v. *Mitchell* (1912), 81 L.J.P.C. 173, a Hong Kong appeal, the defendant had pleaded in the first action for criminal conversation that the Court had no jurisdiction. The point of law so raised was set down for hearing. The Court gave effect to it and dismissed the action. Retroactive legislation was passed giving the Court jurisdiction. A second action was then commenced for the same cause of action. The plea of *res judicata* was raised as here and was argued as a point of law apart from other questions arising. It was overruled on the ground there had been no judgment on the merits of the first action. That view was upheld by the Full Court, but reversed on appeal to the Judicial Committee. The Board held that the substance of the question tried in the first action was not restricted to jurisdiction, but extended to that which had been argued fully in the first action, *viz.*, whether the law of Hong Kong gave the plaintiff a remedy on the facts there alleged. To my mind that was another way of saying the substantial question involved was whether the plaintiff had disclosed a reasonable cause of action. The Board said at p. 175:

> It was decided that it did not, and the defendant thereupon became entitled, on those allegations, to a judgment dismissing the whole claim.

And then proceeded also at p. 175:

> The judgment was a final determination of the rights of the parties, and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies, . . .

The application of *Lemm* v. *Mitchell* is the more convincing, in that no question of jurisdiction was involved in the point of law taken before Mr. Justice MCDONALD.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants Liquidator of Gibson Mining Co. Ltd. and D. K. May: *R. S. Lennie.*

Solicitors for respondent: *Brown & Dawson.*

CLARIDGE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

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March 2, 9.

Negligence—Street-railway—Injury to person attempting to get on car—Duty to passenger boarding car—Inability to practise profession—Refusal to undergo operation—Damages.

The plaintiff had lost his left arm from below the elbow in his youth. In attempting to board one of the defendant's cars the car started and he was thrown to the ground and severely injured. He was a doctor by profession and 55 years of age. His medical advisers would not guarantee a satisfactory result and he refused to undergo an operation which would involve the anchoring of his biceps muscle near the shoulder.

Held, that the brakesman failed in his duty in giving the signal to start when the plaintiff was in a position of danger, and the general damages were assessed at $4,000 in addition to the special damages.

ACTION for damages for injuries sustained by the plaintiff owing to the negligence of the servant of the defendant company when he was about to board one of the defendant's street-cars. Tried by McDONALD, J. at Vancouver on the 2nd of March, 1940.

Nicholson, and *Burton,* for plaintiff.
J. W. deB. Farris, K.C., for defendant.

Cur. adv. vult.

9th March, 1940.

McDONALD, J.: In the conflict which we have in this case it becomes necessary to analyze the evidence carefully. This I have done and I have reached the conclusion that the weight of evidence is decidedly with the plaintiff. In my opinion the brakesman failed in his duty to see the plaintiff when the latter was in the act of stepping upon the car. Having failed in that duty, the giving of the signal to start the car, when the plaintiff was in a position of danger, was negligence which resulted in the plaintiff's injuries. So far as the law is concerned this is laid down very clearly in *Squires* v. *Toronto R.W. Co.* (1920), 47 O.L.R. 613, and *Wilson* v. *Winnipeg Electric Ry. Co.*, [1922] 2 W.W.R. 610. Special damages are allowed at $610. As to

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general damages the plaintiff has suffered a very serious injury. Having in his infancy lost his left arm just below the elbow he had developed through the years a very strong and useful right arm. He is qualified to practise and has practised his profession as a doctor in physiotherapy. That profession he will never be able to practise again. He is 55 years old and for the reason that his medical advisers will not guarantee a satisfactory result he has declined to undergo an operation which would involve the anchoring of his biceps muscle near the shoulder. Having regard to the uncertainty of the result I think he cannot seriously be blamed for so declining. He may probably be able to make a living of sorts in the poultry business upon which he has entered. No doubt his arm will gradually grow somewhat stronger with use and yet he has been left in a very unfortunate condition.

Having considered the matter in all its aspects I assess general damages at $4,000. There will accordingly be judgment for $4,610 and costs.

Judgment for plaintiff.

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June 5, 25.

REX v. SIDNEY MILLER.

Criminal law—False pretences—Questions tending to show commission of other frauds—Admissibility—Theft—Criminal Code, Secs. 347 and 405.

Accused went to the farm-house of N., where he found H., who worked for N. alone. Accused inquired as to the purchase of potatoes and H. told him he would have to see N. who was about a mile away cutting wood. H. pointed where he could find N. and accused went away. In about an hour and one-half accused came back and told H. that N. said he could have half a ton of potatoes (20 sacks to the ton). H. allowed him to take away seven sacks in his car. N. denied that he saw accused on that day. Accused was charged and tried on an indictment containing two counts, one for obtaining potatoes by false pretences, and the other for theft of potatoes. On the trial accused was asked by Crown counsel questions relative to his failure to pay for potatoes purchased by him from other farmers, and the learned judge below, in delivering judgment, said: "Well, there is a conflict of evidence here, but the accused's conduct is so exactly and precisely in accordance with the

treatment of others, that I do not believe him, and I must find him guilty of theft."

Held, on appeal, reversing the decision of WHITESIDE, Co. J., that the reason for the rejection of the evidence of the accused as untrustworthy is clearly based upon a misconception of the evidence given in cross-examination by the accused, as accused's treatment of the complainant in this case is dissimilar in every respect from his transactions with other farmers from whom he purchased potatoes. The conviction is quashed and a new trial is ordered.

The credit of an accused person who gives evidence may be impeached by cross-examination.

APPEAL by accused from his conviction by WHITESIDE, Co. J. on the 29th of April, 1940. The accused was charged and tried on two counts, namely, for obtaining seven sacks of potatoes by false pretences, also for theft of the said potatoes. He was convicted on the theft charge. The accused went to the farm of one Nakoneshny on the 21st of February, 1940, where he saw one Halakaylo, who was working for the owner. Accused asked Halakaylo if he had potatoes for sale, to which Halakaylo replied that the owner was about a mile away cutting wood and he would have to see the owner and bargain with him. He directed the accused as to where the owner was. Accused went away and came back in about an hour and one-half and said the owner agreed that he could take half a ton of his potatoes. Halakaylo helped accused to put seven sacks in his car, and accused took them away. Upon Nakoneshny coming back from his work he was told that accused had taken seven sacks of his potatoes. Nakoneshny stated accused had never seen him on that day at all.

The appeal was argued at Vancouver on the 5th of June, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Burton, for appellant: On cross-examination accused was asked as to other acts relative to his failure to pay for potatoes purchased from other farmers. These have no similarity to the offence charged. The learned judge based his judgment on this evidence. He misdirected himself: see *Rex* v. *Ellis* (1910), 79 L.J.K.B. 841; *Rex* v. *Baird* (1915), 84 L.J.K.B. 1785. It was a question of credit and he received credit: *Rex* v. *Fisher* (1909), 79 L.J.K.B. 187; *Makin* v. *Attorney-General of New*

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South Wales (1893), 63 L.J.P.C. 41. A charge of theft has not been made out.

Petapiece, for the Crown, referred to *Rex* v. *Porter* (1935), 25 Cr. App. R. 59; Archibold's Criminal Pleading, 30th Ed., 532.

Burton, replied.

Cur. adv. vult.

25th June, 1940.

MACDONALD, C.J.B.C.: There should be a new trial for the reasons given by my brother SLOAN.

MCQUARRIE, J.A.: I agree.

SLOAN, J.A.: In this case the appellant was charged and tried on an indictment containing two counts: the one for obtaining potatoes by false pretences; the other for theft of the said potatoes. He was convicted on the theft charge. I leave open for consideration the question whether on a speedy trial an indictment should contain more than one count. The point was not raised nor argued before us but I am not unmindful of the divergence of opinion in the Supreme Court of this Province on this point as exemplified in *Rex* v. *Matija December* (1931), 44 B.C. 210; 56 Can. C.C. 110 (FISHER, J.) and *Rex* v. *Matija December* (1931), 56 Can. C.C. 391 (MCDONALD, J.).

The appellant's first complaint to us was that he was improperly cross-examined as to other acts which bore no similarity to the offences charged. An examination of the record discloses that he was asked by Crown counsel questions relative to his failure to pay for potatoes purchased by him from other farmers.

His conduct on the previous and different transactions amounted to nothing more than the purchase of potatoes, a payment in part and non-payment of the balance and bore no similarity to his conduct on the occasion which led to these charges. If it was an attempt by the Crown to prove a course of conduct or system on the part of the accused in relation to the false pretence count then it fell far short of establishing anything of the kind.

In England, because of the Criminal Evidence Act, 1898 (61 & 62 Vict., Cap. 36), Sec. 1 (*f*) I am inclined to think that the

form of the Crown's questioning might be considered improper but in Canada there is not the same limitation upon the right of cross-examination as in England (*Rex* v. *D'Aoust* (1902), 5 Can. C.C. 407) and in my opinion, while this case is close to the line, it can fairly be said to be within the rule permitting credit of the witness to be impeached. The appellant in consequence cannot succeed in this submission.

The appellant then contended in the alternative that the learned trial judge misconceived the effect of the evidence adduced in cross-examination and argued that if relevant at all it was innocuous and of no real effect. That is my view of the matter but when we turn to the record we find the following observation of the learned trial judge when convicting as to his conception of the cross-examination:

THE COURT: Well, there is a conflict of evidence here, but the accused's conduct is so exactly and precisely in accordance with the treatment of others, that I do not believe him, and I must find him guilty of theft.

The expressed reason for the rejection of the evidence of the accused (a direct denial of the Crown evidence) as untrustworthy is clearly based upon a misconception of the evidence given in cross-examination by the accused. I have read this evidence closely and it discloses that his treatment of the complainant in this case is dissimilar in every respect from his transactions with other farmers from whom he purchased potatoes.

With respect in my opinion we should quash the conviction and order a new trial. It is not a case wherein we can say that on a new trial a conviction would be inevitable.

Conviction quashed and new trial ordered.

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May 31;
June 25.

REX v. MANLEY.

Criminal law—Theft of mining and oil shares—Accused a broker—Shares used to cover broker's account—"Running debit and credit account" between broker and client—Criminal Code, Secs. 347, 355, Subsecs. 2 and 3, and 951.

The indictment upon which the accused was tried and convicted contained two counts, both of which charged that he, between certain dates "unlawfully did steal" certain shares.

Held, on appeal, that evidence upon which the Crown relied indicated that the theft fell not only within section 347 of the Criminal Code upon which the learned trial judge instructed the jury, but also within that amplified and special category of theft covered by section 355, and upon which the learned judge refused to charge the jury. By reason of subsections 2 and 3 of section 355, the exception therein contained may be relied upon by the accused as a defence to the charge of theft under section 355. The form of the indictment charges "stealing" at large and there is no logical ground for saying that when the evidence discloses that the accused may have committed that particular character of theft defined by section 355, the jury should not be instructed accordingly. It follows that the jury should, as a necessary concomitant, be charged to consider whether or not the facts are such as to bring the accused within the exception in subsections 2 and 3 of said section, and there should be a new trial.

APPEAL by accused from his conviction on charges that between the 9th of September, 1937, and the 16th of May, 1939, he

unlawfully did steal 330 shares of Bralorne Mines Limited N.P.L. of the total value of over $200, the property of David C. Dawson,

and that between the 7th of December, 1936, and the 17th of May, 1939, he

unlawfully did steal 730 shares of Premier Gold Mining Company Limited, 8 shares of Imperial Oil Limited, 200 shares of Okalta Oils Limited, 9,725 shares of the Calgary and Edmonton Corporation Limited, and 1,000 shares of Southwest Petroleum Company Limited, of the total value of over $200, the property of David C. Dawson.

The appeal was argued at Vancouver on the 31st of May, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

W. B. Farris, K.C., for appellant: This is a charge under section 355 of the Criminal Code. On the evidence there was a running debtor and creditor account between Miller Court

and Manley and Dawson, and the learned judge refused to charge the jury as to its being a running debit and credit account. It comes clearly within subsection 2 of section 355 of the Code: see *Rex* v. *Swityk*, [1925] 1 D.L.R. 1015; *Rex* v. *Marion* (1922), 42 Can. C.C. 347. If the facts come within section 355, subsection 2 it is for the jury to decide whether the facts come within said section. The defence must be put to the jury: see *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77.

D. J. McAlpine, for the Crown: There is no magic in a "running account" or debit and credit account. The definition of theft is in section 347 of the Code. The facts of the case do not apply to section 355, subsection 2: see *Rex* v. *Fraser,* [1918] 2 W.W.R. 324, at p. 326. He hypothecated the stock to the bank to cover the general indebtedness of his firm to the bank.

Farris, replied.

Cur. adv. vult.

25th June, 1940.

MACDONALD, C.J.B.C.: There should be a new trial. I agree with the reasons given by my brother SLOAN.

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

SLOAN, J.A.: The appellant was convicted after a trial before ROBERTSON, J. and a jury at the Vancouver Assize of the theft of certain mining and oil shares, the property of one Dawson. The appellant was a stock-broker and Dawson was his customer. The appellant hypothecated Dawson's shares with his bankers and others and the greater part of these shares were sold by the pledgees to liquidate the appellant's indebtedness to them. The appellant was financially unable to replace the Dawson shares and prosecution followed. There is no real dispute as to the facts. The appellant admitted at the trial that he had, without authority, hypothecated Dawson's shares. He set up, as a defence, that Dawson's account with him was a cash account in which from time to time there would be debit and credit balances and that when he received the Dawson shares from the vendor broker on the Stock Exchange these shares were credited in his books as items in the debtor and creditor account between him-

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self and Dawson; that Dawson relied upon his personal liability in respect thereto and in consequence, because of the provisions of subsections 2 and 3 of section 355 of the Criminal Code, there had been no fraudulent conversion of the shares. The learned trial judge refused to charge the jury on section 355 holding that it had no application. It is not for us to say whether or not such a defence has any merit. That is a question of fact for the jury. The question for determination by us, as I see it, is whether or not section 355 can have any application to the facts of this case. It is well settled that to be within section 355 the accused must have received

> money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof,

to a person other than the person from whom the "money or valuable security or other thing whatsoever was received." *Rex* v. *Fraser* (1918), 30 Can. C.C. 70; *Rex* v. *Marion* (1922), 42 Can. C.C. 347; *Rex* v. *Luciuk*, [1926] 3 W.W.R. 453; *Rex* v. *Connors* (1923), 51 N.B.R. 247. That is to say A must receive the money or valuable security or something of a like nature from B on terms requiring him to pay or account for it to C. On the facts of this case (A), the appellant, received the shares from (B) the Stock Exchange for another person (C) Dawson. There is nothing to indicate that the vending broker who sold the shares to the appellant did so on terms requiring him to account for the same to Dawson. In the absence of any evidence to the contrary I assume that the ordinary relationship existed between the appellant, as buying broker, and the vending broker, *i.e.*, they dealt as principals, each unaware of the existence or identity of the other's ultimate principal. The appellant's obligation to account to Dawson arose from his relationship as broker to Dawson and not because of any direction from the person from whom he received the shares. What is the test to be applied in determining whether or not "terms" were imposed upon the receiver within the meaning of the said section? Must the "terms" be imposed by the person paying the money or may the "terms" arise out of the relationship of the receiver and the person to whom he is to pay or account for the money? The answer to that question is to be found in the following cases:

Reg. v. *Unger* (1894), 5 Can. C.C. 270, wherein the High

Court of Justice of Ontario, sitting as a Court for Crown Cases Reserved decided that the reference in section 308 of the Code (now section 355)

> to the terms on which the money was received means the terms on which the defendant holds the money when he has received it, and that the section is not restricted to cases where the terms are imposed by the person paying the money.

Rex v. *Fraser* (1918), 30 Can. C.C. 70, a judgment of the Court of Appeal of Saskatchewan, wherein Lamont, J.A. at p. 72 says:

> The gist of the offence is, that he has received something which, in reality, belongs to the person to whom he has to account and to whom he would turn it over if he performed his duty.

And at p. 73 the learned judge cites *Unger's* case, *supra,* with approval. Elwood, J.A. (dissenting on the facts) said at p. 76:

> It was further contended that the parties from whom he had received the money had not required him to account to the company [the complainant] for it. To my mind that is quite immaterial.

The learned judge cited in support of his view *Rex* v. *McLellan* (1905), 10 Can. C.C. 1; *Rex* v. *Sinclair* (1916), 27 Can. C.C. 327 and *Reg.* v. *Unger, supra.*

In *Rex* v. *Kimbrough* (1918), 30 Can. C.C. 56, Harvey, C.J. in delivering the judgment of the Appellate Division of the Supreme Court of Alberta accepted (p. 57) the reasons for judgment of Elwood, J. in *Rex* v. *Fraser, supra,* although previously refusing to follow *Rex* v. *McLellan* referred to by Elwood, J. in *Rex* v. *Thompson* (1911), 21 Can. C.C. 80.

The English decisions are to the like effect. By the Larceny Act, 1916 (6 & 7 Geo. 5, Cap. 50), Sec. 20 (1) (iv.) (*b*)—

> Every person who—having . . . received any property for or on account of any other person; fraudulently converts to his own use or benefit, . . . , the property . . . ; shall be guilty of a misdemeanour . . . .

The offence under that section is of the same character as that covered by section 355 of the Code. In *Rex* v. *Bottomley* (1922), 16 Cr. App. R. 184, Mr. Justice Bray, delivering the judgment of the Court, said (at pp. 189-90) in relation to said section 20 of the Larceny Act, 1916:

> We must look at the actual words used in this sub-section and give them their natural interpretation. The words are: "having either solely or jointly with any other person received any property for or on account of any other person." It does not say from whom. The section treats that as

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immaterial. If he has received property for and on account of any other person for any other person than himself, he commits an offence if he fraudulently converts that to his own use or benefit. That seems to us to be the natural interpretation of the words of the subsection, and we can see no reason why we should put any limited construction on these words. This interpretation of the sub-section is the same as was adopted by this Court in the case *Rex* v. *Grubb*, [1915] 2 K.B. 683, at p. 689. . . . Some of the counts of the indictment charge him with having converted something other than money, *i.e.*, 5 per cent. National War Bonds (counts 1 and 2), and Victory Bonds (or the allotment letters, which are the same thing) (count 3). Now these he received from the Bank of England. With regard to these it was contended he received them for himself because they were payable to bearer. But he received the monies with which he bought them for the subscribers, not for himself, and when he bought these bonds he held them for the subscribers in the same way. It cannot make any difference whether these bonds would pass by hand to bearer or by transfer. In either case as between him and the subscribers he held them for or on account of the subscribers.

In *Attorney-General* v. *Lawless*, [1930] I.R. 247, Hanna, J., in delivering the judgment of the Court of Criminal Appeal, when considering the interpretation to be given the section, said (pp. 258-9):

The sub-section which creates the offence in the indictment, with which the Court is concerned, may be fairly described as a drag-net clause. The words used are of the widest description. The section refers to the receipt of "any property for or on account of any other person." The Court is of opinion that the question as to whether the property or possession in the strictly legal sense had passed at any particular moment of time either to the accused or any other person (a question sometimes arising in charges of embezzlement or larceny at common law) is not under this section the test as to whether the property had been received for or on account of any other person. It may in many cases be quite irrelevant. Neither is it the test that the person who pays the money intends to, or is bound to, pay it to the accused, or is not aware of any right on the part of any one else to it. The test is whether, in addition to fraudulent intent and *mens rea*, on the evidence before the jury, the accused receives it for or on account of any other person in this case the County Council.

As this case has to be tried again we do not propose to discuss the facts or evidence upon which the decision of the jury must be given, but it is our duty to point out what direction should be given by the Judge at any further trial. In the opinion of the Court, money is received for or on account of any person when it is received by the accused under circumstances which impose on the receiver a definitely binding legal obligation, arising from contract or otherwise, to pay it over or account for it to that third person.

In my opinion it is clear from the foregoing authorities that the absence of any direction to the appellant from the person from whom he received the shares of Dawson is immaterial. His

obligation to account to Dawson arose from his relationship to him, *i.e.*, as brokers to customer. I would say therefore that he falls within section 355.

At this juncture another question arises. The indictment upon which the appellant was tried contained two counts both of which charged that he, between certain dates "unlawfully did steal" certain shares, the property of Dawson. The evidence disclosed the facts, hereinbefore shortly referred to, upon which the Crown relied to prove the charge. That evidence, to my mind, indicated that the theft here fell not only within section 347 of the Code, upon which the learned trial judge instructed the jury, but also within that amplified and special category of theft covered by section 355 and upon which the learned trial judge refused to charge the jury. Were it not for subsections 2 and 3 of section 355 the refusal of the learned trial judge to charge the jury upon the elements of theft by an agent (section 355) could not be relied upon by the appellant as a valid objection because the failure to do so would militate against the Crown and in favour of the accused. By reason of said subsections 2 and 3, however, the exception therein contained may be relied upon by the appellant as a defence to the charge of theft under section 355 which would not otherwise be open to him. Because of this circumstance then it seems to me that he can raise this objection. The form of the indictment charges "stealing" at large without definition, but as every count is divisible (section 951) I cannot see any logical ground for saying that when the evidence discloses that the accused may have committed that particular character of theft defined by section 355 the jury should not be instructed accordingly. If that is so then it follows that the jury should, as a necessary concomitant, be charged to consider whether or not the facts are such as to bring the accused within the exception in subsections 2 and 3 of the said section. I must confess that I have reached this conclusion with considerable doubt but that doubt I have resolved in favour of the accused.

Counsel for the Crown conceded that if we reached the conclusion that the learned trial judge ought to have charged on section 355 and the subsections thereof there should be a new trial and did not ask us to apply the provisions of section 1014

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(2). I consider the position he took to be a proper one. With respect therefore I would allow the appeal and order a new trial for the reasons I have herein expressed.

Appeal allowed and new trial ordered.

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April 11.

ROGERS v. CLARENCE HOTEL COMPANY LIMITED *ET AL.*

Damages—Hotel—Beer parlour—Refusal to serve beer to a coloured person —"Trader or merchant" — "Freedom of commerce" — R.S.B.C. 1936, Cap. 160.

The plaintiff, who is a negro, entered a beer parlour owned and operated by the defendants in the city of Vancouver and asked to be served a glass of beer. The servants of the defendants refused him for the sole reason that they had been instructed not to serve coloured persons. In an action for damages for the humiliation he suffered, the plaintiff recovered judgment.

Held, on appeal, reversing the decision of MCDONALD, J. (O'HALLORAN, J.A. dissenting), that the doctrine of "complete freedom of commerce" extends to the operator of a "beer parlour" in this Province. As to service, he is free to deal as he may choose with any individual member of the public who enters his premises.

APPEAL by defendants from the decision of MCDONALD, J. of the 22nd of February, 1940, in an action for damages against the defendants, who being innkeepers,

did on the 4th day of October, A.D. 1938, on the premises known as "The Clarence Hotel," 515 Seymour Street . . . , in the city of Vancouver, . . . wilfully and without legal or reasonable justification or excuse, . . . , refuse to supply the plaintiff with accommodation and/or refreshments in the said Clarence Hotel.

To the Clarence Hotel there is a beer parlour attached with a licence to sell beer by the glass. The plaintiff entered the beer parlour and the servants refused to serve him with a glass of beer.

The appeal was argued at Victoria on the 11th of April, 1940, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

G. L. Fraser, for appellants: The plaintiff entered the beer parlour and was refused service of beer. The premises in ques-

tion is not an hotel. The hotel premises are distinct from the beer parlour. The plaintiff is not a traveller. He is a coloured person and he was refused service on account of his colour. The licensee may refuse to serve anyone he chooses: see *Christie* v. *The York Corporation,* [[1940] S.C.R. 139]; [1940] 1 D.L.R. 81. He is not a "traveller": see Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 151, sec. 198; *The Queen* v. *Rymer* (1877), 2 Q.B.D. 136; *Orchard* v. *Bush & Co.,* [1898] 2 Q.B. 284.

Adam Smith Johnston, for respondent: Rogers has all the rights and privileges of a British subject. The appellants are innkeepers. They are licensees and have a monopoly. They must serve customers: see *In re Brodie and the Corporation of Bowmanville* (1876), 38 U.C.Q.B. 580. The Quebec cases do not apply, as in Quebec a licensee has not got a monopoly; there are other outlets there where beer can be obtained by the glass: see *Ortenberg* v. *Plamondon* (1914), 24 Que. K.B. 385; *Fraser* v. *McGibbon* (1907), 10 O.W.R. 54.

Fraser, replied.

Cur. adv. vult.

28th May, 1940.

MACDONALD, C.J.B.C.: The facts will be found in the judgment of my brother O'HALLORAN. In my opinion the decision of the Supreme Court of Canada in *Christie* v. *The York Corporation,* [1940] S.C.R. 139 applies. This decision was not based solely on law applicable to the Province of Quebec; it applies to cases based on essentially similar facts arising anywhere in Canada. There is no internal evidence in the report itself that the principle enunciated, *viz.,* that a merchant or trader, not engaged in a monopolistic or privileged enterprise may conduct a business in the manner best suited to advance his own interests is based on some article of the Civil Code of the Province of Quebec or on a principle of law applicable only to that Province.

The basis of the decision is, I think, readily ascertained by perusal of the judgments in the three Courts through which it passed. The trial judge in awarding the allegedly injured party $25 and costs as damages did so because he thought it illegal to refuse to serve negroes in view of the language contained in cer-

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tain sections of the Quebec Licence Act. The Court of King's Bench held that these sections did not apply and that in the absence of any specific law a trader might conduct his business in the manner indicated.

Two main points were considered by the Supreme Court of Canada—first, whether or not specified sections of the Quebec Licence Act, providing that certain licensees could not, without reasonable cause, refuse to give food to travellers, applied to the facts in the case considered. Second, if in the absence of a statute "or any specific law" the case fell within a principle of general application known as "freedom of commerce." It is true Rinfret, J., at p. 142, said:

> In considering the case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce.

It is not necessarily indicated that the principle is confined to that Province. His Lordship proceeded to refer not only to a case decided in France but also to *Loew's Montreal Theatres Ltd.* v. *Reynolds* (1919), 30 Que. K.B. 459, not confined in its application to that Province. This is placed beyond question by a further reference to an Ontario case in support of the same principle.

True in the last two paragraphs of the judgment Rinfret, J. refers to Quebec statutes where a distinction is made between an hotel or restaurant and a tavern. It is pointed out that by the statute itself a licensee for an hotel cannot refuse, without just cause, to give food or lodging to travellers. It is then stated that as no similar provision is made for taverns it would follow from the Quebec statute itself

> that the Legislature designedly excluded tavern owners from the obligation imposed upon the hotel and restaurant owners.

This, however, is not the basis of the decision. The opening words of the paragraph referred to discloses that it is merely an addendum and does not affect the basic principle of the decision, *viz.*, that in the case there considered the owner of the tavern should be regarded as a trader or merchant. The fact too that it could not be conducted without a licence was not material.

It follows that if our Government Liquor Act, R.S.B.C. 1936, Cap. 160, under which a licence to sell beer was issued to the

appellants herein carrying on business under the name and style of "Clarence Hotel," is substantially similar to the Quebec Licence Act she too, because of this decision, must be regarded as a trader or merchant conducting a private enterprise not privileged nor monopolistic in character. It follows that she must be permitted to exercise a similar discretion to serve whom she pleases. This in my opinion is so contrary to ethics and good morals that a licence might properly be refused to any one discriminating against a class in this highly objectionable manner without just cause. It would be otherwise if a licence had been secured to serve a restricted class of customers.

I have examined and compared the two Acts. Both the British Columbia Act and the Quebec Act reflect a policy, as stated by Davis, J. in a dissenting judgment, of complete control of the sale of alcoholic liquor. It is true that Rinfret, J. in the prevailing judgment stated, at p. 144, that the licence in the case there considered was

> mainly for the purpose of raising revenue and also, to a certain extent, for allowing the Government to control the industry.

I think the main object of the legislation in this Province was to completely control the sale of liquor. It may, however, be said of our Act, with equal justification, that it serves the same dual purpose. We have therefore a situation where the character of the so-called merchant or trader is determined by the legislation creating this type of dealer or licensee. As our Act is substantially similar appellants must be placed in the same category and when that point is reached the principle of "freedom of commerce" must be applied. It would be idle to suggest that minor differences in the two Acts concerning *modus operandi* in effecting policy could change the character of the licensee. If he is a "merchant or trader" in Quebec he must be so regarded in British Columbia. It follows that the appeal should be allowed.

SLOAN, J.A.: In my reading of it the judgment of the Supreme Court of Canada in *Christie* v. *The York Corporation*, [1940] S.C.R. 329 is not based upon law peculiar to the Province of Quebec but upon general principles which also apply to the common-law jurisdictions of Canada. If in Quebec the keeper of a tavern is considered to be, as any other merchant, "free to

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deal as he may choose with any individual member of the public" then, because the system of liquor control in this Province is substantially the same as in Quebec, the doctrine of "complete freedom of commerce" extends, with equal force, to the operator of a "beer parlour" in this Province.

With respect the appeal, therefore, must be allowed.

O'HALLORAN, J.A.: The appellants operate a beer parlour in Vancouver under the Government Liquor Act, Cap. 160, R.S.B.C. 1936. This litigation arose because she refused to serve the respondent with a glass of beer, solely on account of his race and colour. He is a negro, a British subject, a taxpayer, and has lived in Vancouver for some 22 years. He carries on a shoe-repairing business in partnership with a white man, with whom he came to the beer parlour. It is admitted the respondent was of respectable appearance and in a fit condition to be served in the beer parlour and that the only objection to him was his race and colour. This appeal involves questions of fundamental importance. For if a person may be refused on account of race and colour, he may be refused also because of racial extraction, religion, political views or upon any ground according to the caprice, malice, whim, fancy or humour of the beer-parlour operator. This is brought into clear outline by the appellant when she said:

> We [*viz.*, beer-parlour operators] can refuse to serve anybody that comes into our premises, and even my own mother I can refuse to serve. . . . If I told my waiter to refuse my own mother, he has the power to refuse to serve my mother, if I gave my waiter instructions to do so.

It will be apparent therefore the appellant has endeavoured to justify her conduct upon two grounds: (1) The respondent's colour and race; and (2) that she was entitled, in any event, to refuse him or any other guest, at her own uncontrolled discretion without being obliged to show reasonable cause for so doing. These contentions must be rejected by a Court which administers the common law of England. With respect, I am unable to agree that the decision of the Supreme Court of Canada in *Christie* v. *The York Corporation,* [1940] S.C.R. 139, prevents this Court giving effect to the common law. The *Christie* case arose in the City of Montreal and its decision was governed

necessarily by the civil law of the Province of Quebec. The applicable English common law which runs in this Province could not enter into its decision, for the reason that it does not run in the Province of Quebec. It is said nevertheless that this Court is bound by the *Christie* decision because of an expression in the majority judgment which would imply (but did not decide), that the conclusion there reached according to French law is also in accord with the common law of England. Such expressions are to be regarded as *obiter dicta* since they are not necessary to the *ratio decidendi*. While such expressions are to be read with the respect which is their due, it is quite another thing to say that this Court is bound by them in the decision of this appeal.

With great respect I do not think their Lordships intended that the *Christie* decision should be binding on the Courts of the common-law Provinces, to the extent of hindering this Court from examining and deciding on their merits the issues presented in this appeal. If I am wrong then it may happen equally, that a binding decision upon the Quebec Courts in an important question of French civil law may be given by indirection, in an appeal from British Columbia, not governed in any way by the French civil law. The matter could then be settled indirectly for the Province of Quebec, by an analogous or illustrative reference to what appeared to be the French civil law, even though it had not been adjudicated upon by the Courts of that Province or argued before the Supreme Court of Canada by counsel versed in the law of that Province. In my view at least such a result was not intended by the Court of last resort in Canada. It is evident that the applicable law of the Province of Quebec, as interpreted in the *Christie* case, differs from the English common law which runs in this Province. The latter will be discussed now under three headings: First, that it is contrary to the common law to refuse to serve a person solely because of his colour or race. Furthermore the appellant could not refuse to serve the respondent without showing reasonable cause; in that, secondly, she "held out" her premises to the public without reservation or limitation, as common and public refreshment rooms where beer might be purchased by the glass; and thirdly,

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the operation of beer parlours in this Province is "affected with a public interest," and is a "public employment" so as to displace any asserted common-law right, if such existed in the appellant, to sell only to whom she would.

The first ground, that refusal to serve the respondent solely because of his colour and race is contrary to the common law, is founded upon the equality of all British subjects before the law. The respondent is a British subject. All British subjects have the same rights and privileges under the common law—it makes no difference whether white or coloured; or of what class, race or religion. This elementary principle of the common law seems to have been overlooked entirely in the restaurant decision, *Franklin* v. *Evans* (1924), 55 O.L.R. 349. For an interesting contrast *vide Ferguson* v. *Gies* (1890), 46 N.W. 718, where this aspect of the common law is discussed in an unanimous judgment of the Supreme Court of Michigan. In *Rothfield* v. *North British Railway Co.*, [1920] S.C. 805, the railway company sought to exclude Rothfield from its Edinburgh hotel during the last Great War. At p. 813, Lord Anderson, the Lord Ordinary said:

> Have the defenders averred a justifying cause of exclusion? They allege that the pursuer is a German Jew and a money-lender. . . . Nothing else is alleged against the pursuer on record, and it is manifest that what is averred against him did not justify the defenders in excluding him from their hotel.

And also at p. 820:

> It is obvious that the defenders are not entitled to exclude the pursuer from their hotel because he is a Jew; and it would have made no difference, in my opinion, had it been proved that he is a Jew of German origin. An individual is not responsible, and ought not to be made responsible, for his ancestry. . . . Nor is it a sufficient ground of exclusion that the pursuer is a money-lender. That is a lawful occupation, and therefore money-lenders are entitled to all privileges enjoyed by other members of the State, including the right to be entertained in the common inns of the country.

On the appeal in that case, while it was held there was evidence justifying the pursuer's exclusion for reasonable cause, yet the Lord Ordinary was upheld on the question of law that race or lawful occupation as such do not constitute reasonable cause. The Lord Justice-Clerk said at p. 828:

> I agree entirely with the Lord Ordinary as to the objection on the ground of the pursuer's race and nationality.

Nothing more need be said I think concerning this principle which is so deeply rooted in our law.

It goes without saying, that for reasonable cause, the appellant could refuse to serve the respondent or any other guest. But in such a case her right to do so would turn upon whether the evidence presented would support a finding of reasonable cause in the circumstances. For example, in a time of war when national feeling may run high against an enemy nation, the presence in a beer parlour of a person of enemy nationality might lead to a breach of the peace and destruction of property. If the beer-parlour operator refused to serve such an enemy national and asked him to leave, and in answer to an action such as this, pleaded reasonable cause, then the right to refuse would depend upon whether the evidence showed a reasonable ground for refusal. But the example given has no application to this case. The sole reason for refusal here was race and colour. But, as pointed out, a person's race or colour does not of itself constitute reasonable cause. There is no evidence in the appeal book that the respondent's race or colour was obnoxious to other patrons. Nor is there any evidence at all to support a conclusion that serving the respondent would have led to consequences because of his race and colour, which would have provided reasonable ground for refusal. It is true the appellant testified she had "some trouble" at another beer parlour from serving a coloured man. Even if that were admissible evidence in this case, it proves little. The respondent might have had some unexplained trouble from serving a Scotsman or an Irishman in one beer parlour, but that could hardly be accepted as a reasonable ground for refusing to serve all Scotsmen or Irishmen in any other beer parlour she might operate.

Then as to the other aspect of the argument of counsel for the appellant, *viz.*, that as a beer-parlour operator she was entitled at common law to refuse to serve the respondent at her own uncontrolled discretion. In plain language, that she could refuse to serve him without being compelled to show reasonable cause. The first main ground for rejecting this contention will be discussed now. It has been stated previously under the heading of "secondly," *viz.*, that the appellant "held out" her

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beer parlour to the public without reservation or limitation, as common and public refreshment rooms where beer might be purchased by the glass. The evidence discloses that the respondent and his white business partner had been occasional patrons of this beer parlour for some months before the appellant took over the licence. Shortly after doing so, she inserted an advertisement in the Vancouver Daily Sun which appeared for nearly three weeks before the refusal of the respondent. It advertised the Clarence Hotel beer parlour to be newly renovated and declared:

> We have spared no expense nor neglected a single detail that will add to the comfort and pleasure of our patrons.

The respondent was reasonably entitled in view of his previous patronage, to regard himself included in the invitation extended "our patrons." The Clarence Hotel beer parlour was described in the advertisement as a "landmark of Vancouver, 515 Seymour Street."

The advertisement as a whole must be regarded as a general invitation without reservation or limitation to all classes and conditions of people to patronize her beer parlour. She extended thereby an invitation to the public generally without exception. Therefore even if the appellant had a right at common law to refuse to serve a guest without reasonable cause, she had precluded herself from asserting or enforcing that right in this instance at least, by her "holding out" to the public in the manner described. For if that common-law right existed, her general invitation to the public without reservation or limitation must of itself be interpreted reasonably to imply a declaration on her part, that no member of the public she had invited would be refused except for reasonable cause. She could not say in one breath, "I invited you" and in the next breath "I did not invite you." The logical conclusion is that a common-law right to refuse without reasonable cause does not exist in any event where a person "holds out" to the public in a manner which is inconsistent with the existence of such a right. This is well illustrated in *Pidgeon* v. *Legge* (1857), 21 J.P. 743, in the Court of Exchequer. Chief Baron Pollock, who took time to state what occurred at the trial before a jury (at which he had presided), said (p. 744):

I ruled that if there was no misconduct or impropriety on that part of the guest, the landlord of an inn or alehouse could not revoke the invitation held out to all, and could not without some sufficient reason eject him from it.

In that case a chimney sweep was refused refreshment in an alehouse after working hours, on the ground he was in a dirty and improper state and had declined to make himself clean when requested. The "invitation held out to all" was the "holding out" by the proprietor of the alehouse that he would serve all who came without reservation or limitation, subject to reasonable cause for refusal.

In *Rothfield* v. *North British Railway Co., supra,* it was argued (p. 807) that the first-class modern hotel conducted by the railway was not an inn open to all-comers, and that there were numerous other hotels and inns of all classes and grades in the vicinity. As to this the Lord Ordinary said at p. 812:

The hotel is an ordinary trade venture, aiming at the acquisition of gain, and appealing to and desiring the patronage of the general public. The doors of the hotel open on Princess Street and the North Bridge, and the general public are thereby invited to patronize the hotel.

And further at p. 815:

As was pointed out in the case of *Lamond,* [1897] 1 Q.B. 541, the question of whether or not an hotel is a common inn is one of fact—the test being, as laid down by Esher, M.R., at p. 545—whether "the proprietors of the hotel held it out to the public as an inn that would take in any traveller who came, provided there was room to do so.

Lord Anderson then proceeded to apply this test of "holding out" at pp. 815-6:

Now, . . . , what has been proved is that by signboards, by advertisement and guide-books, by the presence of a porter at railway trains, and by the implied invitation of the open door, members of the public, without exception, . . . , are invited to the hotel. No limitation or restriction has been proved by the defenders as to those whom they invite. Their invitation is to the public generally. . . .

On appeal, in so far as this point was concerned, the Lord Justice-Clerk agreed with the Lord Ordinary, p. 826, as did also Lord Ormidale, p. 836; and *vide* Lord Salvesen at p. 833. In my view the portions of the judgment just quoted apply with the same force as if they were directed to the case at Bar.

I have cited these extracts from the *Rothfield* case to show that the duty of the hotel to serve the public in that case was placed solely upon the ground of "holding out" to the public. It did not depend upon the fact that it was an hotel. The prin-

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ciple enunciated there applies equally to an alehouse (*vide Pidgeon* v. *Legge, supra*) and to the case at Bar. Lord Esher, M.R. in *Lamond* v. *Richard,* [1897] 1 Q.B. 541 (followed in the *Rothfield* case) said at p. 545:

> Such a finding in this case does not affect the position of other hotels, and I think it is open to argument that the large London hotels do not hold themselves out as receiving customers according to the custom of England—at any rate, such a matter would be a question of fact.

And *vide* also *Jones* v. *Osborn* (1785), 2 Chit. 484. It follows from the common-law principle applied in *Pidgeon* v. *Legge, Lamond* v. *Richard* and the *Rothfield* case, *supra,* that the argument of counsel for the appellants, that at common law, the proprietor of an alehouse can refuse to serve a guest without reasonable cause while the proprietor of an inn cannot, has no foundation. It is clear, that the right to refuse in either case, depends solely upon the question of fact whether the premises have been "held out" to the public without reservation or limitation. This is not to say of course, that when both an alehouse and an hotel have been "held out" to the public, that the grounds of refusal which may be considered reasonable are necessarily the same.

I cannot regard *Reg.* v. *Rymer* (1877), 41 J.P. 199 and following it *Sealey* v. *Tandy* (1901), 71 L.J.K.B. 41, decisions relied upon by the appellants, as extending beyond their own facts. In both cases there was reasonable ground for refusal, and that was all that was necessary for their decision. Certain expressions of opinion extending beyond that cannot be regarded as a part of or a step in the *ratio decidendi.* As such they are *obiter dicta.* For that reason his Lordship the Chief Justice of Canada said in *Trottier* v. *Rajotte,* [1940] S.C.R. 203, at 215 in regard to *obiter dicta* contained in a previous decision of the Supreme Court of Canada to which he referred:

> Consequently, it is open to challenge in this Court and, when challenged, it would be our duty to examine the point on the merits.

In neither *Reg.* v. *Rymer* nor *Sealey* v. *Tandy* were any authorities cited to support the *obiter dicta* therein, which must be regarded as contrary to the accepted principle of the common law in relation to "holding out" to the public as laid down in *Pidgeon* v. *Legge, Lamond* v. *Richard* and the *Rothfield* case, *supra.* In

neither case was there evidence of "holding out" such as exists here. *Reg.* v. *Rymer* was cited in argument in *Sealey* v. *Tandy;* but in *Reg.* v. *Rymer* no counsel appeared on either side to argue the case.

The appellant's contention, that she could refuse to serve the respondent without showing reasonable cause, must be regarded as unreasonable on its face. We cannot consider the right of the beer-parlour operator to refuse the respondent without also considering the right of the respondent to be served. Society is made up of individuals. The common-law rights of each individual are necessarily limited by the manner in which their exercise affects the common-law rights of other individuals. If the respondent had the right to be served (as he did from the general invitation to the public and the "holding out") it is repugnant to any sense of fair dealing to contend that he could be denied that right except for reasonable cause. It would be unreasonable and unjust; a clear invasion of his common-law rights. As such it cannot claim any authority under the common law, as witness the observation of Lord Esher in *Emmens* v. *Pottle* (1885), 55 L.J.Q.B. 51, at p. 52, cited with approval by Lord Macmillan in *Donoghue* v. *Stevenson,* [1932] A.C. 562; 101 L.J.P.C. 119, at 141:

> Any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England.

So far the position of the appellant has been considered on the assumption that she operated a beer parlour as a private business. But that is not this case, for the manufacture and sale of beer in this Province are controlled in their entirety by the Government in the public interest under the Government Liquor Act, *supra.* The Legislature intervened to protect the public from the evils found to exist when the sale of beer was conducted as a private business. Licences to operate beer parlours are granted at the discretion of the Government Liquor Control Board, and then only in such locality, in such premises, and to such persons as the board may approve. The board may refuse to grant a licence at its own discretion. It may summarily suspend or cancel any licence. There is no comparison with retail licences issued by municipalities to grocery stores and

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other retailers. Beer parlour licence-holders may not purchase beer except from the Government liquor vendor designated by the Liquor Control Board. The wholesale and retail prices are controlled by the Government and the sale of beer in beer parlours is surrounded with governmental restrictions designed for the good and welfare of the people. The Province has taken complete control. Licences to operate beer parlours are issued as an indulgence of the Crown and not as licences to trade. The beer licence does not authorize a private business. The beer licensee is compelled to carry out governmental regulations adopted as part of the operative plan which removed beer from the sphere of commerce and made it instead a governmental enterprise conducted by the Government for the good and welfare of the people. It is the carrying on of a public necessity under Government control, after it was taken out of the hands of private business.

This brings us to the third objection to the appellants' contention, *viz.*, that beer parlours in this Province are "affected with a public interest" thereby depriving the appellant of her "*jus privatum*" (if such existed) to refuse to sell to any person without reasonable cause. Lord Chief Justice Hale "in his treatise De Portibus maris, par. sec. cap. 6 (Hargr. Tra., Vol. 1, p. 77)," said (I quote from *Bolt* v. *Stennett, post,* at 608, as Hargrave's Tracts are not available):

> "If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licenced by the Queen . . . the duties must be reasonable and moderate, though settled by the King's licence or charter. For now the wharf and crane are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected by a public interest."

In this quotation Lord Hale illustrated the principle of private business fastened with "a public interest" by the example of "wharfs only licenced by the Queen." Here we deal with "beer parlours only licensed by the King." As already pointed out the Legislature of the Province in the name of His Majesty controls entirely the production and sale of beer. Sale of beer by the glass is permitted only in beer parlours "licensed by the King,"

under conditions imposed not for the benefit and maintenance of trade, but for the good and welfare of the people.

The Legislature has eliminated beer from the scope of private commerce and has placed it entirely under the control and supervision of the Government for the "public good." In so doing the Legislature may be said to have destroyed any "freedom of commerce" or "*jus privatum*" in the sale of beer, if such ever existed at common law. By overriding all interest and advantage which the individual might claim if beer were a private utility or an article of commerce, the Legislature itself has affected the sale of beer with a "public interest." It has applied Lord Hale's common-law doctrine by statute in a manner that cannot be denied. Lord Hale's doctrine was discussed in *Bolt* v. *Stennett* (1800), 8 Term Rep. 606; 101 E.R. 1572 and *vide* foot-note thereto and in *Allnutt* v. *Inglis* (1810), 12 East 527; 104 E.R. 206. It was applied also by the Supreme Court of the United States in *Munn* v. *Illinois* (1876), 94 U.S. 113 by Mr. Chief Justice Waite in a decision of outstanding importance involving the regulation of grain elevators. And *vide* also *Nebbia* v. *New York* (1934), 291 U.S. 502, concerning the regulation of milk prices. In the latter case it was held (p. 531) that the test as to whether a business is "affected with a public interest" is whether its control is for the public good; and further that it is not restricted to businesses which are public utilities or which have a monopoly or enjoy a public grant or franchise.

Lord Hale's doctrine was adopted by the House of Lords in *Simpson* v. *Attorney-General* (1904), 74 L.J. Ch. 1, *vide* Lord Macnaghten, p. 8. The real question in that case, *vide* p. 11, was whether the appellant was justified in closing his locks altogether. In his speech leading up to this question, Lord Macnaghten makes it clear that the appellant's patent for the locks in the river was affected with a public interest although it was not a monopoly. The comparison was made with a monopoly as exemplified by an ancient ferry at p. 9:

> The ferry carries with it an exclusive right or monopoly. In consideration of that monopoly the owner of the ferry is bound to have his ferry always ready. But there is nothing of that kind here. No one is bound to pay for the locks except the person who uses them. Anybody may make other locks or other contrivances for getting past the mill-weirs.

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It is to be concluded therefore that the holding of a monopoly or public grant or franchise for sole use, sale or operation is not an essential condition to an occupation becoming "affected with a public interest." *Vide* also *Brass* v. *Stoeser* (1894), 153 U.S. 391. When the term "monopoly" is used regard should be had for the Statute of Monopolies, 1623 (21 Jac. 1, c. 3), and *vide* Lord Macnaghten at p. 7; *Simpson* v. *Attorney-General, supra.*

From the foregoing discussion of this phase of the subject (and apart from the question of "holding out" already discussed) these conclusions follow that: (1) The sale of beer in beer parlours in this Province is not a private business; (2) by the legislation under which they are created and operated, beer parlours have become "affected with a public interest." This common-law doctrine has been applied by statute; (3) the sale of beer in beer parlours having become in this manner "affected with a public interest," it becomes available to all the King's subjects, and displaces any right that the respondent might have had at common law, if engaged in private business, to sell only to whom she would. However, even if it could be said that beer parlours as they exist, still retain sufficient of the characteristics of private business to exclude the application of Lord Hale's doctrine, yet it must be admitted at the same time that the sale of beer has been authorized and supervised therein solely for the "public good," under the legislation I have already described. This legislation coupled with the appellant's "holding out" to the public (to which reference has been made previously) constitute beer parlours a "public employment" in the sense described by Lord Chief Justice Holt in *Lane* v. *Sir Robert Cotton* (1701), 12 Mod. 472; 88 E.R. 1458, when he said at p. 1464:

> If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade (Keilwey, 50. pl. 4). If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier; and I have known such actions maintained, though the cases are not reported. . . . If the inn be full, or the carrier's horses laden, the action would not lie for such refusal; but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public.

While Lord Holt was in the minority in *Lane* v. *Sir Robert Cotton, supra,* the difference in judicial opinion arose, not in respect of the common-law principle he had enunciated, but in respect of its application in an action against the postmaster for loss of Exchequer bills in a letter delivered to the post office: *vide Bainbridge* v. *The Postmaster-General,* [1906] 1 K.B. 178, at 186-7. In *Johnson* v. *The Midland Railway Company* (1849), 4 Ex. 367; 154 E.R. 1254, which related to the liability of a carrier at common law, Baron Parke (with whom Alderson, Rolfe and Platt, BB. concurred) cited the principle that Lord Holt put forward and applied it at p. 1256:

> And that arises from the public profession which he has made. A person may profess to carry a particular description of goods only, for instance, cattle or drygoods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, . . . , and then he would not be bound to carry to or from the intermediate places. Still, until he retracts, every individual . . . , has a right to call upon him to receive and carry goods according to his public profession.

That is to say, the carrier's obligation at common law arose not because he was a carrier, but because of the "holding out" or "profession" to the public which he made in respect to his occupation of carrier. So likewise in regard to the smith and the innkeeper mentioned by Lord Holt as examples of the common-law duty attaching to a person engaged in an occupation for the public good which he "holds out" to the public for common use without reservation or limitation.

In *Johnson* v. *The Midland Railway Company, supra,* Baron Parke mentioned without further comment that Manning, J. had suggested this proposition did not apply to a smith which was one of the examples given *supra* by Lord Holt. But reference to the case cited in support, *Parsons* v. *Gingell* (1847), 4 C.B. 545, at 555; 136 E.R. 621, which deals with another point entirely, *viz.,* whether the horse of a third party boarded at a livery stable is subject to distress for rent, does not support its exclusion, and *vide Ex parte Russell* (1870), 18 W.R. 753. In fact it seems clear from the observations of both Lord Chief Justice Wilde and Coltman, J. in *Parsons* v. *Gingell* that the business of a livery stablekeeper was there regarded as "public and common," being the very point stressed by Lord Holt and Baron Parke, *supra.*

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Again in *Dickson* v. *Great Northern Railway Co.* (1886), 18 Q.B.D. 176, which concerned the railway's duty to carry dogs, Lindley, L.J. said at p. 183:

> At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; . . .

This is another way of saying that the right of an individual to have his dog carried depended upon the "holding out" or "profession" to the public in an occupation which was for the "public good." Profession of a trade for the public good constituted in Lord Holt's language a "public employment." As the appellant "professes" to serve beer to "people in general" she is bound at common law to serve the respondent in particular, unless for reasonable cause shown. It has been shown that beer parlours exist for the "public good" because of the legislation creating and supervising them for the purpose. Coupled with the appellants' "holding out" to the public they then become a "public employment" in the sense used by Lord Holt in *Lane* v. *Sir Robert Cotton, supra.* As such, in Lord Holt's language (p. 484), the appellant

> is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him.

And again, she is

> bound to the utmost extent of that employment to serve the public.

From the cases cited and discussed the conclusion cannot be resisted that hotels, carriers and smiths were regarded as "public employment," not because of their nature alone but because of the two essential conditions laid down by Lord Holt; first, that the occupation itself was one for the "public good"; and secondly, that the proprietor "held out" a general invitation to the public without reservation or limitation which was inconsistent with a refusal to any member of the public, except for reasonable cause shown. An inn became a common inn and a carrier became a common carrier because of the combination of these two essential conditions. It is clear from the authorities cited that an inn did not become a common inn, simply because it was an inn, nor did a carrier become a common carrier simply because it was a carrier. It was the "holding out" (which is a question of fact in each case) which made the inn a common inn and the

carrier a common carrier. This analysis clarifies the *ratio decidendi* of the authorities, and extracts the applicable principle therefrom. It is not confined to inns and carriers as such, for the occupations to which such principle may be applied, are not susceptible of division into closed classes or categories. The principle is applicable to any occupation wherein the two essential conditions are present together. In the case at Bar, the appellant beer-parlour operator is engaged in an occupation where these two essential conditions have been shown to exist together.

It is said there were other beer parlours in Vancouver, at which the respondent could be served. But in the language of Lord Hale "they are the beer parlours only licensed by the King." They are all "affected with the public interest." So far as disclosed by the record they all come under the heading of "public employment." If the appellants have the right in law to refuse to serve the respondent because of his colour and race, so have all the other beer-parlour operators. But even if other beer-parlour operators should not refuse him he has the legal right to be served in the appellants' beer parlour. In *Rothfield* v. *North British Railway Co., supra,* it is said at p. 812:

> It was suggested that, as the pursuer might have obtained accommodation at another hotel in Edinburgh, he was not entitled to insist on obtaining it at the defenders' hotel. I do not agree. A traveller is, in my opinion, entitled to choose the hotel at which he desires to be a guest, and the defenders are not entitled to put a traveller, desiring to use their hotel, to the trouble and expense of finding another hotel.

It will be remembered that the hotelkeeper's rights in the *Rothfield* case did not depend on the fact that it was an hotel. They were founded on its "holding out" to the general public. I think such reasoning applies with equal force to the case at Bar.

Counsel for the appellants contended that at common law an alehouse keeper (as he classed the appellant) could refuse to serve a guest without showing reasonable cause. He admitted that an innkeeper—which he asserted the appellants were not—could not do so without showing reasonable cause. It has been shown previously that such a common-law distinction does not exist in the manner contended. However, even if it did exist, there are several reasons at least why that contention has no bearing in this case. In the first place whatever may be the

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common-law duty of an alehouse keeper, the appellants are not alehouse keepers to which such common law is applicable. As already explained, beer parlours in this Province are not a common-law growth but were created by a statute whose purpose was to eliminate entirely the private commerce in or "freedom of commerce" in beer. In such circumstances the common law relating to alehouse keepers in England as gleaned from the historic past can be of little assistance in the determination of this case.

In the second place, if the conclusions I have reached in regard to the appellants' "holding out" and being engaged in "a public employment" and "affected with a public interest," are correct statements of the common law, then whatever distinctions there may have been or may be between inns and alehouses, as those terms have been interpreted from time to time in the changing conditions of England over several centuries past, such distinctions can have at best but little application to the *status* of a beer parlour in this Province operated under the provisions of the Government Liquor Act, *supra*. In the third place, in my view, the *onus* is on the appellant to establish the common-law right she asserts. *Vide* the *Rothfield* case, *supra*, at p. 816. That is to say, having invited the general public by "holding out" as she has, then if she desires to be excused from her consequential obligations, the *onus* is upon her to show good cause therefor. To my mind the appellant has failed to discharge that *onus*. Inns and alehouses in England altered with the changes in the character of the roads and methods of transportation, which in turn brought changes in the customs and habits of the people; of equal importance were the changes in liquor legislation from the year 1495 onward; all of which could not fail to exert a profound influence upon the relevant common law during those periods—*vide* for example *Rothfield* v. *North British Railway Co.*, *supra*, at p. 816; *The Evolution of the "Pub,"* 20 L.Q.R. 316; *Cayle's Case* (1584), 4 Co. Rep. 202; 77 E.R. 520; *Six Carpenters' Case* (1610), 4 Co. Rep. 432; 77 E.R. 695; *Parker* v. *Flint* (1697), 12 Mod. 254; 88 E.R. 1303; *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283; 106 E.R. 667, and *Lorden* v. *Brooke-Hitching*, [1927] 2 K.B. 237, at 250. For example the

Alehouse Act, 1828 (9 Geo. 4, c. 61), in section 37 defined "inn" to include "alehouse." *Vide* also *Webb* v. *Fagotti Brothers* (1898), 79 L.T. 683, Chitty, L.J. at 684; also Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 143, note (*f*).

The appellant has failed to show any universal usage from which may be collected the common-law right she asserts. In the *Six Carpenters' Case, supra,* the common-law right to enter a "common wine tavern" was not questioned in the year 1610. That these changes in customs and statute law have led to uncertainty as to what the common law was and is in regard to alehouses, as well as in regard to the distinction between inns and alehouses in this respect, is exemplified further by comparing a leading article in 1883—47 J.P. 579 with a similar article in 1898—62 J.P. 305. This is illustrated again by the change in the judicial interpretation of "traveller" (upon which the appellants relied) which occupies an important place in the decision of many of the cases. In *Cayle's Case* in 1584 it was restricted to "passengers and wayfarers"; but in *Orchard* v. *Bush* (1898), 67 L.J.Q.B. 650, it was interpreted to include a guest who was neither a passenger nor a wayfarer, as it had been in other decisions before and since; *vide Bennett* v. *Mellor* (1793), 5 Term Rep. 273; *Rex* v. *Ivens* (1835), 7 Car. & P. 213—note charge to jury of Coleridge, J.; *Axford* v. *Prior* (1866), 14 W.R. 611; *Regina* v. *Harris, et al.* (1892), 2 B.C. 177 and *Cryan* v. *Hotel Rembrandt, Limited* (1925), 41 T.L.R. 287.

I am of the view, with respect, that the learned trial judge reached the right conclusion. The reasons given above are now summarized (1) *Christie* v. *The York Corporation, supra,* is not binding upon this Court so as to prevent the determination of the issues involved here. (2) The respondent's race and colour was not a ground for refusal to serve him. (3) There is no evidence adduced to support a refusal for reasonable cause. (4) The appellant having "held out" her beer parlour to the public without reservation or limitation could not refuse the respondent except for reasonable cause shown; and none was shown. (5) The Legislature, having taken over the control of beer, thereby "affected it with a public interest" so that no mem-

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ber of the public could be refused by the appellants without reasonable cause shown. (6) In any event beer legislation being for the "public good," that together with the appellant's "holding out" to the public, constituted her beer parlour a "public employment," and the appellant could not therefore refuse a member of the public without reasonable cause shown.

I would dismiss the appeal.

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

Solicitors for appellants: *Wismer & Fraser.*
Solicitor for respondent: *Adam Smith Johnston.*

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April 15;
May 21.

Cons'd
v. Colwin
[1931] 2 D.L.R. 20
[1931] 3 W.W.R. 465

Cons'd
v. Koshman
[1931] 3 W.W.R. 231

Cons'd
v. Lee Hay Hung
[1940] 2 W.W.R. 308

Appld
Marshall v. R.
[1940] 2 W.W.R. 70
(1940 S.C.J.)

REX v. CHO CHUNG.

Criminal law—Charge of being in possession of opium—Accused sits in room while another finishes his smoke—"Knowledge and consent"—Interpretation—Can. Stats. 1929, Cap. 49, Sec. 17—Criminal Code, Sec. 5, Subsec. 2.

The accused called upon another Chinaman to sell him lottery tickets. When he entered the other's room he found him smoking opium. The other would not do business until he had finished his smoke. The accused sat down to wait until he had finished. While waiting the police entered the room. A charge of being in possession of opium was dismissed. On appeal by the Crown:—

Held, affirming the decision of police magistrate Wood, that the facts herein do not disclose such "consent" on accused's part that would bring him within the meaning of section 5, subsection 2 of the Criminal Code.

APPEAL by the Crown from the decision of police magistrate Wood for the city of Vancouver, dismissing a charge against the accused of unlawfully having in his possession a drug, to wit, opium. On the 13th of November, 1939, Cho Chung went to the room of a friend Mah Chong for the purpose of selling him lottery tickets. When he arrived he found his friend lying on the bed smoking opium, and after admitting Cho Chung, Mah Chong laid down on the bed again to finish his smoke and would not talk business until he had finished. Cho Chung then sat

down and waited for him to finish his smoke, but ten minutes later the police came into the room.

The appeal was argued at Victoria on the 15th of April, 1940, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

Donaghy, K.C., for appellant: The charge is under section 4 (*d*) of The Opium and Narcotic Drug Act, 1929. On the interpretation of section 5, subsection 2 of the Criminal Code, the word "consent" was dealt with by the learned magistrate: see *Rex* v. *Mitchell and McLean*, [1932] 1 W.W.R. 657; *Reg.* v. *Dring* (1857), 7 Cox, C.C. 382; *Rex* v. *Pritchard* (1913), 9 Cr. App. R. 210. On the question of knowledge and control see *Rex* v. *Campbell*, [1938] 4 D.L.R. 773. The word "possession" depends on the circumstances of each case: see *Reg.* v. *Thompson* (1869), 11 Cox, C.C. 362.

W. W. B. McInnes, for respondent: Section 5 of the Criminal Code does not apply to The Opium and Narcotic Drug Act, 1929. This man is not liable on a charge of possession. Section 17 of The Opium and Narcotic Drug Act, 1929, deals with cases such as this, so the other does not apply: see *Rex* v. *Wong Loon* (1937), 52 B.C. 326; *Rex* v. *Wong Yip Lan and Lee Lung* (1936), 50 B.C. 350. The only charge against the smoker is smoking. The cases do not go so far as to say that "smoking" always includes "possession." The proper charge in this case would be "smoking": see *Rex* v. *Lee Po* (1932), 45 B.C. 503. As to the word "consent" mere acquiescence does not constitute "consent." There must be some gesture or action on his part to constitute "consent." In fact his attitude was that of annoyance rather than consent.

Donaghy, in reply, referred to *Witt v. David Spencer Ltd.* (1935), 50 B.C. 35; *In re Henderson, Stewart, Broder & Joe Go Get*, [1930] S.C.R. 45, at p. 61.

Cur. adv. vult.

21st May, 1940.

MACDONALD, C.J.B.C.: Appeal by the Crown on a question of law only from a decision of magistrate Wood holding that respondent was not guilty of the charge of having in his possession opium contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto. The point of law is necessarily based

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on facts found in the reasons for judgment. I will not repeat them in detail. I agree with the magistrate that section 5, subsection 2 of the Criminal Code applies to a charge under The Opium and Narcotic Drug Act, 1929. It reads as follows:

> If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

In this case one Mah Chong Jing was convicted of having opium in his possession. The respondent called upon him to sell lottery tickets and became aware that the other was smoking opium as soon as he entered the room; there is therefore no dispute as to knowledge on respondent's part. Far from assenting or conniving at the commission of the offence by Mah Chong Jing respondent, it would appear, if he displayed any emotion at all, was annoyed to find it necessary to wait till the other finished his smoke before he would discuss business with him. The situation would be precisely similar if a missionary called to sell tracts to Mah Chong Jing; found him smoking what he knew to be opium and waited till he finished his smoke before proceeding to discuss a sale. Put this way, it is clear that it could not reasonably be said that the missionary was a consenting party to the commission of a crime by reason of the provisions of section 5, subsection 2 of the Criminal Code.

Mr. *Donaghy,* for future guidance, asked us to find that the following statement by the magistrate (particularly the words "there must be some kind of control") is not an accurate test in assigning a meaning to the word "consent" in section 5, *viz.*:

> Mere acquiescence is not sufficient but there must be something of an active nature, either mental or physical; there must be some kind of control; there must be something upon which the consent of the accused must operate and this consent must be effective.

He asked us to substitute a better statement that could be applied like a yardstick to all similar or somewhat similar cases arising in the future. I must decline the invitation. I adhere to the salutary rule of deciding only the issue before us. I merely say, therefore, that the facts herein do not disclose such consent on respondent's part that would bring him within the meaning of section 5 of the Code. It might well be that on facts slightly different another conclusion ought to be reached. Nor is it wise

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I think to attempt to give one definition only of the word "consent" broad enough to cover all cases. Several meanings may be given to the word: one or the other might fit the facts of a particular case.

I would dismiss the appeal.

SLOAN, J.A.: I agree.

O'HALLORAN, J.A.: I concur in the judgment given by my Lord the Chief Justice.

Appeal dismissed.

Solicitor for appellant: *Dugald Donaghy.*
Solicitor for respondent: *W. W. B. McInnes.*

REX v. CARMICHAEL. (No. 2.)

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April 1;
May 23.

Criminal law—Interdicted person—Interdiction order set aside—Accused later arrested when in possession of liquor—Setting aside order not filed with board—Conviction—R.S.B.C. 1936, Cap. 160, Secs. 70 and 73 (1).

An order of interdiction was made against the accused on the 29th of June, 1937. On the 21st of July, 1939, said order was set aside by the county court judge for the county of Yale. On August 9th, 1939, accused was convicted by a stipendiary magistrate on a charge that on the 26th of July, 1939, he unlawfully did as an interdicted person have in his possession liquor. Section 73 (1) of the Government Liquor Act, under which the county court judge has power to set aside an order of interdiction, provides, *inter alia*, that "upon the order of the Judge so setting aside the order of interdiction being filed with the Board, the interdicted person shall be restored to all his rights under this Act." The order of the county court judge was not filed with the "board" until five days after accused was arrested on the 26th of July, 1939. On appeal to the Supreme Court by way of case stated the conviction was affirmed.

Held, on appeal, reversing the decision of MANSON, J., that on the 21st day of July, 1939, by the order of KELLEY, Co. J. the order of interdiction had been set aside and in the absence of an existing interdiction order a person cannot be said to be an "interdicted person" as defined by the

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Act. The accused was not an "interdicted person" within the meaning of the Act at the time of his arrest, and the conviction should be set aside.

APPEAL from the order of MANSON, J. of the 7th of December, 1939, whereby it was ordered that the appeal of the accused by way of case stated be dismissed and that the conviction of the stipendiary magistrate for the county of Yale be affirmed, on a charge that the accused unlawfully did, as an interdicted person, have in his possession or under his control, liquor. An order of interdiction was made by the stipendiary magistrate for the county of Yale against Carmichael on the 29th of June, 1937. Upon the application of said Carmichael the said order of interdiction was set aside by KELLEY, Co. J. for the county of Yale on the 21st of July, 1939. Carmichael was arrested on the 26th of July, 1939, when he was in possession of intoxicating liquor, and on the 3rd of August, 1939, was convicted as above stated. It was held that the order of KELLEY, Co. J. of the 21st of July, 1939, did not become operative pursuant to section 73 (1) of the Government Liquor Act until the 31st day of July, 1939, being the date when it was filed with the Liquor Control Board at Victoria, British Columbia.

The appeal was argued at Vancouver on the 1st of April, 1940, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: Accused was arrested on the 26th of July, 1939, when found with liquor, but the order of interdiction against him was set aside on the 21st of July, 1939. He was then no longer an interdicted person and therefore not subject to arrest. The order was not filed with the Liquor Control Board until the 31st of July, but that is no answer to the fact that he was not an interdicted person when arrested.

H. W. McInnes, for the Crown: The essence of interdiction is the loss of a right. The statute purports to restore that right and the right is not restored until the order setting aside the interdiction order is filed with the Liquor Control Board. This was not done until after the arrest: see Maxwell on the Interpretation of Statutes, 8th Ed., 320; *Jolly* v. *Hancock* (1852), 22 L.J. Ex. 38; *Caldow* v. *Pixell* (1877), 2 C.P.D. 562, at p. 566.

Cur. adv. vult.

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On the 23rd of May, 1940, the judgment of the Court was delivered by

SLOAN, J.A.: On the 29th of June, 1937, an order of interdiction was made against the appellant pursuant to the relevant sections of the Government Liquor Act, R.S.B.C. 1936, Cap. 160. On the 21st of July, 1939, the said order of interdiction was set aside by KELLEY, Co. J.

On the 9th of August, 1939, the appellant was convicted by a stipendiary magistrate on a charge that he, the appellant, on the 26th of July, 1939,

unlawfully did, as an interdicted person, have in his possession or under his control liquor, contrary to the form of the statute in such case made and provided.

From this conviction an appeal was taken by way of a case stated which came before MANSON, J. who affirmed the conviction. The appellant now appeals to this Court, alleging that the conviction is wrong in law in that he was not an interdicted person on the 26th of July, 1939, as the order of interdiction had been set aside five days prior to that time.

An "interdicted person" as defined by section 2 of the Government Liquor Act means

. . . a person to whom the sale of liquor is prohibited by an order made by an interdiction official. . . .

By section 73 of the said Act a county court judge has power to set aside the order of interdiction, which jurisdiction was exercised, as I have mentioned, by KELLEY, Co. J. on the 21st of July, 1939. The said section then continues:

. . . and upon the order of the Judge so setting aside the order of interdiction being filed with the Board, the interdicted person shall be restored to all his rights under this Act, and the Board shall forthwith notify all Vendors and all licensees holding beer licences, club licences, or veterans' club licences under this Act accordingly.

The order of KELLEY, Co. J. was not filed with the board until after the 26th of July. It was the opinion of the learned magistrate (apparently shared by the learned judge below) that the accused remained within the definition of an interdicted person until the order setting aside the interdiction order had been filed with the board. With great respect I am unable to accept that contention. I take it, in the absence of any suggestion to the contrary, that the said order of KELLEY, Co. J. was perfected

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upon the date it bears, *i.e.,* the 21st of July, 1939, and thus became an operative order on and from that date. That being so it follows, in my view, that the interdiction order was set aside on and from that date. In the absence of an existing interdiction order I cannot see how a person can be said to be an "interdicted person" within the meaning of the definition to which I have referred. True he is not restored "to all his rights" (whatever that may mean) until the order is filed with the board and may remain in some sort of "no-man's-land" until that step is taken, but, whatever his position, he is not, in my opinion, an "interdicted person" within the meaning of the Act after the interdiction order has been set aside.

With respect I would allow the appeal and set aside the conviction.

Appeal allowed and conviction set aside.

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Lumber company—Debentures—Specific charge on standing timber—Timber cut and sold—Right to proceeds—Assignment of part of proceeds to bank—Interpretation of trust deed.

The plaintiff company executed a debenture trust deed in March, 1923, creating a fixed and specific charge upon the company's real property, timber licences and timber berths, including standing timber. It also included a floating charge upon the company's other property and assets present and future. Included in the specific charge were licences to cut timber on five Dominion timber berths. In July, 1927, the plaintiff company with the concurrence of the trustee, entered into an agreement with another company permitting the latter to enter upon the said timber berths "to cut into shingle bolts and remove therefrom all merchantable and accessible cedar timber, whether standing or fallen." The plaintiff company agreed thereunder to sell the latter company at prices therein set out "all shingle bolts which have been cut by the purchaser."

In an action for damages the plaintiff Aitken, representing the debenture-holders, maintained that the plaintiff company had no power under the trust deed to cut its standing timber or to enter into said agreement to cut it, because it was specifically charged, and she supported the logical consequence that the trust deed prevented the plaintiff company from operating. She also contended that even if the agreement were valid, nevertheless the moneys arising therefrom were impressed with a trust in favour of the debenture-holders and could not be used by the plaintiff company in its ordinary course of business. The plaintiff recovered judgment.

Held, on appeal, reversing the decision of McDONALD, J., that to ascertain the true intent and meaning of the trust deed, not only must the portions creating the specific and floating charges be looked at, but the trust deed as a whole in the light of the nature of the undertaking and the ordinary business of the plaintiff company. The deed intended and permitted the plaintiff company to carry on its business as a going concern and therefore enabled it to cut its standing timber even though described therein as specifically charged. Under article 3 (8) of the deed the plaintiff company was empowered in plain language to sell or lease all or any of the specifically mortgaged premises, that is to say, to sell or lease any of its timber berths which included therewith the right to cut the standing timber thereon. It is significant that the trust deed does not contain an additional clause providing that the capital moneys derived from the sales be impressed in effect with a trust in favour of the debenture-holders. The company's business at the time the trust deed was entered into was the cutting of its standing

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timber into merchantable logs, *i.e.*, "loggers pure and simple." The objects of the company could not be carried out except by logging the timber berths or entering into an agreement with someone else to do so. When the security was created the debentures were secured by the assets and undertaking of the plaintiff company as a going concern; that is to say, a going concern depending for its existence and the security of its debenture-holders upon the carrying on of its ordinary business, which was the cutting of the very standing timber expressed to be specifically charged in the trust deed. The contention on behalf of the debenture-holders cannot be sustained.

APPEAL by defendants Westminster Trust Company and The Bank of Toronto from the decision of MCDONALD, J. of the 7th of November, 1938 (reported, 53 B.C. 300), adjudging that the defendant the Westminster Trust Company pay $45,959.72 to the plaintiffs, being moneys received by the said company and which said company failed to apply in accordance with the terms of the trust indenture of the 1st of March, 1923, and that The Bank of Toronto pay the plaintiffs $9,161.79, being trust moneys received by it for the benefit of bondholders referred to in the said judgment, and that all moneys paid into Court be received by the receiver appointed herein for the benefit of the bondholders. The plaintiff Stave Falls Lumber Company Limited was formerly known as Abernethy & Lougheed Limited, and on the 1st of March, 1923, by indenture of trust created an issue of bonds in the sum of $225,000. The Westminster Trust Company was appointed trustee under said indenture of trust. The plaintiff Olivia Brand Aitken is the holder of one of these bonds and also is holder of a bond issued under a subsequent indenture of trust made by said company on the 1st of March, 1931. She is suing on behalf of herself and all other bondholders under the said two indentures of trust. The sum of $35,700 and $12,495 interest is due on the 1923 issues of bonds, and $367,000 and $153,317.50 interest due on the 1931 issue. The assets mortgaged under the 1923 indenture included, *inter alia,* five Dominion timber berths, known as Stoltze licences. These licences were assigned to the trustee the Westminster Trust Company and were registered in its name and are still there. The trust indenture also included an insurance policy of $25,000 on the joint lives of Lougheed and Abernethy. One E. A. Riddell was manager and director of the Westminster Trust Company

and also director of the Stave Falls Lumber Company. In July, 1937, the Stave Falls Lumber Company agreed in writing with the Stoltze Manufacturing Company Limited for the sale of cedar timber on the Stoltze licences for being cut into shingle bolts at $1.50 per cord. Lougheed, manager of the Stave Company, and Riddell, manager of the Westminster Trust, had doubts as to whether it was proper to sell these specifically mortgaged licences, and received legal advice from *W. J. Whiteside,* solicitor for the Westminster Trust Company. They took his advice that it was in order for the Stave Falls Lumber Company to enter into the contract. The Stoltze Company proceeded to cut shingle bolts and paid $12,450 to the Stave Falls Company, which moneys were used by the Stave Falls Company in its business and was not applied towards payment of the bonds. At this time Lougheed was heavily indebted to the Westminster Trust Company, and to pay this debt he procured an assignment from the Stave Falls Company to the Westminster Trust Company of the purchase-moneys payable by the Stoltze Company, and arranged with Riddell, manager of the Westminster Trust Company, to assign these moneys to the Westminster Trust Company. Riddell again obtained advice from *W. J. Whiteside* as to whether this could be done, and was assured it was in order. The Bank of Toronto was banker for both the Stave Falls Company and the Westminster Trust Company, and one Lamprey (manager of the Vancouver branch of The Bank of Toronto) looked after the Stave Falls Company, and when he took over the account after investigation he granted the Stave Falls Company a credit of $75,000 to be secured by section 88 of the Bank Act, and by assignment of book accounts. The assignment was executed in February, 1926. At this time Lamprey was advised that the assets of the company were mortgaged to the Westminster Trust Company and that the mortgage consisted of the bond issue of 1923. In August, 1929, the Stave Falls Company was in financial difficulties and the bank made demand for payment of its loan. The Westminster Trust Company then assigned to the bank one-half of the Stoltze Company money. In November, 1929, the Westminster Trust Company received $10,000 from the Stoltze Company and paid $5,000 of this to the bank and later

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the Westminster Trust Company received two payments of $1,000 and $1,800 and paid half of these amounts to the bank. The learned judge ordered that the bank should account for the $6,400 that it had received. The remaining $6,400 held by the Westminster Trust Company was not used for the benefit of the bondholders. The learned trial judge held this amount was received by the Westminster Trust Company and retained in breach of trust and was liable to account for this amount. The Stoltze Company then ceased operations and no further payments were made. In 1930 the Stave Falls Company decided to create a further issue of bonds for the purpose of retiring the issue of 1923, and on March 1st, 1931, executed an indenture of trust in favour of the Montreal Trust Company as trustee creating an issue of $700,000 seven per cent. sinking fund bonds, which mortgage charged all real and moveable property of the Stave Falls Company, including the Stoltze Company licences. The Montreal Trust Company had no information that the moneys payable under the Stoltze Company agreement had been assigned to other parties. $100,000 of the bonds of the 1931 issue were sold for $90,000, and on receipt of same the Montreal Trust Company sent $45,000 to the Westminster Trust Company to pay off the 1923 issue, but only $18,817.82 was used in purchasing bonds of the 1923 issue, and the balance was applied to other purposes. Out of the $45,000 received by the Westminster Trust Company said company paid itself $14,786.66 for premiums on insurance policies owing by the Stave Falls Company. In February, 1936, the Stoltze Company agreement was assigned to one McGee under agreement with the Stave Falls Company and The Bank of Toronto. In April, 1936, McGee sold the timber in the Stoltze licences to the Allen McDougall Butler Shingle Company Limited, and certain payments were made by this company to the Westminster Trust Company, the learned trial judge ordering that these payments be transferred to the plaintiff. Abernethy died in 1938, and the $25,000 insurance on the joint lives of himself and Lougheed was paid to the Westminster Trust Company. The learned trial judge found that this sum be paid to the plaintiff for the benefit of the bondholders.

The appeal was argued at Vancouver on the 31st of March and the 3rd to the 6th of April, and at Victoria on the 11th to the 13th of April, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

J. W. deB. Farris, K.C. (*E. B. Bull,* with him), for appellant The Bank of Toronto: The bank received certain moneys from the Westminster Trust Company. These moneys (a) were not "trust" funds belonging to the shareholders; (b) the bank did not receive the moneys under such circumstances as to require it to return them. As to (a), under the trust deed of March 1st, 1923, the Stave Falls Company had the right to cut the timber on the Stoltze Company licences and to agree to allow the Stoltze Company to cut. If they did not have the right the Westminster Trust Company consented to it. The trust deed specifically provides that the Stave Falls Company can log their holdings. If they were not able to do this they could do no business at all. An ordinary mortgagor in possession may cut timber on the mortgaged land. The security for the loan never became enforceable: see *Reid* v. *Galbraith* (1927), 38 B.C. 287. The provisions of a mortgage must be interpreted so as to permit the business to be operated: see *Wheatley* v. *Silkstone Coal Co.* (1885), 54 L.J. Ch. 778; *National Provincial Bank* v. *United Electric Theatres* (1915), 85 L.J. Ch. 106; *In re Yorkshire Woolcombers Association* (1903), 72 L.J. Ch. 635, at p. 639; *sub nom. Illingworth* v. *Houldsworth* (1904), 73 L.J. Ch. 739; *Hoare* v. *British Columbia Development Association* (1912), 107 L.T. 602; *Government Stock &c. Investment Co.* v. *Manila Railway* (1896), 66 L.J. Ch. 102. After the sale of the logs the moneys are available for carrying on the business of the company: see *Ex parte National Mercantile Bank. In re Phillips* (1880), 16 Ch. D. 104. If the Stave Falls Company can work the licences it follows that it can enter into an agreement with the Stoltze Company to have that company work them. Then the moneys received by The Bank of Toronto from the proceeds of the logs were properly paid and credited to the indebtedness of the Stave Falls Company. The consent of the Westminster Trust Company to the Stoltze agreement was a

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concurrence under article 4 of the deed. There was no condition that the proceeds should be paid to the trustee for the bondholders. Two of the three payments to the bank were made before the 1931 trust deed, so that the trust deed has no application to these two payments. As to the payment of $900 which was made two months after the trust deed of March, 1931, was executed, the evidence shows the shingle bolts for which this payment was made were cut prior to March 1st, 1931. The bank can retain this money because it was a *bona fide* purchase for value without notice of any defect in title. The bank is a purchaser for value of all moneys received by it: see Ashburner's Principles of Equity, 2nd Ed., 82; *Thorndike* v. *Hunt* (1859), 3 De G. & J. 563; 44 E.R. 1386; *Taylor* v. *Blakelock* (1885), 55 L.J. Ch. 97; *Taylor* v. *London and County Banking Co.* (1901), 70 L.J. Ch. 477, at p. 486. The bank had no notice express or constructive. Money cannot be followed where there is no notice: *Re Cohen & Lyons. Canadian Credit Men's Trust Ass'n* v. *Spivak,* [1927] 1 D.L.R. 577. That the circumstances should have put Lamprey, the manager of the bank, on inquiry see *White* v. *Dominion Bank,* [1935] 1 D.L.R. 42, at p. 48. On the doctrine of constructive notice see *Manchester Trust* v. *Turner, Withy & Co.* (1895), 64 L.J.Q.B. 766, at 770; *Ware* v. *Lord Egmont* (1854), 4 De G. M. & G. 460; 43 E.R. 586; *Lloyd's Bank (Limited)* v. *Swiss Bankverein* (1913), 29 T.L.R. 219; *Greer* v. *Downs Supply Co.* (1926), 96 L.J.K.B. 534; *English and Scottish Mercantile Investment Trust* v. *Brunton* (1892), 62 L.J.Q.B. 136; *In re Valletort Sanitary Laundry Co.* (1903), 72 L.J. Ch. 674; *The Birnam Wood* (1906), 76 L.J. P. 1; *Thomson* v. *Clydesdale Bank, Limited,* [1893] A.C. 282; *G. & T. Earle, Limited* v. *Hemsworth R.D.C.* (1928), 44 T.L.R. 605 and 758. This was a commercial transaction: see *The King* v. *Union Bank of Canada,* [1927] 4 D.L.R. 937. The respondent Aitken is not entitled to sue until the conditions precedent are fulfilled: see *The Home Life Association of Canada* v. *Randall* (1899), 30 S.C.R. 97.

Griffin, K.C., and *Edmonds, K.C.,* for appellant Westminster Trust Company: The life policy of Abernethy became subject to certain clauses in the debenture deed, whereby the money

could be paid to the Stave Falls Company for its general corporate purposes. Authorities show that payments made by the authority or for the account of the Stave Falls Company were made to it: see *Spargo's Case* (1873), 8 Chy. App. 407; *Ferrao's Case* (1874), 9 Chy. App. 355; *Larocque* v. *Beauchemin,* [1897] A.C. 358; *North Sydney Investment and Tramway Company* v. *Higgins,* [1899] A.C. 263; *In re H. H. Vivian & Co., Limited,* [1900] 2 Ch. 654, at pp. 658-9; *In re Washington Diamond Mining Company,* [1893] 3 Ch. 95. The Stoltze money involves $12,800 for half of which the Stave Falls Company was held liable and the bank for the other half. The timber was the property of the Stave Falls Company but burdened with the charge of the bonds. It was floating as to the timber lease and licences, and the logs could be sold by the Stave Falls Company free of the debenture charge. The protection of the mortgagor company consists of the sinking fund: see *In re Hamilton's Windsor Ironworks. Ex parte Pitman and Edwards* (1879), 12 Ch. D. 707; *Yorkshire Railway Wagon Company* v. *Maclure* (1882), 21 Ch. D. 309; *Willmott* v. *London Celluloid Company* (1886), 31 Ch. D. 425, and on appeal 34 Ch. D. 147; *Ward* v. *Royal Exchange Shipping Company Lim.; Ex parte Harrison* (1887), 6 Asp. M.C. 239; *Governments Stock and Other Securities Investment Company* v. *Manila Railway Co.,* [1897] A.C. 81, at p. 86; *In re Old Bushmills Distillery Co.; Ex parte Brett,* [1897] 1 I.R. 488; *Re Arauco Company Limited* (1898), 79 L.T. 336; *In re H. H. Vivian & Co., Limited,* [1900] 2 Ch. 654; *In re Borax Company. Foster* v. *Borax Company,* [1901] 1 Ch. 326; *In re Yorkshire Woolcombers Association, Limited,* [1903] 2 Ch. 284; *sub nom. Illingworth* v. *Houldsworth,* [1904] A.C. 355; *Robinson* v. *Burnells Vienna Bakery Company,* [1904] 2 K.B. 624; *Cox Moore* v. *Peruvian Corporation, Limited,* [1908] 1 Ch. 604; *Evans* v. *Rival Granite Quarries Limited,* [1910] 2 K.B. 979; *In re Ind, Coope & Co., Limited,* [1911] 2 Ch. 223; *National Trust Co.* v. *Trusts and Guarantee Co.* (1912), 5 D.L.R. 459; *Great Lakes Petroleum Co. Ltd.* v. *Border Cities Oil Co. Ltd.,* [1934] O.R. 244; Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 480, secs. 780-82. The Stave Falls Company received in

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all $12,450 and received it rightfully. It is only when the bondholders take steps by taking possession or appointing a receiver to enforce their security that the Stave Falls Company's right to collect ceases. There was no breach in relation to the assignment of the Stoltze Company money to the Westminster Trust Company. The Westminster Trust Company has never converted to its own use any proceeds of trust property and does not now retain any. All the money it received was money belonging to the Stave Falls Company and which that company has the right to dispose of: see *Thorne* v. *Heard,* [1894] 1 Ch. 599, at 606 and 613; *How* v. *Earl Winterton,* [1896] 2 Ch. 626, at 636 *et seq.; In re Page. Jones* v. *Morgan,* [1893] 1 Ch. 304; *In re Gurney. Mason* v. *Mercer, ib.* 590; *In re Timmis. Nixon* v. *Smith,* [1902] 1 Ch. 176, at 183 and 185; *In re Bowden. Andrew* v. *Cooper* (1890), 45 Ch. D. 444; Lewin on Trusts, 13th Ed., 919. The Court had no jurisdiction to entertain this action because the matters in question were already before the Court in the debenture-holders' action in which judgment had already been pronounced in October, 1932: see *Burt* v. *British National Life Assurance Association* (1859), 4 De G. & J. 158, at 174; *Huggons* v. *Tweed* (1879), 10 Ch. D. 359; *Watson* v. *Cave (No. 1)* (1881), 17 Ch. D. 19; *Wolff* v. *Van Boolen* (1906), 94 L.T. 502. On the general topic of representative actions see *Duke of Bedford* v. *Ellis,* [1901] A.C. 1; Halsbury's Laws of England, 2nd Ed., Vol. 26, p. 17, sec. 14; Vol. 5, p. 532, sec. 863. A representative action does not lie for damages: see Yearly Practice, 1933, p. 207; *Aberconway (Lord)* v. *Whetnall* (1918), 87 L.J. Ch. 524; *Hardie and Lane, Ld.* v. *Chiltern,* [1928] 1 K.B. 663; *Market & Co., Limited* v. *Knight Steamship Company Limited,* [1910] 2 K.B. 1021; *Jones* v. *Cory Brothers & Co., Ltd.* (1921), 152 L.T. Jo. 70; *The London Motor-cab Proprietors Association and The British Motor-cab Company (Limited)* v. *The Twentieth Century Press (1912) (Limited)* (1917), 34 T.L.R. 68; *Jones* v. *Garcia del Rio* (1823), Turn. & R. 297. Liability for breach of trust is equivalent to "damages for breach of duty": see Lewin on Trusts, 13th Ed., 919; *In re Bowden. Andrew* v. *Cooper* (1890), 45 Ch. D. 444. Everything was done with the

acquiescence of the plaintiff company: see *Fletcher* v. *Collis,* [1905] 2 Ch. 24, at pp. 32-4; Halsbury's Laws of England, 2nd Ed., Vol. 13, pp. 208-09, secs. 199-201. The Westminster Trust Company was never a trustee for the holders of bonds of the second issue: see *Banner* v. *Berridge* (1881), 18 Ch. D. 254; *Taylor* v. *Russell,* [1892] A.C. 244; *In re James' Mortgage Trusts,* [1919] 1 Ch. 61; Coote on Mortgages, 9th Ed., 72; Halsbury's Laws of England, 2nd Ed., Vol. 23, pp. 435, 437, 443, secs. 640, 644 and 652-3.

Bull, K.C., for Montreal Trust Company: This judgment does directly affect us. On the pleadings we are affected. We are interested in the unperformed part of the Stoltze Company agreement: see *Dearle* v. *Hall* (1828), 3 Russ. 1; 38 E.R. 475, at p. 479. As to floating charge see Palmer's Company Precedents, 15th Ed., Part III., pp. 68-9. The licences specifically mortgaged are an interest in land: see *Glenwood Lumber Company* v. *Phillips,* [1904] A.C. 405. That the assignment to The Bank of Toronto is invalid see *The Canadian Bank of Commerce* v. *The Yorkshire & Canadian Trust Ltd.* (1938), 52 B.C. 438, and on appeal [1939] S.C.R. 85; Godefroi on Trusts and Trustees, 5th Ed., 570-1. The case of *English and Scottish Mercantile Investment Trust* v. *Brunton* (1892), 62 L.J.Q.B. 136 does not apply. The rule is quite different when you deal with real property. The Stoltze agreement is an interest in land: see Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 8, sec. 5; *Crosby* v. *Wadsworth* (1805), 6 East 602; *Back* v. *Daniels,* [1925] 1 K.B. 526. The rule as to constructive notice applies as it is an interest in land and is different from other cases where it is a chose in action. The bank had knowledge that should have put them on their guard and on enquiry: see *White* v. *Dominion Bank,* [1934] 3 W.W.R. 385; *Begley* v. *Imperial Bank of Canada,* [1935] S.C.R. 89.

Walkem, K.C., for respondents: They contend that as long as the sinking fund payments are made the Stave Falls Company can use the timber in any way it pleases. If this is sound the modern debenture trust deed, containing a specific charge on certain assets and a floating charge over others, as is the case in question, would be a worthless security. Practically the whole

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of the security consists of timber holdings. If the Stave Falls Company can cut the timber and retain the proceeds then after two sinking fund payments amounting to $45,000 had been paid there would be nothing to prevent the Stave Falls Company from cutting the whole of the remaining timber and retaining the proceeds with the result that the bondholders' security would be gone and nothing left to pay the balance of the $225,000 issue. There is no authority for such a proposition, and Mr. *W. J. Whiteside* gave bad advice. It is actually forbidden by the trust indenture which contains a covenant that the company will not create any mortgage or charge on the mortgaged premises, and the Stoltze Company agreement was an attempt on the part of the company to create such a charge: see Coote on Mortgages, 9th Ed., Vol. 1, pp. 4 and 129. The mortgagee is entitled to have the security kept unimpaired: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 354. The mortgagor is in possession and may exercise all the rights of ownership, not diminishing the security or rendering it insufficient: see *Kekewich* v. *Marker* (1851), 3 Mac. & G. 311; 42 E.R. 280; Coote on Mortgages, 9th Ed., 690-91. The mortgagor is not permitted to do any acts jeopardizing the sufficiency of the security: see Story on Equity, 3rd Ed., 419-20. The facts show the sale of the Stoltze Company licences impaired the security: see *Reid* v. *Galbraith* (1927), 38 B.C. 287; *Dedrick* v. *Ashdown* (1888), 15 S.C.R. 227. It was rightly held that the proceeds of the sale of timber on the Stoltze Company licences are the property of the bondholders, and the Westminster Trust Company and The Bank of Toronto must account for these proceeds received by them. The bank had actual notice of all the facts showing that these moneys were trust funds belonging to the bondholders: see Godefroi on Trusts, 5th Ed., 570; *Thomson* v. *Clydesdale Bank, Limited,* [1893] A.C. 282. If a trustee sells trust property other than negotiable security, and the seller be known to be a trustee, the purchaser is put on inquiry: see *Hill* v. *Simpson* (1802), 7 Ves. 152; *Simpson* v. *Molsons' Bank* (1895), 64 L.J.P.C. 51. That the bank is liable to account see *Bank of Montreal* v. *Sweeny* (1887), 56 L.J.P.C. 79; *Earl of Sheffield* v. *London Joint Stock Bank (Lim.)* (1888), 57 L.J.

Ch. 986; *London Joint-Stock Bank* v. *Simmons* (1892), 61 L.J. Ch. 723; *White v. Dominion Bank,* [1934] 3 W.W.R. 385; *McPherson* v. *Dominion Bank,* [1935] 2 W.W.R. 1; *Begley* v. *Imperial Bank of Canada,* [1935] S.C.R. 89. It was found by the trial judge that $2,545.62 life insurance moneys was converted by the Westminster Trust Company to its own use and were not paid to the company for its corporate purposes. This is a question of fact and should not be disturbed. At the time the sinking fund moneys were received the Stave Falls Company owed the Westminster Trust Company $13,676.43 for insurance premiums and the money was taken from the sinking fund to pay this insurance. It was held they were not entitled to take these moneys out of the sinking fund moneys. A trustee cannot contract with itself in relation to the insurance: see *Wright* v. *Morgan* (1926), 95 L.J.P.C. 171, at p. 175. The Stave Falls Company had no authority to give directions to the trustee as to distribution of moneys in the sinking fund. A receiver must maintain the action in the name of the person who is entitled to sue, namely, the company: see *In re Sacker* (1888), 58 L.J.Q.B. 4; Kerr on Receivers, 10th Ed., 233. Order XVI., r. 9, authorizes such an action as this by a person representing parties having the same interest, so the plaintiff Aitken properly brings this action: see Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 448. The action is for breach of trust and recovery of trust funds. The Westminster Trust Company became a trustee for the holders of the bonds of the 1931 issue upon receiving notice of the charge of the indenture of March 1st, 1931, being created by the Stave Falls Company. The effect of giving notice to the Westminster Trust Company was to convert it into a trustee for the Montreal Trust Company and its bondholders: see Godefroi on Trusts, 5th Ed., 554-5; *Dearle* v. *Hall* (1828), 3 Russ. 1; 38 E.R. 475. The Bank of Toronto is a trustee of the Stoltz Company moneys and still retains these moneys, and consequently is not entitled to the benefit of the Statute of Limitations: see Lewin on Trusts, 13th Ed., 936; *Foxton* v. *Manchester and Liverpool District Banking Company* (1881), 44 L.T. 406; *Soar* v. *Ashwell,* [1893] 2 Q.B. 390, at p. 394; *Burdick* v. *Garrick* (1870), 5 Chy. App. 233, at p. 243.

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Persons who have received property subject to a trust and dispose of it inconsistently with the terms of the trust of which they are cognizant are not entitled to the benefit of the statute: see *Spickernell* v. *Hotham* (1854), Kay 669; *Stone* v. *Stone* (1869), 5 Chy. App. 74; *Lee* v. *Sankey* (1873), L.R. 15 Eq. 204; *Wilson* v. *Moore* (1834), 1 Myl. & K. 337; *Bridgman* v. *Gill* (1857), 24 Beav. 302; *Townshend* v. *Townshend* (1783), 1 Bro. C.C. 550; *Beckford and Others* v. *Wade* (1805), 17 Ves. 87. They are not entitled to the benefit of the statute.

Farris, and *Griffin,* replied.

Cur. adv. vult.

5th March, 1940.

MARTIN, C.J.B.C.: After hearing counsel on the 27th of November last with respect to the moneys, paid and payable, dealt with under caption II. of the judgment of my brother O'HALLORAN as those of the Allen McDougall Butler Shingle Company Limited, I am of opinion, having regard to the issues and proceedings upon the record and the divergence of views expressed and positions taken by counsel, that the judgment pronounced by my learned brothers should not be varied.

As to the costs: (1) The appellants shall have them against the respondents here and below; (2) the Montreal Trust Company shall pay the costs of the Westminster Trust Company in this Court, but not the costs of The Bank of Toronto because it does not ask for them; (3) the said Montreal Trust Company shall neither pay nor receive costs below, the respondents not asking for them; (4) as to the said moneys dealt with under said caption II. there shall be no costs to any party here or below.

In other respects I do not differ substantially from the conclusions reached by my learned brothers.

MACDONALD, J.A.: I agree with my brother O'HALLORAN.

O'HALLORAN, J.A.: Represented by Olivia Brand Aitken, the first debenture-holders of Stave Falls Lumber Company Limited, obtained judgment in November 1938, for $45,959.72 damages for several unrelated breaches of trust against Westminster Trust Company, the trustee named in the debenture

trust deed. They secured judgment for $9,161.79 additional at the same time against the Stave Company's bank, The Bank of Toronto. Both the bank and the Westminster Trust Company appeal therefrom. The judgment is founded upon events which occurred before the debenture trust deed had "crystallized." The first issue affects both appellants. It may be referred to conveniently as:

(I.) The Stoltze agreement moneys:

On March 1st, 1923, the Stave Company entered into a debenture trust deed to secure $225,000 seven per cent. first mortgage gold bonds, repayable in ten years with an annual sinking fund requirement of $22,500; Westminster Trust Company was named trustee. G. G. Abernethy and Nelson S. Lougheed, who held the controlling interest in the Stave Company, joined in the trust deed as guarantors. The trust deed created a specific charge upon the company's real and immovable property, timber licences, timber berths and rights including what was expressed as standing timber. It created a floating charge also upon the company's other property and assets present and future. Included in the specific charge were licences to cut timber on five Dominion timber berths. The Dominion Government retained title to the land. Some four years after the trust deed was entered into, *viz.*, on the 18th of July, 1927, the Stave Company, with the concurrence of the trustee acting on its solicitor's advice, entered into an agreement with the Stoltze Manufacturing Company Limited, permitting the latter to enter upon the said timber berths

to cut into shingle bolts and remove therefrom all merchantable and accessible cedar timber, whether standing or fallen.

The Stave Company agreed thereunder to sell the Stoltze Company at prices therein set out "all shingle bolts which have been cut by the purchaser" (the Stoltze Company).

The Stave Company had received $12,450 (which is not involved in this appeal) under the Stoltze agreement prior to the 17th of November, 1928, when it assigned the said agreement to Nelson S. Lougheed and the Abernethy estate as security for its indebtedness to them, then amounting to some $203,712. On the same day the latter parties assigned the Stoltze agreement

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to Westminster Trust Company, not in its capacity as trustee in the 1923 debenture trust deed, but as collateral security for their indebtedness to it in its separate capacity of some $68,000 and also for the indebtedness of Ruskin Operations Limited to it of some $50,000 and interest which Lougheed and Abernethy had guaranteed to the Westminster Trust Company. Before these assignments were entered into both Westminster Trust Company and the Stave Company had legal advice upon their right to do so. A year or so later, between August, 1929, and 22nd February, 1930, the Westminster Trust Company, at the request and for the benefit of the Stave Company, assigned to The Bank of Toronto one-half of any moneys which it might receive under its assignment of the Stoltze agreement. The Stave Company was being pressed at that time by The Bank of Toronto to reduce its indebtedness to the bank amounting to over $50,000.

Westminster Trust Company received in all $12,800 under the Stoltze agreement (namely, $10,000 on the 29th of November, 1929; $1,000 on the 30th of September, 1930; and $1,800 on the 2nd of May, 1931). Half thereof was paid to The Bank of Toronto accordingly and applied by it on account of the Stave Company's indebtedness. It should be said here that the first default in complying with the sinking fund provision in the trust deed occurred on the 1st of March, 1930, but this was cured, and the 1931 sinking fund provided for as well. All of the complained of acts took place before the 5th of March, 1932, at which time the trustee took steps to enforce the debenture trust deed. The learned trial judge, Mr. Justice MCDONALD, held that the Stoltze agreement moneys received by Westminster Trust Company were subject to the specific charge in the trust deed and therefore should have been applied only for the benefit of the debenture-holders. He held that Westminster Trust Company, as trustee named in the trust deed, was therefore guilty of breach of trust in receiving and applying the Stoltze agreement moneys in the manner stated and gave judgment accordingly against the Westminster Trust Company for $6,400 it retained (*viz.*, half of the sum of $12,800 received) with interest to date of judgment. The learned judge found also that The

Bank of Toronto had notice that the Stoltze agreement moneys which it received were trust moneys subject to the specific charge and therefore that it had notice the Westminster Trust Company could not deal with the same except as such and as trustee under the debenture trust deed. He gave judgment against the bank accordingly for $6,400 it received from the trust company (*viz.*, the remaining half of the $12,800) together with interest to the date of judgment.

We have to consider the right of the Stave Company to enter into the Stoltze agreement and its right to deal with the moneys arising therefrom in the ordinary course of business, having in mind that the trust deed described the timber berths and standing timber as specifically charged. The appeal raises a question as to the rights of debenture-holders which in the precise form in which it comes before us, does not appear to be covered by any previous authority cited by counsel. It will not be necessary therefore to discuss more than a few of the many authorities referred to. Counsel representing the debenture-holders took a strong stand. In replying to a question from the Court he maintained that the Stave Company (for which he appeared also) had no power under the trust deed to cut its standing timber (or to enter into the Stoltze agreement to cut it) because it was specifically charged; he supported the logical consequence that the trust deed prevented the Stave Company from operating. In this impasse all he could suggest was a meeting of the debenture-holders to determine what should be done under an improvident trust deed, in order that the Stave Company might be able to carry on its ordinary business. He maintained also that even if the Stoltze agreement were valid nevertheless the moneys arising therefrom were impressed with a trust in favour of the debenture-holders and could not be used by the Stave Company in its ordinary course of business.

Therefore we must look at the trust deed; not only at the portions creating the specific and floating charges but at the trust deed as a whole, in the light of the nature of the undertaking and the ordinary business of the Stave Company in order to ascertain the "true intent and meaning of this trust deed" (to use the express language found in article 16 of the trust deed

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itself). In *Evans* v. *Rival Granite Quarries, Limited,* [1910] 2 K.B. 979, Fletcher Moulton, L.J. in considering a debenture trust deed was led to remark at p. 993 that its interpretation did not depend upon the special language used in the particular document, but upon the essence and nature of a security of this kind. I am unable to agree with the submissions of counsel for the debenture-holders. In my view the trust deed intended and permitted the Stave Company to carry on its business as a going concern and therefore enabled it to cut its standing timber even though described therein as specifically charged. I cannot read the trust deed as intending to paralyze the undertaking of the company with accompanying losses to the debenture-holders as well as the shareholders, in fact as defeating the very purpose for which it was entered into. The principal reasons for that view are now discussed.

The Stoltze agreement related to "cedar timber whether standing or fallen." While standing timber was described as specifically charged in the trust deed, fallen timber was not. It was not contended that action would lie in respect to the fallen timber. But no evidence was adduced as to the quantity of fallen timber or standing timber which was cut into shingle bolts under the Stoltze agreement; likewise there was no evidence as to what portion of the moneys for which judgment was given related to fallen timber and standing timber respectively. On this ground alone the judgment should be set aside. However, even if the questioned moneys related only to standing timber the judgment below is subject to grave objections. The Stoltze agreement related only to five timber berths which had been "logged off" and from which the "loggable" timber had been taken out. The Stave Company did not have a shingle mill or a shingle business of its own. When it "logged over a piece of ground" it generally sold what was left of both standing and fallen timber to the shingle-bolt men to "clean up." This was considered good practice in logging. The evidence on these points is clear—*vide* the cross-examination of Nelson S. Lougheed, the president of the Stave Company. At the time the trust deed was entered into the Stave Company were "loggers pure and simple" to use the expression in the evidence. Under the trust deed the Stave Company was required to build a sawmill, but the

purpose thereof was to utilize timber cut from its licences which otherwise would be too costly to ship out in the form of logs. It is a rational assumption therefore that at the time the trust deed was entered into, it was intended by all concerned that a sawmill would be built to enable the Stave Company to cut some at least of its own standing timber; furthermore that it would continue cutting its own timber and in accordance with good logging practice that it would sell what was left of the standing timber on "logged off" ground to the shingle-bolt men to "clean up." These conditions must be regarded as of the essence and nature of a security of this kind. This view is supported by even the strictest construction of the trust deed.

Under article 3 (8) thereof the Stave Company was empowered in plain language to sell or lease all or any of the specifically mortgaged premises, that is to say to sell or lease any of its timber berths which of course included therewith the right to cut the standing timber thereon. This clause reads as follows:

At any time before the security hereby constituted becomes enforceable, the trustee may upon the application and at the expense of the company, do or concur in doing all or any of the things following in respect of the specifically mortgaged premises, that is to say:—

(a) May sell, or collect all or any of the specifically mortgaged premises, with full power to make any such sale for a lump sum or for a sum payable by instalments, or for a sum on account and a mortgage or security for the balance.

(b) May let on lease any part of the specifically mortgaged premises on such terms as may seem expedient.

It is clear authority to the Stave Company to enter into an agreement such as the Stoltze agreement to cut standing timber although described in the trust deed as specifically charged. This clause is almost word for word the same as clause 19, subsections (1) and (2) at p. 326 of Palmer's Company Precedents, 15th Ed., Part III. It is significant, however, that the trust deed does not contain the additional clause at p. 328 of Palmer, *supra,* or any similar clause, providing that the capital moneys derived therefrom shall be impressed in effect with a trust in favour of the debenture-holders. That additional clause, which is not in the trust deed before us, reads as follows:

All capital moneys arising under the last preceding clause and all assets acquired pursuant to that clause shall become part of the specifically mortgaged premises and shall be vested in the trustees accordingly.

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If it had been the "true intent and meaning of this trust deed" that the Stoltze agreement moneys were to be impressed with a trust in favour of the debenture-holders, then there would have been no easier way of manifesting that intent than by including in the trust deed what would appear to be a standard clause for that purpose. Counsel for the respondent Stave Company and its first debenture-holders, contended that this was stipulated in article 5 (6) of the trust deed; but that article relates only to moneys arising "under any sale by the trustee or by judicial process," that is to say, in the enforcement of the security. It does not relate to moneys arising from a sale by the Stave Company in the course of its business before the trustee has taken steps to enforce the security; as such it has no application to the case under review.

In my view these reasons are sufficient to establish the judgment cannot be sustained. In deference, however, to the extended argument of counsel I shall refer to the trust deed further; study thereof, even apart from the reasons already given, leaves little, if any, escape from the conclusion that it was a security upon the assets and undertaking of the Stave Company as a going concern, subject to the powers of the company to dispose of its property and assets in the ordinary course of business. The company's business at the time the trust deed was entered into was the cutting of its standing timber into merchantable logs—"loggers pure and simple," as already stated. To apply the language used in another respect by Lord Justice Lopes, in *Lee* v. *Neuchatel Asphalte Co.* (1889), 58 L.J. Ch. 408, at p. 419, its business was

> in its inherent nature wasting. The scheme of the undertaking is that there should be a gradual exhaustion of material; the wasting, in point of fact, is the business of the company, and without such gradual exhaustion there would be no revenue.

In acquiring these Dominion timber berths the purpose of the Stave Company was to obtain a wasting property. The objects of the company could not be carried out except by logging the timber berths or entering into an agreement with someone else to do so. Cutting the standing timber involved the gradual exhaustion thereof. The security taken by the debenture-holders was therefore of a wasting nature. It was obviously of the

essence and nature of the debenture trust deed. In plain language therefore, when the security was created, the debentures were secured by the assets and undertaking of the Stave Company as a going concern; that is to say a going concern depending for its existence and the security of its debenture-holders upon the carrying on of its ordinary business, which was the cutting of the very standing timber expressed to be specifically charged in the trust deed.

The language of the trust deed itself emphasizes this in article 3 (3) which provides in part:

> Provided always that the trustee shall, subject to the terms of this indenture, permit the company to hold and enjoy all the mortgaged premises, and to carry on therein and therewith the business or any of the businesses mentioned in the memorandum of association of the company until the security hereby constituted shall become enforceable. . . .

The expression "mortgaged premises" therein is defined in the interpretation clause of the trust deed to include all the company's assets and undertaking covered by both specific and floating charges. The expressions "hold and enjoy" and "carry on therein and therewith the business of the company" rationally must bear the meaning that the Stave Company was thereby permitted to cut its standing timber even though described as specifically charged, in order to carry on its business operations. To hold the contrary, would be to interpret the trust deed as paralyzing the operations of the company; in other words to hold it was intended to defeat the very purposes for which it was entered into. It was entered into to raise moneys "necessary for its corporate purposes," as stated in the first few lines of the trust deed itself. The business of the Stave Company was that of logging, *i.e.*, cutting its standing timber. One of the objects in issuing the debentures was the construction of a sawmill, so mentioned in article 8 (17) of the trust deed. Counsel for the respondent Stave Company and its debenture-holders contended that the right to hold and enjoy the premises, and to carry on business was restricted by the limiting term "subject to the terms of this indenture." In plain language this would mean that in one sentence the Stave Company was permitted to carry on its business of cutting its standing timber and in the next sentence was prevented from doing so by the specific charge on standing timber.

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I am unable to accept this as a rational interpretation of a commercial instrument, consistent with the true intent and meaning of the trust deed in the light of the essence and nature of the security. The standing timber and the timber licences were specifically mortgaged, but the Stave Company was permitted to carry on its business, which was the cutting of that timber. I see nothing inconsistent therein—no conflict between the specific and floating charges. The timber licences were specifically charged; the timber thereon was specifically charged while it was "standing." Once the timber was cut it was freed from the specific charge, although of course the timber licence itself remained subject thereto. The debenture-holders, by the very terms of the trust deed, authorized the company to cut the timber, that is in effect to deal with the timber in that respect, as if it were not specifically charged. It is obvious that the timber could not be cut and sold in the ordinary course of business and remain subject to a specific charge. The debenture-holders were equitable mortgagees in respect to the timber berths and standing timber thereon. In permitting the Stave Company to carry on its business, that is to cut its standing timber, the debenture-holders allowed the Stave Company to deal with the timber when cut as if released from the specific charge.

In effect so to speak the debenture-holders handed the title to the timber so cut to the Stave Company to enable the latter to deal with it in the ordinary course of business. They are in an analogous position to an equitable mortgagee (holding title deeds to land as security) who hands these title deeds back to the mortgagor to enable the latter to deal with the land in the ordinary course of business—*vide In re Castell & Brown, Limited,* [1898] 1 Ch. 315; *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (1885), 29 Ch. D. 715; *National Provincial Bank of England* v. *United Electric Theatres, Limited,* [1916] 1 Ch. 132. I find nothing in this view to conflict with the respective characteristics of specific and floating charges discussed in the Court of Appeal and the House of Lords in relation to present and future book debts as considered in the *Yorkshire Woolcombers* case, cited as *Illingworth* v. *Houldsworth* (1904), 73 L.J. Ch. 739, in the House of Lords, and *sub nom. In re York-*

shire Woolcombers Association (1903), 72 L.J. Ch. 635 in the Court of Appeal.

The tendency of authority has been to give a liberal meaning to "course of business" when the term is employed in debenture trust deeds—*vide In re Hamilton's Windsor Ironworks* (1879), 12 Ch. D. 707; *The Yorkshire Railway Wagon Company* v. *Maclure* (1882), 21 Ch. D. 309; *Governments Stock and Other Securities Investment Company* v. *Manila Railway Co.*, [1897] A.C. 81; *In re Old Bushmills Distillery Co.; Ex parte Brett* (1897), 1 I.R. 488. It is true that in the authorities cited in this connection, when a specific charge is considered, it is one which was created subsequently to an existing floating charge. But these authorities show that in determining whether a subsequent specific charge has priority to an existing floating charge the Courts have been astute to see if the creation of the specific charge has been necessitated by the demands upon the company in the ordinary course of its business. Applying these considerations to the case at Bar, we should reject an interpretation of the trust deed whereby the specific charge would disable or paralyze the ordinary business of the company which in this case included the cutting of its standing timber. In *In re Florence Land Co.* (1878), 48 L.J. Ch. 137, at 142 Sir George Jessel, M.R. referred to what he described as two "extravagant results" which would follow otherwise:

> . . . they could not make any practical use of the money borrowed, because that would become the property of the company, and anybody with notice would be liable on that view to repay it to the mortgagee or debenture holder. That would be an extravagant result.

The "practical use" of the money borrowed in the case at Bar was for working capital and construction of a sawmill to carry on its ordinary business, *viz.*, to cut its standing timber all of which was situate on licences specifically charged. The "extravagant result" would be that anyone with notice of the trust deed purchasing logs or lumber from the Stave Company would be liable to pay the trustee of the debenture-holders and not the Stave Company. He then points to the other extravagant result:

> If the company is formed to build and to let and mortgage its property, you can neither lease nor mortgage without the consent of every individual

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bondholder or debenture holder, which again, to my mind, would be extravagant.

In the case at Bar the business of the Stave Company included the cutting of its standing timber: "Loggers pure and simple" when the trust deed was entered into. Counsel for the Stave Company and its debenture-holders before us in fact took the position condemned by Sir George Jessel, *viz.*, that before the Stave Company could cut its timber a meeting of the debenture-holders would have to be held to obtain their authority. In the light of these two "extravagant" results, the rational view to adopt, as was said in the *Florence Land Co.* case, is that the trust deed created a charge subject to the powers of the Stave Company to carry on its business. It is not a rational view to hold that the moment the Stave Company executed the trust deed in March, 1923, that it thereby paralyzed its legal powers and incapacitated itself from carrying on its business. *Vide* also *In re Borax Company. Foster* v. *Borax Company,* [1901] 1 Ch. 326, at 342.

In accepting this interpretation of the trust deed it is regarded as significant that the Abernethy life-insurance moneys (discussed hereafter) were dealt with in much the same manner. Although these moneys were expressed to be subject to the specific charge yet the trust deed contained a provision permitting the trustee in its sole discretion to apply them to either sinking fund or general corporate purposes. The effect of this provision therefore was that the life-insurance moneys remained specifically charged until such time as the trustee should exercise its discretion by applying them in one of the two ways mentioned. Of course if applied to sinking fund the first debenture-holders would benefit from the trustee's decision but the moneys could not be applied to general corporate purposes without releasing them from the specific charge. Once the trustee decided to apply them to general corporate purposes (as it did) they became the moneys of the company free from any trust in favour of the debenture-holders.

Before leaving this branch of the appeal reference should be made to the decision of this Court in *Reid* v. *Galbraith* (1927), 38 B.C. 287. It concerned a mortgage of land upon which there was timber. The mortgagor's right to cut the timber turned

upon the extent the security was impaired thereby. It will be apparent, that issue does not arise here. As already pointed out, the business of the Stave Company being to cut its timber, its business was therefore of an inherently wasting nature. However, no issue of impairment of security arises here; and, even if it did, there is evidence that the Stave Company had ample assets in the form of standing timber alone to secure the outstanding first debentures of $35,700. The creation of a second mortgage debenture issue of $700,000 on 1st March, 1931, lends confirmation thereto. Sinking fund provisions in the trust deed calling for annual redemption of debentures were designed also to protect the debenture-holders during the depletion of the timber in the course of cutting.

For these reasons the appellants should succeed on this branch of the appeal. As I hold this view, it is not necessary for the decision of the appeal, to consider that portion of the argument of counsel for the appellant, The Bank of Toronto, relating to its assignment of book accounts from the Stave Company in 1926, or its knowledge of the character of the Stoltze agreement moneys it received from Westminster Trust Company.

(II.) Allen McDougall Butler Shingle Company Limited moneys.

Nearly five years later in April, 1936, and almost four years after the trustee had taken steps to enter into possession and enforce the security, the Allen McDougall Butler Shingle Company Limited obtained from an assignee of the Stoltze Company the right to cut shingle bolts on the five timber berths above mentioned under the agreement between the Stoltze Company and the Stave Company of the 18th of July, 1927, which has been discussed previously. Between October, 1936, and April, 1937, the Allen McDougall Butler Company paid $1,122.31 to the receiver of the Stave Company appointed by the trustee. These moneys are held in the hands of the trustee pending the outcome of this litigation. The learned trial judge held that neither of the appellants have any interest therein, and that such moneys and any further moneys which may be received from the said source should be paid over for the benefit of the first debenture-holders and thereafter, if any surplus, for the benefit of the second

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debenture-holders. It has been found, *supra,* that the assignment of the Stoltze agreement by the Stave Company to Westminster Trust Company was a valid assignment to the latter in its separate capacity and not as trustee under the trust deed, and consequently that the moneys arising thereunder were not impressed with a trust in favour of the first debenture-holders. By reason thereof the moneys arising hereunder belong to Westminster Trust Company in its separate capacity and should be paid over to it. Neither the Stave Company nor its debenture-holders have any claim thereto. This branch of the appeal should be allowed also.

(III.) Abernethy life-insurance moneys.

One of the specifically charged assets was an insurance policy for $25,000 on the joint lives of Nelson S. Lougheed and G. G. Abernethy. Abernethy died in 1928, and the money was paid to the trustee (Westminster Trust Company) in March of that year. Under article 7 (4) of the trust deed the trustee was given "the sole option and discretion" to use this money for the redemption of debentures or to pay it to the Stave Company for the latter's "general corporate purposes" upon such terms and conditions as in its "absolute option and discretion" the trustee should see fit to impose. As already pointed out, although this money was described in the trust deed as specifically charged and therefore impressed with a trust in favour of the debenture-holders, yet by the clear terms of the trust deed it could cease to be so at the sole option and discretion of the trustee. When the insurance money matured the Stave Company was not in default and the trustee in exercise of its powers disbursed the moneys to the order of the Stave Company for the latter's "general corporate purposes." The learned trial judge found nothing wrong in this nor in the application of $22,454.38 thereof for such purposes as payment of the Stave Company's bank indebtedness, second mortgage interest and to the Westminster Trust Company itself for fire-insurance premiums.

The learned judge did find, however, that the trustee was guilty of breach of trust in the application of the balance of $2,545.62. This consisted of three items. Two items of $108 and $637.62, totalling $745.62 were paid to Westminster Trust

Company in repayment of four fire-insurance premiums on a shingle mill of Ruskin Operations Limited, built on land leased from the Stave Company. Lougheed and Abernethy were controlling shareholders of the Ruskin Company. The third item related to $1,800 the Westminster Trust Company received on account of interest due it on a mortgage from Lougheed and Abernethy. The learned trial judge is in error, with respect, when he finds that this sum $2,545.62 should have been applied to the use of the debenture-holders. I think, however, the context indicates he intended to say it was not used for the general corporate purposes of the Stave Company. I deal with it on that assumption. A review of the material facts is required to understand the business relationship of the Westminster Trust (entirely apart from its position as trustee in the Stave Falls trust deed) with Lougheed and Abernethy and Ruskin Operations Limited. Some reference thereto has been made already in the discussion of the Stoltze agreement moneys. The moneys raised by the Stave Company on the security of its 1923 debenture issue were not sufficient for its purposes. All its assets were mortgaged thereby. Messrs. Abernethy and Lougheed, who were its principal shareholders, then borrowed on the security of their own assets and on the security of assets of their other companies including Ruskin Operations Limited, some $200,000 which they loaned to the Stave Company without security to complete the sawmill and for working capital. Some of this money was borrowed by them from Westminster Trust Company in its separate capacity.

The position therefore, as already pointed out, was that the Stave Company was indebted to Lougheed and Abernethy and the latter in turn were indebted to Westminster Trust Company. In addition, however, Ruskin Operations Limited was indebted to the Westminster Trust in a substantial sum, some $50,000, which was guaranteed by Lougheed and Abernethy. This has been referred to in the discussion of the Stoltze agreement. While there is no direct evidence that when the above sum of $745.62 was paid the Westminster Trust Company on behalf of Ruskin Operations Limited on March 29th, 1928, the latter company owed any money to the Stave Company, yet it is shown by the

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Stave Company's balance sheet as at November 30th, 1928, that at some time during the financial year then ended, Ruskin Operations Limited had become indebted to it in the sum of $4,414.75. If the Stave Company had paid $745.62 of its indebtedness to Lougheed and Abernethy and the latter had then paid it to Westminster Trust Company on account of the indebtedness of Ruskin Operations Limited there could be no question but that the payment to Lougheed and Abernethy was for a general corporate purpose of the Stave Company, namely, payment on account of its indebtedness to Lougheed and Abernethy. What the latter did with the money thereafter would not be a subject of inquiry. If at the request and concurrence of all parties concerned the payment was made direct from the Stave Company to Westminster Trust the nature of the transaction would not be changed.

The same reasoning applies to the $1,800 item; if the Stave Company had paid $1,800 of its indebtedness to Abernethy and Lougheed it would have been for a general corporate purpose also, *viz.*, payment on account of its indebtedness to them. If the latter then had paid the Westminster Trust Company it could not have been questioned. The fact that the Westminster Trust Company acting within its powers as trustee under the debenture trust deed and at the request of both the Stave Company and the Lougheed and Abernethy interests paid this money directly to itself in another capacity instead of first paying it to the Stave Company does not alter the substance of the transaction. These three disputed sums were applied to "general corporate purposes" of the Stave Company. It should be noted as well that at all material times the manager of the Westminster Trust Company was a director of the Stave Company; also that the payments were taken note of and not questioned by Riddell, Hodges & Winter, chartered accountants, who conducted the Stave Company's annual audit. If the disputed sum of $2,545.62 had been paid direct to the Stave Company, no more would have been heard of it. No objection was taken to some $9,998.23 so paid. The trustee applied this $2,545.62 as it did on the instructions of the Stave Company and Nelson S. Lougheed representing Ruskin Operations Limited and the Lougheed Abernethy inter-

ests as well. The affairs of the Stave Company, Ruskin Operations Limited and the Lougheed Abernethy interests were dominated by Nelson S. Lougheed, by reason of his large financial interests therein and his executive positions therewith. The financial affairs and operations of these interests were closely interrelated as already shown. In their relations with the Westminster Trust Company, Nelson S. Lougheed acted on behalf of these interests.

No doubt these three payments were not made so carefully or skilfully with a view to the exigencies of the law as they might have been, as was said by Lord Davey in delivering the judgment of the House of Lords in *North Sydney Investment and Tramway Company* v. *Higgins,* [1899] A.C. 263, at 268. But as said by Lord Justice James in *Spargo's Case* (1873), 42 L.J. Ch. 488, at 491, these were honest transactions excluding any question of sham, fraud or trickery. The Stave Company never questioned the payments until brought into this action as a party plaintiff by a representative of the debenture-holders. The Westminster Trust Company made the payments on the written request of Nelson S. Lougheed. Mr. Lougheed was a director of the Stave Company, and admitted in cross-examination that he signed the written request to the trustee at the request of his fellow directors. Lord Justice Mellish said in *Spargo's Case, supra* (p. 492):

> It is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

E. A. Riddell, at that time a director of the Stave Company, as well as manager of the Westminster Trust Company, said, and it was not questioned:

> Those moneys, I think you will find, are charged up in the Stave Falls books as a reduction of the Stave Falls liability to Nels Lougheed.

Spargo's Case was approved by the House of Lords in the *North Sydney Investment and Tramway Company* v. *Higgins* case, *supra.*

The complained of payments must therefore be regarded in the same light as if the $2,545.62 had been paid by the trustee to the Stave Company and paid back by it to the Westminster

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Trust Company with instructions to disburse it in the way it did. I would therefore allow this branch of the appeal.

(IV.) Sinking fund.

This fourth branch of the appeal involves $22,966.90 which was part of $45,000 received by the trustee under circumstances which require some analysis. In article 8 (16) of the trust deed the Stave Company covenanted to pay the trustee not less than 30 days before the first of March in each year,

> as a sinking fund, such sum of money as shall equal the principal amount of $22,500.00 par value of the bonds secured hereby, and the premium from time to time and at that time payable for the retirement of the said bonds.

In a further portion of this provision the Stave Company was given the right to purchase its own debentures and hand them to the trustee in lieu of or in part satisfaction of the above mentioned annual sinking fund requirement; it was stipulated that such bonds should be accepted for the sinking fund at their cost of purchase as therein specified. By article 9 the trustee was required on or before the 1st of March in each year (*viz.*, within the 30 days above referred to) to employ such sinking fund moneys (if all the sinking fund requirements had not been satisfied by the deposit of debentures as aforesaid) in the purchase of debentures in the manner therein specified. It is important to understand at the outset therefore that the method of sinking fund adopted in the trust deed was such that it could be complied with only by the deposit of redeemed debentures; and not by cash or cash invested in other securities. And furthermore that these redeemed debentures were obtainable in either of two ways (a) by the Stave Company itself depositing them; or (b) by the trustee buying them in with money furnished by the Stave Company.

On March 1st, 1930, the Stave Company for the first time failed to comply with its annual sinking fund requirement of $22,500. Late in 1930 and early in 1931, after consultation with its financial advisers in Eastern Canada it was planned to resume logging and milling operations if working capital could be obtained and the principal creditors did not object. It was then proposed to create a new trust deed secured by the issuance of $700,000 debentures with the Montreal Trust Company as trustee. Out of this amount the existing creditors, the balance

of the first mortgage debentures then outstanding, of some $112,500 would be paid and the necessary working capital provided. These negotiations were carried on by the Stave Company and the Montreal Trust Company; Westminster Trust Company took no part therein. In or about March or early in April, 1931, $100,000 of the second debentures were sold for $90,000, which was paid to the Montreal Trust Company. In the meantime another sinking fund provision had become due on the first debenture issue so that the Stave Company was $45,000 in default in the redemption of its debentures on the 1st of March, 1931. During the progress of the negotiations, *viz.*, on 13th April, 1931, the Montreal Trust Company paid Westminster Trust Company $45,000 under circumstances to be related. It is claimed by the first mortgage debenture-holders that this money was paid to it for sinking fund requirements and that $22,966.90 thereof was not used therefor, although it is admitted that the trustee not only brought the sinking fund up to date but in addition deposited $31,800 redeemed debentures in the sinking fund over and above the requirements of the trust deed.

The learned trial judge found [53 B.C. at pp. 307-08]:

> Here again the trust company has retained for its own use moneys properly belonging to the bondholders. It received the $45,000 in question, and appropriated it to sinking fund account as it was instructed to do by the Stave Company. I think it cannot afterwards be heard to say that it altered its election and chose to credit the money to an old debt of its own and by some sort of manipulation of old and new bonds satisfy its obligations as trustee for the bondholders. There must be an accounting for $22,966.90 on this account.

With respect the error in this finding originates in the conclusion that the $45,000 in question was the "bondholders' money." Examination of the facts shows that it was never so at any time. As a result of an arrangement or agreement between the Stave Company and the Montreal Trust Company as trustee for the second debenture-holders and in which Westminster Trust Company had no part, the Montreal Trust Company made out a cheque in favour of Westminster Trust Company for $45,000 and handed it to David Lougheed, a director of the Stave Company, who handed it to the Westminster Trust Company as trustee for the first debenture-holders on 13th April, 1931.

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There is no evidence of any agreement, let alone of any communication written or verbal between the two trust companies regarding this payment. It must be obvious, that the Montreal Trust Company had this money in its control; that it controlled its release and of course could control the manner of its use on release. The Montreal Trust Company was a trustee of this $45,000. On the facts presented to us it must be inferred that it had confidence in the Stave Company and that the latter would instruct the Westminster Trust Company what should be done with the money. This close relationship between the Montreal Trust Company and the Stave Company is a factor of importance when we consider the interchange of first and second debentures. The success of the second debenture issue depended upon the retirement of the first debentures. But the most practical method available of retiring the first debentures was by persuading the holders thereof to exchange them for second debentures. In the carrying out of this plan one would expect close collaboration between the Stave Company and the Montreal Trust Company.

What took place must be considered in the light of the Westminster Trust Company's duties as trustee under the trust deed. On the 4th of April, 1931, nine days before the Westminster Trust Company received from David Lougheed the cheque for $45,000 made out in its favour by the Montreal Trust Company, the Stave Company wrote Westminster Trust Company as follows:

> We expect to deposit to the credit of Stave Falls Lumber Company Limited bond issue sinking fund some $45,000.00 Wednesday or Thursday of next week. We ask that you hold this money pending our instructions as to redemption of bonds or investment. Under the terms of the trust deed this company is required to deposit with you bonds or cash for sinking fund purposes. In this case we are depositing cash, and do not wish any purchases to be made except upon our expressed instructions and approval.

In acknowledging receipt of the money on the 13th of April, 1931, Westminster Trust Company advised the Stave Company that the money "is being held according to your instructions for the sinking fund." On these letters the learned judge found that the Westminster Trust Company appropriated the $45,000 to the sinking fund account and therefore it could not afterwards be heard to say that it altered its election and chose to apply it

in another way. These letters and the subsequent conduct of the Stave Company will be considered further; but at the moment this finding requires critical examination. It is not borne out by the evidence; on the contrary it is shown that the trustee did not appropriate this sum to sinking fund account, but, as directed in the quoted letter from the Stave Company of the 4th of April held it subject to the receipt of further "express instructions" referred to in the letter.

This is evidenced by the terms of the receipt which Westminster Trust Company mailed the Montreal Trust Company on the date the money was received, *i.e.*, 13th April, 1931; the $45,000 is described therein as "Credit Stave Falls Lbr. Co. Ltd. Clients a/c." No reference is made therein to sinking fund account. No objection to the terms thereof was taken by Montreal Trust Company, which as trustee for the second debenture-holders, had the greatest interest of all concerned, in the application of the money, in accordance with the plan it was working out in conjunction with the Stave Company, for the most expedient way of retiring the first debentures. It is also evidenced by the clients' ledger statement of Westminster Trust Company which shows that the money was not deposited to the credit of the Stave Company sinking fund account, which was kept as a separate account; it shows the money was deposited in a special account opened as such on the date of receipt, *viz.*, 13th April, 1931. Furthermore in writing the Stave Company on the 13th of April, 1931, the date of receipt, the Westminster Trust Company said:

> We wish to acknowledge receipt of the Montreal Trust Company cheque for $45,000.00 which is being held according to your instructions for the sinking fund account of the Stave Falls Lumber Company 7% bonds due March 1st, 1933.

It is important to observe that this letter does not state the money is received for sinking fund purposes, or that it is applied thereto or that it is deposited in sinking fund account. If it did, it would be contrary to the receipt and the ledger statement mentioned above. It is stated to be "held according to your instructions for the sinking fund." While the above language standing alone might give rise to some confusion yet it is clear that the Westminster Trust Company had no intention of appropriating it to sinking fund account at that time, but was in fact, as the

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above-mentioned receipt and ledger statement verify, holding it pending receipt of the further "express instructions" referred to in the quoted letter from the Stave Company of the 4th of April. This is borne out by the next paragraph of the letter of the 13th of April, wherein Westminster Trust Company says:

We must call your attention to the fact that there is $16,038.78 due for insurance premiums and we think that a portion of the $45,000.00 cheque should be appropriated towards liquidating this amount. This amount has been paid by us on the understanding and with a definite promise that we would be reimbursed from the first monies to be received by us from the East.

Westminster Trust Company could not in one breath appropriate $45,000 to the overdue sinking fund, and in the next breath demand out of this sum payment of $16,038.78 which it had advanced for insurance premiums. This in itself would seem to establish beyond doubt that there was no appropriation as found by the learned trial judge. It should be observed also that Westminster Trust Company as trustee was under no greater obligation to see that the sinking fund was kept up than to see proper insurance was carried. Furthermore under article 8 (14) of the trust deed the moneys advanced by the trustee for insurance premiums among other purposes,—

shall upon default by the company hereunder become a first charge or lien upon the mortgaged premises [as already explained this term includes both the specific and floating charges] in priority to any of the said bonds or coupons and shall be payable out of any funds coming into the possession of the trustee.

Westminster Trust Company as trustee had a first charge therefore on the $45,000 for $16,038.78 insurance premiums which it had advanced. This analysis with respect shows the conclusion reached by the learned trial judge cannot be supported. It follows there could be no election by the trustee to treat the sum of $45,000 as "appropriated" to sinking fund account. If there was no election there could be no change in election.

At the time the trustee received this $45,000 on 13th April, 1931, the sinking fund was in default of redeemed debentures to the extent of $45,000. It was explained at the outset that the trustee's duty under the terms of the trust deed was not to deposit $45,000 cash or securities in the sinking fund but to procure and deposit redeemed debentures to that amount. Moneys received for sinking fund purposes were to be employed by the

trustee in the purchase of debentures for deposit in the sinking fund. But the letter of the Stave Company of the 4th of April shows clearly that the $45,000 was paid over on conditions which did not permit this. In this letter the Stave Company stipulated that

> We . . . do not wish any purchases to be made except upon our express instructions and approval.

This was equivalent to a condition that the money could not be used by the trustee to purchase debentures to deposit in the sinking fund until it received further instructions from the Stave Company. The consequence was it could not be used for sinking fund purposes at all, until the Stave Company gave further "express instructions" regarding the purchase of debentures. It was to be held "pending our instructions as to redemption of bonds or investment" as stipulated in the Stave Company's letter of the 4th of April, 1931, already referred to. The plan of events was consistent with that course. The $45,000 was received from the Montreal Trust Company at the behest of the Stave Company at a time when both the Montreal Trust Company and the Stave Company were engaged in promoting the second debenture issue. It was paid as part of the plan evolved by these two companies to retire all the first debentures and clear the way for the second debenture issue. Westminster Trust Company received it not as a provision for sinking fund made by the Stave Company pursuant to the trust deed but in the character of moneys to be held by it pending instructions during the progress of the plan to retire the first debentures.

The plan was to persuade all or as many as possible of the outstanding $112,500 first debenture-holders to exchange them for second debentures. It was arranged between the Montreal Trust Company and the Stave Company—and so carried out—(1) that the Stave Company should receive from the Montreal Trust Company $100,000 par value second debentures, which it could exchange for first debentures if the holders were willing, and (2) that $45,000 in cash should be paid by the Montreal Trust Company to Westminster Trust Company to be used by the latter in accordance with instructions to be given it by the Stave Company, as the plan to retire the first debentures got under way. The Stave Company could not very well convince

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first debenture-holders to take second debentures in exchange while the sinking fund requirements of the first issue were in default. The Stave Company would be in a strong position if it could say to the first debenture-holders in effect "the trustee has $45,000 in hand with which the sinking fund default can be cured; but if you will exchange for second debentures we may be able to cure the default without touching the $45,000 which can then be used to maintain the security most advantageously by payment of taxes, insurance premiums, timber licence, renewals and other charges."

In pursuance of this plan $76,800 (all but $35,700) of the first debentures were redeemed. Of the $45,000, all except $22,916.90 was utilized in purchase of first debentures; $14,786.16 of this latter amount was subject to a first charge for payment of insurance premiums and was so used; and the balance was applied in payment of commission on exchanges of first debentures for second debentures and in payments to the Stave Company or to its order. This result was made possible, of course, only by (1) the willingness of the Montreal Trust Company as trustee for the second debenture-holders to release $100,000 of the second debentures to the Stave Company and also to pay to the Westminster Trust Company $45,000 to be disbursed as part of this plan on the Stave Company instructions, and also (2) the willingness of holders of first debentures to accept second debentures in exchange to the extent they did. If there was any manipulation in these arrangements it was not on the part of Westminster Trust Company. It was arranged and made possible by the plan of the Stave Company and the Montreal Trust Company to make a success of the second debenture issue, and thus permit the Stave Company to resume operations. Because the plan was not completely successful, is not ground to charge Westminster Trust Company with breach of trust. It did nothing to weaken the position of its debenture-holders. On the contrary it strengthened their position by co-operating with the Stave Company and the Montreal Trust Company.

The duty of the Westminster Trust Company as trustee, as pointed out at the outset, was to place redeemed debentures in the sinking fund. By co-operating with the Montreal Trust

Company-Stave Company plan it was successful in placing $76,800 redeemed debentures in the sinking fund, and at the same time pay off a first charge of $14,786.16 for insurance premiums—in other words it benefited the first debenture-holders to the amount of $91,586.16. If instead it could have applied the $45,000 in the manner the respondents contend, it would have purchased $45,000 first debentures and the first debenture-holders would not have benefited by the additional $46,586.16 reduction in indebtedness. This analysis does not disclose any breach of trust on the part of Westminster Trust Company. It acted throughout in accordance with its duty to maintain and preserve the security of the first debenture-holders, and it did not in particular neglect that aspect of its duty which related to maintenance of the sinking fund. This branch of the appeal should therefore be allowed.

V. Conclusion.

Counsel for appellant trustee, the Westminster Trust Company argued as well that the issues herein were *res judicata* on the ground they had been before the Court in a debenture-holders' action, commenced by the Westminster Trust Company on the 5th of March, 1932, wherein both the Stave Company and the Montreal Trust Company were defendants. He argued also that the action was barred by sections 3 and 4 of the Statute of Limitations, Cap. 159, R.S.B.C. 1936, and *vide* also section 83 (1) of the Trustee Act, Cap. 292, R.S.B.C. 1936. He contended as well that the respondent Olivia Brand Aitken had no right to bring or maintain a representative action on behalf of other debenture-holders for a declaration that the appellant trustee had committed a breach of trust or for damages therefor or for conspiracy. These points were not raised before us until appellant's counsel had exhausted his argument on the merits. Having reached the conclusion that the appeal should be allowed in its several branches on the merits, it is assumed in the respondents' favour, for the purpose of this appeal only but without so deciding, that Olivia Brand Aitken had the right to bring this action, notwithstanding the above-mentioned objections.

In view of the conclusions reached it is unnecessary to consider the protective clauses in the trust deed and related sections of

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the Trustee Act, *supra,* which were relied on by counsel for the appellant trustee. Before us counsel for debenture-holders stated he was not charging the trustee with fraud, but with misapplication of the moneys. In any event the moneys were applied at the request of the Stave Company and for its purposes. In regard to both the Stoltze agreement and the Abernethy life-insurance moneys the trustee acted on the advice of its solicitor. In the case of the $45,000 received from the Montreal Trust Company no evidence was submitted that either the trustee or the Montreal Trust Company acted on solicitor's advice. A review of the evidence points definitely to the conclusion that the first debenture-holders as well as the Stave Company were benefited and not damaged by the acts of the trustee.

Having reached the conclusion that Olivia Brand Aitken cannot succeed, as representative of the first debenture-holders, it follows she cannot succeed on behalf of the second debenture-holders on whose behalf she sued also. In stating this consequential conclusion it is not decided that her action was brought properly on behalf of the second debenture-holders or that she should retain the judgment as given in that respect if the first debenture-holders had been successful in the appeal. While Olivia Brand Aitken sued on behalf of the second debenture-holders the Montreal Trust Company, the trustee under the second debenture trust deed, was joined also but as a party defendant. It was represented by counsel before us as a respondent in this appeal. It joined with the first debenture-holders before us to uphold a judgment against the trustee of the first debenture-holders.

In the result therefore the appeal of the appellant Westminster Trust Company is allowed in respect to the sum of $33,034.83 received from the Stoltze agreement, the Allen McDougall Butler agreement, the Abernethy life-insurance moneys and the sinking fund, which with stated interest of $12,924.89 amounts to $45,959.72. The judgment against the Westminster Trust Company should be set aside. The appeal of the appellant, The Bank of Toronto, is allowed in respect to the sum of $6,400 received from the Stoltze agreement which, with stated interest of $2,761.99, amounts to $9,161.99. The judgment against The

Bank of Toronto should be set aside. The appeal is also allowed in respect to any moneys the subject-matter thereof paid or thereafter payable by Allen McDougall Butler Shingle Company Limited if not included in the above stated amounts.

Appeal allowed.

Solicitor for appellant Westminster Trust Company: *Henry L. Edmonds.*

Solicitor for appellant The Bank of Toronto: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitor for respondents: *R. K. Walkem.*

Solicitor for defendant Montreal Trust Company: *W. W. Walsh.*

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Marriage — Foreign judgment — Voluntary submission to jurisdiction— Promise by husband to wife before dissolution of their marriage— Whether enforceable—Public policy—R.S.B.C. 1936, Cap. 242, Sec. 4 (a) and (f).

The plaintiff Margaret M. Pope was the first wife of the defendant Edgar W. Pope, to whom she was married in 1911. This marriage was dissolved by Act of Parliament in June, 1923. Marie Pope was his second wife, whom he married in May, 1924. Pope was a soldier in the Great War, and on returning to Canada in 1919 he no longer lived with his first wife. On August 27th, 1919, they entered into a separation agreement, one of the terms being that the wife should have the custody of their children and he was to pay her $125 per month for six months, and after that one-half of his pay and allowances. Payments fell in arrears, and in May, 1923, a further agreement was entered into between the first wife, the husband and the second wife, whereby the second wife agreed to transfer certain property, both real and personal, to The Royal Trust Company as trustee, the trustee to pay from the rents and profits to the plaintiff an annual sum of $1,000, payable in consecutive monthly instalments of $150 as an alimentary allowance, the husband guaranteeing that the annual allowance be $1,800. The second wife continued to make payment of the greater part of the amounts specified until the 1st of April, 1938, when of the amount due there remained unpaid the sum of $1,658. The plaintiff then sued the defendants in Ontario for that sum under the agreement of May, 1923, and obtained judgment.

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Pursuant to an *ex parte* order, obtained under the Reciprocal Enforcement of Judgments Act, the Ontario judgment was registered in British Columbia. On an application by the defendants to set aside the registration of the Ontario judgment on grounds based on section 4 (*a*) and (*f*) of said Act, namely, that the original Court acted without jurisdiction and that the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering Court, it was held that upon the defendant voluntarily entering an unconditional appearance, he thereby submits to the jurisdiction, and accordingly that Court has jurisdiction and there is nothing in the agreement in question that would render it invalid as being against public policy.

Held, on appeal, affirming the decision of ROBERTSON, J. (O'HALLORAN, J.A. dissenting), that the appellants claim the agreement of May, 1923, was by one woman, the present wife, to pay $150 a month to another woman, the first wife, the condition being that the latter would obtain a divorce from her husband to enable the former to marry him, and if this is a fair interpretation of the agreement it would be against public policy. But reading the agreement, no such suggestion can be drawn from it. Payments were made under it for nearly ten years, and it was only raised when judgment was obtained for arrears. The two women never met. It is not objectionable for husband and wife to enter into an agreement to provide for her support in the event of dissolution of the marriage ties, and in this case the second wife is brought into it as a woman of means to enable the husband to carry out his marital obligations. The husband and first wife were separated for four years before the agreement was executed, and he had pressed her for divorce in 1921. It cannot be said the first wife was doing anything contrary to public policy, all she wanted was protection, and there was no evidence that she knew there was any arrangement between the husband and second wife to marry. This contract would be perfectly legal if entered into between Pope and his first wife, and it cannot be made illegal because the second wife came forward to supply the means to carry it out. Effect should not be given to the appellants' contention.

APPEAL by defendants from the decision of ROBERTSON, J. of the 19th of March, 1940 (reported, *ante*, p. 27), on an application by the defendants to set aside the registration of a final judgment of the Supreme Court of Ontario of the 12th of July, 1939, for $1,658 and $529.25 costs, made pursuant to an *ex parte* order, obtained under the provisions of the Reciprocal Enforcement of Judgments Act on the 8th of January, 1940. The plaintiff Margaret Pope was the first wife of the defendant Edgar W. Pope, to whom she was married in 1911. This marriage was dissolved by Act of Parliament in June, 1923. The defendant Marie Pope was his second wife, whom he married in

May, 1924. Pope was a soldier in the Great War, and on returning to Canada in 1919 he no longer lived with his first wife. On August 27th, 1919, they entered into a separation agreement, one of the terms being that the wife should have the custody of their children and he was to pay her $125 per month for six months, and after that one-half of his pay and allowances. Payments fell in arrears, and in May, 1923, as a result of coercion by the husband, the wife reluctantly agreed to divorce him if increased alimony was secured. A formal agreement was entered into between the first wife, the husband and the second wife, whereby the second wife agreed to transfer certain property both real and personal to The Royal Trust Company as trustee, the trustee to pay from the rents and profits to the plaintiff an annual sum of $1,800. She was to receive monthly instalments of $150 as an alimentary allowance, the husband guaranteeing that the annual allowance would be paid. The second wife made payment of the greater part of the amounts specified and the husband reimbursed her until the 1st of April, 1938, when there were arrears of $1,658. The plaintiff then brought action in Ontario for this amount under the agreement of May, 1923, and obtained judgment.

The appeal was argued at Victoria on the 19th and 22nd of April, 1940, before MACDONALD, SLOAN and O'HALLORAN, JJ.A.

Clearihue, K.C., for appellants: The agreement of May, 1923, upon which the Ontario judgment was based, was made prior to the first wife obtaining a divorce. The agreement was based on a collusive arrangement to bring about a divorce. The consideration for the contract sued upon in Ontario was the promise of Margaret Pope to divorce her husband. The consideration is illegal and contrary to public policy: see *Collins* v. *Blantern* (1767), 2 Wils. K.B. 341; *Clark* v. *Hagar* (1894), 22 S.C.R. 510; Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 328, sec. 383; *Huntington* v. *Attrill*, [1893] A.C. 150; Norton on Deeds, 2nd Ed., 151; *Boyle* v. *V.Y.T. Co.* (1902), 9 B.C. 213; Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 158, sec. 224. An agreement facilitating divorce is void: see *Hope* v. *Hope* (1857), 8 De G. M. & G. 731, at p. 743; Lush on Husband and Wife, 4th Ed., 436; *Bishop* v. *Bishop*. *Judkins* v. *Judkins*,

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[1897] P. 138; *Davies* v. *Elmslie,* [1937] 4 All E.R. 471. The agreement of May, 1923, was really between the two women to bring about the divorce: see *Campbell* v. *Campbell,* [1936] 4 D.L.R. 52, at p. 54; *Churchward* v. *Churchward,* [1895] P. 7; *Siveyer* v. *Allison,* [1935] 2 K.B. 403, at p. 408; *In re Moore. Trafford* v. *Maconochie* (1888), 39 Ch. D. 116; *Tennant* v. *Braie* (1608), Toth. 78; 21 E.R. 128; 17 C.J.S. Contracts, sec. 235: The agreement was made in anticipation of the divorce. *Engel* v. *Schloss* (1919), 106 Atl. 169; *Scott* v. *Scott,* [1913] P. 52; *Attorney-General for British Columbia and The Minister of Lands* v. *Brooks-Bidlake and Whittall, Limited* (1921), 63 S.C.R. 466, at p. 473.

D. M. Gordon, for respondents: In the case of a foreign judgment in a Province where the law is the same as here and no statute law enters into the case, the Reciprocal Enforcement of Judgments Act never contemplated that our Courts should review the foreign Court's decision. The case of *Huntington* v. *Attrill,* [1893] A.C. 150, turns on the statute law of a foreign state. When the law of the foreign state is the same as ours, the question of public policy is *res judicata.* In all cases where public policy was held to be a defence to an action on a foreign judgment the foreign law was quite different from the domestic law. *In re Macartney. Macfarlane* v. *Macartney,* [1921] 1 Ch. 522, was based on a cause of action quite unknown to English law. In this case Colonel Pope started matters leading to the divorce. The two women never met, and there is no evidence whatever of there being any negotiations between them; the husband did all negotiating. The bargain between husband and wife was legal: see *Wilhelm* v. *Wilhelm et al.,* [1938] O.R. 93, following *Scott* v. *Scott,* [1913] P. 52, at p. 54; *Fender* v. *St. John-Mildmay,* [1938] A.C. 1, at p. 25. Miss Coursol was simply a means of carrying out the bargain, much as a guarantee company would have been. There is no evidence that the plaintiff knew the Colonel and Miss Coursol had any definite agreement to marry. It was not a term of the contract that the Colonel and Miss Coursol were to be married, in fact they were not married until a year after the divorce was obtained. The payments were started nearly a year before the second marriage.

The plaintiff would not have agreed to the remarriage being a condition of payment, for she could not control the Colonel after divorce. In any case the agreement should be upheld as the defendants continued to carry out the agreement for sixteen years, long after the divorce and remarriage: see *Ditcham* v. *Worrall* (1880), 5 C.P.D. 410; *Skipp* v. *Kelly* (1926), 42 T.L.R. 258.

Clearihue, replied.

Cur. adv. vult.

21st May, 1940.

MACDONALD, C.J.B.C.: Appeal from the judgment of ROBERTSON, J., refusing to set aside the registration in this Province of an Ontario Supreme Court judgment dated the 12th of July, 1939, given in an action tried in that forum. The Ontario action was instituted at the suit of Margaret M. Pope (a former wife of the defendant Edgar William Pope) and her three children as plaintiffs against the said Edgar William Pope and his present wife Marie Pope as defendants for a declaration that an agreement dated May, 1923, between the said Margaret M. Pope and the two defendants making provision for the financial support of the former in view of a contemplated divorce was valid and enforceable against the latter. The name of The Royal Trust Company appeared as a party to the agreement but it did not execute the document: that is not material.

The action was tried at St. Thomas, Ontario, by Mr. Justice McFarland and judgment was given declaring that the agreement referred to was a valid subsisting agreement and ordering payment of $1,658 arrears due thereunder up to the day of the issue of the writ. The formal judgment in that action was registered in the Supreme Court of British Columbia pursuant to the Reciprocal Enforcement of Judgments Act, R.S.B.C. 1936, Cap. 242, as the defendants moved to this Province. The action in Ontario was contested by the defendants.

Application was made by Marie Pope and Edgar William Pope, now judgment debtors to set aside the order for registration of the judgment in this Province on the ground—the only ground submitted to us; all others were abandoned—that it was obtained in respect to a cause of action which for reasons of public policy

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should not be recognized by the Courts. This application, based upon affidavits and part of the evidence used in the Ontario action, was heard by ROBERTSON, J. He refused to set aside the judgment; from that order this appeal is brought.

The same point was raised by the defendants in the Ontario action. They pleaded their own wrong, *viz.*, that the alleged agreement was based upon an illegal consideration contrary to public policy. Mr. Justice McFarland after a trial of this issue with more evidence before him than we have on this application refused to entertain it.

Under section 7 of our Reciprocal Enforcement of Judgments Act, an application may be made by the judgment debtor to set aside the registration of a judgment. One ground for setting it aside is more specifically set out in section 4, subsection (*f*), as follows, if

> the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering Court;

that is to say by the Courts of this Province, it may be vacated.

It would be anomalous if after trial of an issue in Ontario and a decision thereupon, with all parties to the action present or represented and evidence in greater detail adduced, this Court should on a summary motion supported by part of that evidence reach a different conclusion. Had an appeal been taken from that judgment in Ontario, certainly if such an appeal had been carried to the Supreme Court of Canada and the National Court sustained the judgment of the trial judge we would be bound by it and could not entertain an application to set aside the registration of the judgment on the ground aforesaid. Section 4 of the Act referred to reads as follows:

> No judgment shall be ordered to be registered under this Act if it is shown to the registering Court that [under the terms of subsection (*f*)] reasons of public policy [should result in its being set aside].

If we had a judgment of a Court binding upon us it could not then be "shown to the registering Court" that it should be set aside. Are we in a different position when confronted with a judgment based upon a more thorough inquiry where the defendants do not choose to prosecute an appeal in Ontario? I do not decide this point; assuming only that we should make an independent inquiry I would not in any event on the facts say that

public morals have been offended, at all events not by the first wife.

The facts are referred to in the reasons for judgment of Mr. Justice ROBERTSON. The present wife of the judgment debtor Edgar William Pope was, as stated, a party to the agreement in question. She provided the funds to enable her co-defendant to pay the judgment creditor Margaret M. Pope $150 a month, her co-defendant undertaking to reimburse her for this outlay. After thus providing for the first wife she married the co-defendant. The divorce after the execution of the agreement was procured from the Parliament of Canada.

The judgment debtors now say, in substance, that this was an agreement by one woman, the present wife, to pay $150 a month to another woman, the first wife, the condition being that the latter would obtain a divorce from her husband to enable the former to marry him; in other words, the present wife in effect said to the first wife "I will give you $150 a month if you will divorce your husband in order that I may marry him." If that is the fair interpretation of the agreement it would be against public policy. I do not think, however, that we should say at the instance of the judgment debtors, or at all, that it bears such a construction. I might add, in passing, that payments were made under it for nearly ten years. It is now raised when default was made and judgment obtained for the arrears.

It was not such a bargain as suggested. The two women in question represented as bargaining for the possession of this man, never met. Reading the agreement no suggestion of this kind can be drawn from it. It is sought to give it this sinister interpretation by oral evidence on the question of true consideration. In a divorce obtained from Parliament, unlike one obtained from the Courts, no provision, as I understand it, is necessarily made for the support of the divorced wife: it is therefore not objectionable for husband and wife to enter into an agreement to provide for her support in the event of dissolution of the marriage tie. This, in substance is such an agreement. The present wife was brought into it, as a woman of means, to enable her co-defendant to carry out his marital obligations. She is called the "settlor" in the agreement. Had she

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been an entire stranger to both parties (as she was to the first wife) and through philanthropic or other impulses was induced to assist and did assist because she thought such a union should be dissolved no objection could be raised. The only suggestion of immorality arises from her relations with the co-defendant at the time and the subsequent marriage. That was no concern of the former wife.

It should be observed further that the present wife by her action did not drive husband and wife apart. They had been separated for four years before this agreement was executed. The husband pressed his former wife for a divorce as early as December, 1921, before his co-defendant came to the rescue with her resources. It cannot be said that the motive of the first wife was to do anything contrary to public policy: all she wanted was protection. There is no evidence that she knew there was any definite arrangement between the co-defendants to marry or that her former husband would not enter into such an agreement himself without the assistance of any one if able to perform it. This contract would be perfectly legal if entered into between Pope and his first wife; it cannot be made illegal because his co-defendant came forward to supply the means to carry it out. We need not be overly solicitous in accepting from the judgment debtors the explanation now given as to moral obliquity in executing it.

The identity of the second wife meant nothing to the first wife. Any solvent person might have taken her place. The first wife was entitled to assume that they were keeping within the law in executing the contract. She had in fact no definite knowledge that they were going to marry. Assuming therefore that we should deal with the point I would not give effect to this contention; nor will I consider the further question, *viz.*, whether or not, in any event, in view of the fact that the judgment debtors acted upon this agreement for at least ten years we should consider the point raised at this late date.

I would dismiss the appeal.

SLOAN, J.A.: I agree with the learned judge below that this case falls, in principle, within *Fender* v. *St. John-Mildmay*, [1938] A.C. 1, and I would dismiss the appeal.

O'HALLORAN, J.A.: In the judgment appealed from it was held that the cessation of *consortium* and attendant unlikelihood of reconciliation which resulted from the separation agreement brought this case within the principle applied by the majority of the House of Lords in *Fender* v. *Mildmay* (1937), 106 L.J.K.B. 641. In that case a decree *nisi* for divorce had been obtained against the husband before he entered into the agreement which he refused to perform subsequently, on the ground it was contrary to public policy. In the case at Bar, the agreement which is resisted on the ground of public policy was entered into before commencement of divorce proceedings, but during the existence of a separation agreement. The appeal raises questions of far-reaching importance. *Fender's* case was the first in which the long established public policy rule was relaxed in favour of an agreement made after the decree *nisi* but before the decree absolute for divorce. The decision appealed from has marched considerably in advance of *Fender's* case, however, and seems to have the distinction of being the first to relax the rule in favour of an agreement made during a mere separation of the married parties by private agreement, and before commencement of divorce proceedings.

Examination of the *ratio decidendi* in *Fender's* case convinces me at least, that decision is founded upon what the majority of the House regarded to be the true effect of a decree *nisi;* and that *consortium* and reconciliation were considered there as elements, only in so far as they would explain and support the true effect of the decree *nisi* as there interpreted. For *Fender's* case to apply in the present instance it must be held that the *status* of the marital contract is affected in the same way by a separation agreement as by the granting of a decree *nisi* in divorce proceedings. But the majority of the House in *Fender's* case refused explicitly to place the decision on that ground. Lord Thankerton said at p. 650:

> It is conceded that public policy prevents the enforcement of a promise of marriage by a married person to a third party made prior to the decree *nisi*.

Vide also *Spiers* v. *Hunt,* [1908] 1 K.B. 720, approved by the Court of Appeal in *Wilson* v. *Carnley, ib.* 729; *Caulfield* v. *Arnold* (1924), 34 B.C. 404, and the decision of the Judicial

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Committee in *Skipp* v. *Kelly* (1926), 42 T.L.R. 258, Lord Dunedin at p. 259.

That the decision in *Fender's* case rested upon the view of the majority that the decree *nisi* in truth terminated the marital contract, is shown by Lord Wright's plain language when he said at p. 663:

> . . . because the marriage is already dissolved in truth by adjudication of the Court.

This is borne out by other references in their Lordships' speeches. Lord Atkin at p. 649 said "the bottom has dropped out of [the] marriage" after the decree *nisi*. Lord Thankerton at pp. 650-1:

> Once the decree *nisi* has been pronounced the petitioner . . . , has done all that he or she can do in order to obtain dissolution of the marriage tie, except to apply, after expiry of the statutory period, for the decree absolute. The guilt of the respondent has been judicially determined. The waiting period is imposed in the public interest, in order to insure that there has been full disclosure before the Court.

Lord Wright at p. 656:

> The question in the present case is whether after decree *nisi* there is any public interest in seeking to preserve, . . . , the transitory and unsubstantial form of marriage which by the decree of the Court is practically doomed to extinction in a brief period of months.

And also at p. 661:

> The order *nisi* in truth determines the *status* of the parties though its final operation is suspended. . . .

And further at p. 661:

> But it is obvious that in truth and in substance there is no longer any marriage.

Lord Wright distinguished (p. 661) *Spiers* v. *Hunt* and *Wilson* v. *Carnley, supra*, on the specific ground the agreement was made in those cases "before decree *nisi* had been made or even sought." Lord Wright discussed also the New Jersey decision of *Noice* v. *Brown*, [(1876), 20 Am. R. 388; affirmed 23 Am. R. 213] in which the agreement had been made by the husband, while living apart from his wife who was then suing for divorce, and he distinguished it thus, p. 663:

> There again there had been no adjudication by the Court and no inchoate decree like the decree *nisi* for dissolution.

At p. 664, Lord Wright observed that in the many hundreds of cases in which he had made orders *nisi* while sitting as a Judge of assize, he did not recall one in which the decree *nisi* had not been made absolute. The decision of the majority of the House

leaves little doubt that the conclusion in *Fender's* case rested solely upon the view that the decree *nisi* was in truth the dissolution of the marriage by adjudication of the Court even though its final operation might be suspended for a few months until the decree absolute was obtained more or less as a matter of course. This reading of *Fender's* case receives confirmation in the speeches of the two dissenting Law Lords, for they held that the decree *nisi* could not have the effect given it by the majority. That the reasoning in *Fender's* case does not apply to a separation agreement such as existed in the case at Bar is stated explicitly in the concluding paragraph of Lord Wright's speech at p. 664:

> I have here chosen the decree *nisi* as marking the line of division and demarcation.

Lord Wright emphasized this dividing line and the reasons for it by referring to the case of a "mere separation" and also to the more advanced case instanced by presentment of a petition for divorce, when he said at p. 664:

> But I think a decisive point is reached by the decree *nisi*. The petition is merely the first step in proceedings. The result is uncertain. There is no public hearing. It is true the parties are, when the petition is lodged, almost certainly living apart and must live apart while the petition is pending. But there is nothing final such as there is in the adjudication and the decree *nisi*, given in public Court and in the eyes of the world. Before that the charge may fail, the petition may be compromised, the parties may be reconciled. The whole position, in my opinion, becomes changed and fixed by the decree *nisi*.

With great respect, a careful analysis of *Fender's* case forces the view that instead of being an authority for the conclusion reached in judgment below, it is in truth an authority against it. To hold that lack of *consortium* and attendant unlikelihood of reconciliation are sufficient elements in themselves to relax the public policy rule "without the adjudication and the decree *nisi* given in public Court and in the eyes of the world" (Lord Wright's language), is to regard the marital contract in somewhat the same light as a tenancy at will, and is to impute an authority to *Fender's* case, which is disclaimed expressly therein.

What has been said thus far, rests upon the premise that the agreement in this case must be regarded as contrary to public policy unless it is governed by *Fender's* case. The applicability of *Fender's* case seems to have been the turning point of the

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decision below. For if the Court below, entirely apart from *Fender's* case, had regarded the agreement as not contrary to public policy, then there would have been no need for that Court to have considered *Fender's* case at all. However the judgment seems to import, particularly by reference to *Scott* v. *Scott*, [1913] P. 53 (discussed later), that in no event was the agreement contrary to public policy. This requires consideration of the agreement itself, the more so in view of the foregoing conclusion that *Fender's* case does not support the decision appealed from.

The agreement in this case was between the two women. Any uncertainty on this point is dispelled by the written agreement of March, 1923. The husband appears as a party in the concluding paragraph of the agreement it is true, where he is described aptly as "the intervenant," but his role is solely that of guarantor of the payment of $150 per month to his wife. Counsel for the appellants contended that the "other good and valuable considerations" recited as the consideration for the agreement between the two women constituted in fact the real consideration between them. That is to say, he contended the evidence disclosed that the real and moving consideration in the agreement for the payment of $150 per month by the single woman to the married woman, was that the married woman would procure a Parliamentary divorce from her husband for which the single woman would pay, to enable the single woman to marry him. Counsel's contention is borne out by the evidence. It is not without significance that there is no evidence of the married woman to challenge in this respect or at all, the evidence given by the husband and the single woman. In plain language the married woman agreed to divorce her husband when she accepted the single woman's offer—paraphrased in short form—"I will pay you $150 per month if you will divorce your husband so that I may marry him."

But it is said the women had never seen each other. That was not necessary. Their minds had met when they signed the agreement of March, 1923. The existence of a contract does not depend upon the parties knowing each other. The single woman knew the married woman had persistently refused to procure a

divorce; she knew the husband and wife had three infant children, aged four, seven and ten respectively at the time of March, 1923, agreement. The married woman, on the other hand, knew of her husband's infatuation with the single woman, for her husband had written her some time before the agreement was made:

I am candid enough to tell you what you must already know. I dearly love another woman and have ever since the date of my return to Canada.

The husband had reason to assume therefore that his wife knew of his infatuation with the single woman since his return to Canada in August, 1919, which it is significant to observe, was the time the separation agreement was entered into.

The wife had been approached by intermediaries on behalf of her husband on at least one occasion previously, in addition to direct approaches by the husband himself, but had refused to apply for a divorce. We must face the realities. When the wife received an offer from the single woman (with whom she had reason to know her husband was infatuated) to pay the costs of the divorce and to pay her a monthly sum which she knew was more than the husband alone could pay she must have known they wished to marry. Both women must be fixed with knowledge that one was buying and the other was selling something which the law does not recognize as the subject of trade and barter. Such an agreement is obviously contrary to public policy. It is an act harmful in itself to our social system as distinguished from harmful tendencies which the law may ascribe to other acts not harmful in themselves—*vide* Lord Atkin at p. 644 in *Fender's* case.

In *Hope* v. *Hope* (1857), 8 De G. M. & G. 731; 44 E.R. 572, the wife had agreed with the husband not only that she would not oppose his suit for divorce but on the contrary would facilitate the obtaining of it. The Court of Appeal held this was repugnant to our law. Lord Justice Turner said at p. 744:

There is nothing which the Courts of this country have watched with more anxious jealousy, and I will venture to say, with more reasonable jealousy, than contracts which have for their object the disturbance of the marital relations.

His next remarks are in point also (pp. 744-5):

The peace of families—the welfare of children, depends, to an extent almost immeasurable, upon the undisturbed continuance of those relations; and so

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strong is the policy of our law upon this subject, that not only is marriage indissoluble, except by the Legislature, but divorces *a mensa et thoro* are granted only in cases of cruelty or adultery.

In *Churchward* v. *Churchward,* [1895] P. 7 (where the Queen's Proctor had intervened) there was no connivance at adultery and no collusion to present false facts to the Court. The wife had agreed with the husband that if he would take proceedings against her for divorce and not claim damages against the co-respondent, she would not only not defend the proceedings but would pay the costs thereof and in addition would settle money on the child of their marriage. The Court said at p. 31:

> If a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the Court declines to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. . . . He appears before the Court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, he raises more than a doubt whether, in the words of Lord Stowell, "he has received a real injury and *bona fide* seeks relief."
>
> In the present case, being of opinion, as I have said, that the initiation of the suit was procured and its results as to costs and damages settled by agreement, I think it must be held that there was collusion. If it be necessary to constitute collusion that there should be a compact not to defend, that also was present in this instance.

In the case at Bar the evidence discloses that the married woman was "acting in concert" with her husband as "the author of the wrong" of which she complained, and at the same time that she was bargaining with the single woman by "subjecting her rights to pecuniary stipulations." The single woman "procured the initiation of the suit for divorce and settled by agreement the costs of divorce" and also the financial provision for the married woman and her children. *Hope* v. *Hope* and *Churchward* v. *Churchward* were cases in which the agreements were between husband and wife; although in the latter case the position of an interested third party was involved specifically. The case at Bar is much stronger as the agreement is between the wife and an interested third party with the husband consenting. In this case the interested third party, in order to marry the husband, procured the divorce by a bargain with the wife wherein she agreed to pay for the divorce and make financial provision for the wife and her infant children. In *Gifford* v. *Gifford and*

Freeman (1926), 43 T.L.R. 141 the agreement was between the petitioner and the co-respondent. It was there agreed the co-respondent should pay the petitioner £1,750 cash and that the latter would place no obstacles in the way of a decree *nisi* being made absolute. These three last-cited decisions should resolve any doubt which might exist that the agreement in this case was contrary to public policy.

Scott v. *Scott*, [1913] P. 53 was referred to as an authority to the contrary. It concerned an agreement between husband and wife. *Churchward* v. *Churchward, supra,* was stated to be distinguished on its facts but the brief report of the judgment does not indicate exactly in what way it was distinguished. It may be inferred however that one real ground of distinction lay in the fact that the agreement in *Scott* v. *Scott* did not specifically involve an interested third party. It appears also that the agreement to obtain a divorce in *Scott* v. *Scott* was made some time after a decree for judicial separation had been obtained. This fact, regarded from the point of view of public policy (with which we are alone concerned here) renders *Scott* v. *Scott* inapplicable in any event to the facts of this case. For a decree of judicial separation is obtained after a trial, and it is in effect a divorce without the rights of the parties to marry again. It has the same force and effect as a decree for divorce *a mensa et thoro* had immediately before the commencement of the Matrimonial Causes Act, 1857: *vide* Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49) s. 187 (2) and 20 & 21 Vict., c. 85, s. 16 and R.S.B.C. 1936, Cap. 76, Sec. 5. The effect of a decree for judicial separation on the public policy rule must therefore be regarded in a different light than a mere separation by private agreement, more particularly in view of the reasoning adopted by the House of Lords in determining the true effect of a decree *nisi* in *Fender's* case. It should be observed in passing that in *Curell* v. *Curell,* [1937] 2 W.W.R. 128, an issue between husband and wife, no agreement was found to exist.

Then it is said the agreement in the case at Bar has been acted on for some years. But that does not entitle the parties to the assistance of the Courts where the agreement is contrary to public policy. Lord Mansfield said in *Holman* v. *Johnson* (1775), 1 Cowp. 341, at 343:

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If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.

The application of this well-known rule does not imply approval of the parties resisting the agreement for Lord Mansfield said further:

It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*

In *Gifford* v. *Gifford and Freeman, supra,* Lord Merrivale, P. refused to grant relief to a party who had agreed to deal with the marital relation in a manner contrary to public policy.

For the reasons stated, I am of opinion, with respect, that the appeal should be allowed and the judgment below set aside.

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

Solicitor for appellant: *J. B. Clearihue.*
Solicitors for respondents: *Crease, Davey & Co.*

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May 21.

J. H. MUNRO LIMITED v. VANCOUVER PROPERTIES LIMITED.

Landlord and tenant—Lease for one year and fifteen days—Overholding on a monthly tenancy—Notice to quit—Validity—R.S.B.C. 1936, Cap. 143.

On the 3rd of March, 1932, the defendant leased a store premises in the Medical-Dental Building on Georgia Street in the city of Vancouver to the plaintiff for a term of one year and fifteen days. The lease provided that if the lessee held over after the term granted, the lessor would accept rent on the new tenancy thereby created from month to month, and the terms of the lease were to apply as far as applicable to a month to month tenancy. On the 27th of June, 1939, the defendant served the plaintiff with the following notice: "We herewith give you notice to vacate your premises in the Medical-Dental Building by July 31, 1939." The plaintiff did not vacate, and upon the defendant taking proceedings under the Landlord and Tenant Act, an order was made in the county court that the lease terminated on the 31st of July, 1939, and directed that a writ of possession do issue to the sheriff to

put the defendant into possession, and on August 24th, 1939, the sheriff executed the writ. An action for damages for trespass and ejectment and for an accounting and for repossession was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (O'HALLORAN, J.A. dissenting), that it was the clear intention of the parties that the defendant might remain in the premises during the whole of July 31st, and that the notice to quit may be so construed. When the plaintiff was asked to vacate by July 31st the meaning was that when that day ended the defendant had no further right to remain. It is capable of that construction, one that is in harmony with the intention of the parties and with what actually occurred.

APPEAL by plaintiff from the decision of MURPHY, J. of the 19th of January, 1940, in an action for damages for ejectment from the premises known as 905 West Georgia Street in Vancouver, for trespass on said premises, for an accounting for moneys due by the defendant to the plaintiff, and for an order that the defendant give the plaintiff repossession of said premises. The plaintiff rented a store premises from the defendant in the Medical-Dental Building on Georgia Street in Vancouver, where he carried on the business of a furrier. The lease, dated the 3rd of March, 1932, was for a period of one year and fifteen days, and provided that if the lessee held over after the term granted the lessor would accept rent on the new tenancy thereby created from month to month, and the terms of the lease were to apply as far as applicable to a month to month tenancy. In the spring of 1938 the plaintiff was in trouble with his creditors, and in May, 1939, he was in arrears for rent in the sum of $1,848, which had accumulated over a period of more than one year, and during this time the plaintiff delivered certain furs to the defendant as security to cover the arrears of rent. On the 27th of June, 1939, the defendant served the plaintiff with a written notice to quit, reading "We herewith give you notice to vacate your premises in the Medical-Dental Building by July 31, 1939." The plaintiff did not vacate the premises, and upon the defendant taking proceedings under the Landlord and Tenant Act in the county court, an order was made by MCINTOSH, Co. J. on August 18th, 1939, holding that the tenancy was determined on July 31st, 1939, and directed that a writ of possession do issue to the sheriff to put the defendant into possession, and on August 24th, 1939, the sheriff executed the

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J. H. MUNRO LTD. v. VANCOUVER PROPERTIES LTD.

writ. An appeal from the order of MCINTOSH, Co. J. was allowed by MCDONALD, J. on the 14th of September, 1939.

The appeal was argued at Victoria on the 10th of April, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

Jeremy, for appellant: The learned judge wrongly accepted the defendant's evidence as to the value of the fur coats given as security for payment of the rent. On May 2nd, 1939, the landlord, without leave, walled off about one-third of our premises, adding it to an adjoining tea-room, for which he was liable in damages for trespass. The notice to quit given on the 27th of June that we vacate on the 31st of July was defective, as this was a monthly tenancy and we were entitled to remain on the premises until the end of July 31st in any case: Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 68, sec. 74; Foa on Landlord and Tenant, 6th Ed., 662; Fawcett on Landlord and Tenant, 3rd Ed., 468-9.

G. L. Fraser, for respondent: As to the price of the fur coats, the evidence of the respondent and his witnesses was accepted by the learned trial judge. Baker, the president of the defendant company, decided to buy the coats to which Munro agreed, and the price was left to be fixed. Section 15 of the Sale of Goods Act then comes into force. The evidence is clear that Munro agreed to a portion of the premises being taken off to give space to a tea-room. The monthly tenancy followed the termination of the lease and commenced at the beginning of the month. This is a monthly tenancy and the notice to quit given on the 27th of June, 1939, was a good and valid notice: see *Wride* v. *Dyer,* [1900] 1 Q.B. 23; *Sidebotham* v. *Holland,* [1895] 1 Q.B. 378; *Gemeroy* v. *Proverbs,* [1924] 2 W.W.R. 764, at p. 765. After the 31st of July, 1939, the plaintiff was a trespasser: *Gibbs* v. *Cruikshank* (1873), 42 L.J.C.P. 273. The word "by" means "not later than."

Jeremy, replied.

Cur. adv. vult.

21st May, 1940.

MACDONALD, C.J.B.C.: The appeal is dismissed, my brother O'HALLORAN dissenting.

I dismiss the appeal for the reasons given by the learned trial judge. The only point that has given rise to difficulty was whether or not a valid notice was given to vacate. The material words were:

> We herewith give you notice to vacate your premises in the Medical-Dental Building by July 31, 1939.

The notice was given on June 27th, and the defendant was entitled to remain throughout the whole of July 31st; he could not, for example, be asked to vacate on the morning of the 31st. While there is much to be said in support of the view of my brother O'HALLORAN that the notice is defective, my brother MCQUARRIE and I think it was the clear intention of the parties that the defendant might remain in the premises during the whole of July 31st and that the notice may be so construed. When he was asked to vacate by "July 31" the meaning was that when that day ended the defendant had no further right to remain. We think it is capable of that construction, one that is in harmony with the intention of the parties and with what actually occurred.

MCQUARRIE, J.A.: This is an appeal from the judgment of MURPHY, J., delivered on 19th January, 1940. It involves an unfortunate dispute between landlord and tenant, both rather prominent in Vancouver business circles. The appellant (plaintiff) is owned, controlled and operated by one J. H. Munro, a well known retail fur merchant and expert operator, who has for some years carried on quite a good business in Vancouver, principally in women's fur coats and having numerous customers both local and transient. Although, as I have said, being an expert operator, or I perhaps should have said worker, he appears withal to have been a surprisingly poor business man who consequently got into trouble with his landlord who did not receive his rental at all satisfactorily, and with his creditors whose bills were not paid as they should have been. I suppose as a natural sequel to the state of financial embarrassment which he eventually got into the appellant did things that he otherwise would not have thought of doing; issuing "N.S.F." cheques for instance and became from a business standpoint somewhat unreliable. The rented premises consisted of a corner

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shop in the Medical-Dental Building at 905 West Georgia Street, being one of the best sites for a business like his in the city, and presently occupied by George Straith Limited, men's clothing. Because of the arrears of rental becoming unreasonably great the respondent demanded security for his rent and received five fur coats, one a second-hand mink and the others seal. Later, owing to pressure from appellant's creditors, it was agreed between him and the respondent's manager, R. P. Baker, that final sale of the five coats should be completed to the respondent and the purchase price applied on the arrears of rental. The price was not at that juncture fixed. According to counsel for the appellant, the main dispute was as to the total sale price. The appellant says it was $1,800 and the respondent $1,300. If the appellant's figure is correct the respondent was overpaid $500. Counsel for the respondent agreed to this. The learned trial judge accepted the evidence of respondent on this point as I shall later show.

The appellant also contends that the respondent unlawfully evicted him from the demised premises although his rent was paid in advance to the extent of the said $500. The appellant further claims that in other respects the eviction order made by the late MCINTOSH, Co. J. was improperly obtained. He claimed particularly that the notice to quit set out in the reasons for judgment of MURPHY, J. is inadequate but as I see it appellant received a full month's notice to quit and the notice was sufficient. The appellant also claims that the respondent illegally trespassed on the demised premises during the tenancy; that no consent was asked or obtained from the appellant for this and the appellant claims damages on that account. Appellant's counsel admitted that the appellant made no objection to the alleged trespass and that there is a finding by the trial judge to the effect that the appellant consented to the alterations but that there is no evidence to support such finding. Further that trespass by the landlord on part of the premises destroys the landlord's right to collect rent for any of the premises. He cited numerous authorities which he claimed supported his contention but in view of the judge's findings that the appellant consented

to the alterations and findings as to other points raised by counsel for the appellant I do not consider it necessary to review them.

There seems to be ample evidence to support the findings of the learned trial judge. I do not propose to canvass the evidence as it is very well set out in the judge's reasons for judgment. The learned trial judge, *inter alia,* made the following findings: [after setting out the findings his Lordship continued].

At the hearing before us leave was given to counsel to submit authorities as to section 15 of the Sale of Goods Act and we have since received memoranda from both counsel. The appellant submits that said section 15 does not apply to the case at Bar. The respondent in his memorandum refers to certain authorities. The reasons for judgment are not materially affected by the said memoranda and I am of opinion that the judgment appealed from should be affirmed.

In view of the foregoing I would dismiss the appeal.

O'HALLORAN, J.A.: The notice to quit requires the appellant to vacate "by July 31." It is conceded his monthly tenancy did not end until the expiration of midnight of that day. The narrow point in issue is whether the expression "by July 31" means "at the expiration of that day" or "during that day." If the former, the notice is good.

I cannot read the expression "by July 31" to mean "at the expiration of that day." In some cases it is true, it might mean before the 31st of July, but in the relevant circumstances I am of the view it must mean on that day or before the end of that day; that is to say during that day. If A promises to pay B ten dollars by July 31st, there is no doubt, payment is to be made during that day. That is to say up to and inclusive of midnight, but not after midnight; for then the 31st day of July has expired and the next day has commenced. The respondent must be taken to have employed the expression "by July 31" in its usual and accepted sense. I find no evidence it was intended to give the words any other meaning.

I believe this conclusion is assisted and not hindered by the *ratio decidendi* in *Sidebotham* v. *Holland,* [1895] 1 Q.B. 378. As to the misleading head-note in that case refer to *Meggeson* v.

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Groves, [1917] 1 Ch. 158, at p. 164. *Vide Page* v. *More* (1850), 15 Q.B. 684; 117 E.R. 618; also *Right* v. *Darby* (1786), 1 Term Rep. 159 and *Ackland* v. *Lutley* (1839), 9 A. & E. 879.

I would allow the appeal in this respect. As the majority of the Court hold a different view, I do not need to discuss the consequential results.

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

Solicitor for appellant: *J. E. Jeremy.*
Solicitors for respondent: *Wismer & Fraser.*

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May 21; *June* 3.

DUMONT v. COMMISSIONER OF PROVINCIAL POLICE.

Mandamus—Motor-vehicle Act, Sec. 84—Cancellation of driver's and owner's licences—Commissioner not acting qua servant of Crown—No alternative remedy—Judgment for costs—Whether judgment for "damages" within meaning of Act—R.S.B.C. 1936, Cap. 195, Sec. 84.

The plaintiff Dumont brought action against one Bollons for damages resulting from an automobile accident, and Bollons counterclaimed for damages in the sum of $59.35. Both claim and counterclaim were dismissed with costs. After taxation Dumont was liable for costs to Bollons in the sum of $466.25. This sum not having been paid within 30 days and no appeal having been taken, the Commissioner of Provincial Police suspended Dumont's driver's and owner's licences under section 84 of the Motor-vehicle Act. Dumont then launched *mandamus* proceedings directed against the commissioner to compel him to return the said licences. His application was refused.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that it was contended *mandamus* would not lie for two reasons: First, that the commissioner was acting as a servant of the Crown and was not subject to the writ; second, that the writ should not issue as there was an alternative remedy, *i.e.*, by petition of right to sue the Crown for a declaration that his licences were improperly suspended. As to the first, the commissioner does not act pursuant to the authority conferred under said section 84 *qua* servant of the Crown but "merely as an agent of the Legislature to do a particular act" and in such capacity the writ will lie against him. As to the second, it cannot be said that the proper and effective procedure open to the appellant is to proceed by petition

of right against the Crown when it is understood that the commissioner is not acting under section 84 as its servant, and no other remedy is suggested. It was never intended by the Legislature that an unsuccessful plaintiff in a motor-car collision case would be deprived of his driver's and owner's licences if he failed to pay the costs of the successful defendant. The amount claimed in the counterclaim for property damage only was less than $100. In consequence, the section has no application and the commissioner failed in his duty in refusing to return the licences to the plaintiff when the true facts were drawn to his attention.

APPEAL by plaintiff from the order of MORRISON, C.J.S.C. of the 26th of April, 1940, on the return of an order *nisi* of the 16th of April, whereby the Commissioner of Provincial Police was ordered to show cause why a writ of *mandamus* should not issue directed to him commanding him forthwith to return to Pascal Dumont his driver's licence and number plates for the motor-vehicle owned by him and registered in his name. On the 13th of November, 1937, a motor-vehicle driven by one J. B. Bollons collided with a motor-vehicle driven by the plaintiff Pascal Dumont. Dumont brought action against Bollons for damages and Bollons counterclaimed for the sum of $59.35. The trial came on before MANSON, J. on the 17th of June, 1938, when the plaintiff's action was dismissed with costs and the defendant's counterclaim was dismissed with costs, and it was further ordered that upon taxation the registrar do set off the said costs of the plaintiff and the defendant, and certify to which of them the balance is due. The defendant's costs were taxed at $675.65 and the costs of defending the counterclaim were taxed at $209.40, the defendant Bollons obtaining judgment for the balance of $466.25. Dumont having failed to satisfy the judgment for costs, the Commissioner of Provincial Police suspended his driver's licence and ordered that his driver's licence and number plates be delivered up under section 84 of the Motor-vehicle Act.

The appeal was argued at Vancouver on the 21st of May, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Marsden, for appellant: This judgment was for the balance due after a set-off of costs: The action was dismissed and the counterclaim for $59.35 was dismissed. The Commissioner of Provincial Police acted under section 84 of the Motor-vehicle Act. This is not a judgment contemplated by said section. He

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has no power on the facts of this case to so act. It is a condition precedent that damage to some one else has ensued. Bollons's action by way of counterclaim was for $59.35 and it was dismissed. *Mandamus* does lie here: see *The Minister of Finance* v. *The King, at the Prosecution of Andler et al.*, [1935] S.C.R. 278, at p. 289; *Regina* v. *Gold Commissioner of Victoria District* (1886), 1 B.C. (Pt. 2) 260; *In re Chinese Immigration Act and Chin Sack* (1931), 45 B.C. 3; *The King* v. *Registrar of Companies* (1933), 48 B.C. 152; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 761, sec. 1293; *Rex ex rel. McKay* v. *Baker*, [1923] 1 W.W.R. 1430; *The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387, at p. 397.

Castillou, for respondent: The police is not a designated party. The amount for which we have judgment exceeds $100. His proper course was to apply for a *fiat*. A *mandamus* will not be granted against a public officer unless there is no other remedy: see *Rex* v. *Solloway & Mills* (1930), 53 Can. C.C. 335; *In re Carey and Western Canada Liquor Co., Ltd.*, [1920] 3 W.W.R. 329.

Marsden, in reply: Costs are not damages. That *mandamus* lies see Halsbury's Laws of England, 2nd Ed., Vol. 9, pp. 745 and 775, secs. 1270 and 1309.

Cur. adv. vult.

3rd June, 1940.

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

MCQUARRIE, J.A.: This is an appeal from MORRISON, C.J.S.C., ordering that the motion of the plaintiff (appellant) for a writ of *mandamus* should stand dismissed without costs and that the order *nisi* granted herein be discharged accordingly.

The facts are sufficiently stated in the judgment of my brother SLOAN and I need not repeat them. After certain preliminary objections raised by counsel for the respondent had been dismissed by the Court counsel for the appellant proceeded with his argument. The questions here are:

1. Whether the respondent had power under subsection (1) of section 84 of the Motor-vehicle Act, R.S.B.C. 1936, Cap. 195, to suspend the appellant's licences and number plates.

2. Whether a *mandamus* would lie against the respondent if he did not have such power in this case.

As to question 1: To render him liable to have his licences so suspended subsection (1) of section 84 aforesaid requires that there must be a failure on the part of the licence-holder to satisfy a final judgment rendered against him in an action for loss or damage resulting from bodily injury to or the death of another person or for damage to property of another person in excess of the amount of $100 occasioned by the licence-holder in the use or operation of a motor-vehicle. In the case now under review it is common ground that there was no loss or damage resulting from bodily injury to or the death of another person. The certificate of the district registrar at Vancouver, dated 13th March, 1940, indicates that a judgment for $466.25 was duly rendered against the appellant. On that basis the respondent would be justified in suspending the appellant's said licences but on further investigation it appears that the amount of the damage to the property of another person in the action covered by the district registrar's certificate was less than $100 and the remainder was for costs. In my opinion on those facts the power of the respondent to suspend the licences is eliminated. As to question 2: If the commissioner was acting as a servant of the Crown in discharging his duties under section 84 of the Motor-vehicle Act there can be no doubt that he would not be subject to a writ of *mandamus* to compel him to return to the appellant his licences, for it is beyond question that a *mandamus* cannot be directed to the Crown or any servant of the Crown simply acting in his capacity of a servant, but where a person is acting as a mere agent of the Legislature to do a particular act, as appears to have been the case here, a *mandamus* lies against him in a proper case. *The Minister of Finance* v. *The King, at the Prosecution of Andler et al.*, [1935] S.C.R. 278, at 284, 285 and 286.

I therefore agree that the appeal should be allowed.

SLOAN, J.A.: Upon the return of an order *nisi* for a writ of *mandamus* the rule was discharged by MORRISON, C.J.S.C. The appeal is from his determination of the matter. The facts are that the appellant herein commenced action in the Supreme Court against one Bollons for unstated general damages and

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special damages sustained by him in a motor-car collision case. Bollons defended the action and counterclaimed against the appellant the sum of $59.35 for damages done to his automobile in the said collision. Both claim and counterclaim were dismissed with costs by the learned trial judge. After taxation the appellant in the result was liable for costs to Bollons in the sum of $466.25.

The Commissioner of Provincial Police upon receipt of a certificate from the registrar of the Court that a "final judgment" for the said sum of $466.25 had been rendered against the appellant and that no appeal has been taken from such judgment and upon being satisfied that the appellant had failed to satisfy the said judgment within 30 days from the determination of the proceedings suspended, under section 84 of the Motor-vehicle Act, R.S.B.C. 1936, Cap. 195, the appellant's driver's and owner's licences. The appellant, having advised the commissioner of the real facts of the case, demanded the return of his licences and upon being refused thereupon launched *mandamus* proceedings directed against the commissioner to compel him to return the said licences which the appellant alleges were improperly and illegally taken from him. His application was rejected by MORRISON, C.J.S.C.

Before us counsel for the commissioner took the position that *mandamus* would not lie for two reasons. The first: that the commissioner was acting as a servant of the Crown and in consequence was not subject to the writ. The second: that the writ should not issue as there was an alternative remedy, *i.e.*, the appellant could apply by petition of right for a *fiat* to sue the Crown for a declaration that his licences had been improperly suspended. In my view, with respect, neither submission is of any substance. So far as the first objection is concerned the commissioner does not act pursuant to the authority conferred under said section 84 *qua* servant of the Crown but "merely as an agent of the Legislature to do a particular act" and in such capacity the writ will lie against him. *The Minister of Finance* v. *The King, at the Prosecution of Andler et al.*, [1935] S.C.R. 278, at 285.

With reference to the second objection it is my understanding

of the matter that a writ of *mandamus* will be granted, if the circumstances warrant it, unless there is another remedy equally convenient, beneficial and effective. *The King (Quinn)* v. *The Urban District Council of Portadown,* [1938] N.I. 1, at p. 8. I am unable to understand how it can be said with any force that the proper and effective procedure open to the appellant is to proceed by petition of right against the Crown when it is understood that the commissioner is not acting under section 84 as its servant. Counsel for the commissioner did not suggest that any other specific and effectual remedies in law were open to the appellant and I do not consider that the Court, in the special circumstances of this case, should be astute *ex mero* to discover them for him especially so when it is borne in mind that the writ of *mandamus* is in the discretion of the Court and the mere fact that another remedy does exist is an element to be considered in the exercise of that discretion and is not sufficient of itself to oust the jurisdiction of the Court to grant the writ. That brings me to the merits of the appeal. Section 84 reads as follows:

> 84. (1.) Where a person who holds a driver's licence fails to satisfy a final judgment rendered against him by any Court in the Dominion within thirty days from the determination of all proceedings, including appeals, in an action for loss or damage resulting from bodily injury to or the death of another person or for damage to property of another person in excess of the amount of one hundred dollars occasioned by such person in the use or operation of a motor-vehicle, the Commissioner shall, upon the expiration of the said thirty days and upon receipt of a certificate or other satisfactory proof of the judgment, suspend the driver's licence of that person and every owner's licence held by him and every licence issued under this Act in respect of any motor-vehicle owned by him.

It could never have been intended by the Legislature that an unsuccessful plaintiff in a motor-car collision case would be deprived of his driver's and owner's licences if he failed to pay the costs of the successful defendant. We can therefore disregard the appellant's action. Coming then to the counterclaim, we must view that proceeding under the circumstances of this case as an entirely unrelated action in which the appellant was defendant. The amount claimed in that action was for property damage only and was for a sum less than the $100 referred to in section 84. In consequence the said section has no application and the commissioner failed in his duty in refusing to return

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the licences to the appellant after the true facts of the matter had been drawn to his attention.

I expressly refrain from expressing any opinion as to whether or not a judgment for a balance due for costs is a "final judgment" within the contemplation of section 84.

In the result and with respect I would allow the appeal and grant the order absolute.

Appeal allowed.

Solicitor for appellant: *P. S. Marsden.*
Solicitor for respondent: *H. Castillou.*

NOTE: Subsequent to delivery of judgment, on the application of the plaintiff an order was made that the Crown Costs Act did not apply and the plaintiff was entitled to his costs of the action.

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April 16, 17. *May* 6.

THE FIRST NARROWS BRIDGE COMPANY LIMITED v. CITY OF VANCOUVER.

Assessment and taxes—Improvements on land—A portion of a bridge within city limits—B.C. Stats. 1921 (Second Session), Cap. 55, Secs. 2 (9), 46 (3a), and 56 (11) and (16)

For permitting the bridge company to construct a bridge-head and other related works thereon, the Crown in right of the Dominion leased to said company an area in Stanley Park 200 feet wide and 700 feet long containing 3.26 acres, and the same indenture continued the lease of the 200-foot strip northerly across the foreshore to low-water mark; an area containing .50 of an acre. In order to construct piers the Crown in the right of the Dominion leased to said company two portions of the bed of Burrard Inlet containing .294 of an acre each. The south pier only is within the city limits and the bridge company has no lease of the bed of Burrard Inlet but merely the right to construct and maintain a bridge over the waters thereof. The boundary-line of the city cuts the bridge at a point 75 feet south of the centre of its suspended span. In 1940 said leasehold interests were assessed by the city at $38,600, and the portion of the bridge within the city was assessed at $1,500,000 as improvements. The Court of Revision reduced these assessments to $14,000 and $600,000 respectively. On appeal, the Board of Assessment Appeals reduced the assessments to $13,210 and $570,000 respectively.

Held, on appeal, varying the decision of the Board of Assessment Appeals (MCQUARRIE, J.A. dissenting), that the governing statutory method of

assessment does not permit the city to assess that portion of the bridge within its boundaries as part of and connected with the portions of the bridge lying outside the taxing authority of the city, because to do so involves taking into consideration and assessing values not only within but without the city's jurisdiction to determine. The portion of the bridge within the city must be valued as so much steel, cable, cement and other material used in its construction. In place as a disconnected part of a bridge it would be valueless and to reduce it to its component parts would cost more than the resultant scrap would bring. That portion of the bridge in the city area has no assessable value.

Held, further, that there is no justification upon the evidence for interfering with the assessment of the leasehold interests.

APPEAL by plaintiff from the decision of the Vancouver Board of Assessment Appeals of the 27th of February, 1940, in respect of the assessment of that portion of the First Narrows Bridge within the city of Vancouver and its property in connection therewith, allowing in part the appeal of The First Narrows Bridge Company Limited from the decision of the Court of Revision of the city of Vancouver. The First Narrows Bridge Company Limited owns and operates a toll bridge across the First Narrows of Burrard Inlet. The bridge was commenced in 1937 and completed on November 12th, 1938, and has since that date been continuously operated by the appellant. Arrangements for the construction of the bridge were completed prior to 1937, at which time the city was only entitled to tax under section 46 (3). The amendment subsection (3*a*) of section 46 only came into effect in 1937. The south end of the bridge lies in Stanley Park and the jurisdiction of the city of Vancouver extends out into the First Narrows to a point 75 feet south of the centre of the suspended span of the bridge. The south end of the bridge which alone lies within the city of Vancouver is located on certain lands leased from the Crown consisting of: (a) A strip 200 feet wide and 700 feet long containing 3.26 acres; (b) a continuation of this 200-foot strip northerly across the foreshore containing .50 acres; (c) the southerly pier site containing .294 acres. Parcels "A" and "B" are held by the appellant under lease dated November 27th, 1936, and parcel "C" is held under lease from the Crown dated January 22nd, 1937. In respect of the area lying north of the pier site, the appellant has no lease, but merely the right and privilege to erect, maintain and operate the bridge over

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and across the waters of Burrard Inlet. The lease of parcels "A" and "B" restricts the use of the area to a bridge-head.

In 1940 the appellant was assessed by the city in respect of leasehold interest and right to construct, and pier site at $38,600 and improvements at $1,500,000. At the Court of Revision this was reduced to $14,000 and $600,000 respectively. On appeal to the Vancouver Board of Assessment Appeals a further reduction was made of 10 per cent. in accordance with section 56 (11) of the city charter, meaning a reduction to the minimum fixed by section 56 (11) of the charter, and would result in an assessment of $7,110 in respect of leasehold interest, and $270,000 in respect of improvements.

The appeal was argued at Victoria on the 16th and 17th of April, 1940, before MACDONALD, MCQUARRIE and SLOAN, JJ.A.

Hossie, K.C. (*Ghent Davis,* with him), for appellant: The appellant has been improperly assessed. The right to assess with respect to leasehold interests is based on section 46 (3) of the city charter, and 46 (3*a*) as enacted in 1937. The amendment subsection (3*a*) only enables the city to assess the holder on the basis of the actual cash value of the lands and improvements so occupied. This does not mean that the occupant shall be assessed for the full value of the land and improvements. It is only the occupant's interest that shall be assessed: see *Stebbing* v. *Metropolitan Board of Works* (1870), L.R. 6 Q.B. 37; *Corrie* v. *MacDermott,* [1914] A.C. 1056, at 1065. The land held under lease has no value commercially. The city assessor assessed said interests at $38,600, which was reduced by the Court of Revision to $14,000. The improvements, apart from their connection with those portions of the bridge outside the city of Vancouver, have no value for assessment purposes. The assessment is made under section 39 of the city charter. They can only assess what is within the city, therefore all they may assess is a "piece of a bridge." That piece of a bridge, considered separately, has no value other than the materials of which it is composed: see *Trimble* v. *Hill* (1879), 5 App. Cas. 342; *The Consumers Gas Co. of Toronto* v. *The City of Toronto* (1897), 27 S.C.R. 453, at pp. 458-460; *Re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351; *In re London Street Railway*

Co. (1900), 27 A.R. 83; *Re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114; *Re Ontario and Minnesota Power Co. Limited and Town of Fort Frances* (1916), 35 O.L.R. 459, at pp. 466-7; *Montreal Island Power Co.* v. *The Town of Laval des Rapides,* [1935] S.C.R. 304, at pp. 307-8; *Re Maritime Telegraph & Telephone Co.,* [1940] 1 D.L.R. 602; *McMullen* v. *District Registrar of Titles* (1922), 30 B.C. 415. Alternatively the portion of the bridge which lies north of pier site "C" (south pier) to the city boundary is not assessable at all. It is not an interest in land: see *Wells* v. *Kingston-upon-Hull* (1875), L.R. 10 C.P. 402, at p. 409; *Laybourn* v. *Gridley,* [1892] 2 Ch. 53; *In re Metropolitan District Railway Company and Cosh* (1880), 13 Ch. D. 607, at pp. 611 and 626. Alternatively the assessment is illegal and *ultra vires* because it includes an assessment of the right to construct the bridge across the waters of Burrard Inlet. The assessor has grouped the whole together and assessed the bridge as an improvement right out to the city boundary and has not apportioned the assessment of the improvements between the various parcels. Alternatively the assessment is excessive: see *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264, at pp. 280-81.

McTaggart, for respondent: Section 39 of the Vancouver Incorporation Act, 1921 (referring to assessment) provides that all rateable property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements being estimated separately from the value of the land on which they are situate. Section 46 provides that

> all land, real property, improvements thereon, machinery and plant, being fixtures therein and thereon, in the city shall be liable to taxation.

Subsection (3*a*) of said section as enacted in 1937 is the section under which the appellant was assessed $14,000 in respect of the land held by it, and $600,000 in respect of the value of the improvements. These assessments were reduced by the Board of Assessment Appeals, and an appeal was taken from the decision of the board. It is submitted that that portion of the bridge within the city limits comes within the purview of said subsection (3*a*) and should be assessed at its actual cash value: see *Niagara Falls Suspension Bridge Co.* v. *Gardner* (1869), 29

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U.C.Q.B. 193. The assessment of $14,000 as the actual cash value of the land occupied by the company, taking into consideration the special applicability of said land to the use to which it has been put, is a correct assessment and is supported by the evidence, and $600,000 as the actual cash value of the improvements is a fair valuation. In determining the value of that part of the bridge within the city limits it must be considered as part of the entire undertaking and not as an isolated part of a bridge: see *Re Ontario and Minnesota Power Co. Limited and Town of Fort Frances* (1916), 35 O.L.R. 459; *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee,* [1913] 1 K.B. 612. It is submitted that in valuing that part of a bridge within the boundaries of the city, the so-called "scrap-iron" rule should not be applied for assessment purposes: see *Re Maritime Telegraph & Telephone Co.,* [1940] 1 D.L.R. 602, at p. 607. The burden is on the person claiming exemption and he must prove all facts necessary to entitle him to exemption: see Manning on Assessment and Rating, 2nd Ed., 29. The principles laid down by MACDONALD, C.J.B.C. in *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264, at p. 266, are applicable.

Hossie, replied.

Cur. adv. vult.

6th May, 1940.

MACDONALD, J.A.: The facts are outlined in the reasons for judgment of my brothers MCQUARRIE and SLOAN.

I have given careful consideration to the points involved and cases cited but do not find it necessary to discuss them at length. I shall only say there is not that certainty required by a taxing statute that the section relied upon is applicable to the bridge or to any right or interest therein. On the other hand if it can be made to apply it must be so construed that the assessment value would be nil.

I would affirm the land assessment. While aware of all that may be urged in favour of a reduction and that section 39 differs from the corresponding section in the Municipal Act, together with the additional fact that certain uses are reserved to the city, I would still hold that there is evidence to support the values

finally determined by the Board of Assessment Appeals, and as they did not proceed on a wrong basis I would not disturb it. Substantial error would have to be shown before we would be justified in interfering.

In respect to the assessment of the property right or interest of appellant in the bridge it is not, as stated, covered with sufficient certainty by subsection (3*a*) of section 46 of the Vancouver Incorporation Act, 1921, as enacted by section 5 (2), B.C. Stats. 1937, Cap. 82. We were referred to many cases in Ontario for a rule of taxation on property partly within one municipality and partly within another. The difficulty arose in Ontario in respect to assessments of part of a bridge between Canada and the United States and also in relation to assessments of poles, wires, conduits and cables of telephone companies passing underground or overground through different municipalities. These cases are not conclusive because they were not based on such a section as we have to consider. They have a value by analogy in disclosing how other Courts dealt with questions of this character.

In *Re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114, it was held that in assessing a section of an international bridge crossing the Niagara River in part lying within a township in Ontario the value of the whole structure and franchise or the total cost of construction could not be taken in determining the value of the part within the township in Ontario but only the actual cash price obtainable for that part of it within the township. In *Re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351, it was held that the poles, wires, conduits and cables of the company could not be valued as part of a going concern in relation to the whole system: they had to be valued as material located in the different assessment divisions sold to provide payment of a just debt to a solvent debtor. The soundness of this decision was questioned in *Re Ontario and Minnesota Power Co. Limited and Town of Fort Frances* (1916), 35 O.L.R. 459. It was, however, followed by our own Court of Appeal in *McMullen* v. *District Registrar of Titles* (1922), 30 B.C. 415. There, where the question of the amount of registration fees payable, calculated upon the market values of land at the time of application for registration, was concerned, it was held that the

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value of a tunnel constructed by the Canadian Pacific Railway under the property in question could not be considered in connection with the railway system as a whole and had no market value at all.

These cases, as intimated, are based upon entirely different statutes and afford indirect assistance only. Whatever one's view might be of their soundness or applicability, it would, I fear, invite uncertain litigation to hold that the principles laid down are not at least useful as a guide. The same difficulty encountered here was remedied in Ontario by legislation: it may, I think, be assumed that the legislation dealing with bridges in Ontario first passed in 1902 in an amending Act, 2 Edw. VII., Cap. 31, Sec. 1 (5), afterwards section 43 in the consolidation of 1904, 4 Edw. VII., Cap. 23 was enacted to cover this anomalous situation and effectively did so. It would appear to be common ground, as recited in various leases, that it was contemplated this property should be subject to taxation—an amendment therefore would provide the most effective means of attaining it.

The appeal will be allowed in part.

MCQUARRIE, J.A.: This is an appeal from a decision of the Vancouver Board of Assessment Appeals dated the 27th of February, 1940. The appellant owns and operates a toll bridge (known as the Lions Gate Bridge) across the First Narrows of Burrard Inlet. This bridge connects the city of Vancouver with the municipality of the District of West Vancouver, and serves that municipality, the municipality of the District of North Vancouver, the city of North Vancouver, the general public of the Province and tourists and incidentally an allied or associated company which has established and has on the market a large subdivision at West Vancouver. The bridge lies some eight or ten miles east of the only other bridge across Burrard Inlet at Vancouver, which outside of ferry services furnishes the only other vehicular transportation way across the inlet from the city of Vancouver.

One end of the appellant's bridge rests on a part of Stanley Park, through which they have established a highway to connect

with the bridge. The bridge was commenced in 1937 and completed and opened for operation on November 12th, 1938. Since then it has been continuously operated by the appellant. Tolls for pedestrians are collected at the Vancouver end of the bridge and for vehicles at the West Vancouver end. The bridge cost approximately $5,000,000 and is undoubtedly a commercial undertaking from beginning to end. Arrangements for construction of the bridge were completed prior to 1937 before which time the city of Vancouver was only entitled to tax under section 46 (3) of the Vancouver charter. The amending section 46 (3*a*) came into effect in 1937. The Board of Assessment Appeals substantially reduced the original 1940 assessment of the appellant's property as revised by the Court of Revision. The south end of the bridge (which is the Vancouver end) is located on certain lands leased from the Crown in the right of the Dominion consisting of: (a) a strip 200 feet wide and about 700 feet long containing 3.26 acres; (b) a continuation of this 200-foot strip northerly across the foreshore containing .50 acres; (c) pier site "C" containing .294 acres.

Parcels "A" and "B" are under lease from the Crown in the right of the Dominion of Canada dated the 27th of November, 1936. Parcel "C" is held under a lease from the Crown in the right of the Dominion dated 22nd January, 1937. In respect of the area lying north of pier site "C" the appellant has no lease but has the right and privilege to erect, maintain and operate the aforesaid bridge over and across the water of said Burrard Inlet. The lease of parcels "A" and "B" restricts the use of the area to a bridge-head and reservation is given to the city of Vancouver to use the whole of the property subject only to that user, and the public is given full access to the area as a park. The lease covering pier site "C" also covers the other main pier site "B" on the north shore of the harbour. The right and privilege to construct, maintain and operate the bridge across the waters of the harbour covers not only the 700 feet within the city of Vancouver but also the 475 feet lying north of the city and that 900 feet lying in the municipality of West Vancouver to the north shore of the harbour.

In 1939 the city of Vancouver assessed the appellant in respect

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of water $1,000, in respect of land $6,900, in respect of improvements $1,500,000. The Court of Revision in that year reduced the assessment of the improvements to $300,000. Presumably the appellant paid taxes to Vancouver on that basis. In 1940 the assessment by the city of Vancouver in respect of interest and right to construct and pier site "C" $38,600, and improvements $1,500,000. The Court of Revision reduced the first mentioned to $14,000 and the second to $600,000. The reductions made by the Court of Revision in 1940 were made in accordance with the proviso at the end of section 46 (3*a*) of the city charter limiting the assessment of leasehold interests held from the Crown to a percentage of the total value increasing from year to year until the total value becomes assessable in 1943. The reductions made by the Court of Revision represent only a percentage fixed by statute of the value for assessment purposes which those interests and improvements will reach in 1943.

The apparent reduction does not represent a reduction in value but only a limitation of assessment. On appeal to the Board of Assessment Appeals a further reduction was made of 10 per cent. in accordance with section 56 (11) of the city charter. As I understand it, the hereinbefore mentioned facts are undisputed. The appellant does not question the validity of the Vancouver charter or the amendments thereto.

As I see it the appeal should be dismissed so far as valuation of the land and land covered by water is concerned and the only real question which faces us is as to the assessment of improvements, it being contended by the appellant that the bridge does not constitute an assessable or taxable improvement under the terms of the Vancouver charter and amendments. Assessment and taxation must, of course, depend on power given by the Legislature to the city of Vancouver.

In both leases previously mentioned there is a provision fixing a duty upon the appellant in regard to payment of taxes which reads as follows:

> That the lessee will pay or cause to be paid all rates, taxes, and assessments, of whatsoever description, that may at any time during the currency of these presents be lawfully imposed or become due and payable upon or in respect of the said lands and right and privilege or any part thereof.

The respondent joined in the lease dated 27th November,

1936, as a third party and I understand consented to the second lease.

The appellant entered into an agreement with the respondent on the 9th of November, 1933, to construct a toll bridge over the First Narrows on Burrard Inlet in the Province of British Columbia from a point on the south shore of the said inlet at or near Prospect Point in Stanley Park to a point on the north shore at the Capilano Indian Reserve. Paragraph 13 of the said agreement reads as follows:

13. The company hereby agrees to pay all such taxes, rates and other charges of whatsoever kind which may lawfully be assessed, taxed, levied and charged upon the undertaking or any part thereof.

The 1940 assessment as set out in the assessment roll contains the following description:

W-2 Leasehold interests and right to construct portion of First Narrows Bridge over Burrard Inlet within the limits of the city of Vancouver, including bridge-head site (3.26 acres in Stanley Park and 0.50 acres on adjoining foreshore) and south pier site (parcel "C" 0.294 acres) all as described in leases from His Majesty the King to The First Narrows Bridge Company Limited, dated the 27th day of November, 1936 (registered in the Land Registry Office, Vancouver, B.C., as No. 4132-M) and the 22nd day of January, 1937, respectively.

The appellant was also assessed at the sum of $1,500,000 in respect to the value of the improvements on the above-described property.

It is necessary for us to know exactly what the powers of assessment and taxation of the respondent are in its charter and it must be remembered that the validity of the charter and amendments is not questioned in this matter. Section 39 of the said Act (referring to the matter of assessments) reads as follows:

All rateable property, or any interest therein, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements (if any) being estimated separately from the value of the land on which they are situate.

Section 46 of the said Act, with certain exceptions not material here, provides that

all land, real property, improvements thereon, machinery and plant, being fixtures therein and thereon, in the city shall be liable to taxation.

Subsection (3*a*) of the same section as enacted by subsection (2) of section 5, Cap. 82, B.C. Stats. 1937, provides as follows:

(3*a*.) Notwithstanding anything contained in this section, any lessee or

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sub-lessee of His Majesty, either in the right of the Province or the Dominion, or any person owning or enjoying any right or interest under any agreement with His Majesty, either in the right of the Province or the Dominion, in respect of any property mentioned in subsection (1) of this section, or any lessee or sub-lessee of any Board of Harbour Commissioners, or any person owning or enjoying any right or interest under any agreement in respect of any property owned or controlled by any such Board, shall be assessed in respect of his right or interest therein on the basis of the actual cash value of the lands (including land covered with water) and improvements so occupied, used, held, possessed, or enjoyed by him, pursuant to the provisions of section 39 of this Act, and shall be taxed in respect thereof as if he were the actual owner of such lands and improvements, so long as such lessee or sub-lessee, or such other person as aforesaid, shall continue to occupy, use, hold, possess, or enjoy the same for any commercial purpose, and any such occupant or lessee or sub-lessee or other person as aforesaid, holding under any such agreement as aforesaid, shall be liable to pay any or all general and special taxes, rates, and assessments levied in respect thereof; Provided nevertheless that except as to improvements henceforth placed upon the land no such occupant, lessee, sub-lessee, or other such person as aforesaid shall in any year up to and including 1942 be so assessed in a greater amount than the assessment for the preceding year plus twenty per cent. of the difference between the assessment for the year 1937 and the actual cash value of each property.

It was under this subsection that the appellant was assessed at the sum of $14,000 in respect of the land held by it and at the sum of $600,000 in respect of the value of the improvements on the said land. These assessments were reduced by the Vancouver Board of Assessment Appeals and it is against the decision of the board that this appeal has been brought.

The appellant contends that the "scrap-iron" rule should be applied here and that the value of the part of the bridge within the limits of the city of Vancouver for assessment as an improvement is nil. That apparently is what was decided by MURPHY, J., in his reasons for judgment in the West Vancouver case, a copy of which was kindly furnished to us by counsel for the appellant, but there he had to deal with the Municipal Act and not the Vancouver charter. No provision similar to the 1937 amendment of the Vancouver charter (subsection (3*a*) of section 46) is contained in the Municipal Act. I express no opinion as to the correctness of the said judgment of MURPHY, J., because as stated by counsel for the respondent before us there is a possibility that there will be an appeal to this Court in that case. I do not, however, consider that the portion of the bridge situate

in the city of Vancouver if standing alone, would be of no value for revenue, exchange or sale purposes. It would in my opinion be of great value to an intending purchaser who could arrange to acquire the remainder of the bridge with the right to operate the whole bridge on a toll basis. I cannot understand how a substantial part of a structure, which recently cost approximately $5,000,000 to erect together with the appurtenances, can have no value for assessment purposes under subsection (3*a*) of section 46 of the Vancouver charter. Such a provision was not involved in any of the decisions cited to us. The assessment here is based on the last-mentioned provision and therefore none of the cases cited to us is of any material assistance. The "scrap-iron" rule is completely eliminated. I am of opinion that the assessment as fixed by the Board of Assessment Appeals should be confirmed. With all deference I would therefore dismiss the appeal.

SLOAN, J.A.: The substantial questions raised in this appeal are whether or not the city of Vancouver has the authority, by the terms of its charter (Vancouver Incorporation Act, 1921, and amendments) to assess and tax, as an improvement, that part of the Lions Gate Bridge which lies within the boundaries of the said city and if so what is the proper valuation thereof.

The structure in question is a suspension bridge spanning the waterway entrance into Vancouver Harbour. The boundary-line of the city of Vancouver cuts the bridge at a point 75 feet south of the centre of its suspended span. The north end of the bridge lies within the municipality of West Vancouver and the boundary-line of that municipality intersects the bridge at a point 400 feet north of the centre of the suspended span thus leaving a section of the bridge 475 feet in length outside the jurisdiction of either municipality.

In this appeal we are concerned solely with the assessment of that portion of the bridge which lies to the south of the boundary-line of the city of Vancouver. The Vancouver end of the bridge and approaches thereto are located in Stanley Park and on the adjacent foreshore. Stanley Park is property of the Crown in the right of the Dominion and is leased to the city of Vancouver.

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For the purpose of permitting the bridge company to construct a bridge-head and other related works thereon the Crown in the right of the Dominion leased to the said company an area of Stanley Park 200 feet wide and 700 feet long containing 3.26 acres and by the same indenture continued the lease of the 200-foot strip northerly across the foreshore to low-water mark; an area containing .50 acres. The city joined in the said lease.

By a further indenture and to permit the bridge company to construct bridge piers thereupon, the Crown in right of the Dominion leased to the said company two portions of the bed of Burrard Inlet each containing .294 acres. One pier site (Pier C) is situate within the city of Vancouver; the other within West Vancouver municipality. By this same indenture the Crown granted the bridge company the right and privilege of erecting maintaining and operating the said bridge over and across the waters of Burrard Inlet. Thus from the site of Pier C north to the Vancouver city boundary-line the bridge company has no lease of the bed of Burrard Inlet but merely the right to construct and maintain a bridge over the waters thereof.

In 1940 the leasehold interests hereinbefore referred to were assessed by the city at $38,600 and that portion of the bridge within the city (including "the right to construct such bridge") was assessed at $1,500,000.

The Court of Revision reduced these assessments to $14,000 and $600,000 respectively but this reduction does not represent a real reduction in valuation but only a limitation of the right of assessment pursuant to section 46 (3*a*) of the city charter added in 1937. The effect of this section is (*inter alia*) to graduate from 1938 to 1942 the assessment for taxation purposes on leasehold interests from the Crown at an increasing percentage of the total assessed value. Thus in 1943 the total assessed value becomes the taxable assessed value.

On an appeal from the Court of Revision to the Board of Assessment Appeals the decision of that board was as follows:

The board has carefully considered the facts and legal decisions cited to it by both counsel, and has come to the unanimous conclusion that the assessment on the improvements is too high. It, therefore, orders a reduction of ten per centum in accordance with section 56 (11) of the Vancouver Incorporation Act, 1921, and amendments, *viz.*, $30,000.

The board is also of the opinion that the assessment on the land is too high and therefore orders a reduction of ten per centum, in accordance with aforesaid section 56 (11), *viz.*, $790.

The sums of $30,000 and $790 therein referred to as ten per centum reductions are explained by reference to section 56 (11) of the charter which contains a curious limitation upon the exercise of jurisdiction by the said board. The said section states in effect that the board may not reduce the assessment on appeal in an amount greater than ten per cent. of the final assessment made "in the year next preceding such appeal." Because of the sliding scale of assessment for taxation purposes provided in said section 46 (3*a*) the bridge assessment in 1939 was fixed at $300,000, and the leasehold interests at $7,900.

In the result, and to sum up, in 1940 the bridge was assessed at $1,500,000 and the leasehold interests at $38,600 but for taxation purposes for such year the bridge was by the Court of Revision deemed to be assessed at $600,000 and the leasehold interests at $14,000 (section 46 (3*a*)) and then, on appeal, the assessments were reduced by the Board of Assessment Appeals to the full extent of its jurisdiction (section 56 (11)) to $570,000 and $13,210 respectively.

We are, in this appeal, concerned with assessed value as such and not with the artificial sliding scale of values provided for in section 46 (3*a*).

I propose to deal with the real and actual assessment of that portion of the bridge within the city of Vancouver. Two questions are involved. The first: Is it an assessable improvement within the meaning of the city charter? The second: If so, what is its proper measure of value for assessment purposes within the said charter?

The definition of "Improvements" in section 2 (9) of the city charter follows:

"Improvements" shall extend to and mean all buildings and structures erected upon or affixed to the land, and all machinery and things so fixed to any building as to form in law a part of the realty.

In my view the bridge structure in so far as it is erected upon or affixed to the leasehold properties may be regarded as an "improvement" within the boundaries of those properties, but I am unable to understand how it can be said with any reason

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that that suspended portion of the bridge north of Pier C to the city boundary can be said to be an "improvement" upon the bed of Burrard Inlet.

Neither can I comprehend under what possible theory of municipal taxation the city may assess and tax the bare "right to construct" as such. It may be that in some circumstances not present here the "right to construct" might be such a right permitting the grantee thereof to be treated by the city under section 46 (3*a*) as the owner for taxation purposes of the property to which the right was attached. In this case, however, the "right to construct" is in part at least not attached to land but is, as I have said, merely the right to build a bridge over certain waters of Burrard Inlet. Assuming the bridge not built would the right of construction granted the bridge company by the Dominion be something taxable under section 46 (3*a*) of the charter? I can see no basis for such a suggestion.

For the purpose of this appeal, however, and leaving aside other aspects of the problem, I propose to treat that entire portion of the bridge within the city as an improvement within section 2 (9) and assessable as such. The next question then arises: What is its proper assessed value for taxation purposes? The answer to that question involves the consideration of certain sections of the Vancouver city charter because the value of the bridge within the city for taxation purposes must be determined according to the proper construction to be placed upon the statutory taxing powers of the city and not upon what might be considered by the Court as a fair and just method of working out this problem apart from the statute itself. It might be a very convenient and no doubt pleasing solution, at least for the city authorities, if we would formulate a plan of assessment and taxation covering this bridge by a form of judicial legislation but I must refuse the adventure.

Turning then to the city charter we find by said section 46 (3*a*) that the city has the power to assess the right or interest of any person in Dominion Crown lands situate in the city on the actual cash value of the land and improvements thereon "pursuant to the provision of section 39" of the charter and to tax such person in respect to such interest as if he were the actual owner thereof.

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When we turn to said section 39 we find it reads as follows: [already set out in the judgment of McQUARRIE, J.A.] What then, is the actual cash value of that portion of the bridge within the city as an improvement "as it would be appraised in payment of a just debt from a solvent debtor"? It must be remembered that the bridge company's right to construct, maintain and operate the bridge cannot be taxed nor sold by the city and that part of the bridge within the city must be regarded as ending at the city boundary and therefore cannot be valued as part of a going concern. The creditor could not expect to get anything from the debtor except that part of the physical structure of the bridge lying within the city of Vancouver disconnected and dissociated from the rest of the bridge. The governing statutory method of assessment, in my opinion, does not permit the city to assess that portion of the bridge within its boundaries as part of and connected with the portions of the bridge lying outside the taxing authority of the city because to do so involves taking into consideration and assessing values not only within but without the city's jurisdiction to determine. In my view the principles enunciated in *Re Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351; *In re London Street Railway Co.* (1900), 27 A.R. 83; *Re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114 are applicable herein and decisive of this appeal.

It follows from the foregoing that that portion of the bridge within the city must be valued in my opinion as so much steel, cable, cement and other material used in its construction. In place as a disconnected part of a bridge it would be valueless and, according to the evidence, to reduce the bridge to its component parts would cost more than the resultant scrap would bring. That portion of the bridge in the city area, in my view, has no assessable value.

It appears to me that the city officials have made an unsuccessful attempt to wrench apart the city charter to fit into it a structure that it was never designed to include. If, in the result, the city suffers any injustice I would repeat what Osler, J.A., said in the *Queenston* case, *supra,* at p. 117, "the remedy rests with the Legislature, not with the Courts," . . .

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So far as the leasehold interests are concerned I may say that while I am of the opinion the assessment is very high nevertheless I do not feel justified upon the evidence in interfering therewith.

The appeal is therefore allowed in part and to the extent indicated.

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

Solicitors for appellant: *Davis, Pugh, Davis, Hossie & Lett.*
Solicitor for respondent: *A. E. Lord.*

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Criminal law—False pretences—Obtaining potatoes and hay by—Promise to pay for goods on following day—Criminal Code, Secs. 404 and 405, Subsec. 2.

The accused Reid and Miller went to the farm-house of one Tarves with two cars on Friday, the 17th of February, 1940, for the purpose of purchasing potatoes. After negotiations, Tarves allowed them to take 32 sacks (20 sacks to the ton) on their promise to come back the next day and pay for them. They came back the same evening at 5 o'clock, made excuses that they were not able to get the money for payment, and Tarves allowed them to take 38 more sacks of potatoes on a promise to pay the next day. They came the next day (Saturday), again made excuses for not having any money, and they took two more loads of potatoes on the promise to pay the next day. They came on Sunday and again made excuses for having no money, and Tarves allowed them to take away the balance of seven tons of potatoes in all and also ten tons of hay, they promising to be back the next day to pay for all the potatoes and the hay. They did not return or pay for the goods. They were convicted on a charge that in incurring a debt or liability to one John Tarves they unlawfully obtained credit under false pretences from the said Tarves with intent to defraud.

Held, on appeal, reversing the decision of WHITESIDE, Co. J. (MACDONALD, C.J.B.C. *dubitante*), that a mere promise to pay for goods in the future does not involve the necessary and irresistible representation of a present fact and is not in consequence a false pretence within the meaning of section 404 of the Criminal Code.

Per SLOAN, J.A.: (1) False representations amounting to mere promises or professions of intention are not false pretences within the meaning of section 404 of the Code.

(2) From the nature and character of a representation relating to the future a representation of a present fact may be implied but only when that implication is necessarily and irresistibly involved in the expressed promise or profession of the future intention.

APPEAL by defendant Reid from the decision of WHITESIDE, Co. J., of the 29th of April, 1940, convicting the defendant on a charge

that . . . on or about the 17th day of February, 1940, at Smith Road . . . in the county of Westminster . . . in incurring a debt or liability to John Tarves, unlawfully did obtain credit by false pretences from the said John Tarves and with intent to defraud the said John Tarves,

in contravention of section 405, subsection 2 of the Criminal Code. On Friday, the 17th of February, 1940, the defendants went to the farm of John Tarves and asked him if he had any potatoes for sale. He said he had about seven tons, and wanted

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$15 per ton. The men had two cars and they took 32 sacks of potatoes (20 sacks to the ton). Before leaving they said they did not have the money to pay for the potatoes but would bring it the next time they came. On the same evening they came back and took away 38 sacks. They again had an excuse for not paying for them and said they would pay the next time they came. They came back on the next day (Saturday) and on Sunday and took away more potatoes. In all they took about seven tons. They also took ten tons of hay at $9 a ton. They owed in all about $200. On both Saturday and Sunday they had further excuses for not having the money to pay, and promised they would be there on the following Monday to pay. They did not return or pay for the potatoes or hay.

The appeal was argued at Vancouver on the 4th of June, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Branca, for appellant: The charge is under section 405, subsection 2 of the Criminal Code, and is for obtaining credit by "false pretences." The facts do not support a "false pretence" at law. Appellant received about seven tons of potatoes and said he would bring the money the next day. A false pretence is a representation of a matter of fact either present or past. It does not apply to a promise to do something in the future: see *Rex* v. *Thimsen,* [*ante,* p. 103]; [1940] 2 W.W.R. 165; *Reg.* v. *Lee* (1863), 9 Cox, C.C. 304; *Regina* v. *Bertles* (1863), 13 U.C.C.P. 607; *Reg.* v. *Burrows* (1869), 11 Cox, C.C. 258; *Mott* v. *Milne et al.* (1898), 31 N.S.R. 372, at p. 384; *The King* v. *Nowe* (1904), 8 Can. C.C. 441; *Reg.* v. *Gardner* (1856), 7 Cox, C.C. 136.

Petapiece, for respondent: The promise implies a representation as to an existing fact: see *Regina* v. *Gordon* (1889), 23 Q.B.D. 354; 16 Cox, C.C. 622; *Rex* v. *Bancroft* (1909), 3 Cr. App. R. 16. It is a present fact both in conduct and statement: see *Reg.* v. *William Jones* (1898), 19 Cox, C.C. 87; *Rex* v. *Carpenter* (1911), 22 Cox, C.C. 618; *Rex* v. *Wyatt,* [1904] 1 K.B. 188; *Rex* v. *Cohen* (1915), 24 Can. C.C. 238, at p. 243; *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483.

Branca, replied.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: Part of the evidence and an extensive review of the cases will be found in the judgment of my brother SLOAN. While the result is justified by the decisions I have difficulty in supporting the reasoning upon which they are based. I venture, with diffidence, a few comments in the hope that in time at least the scope of former decisions may be kept within more reasonable limits, if not in fact abandoned for what, with deference, I conceive to be a more reasonable view—one that will prevent, in this and many other cases, a modern type of confidence man from escaping just punishment. The mental equipment of this class when put to criminal uses may be as dangerous as more lethal weapons.

To make the position clear I think it necessary to make some material additions to the evidence outlined in my brother SLOAN'S judgment. What occurred before the final decision to extend credit was arrived at (and of course before the promise to pay in the future was made) is important. What induced complainant to trust one now known to be a swindler of whom the trial judge truthfully said "he deliberately went around the country and defrauded these farmers"? The answer must be found in what took place before complainant decided that he could trust him. It will not, I hope, be suggested that complainant acted upon some independent generous impulse of his own having no relation to what took place between them. A narration of the facts, meagre though they are, may disclose an existing fact that induced complainant, as the event proved, to submit to being defrauded.

The accused (he was accompanied by another man not however an appellant) drove to complainant's farm in a large touring-car creating thereby an air of prosperity: had a tramp appeared the discussion would have been brief. They discussed the price of potatoes and without any haggling accused agreed at once to complainant's price of $15 per ton: to him the price was immaterial; he didn't intend to pay anyway. He told complainant that he was reselling the potatoes to a captain of an unnamed boat thus creating the impression that the money to pay for them would be available. Whether or not this statement was true we do not know: it is not material—the truth may be

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used for purposes of deception. From his conversation and conduct, no doubt plausible and ingratiating complainant finally made up his mind that accused was honest: he testified that it was on the strength of that belief formed after the general discussion referred to that he let him have the produce. One would gather from the value of the goods transferred that the complainant was wholly convinced of the honesty of the accused: he parted with potatoes to the value of $110 and hay to the value of $90. The accused also stated that he had arranged for the sale of the hay. At that point, that is to say after the events narrated took place and after a dishonest man had planted in the mind of the complainant the conviction that he was honest accused asked for credit for a day or two and, as disclosed in the extract from the evidence referred to by my brother SLOAN, complainant gave it to him relying upon his promise to pay, a promise known by accused at that time to be false. Had accused told the truth and said to complainant "I will take the produce but I do not intend to pay you" he would not, of course, have received credit. His conduct throughout where he played the part of an honest purchaser of goods was intentionally false and deceptive; by words and conduct like the pretended student in cap and gown he misrepresented himself to complainant. If that, in conjunction with the false promise to pay, made of course before credit was granted is not a false representation by "words or otherwise" known to the accused to be false and intended by him to induce complainant to act upon it there is of course no basis for my submission. If too such conduct, planting and intended to implant in the mind of complainant the false conviction that accused was honest is not in itself a fact there is also no basis for my submission, I suggest that conduct, actions, state of mind, convictions upon which men act are properly treated as facts. If too that conduct resulting as aforesaid is a fact, it must be an existing one: in other words it must have been *in esse* at or before the moment that it produced results, *viz.*, the securing of credit. It may of course be suggested that the evidence of this existing fact producing the results referred to is too scanty —a mere scintilla; that however is not suggested. What is suggested in the cases presumably is that if it happens to be

associated with a promise to pay in the future it is not an existing fact at all.

I would make this further addition to the evidence; the accused also obtained credit from other farmers by the same course of conduct; he was apparently successful wherever he brought his forceful personality to bear on his victims. This evidence of similar acts rebutted any presumption of innocence; it justified the trial judge in finding that the accused was a swindler, a fact so transparent that appellant's counsel before us admitted an intention to defraud.

However, notwithstanding these observations in the light of the authorities, whatever my opinion of the *ratio decidendi* the issue, strangely enough, is not affected. In cases based upon English statutes taken by our Courts as of similar import to the relevant sections of the Code, although the language is different, juries have found in the past "no intention to pay" and yet convictions based upon such findings have been set aside. These transactions, if they happen to contain a promise to pay in the future, are treated as ordinary breaches of contract by dishonest men. A civil action presumably is the only remedy. That ought to be satisfactory to this type of "bunco" or "confidence" men: they escape punishment while the parties defrauded lose their property although their only fault is credulity.

It was suggested that a conviction might have been recorded if a charge had been based upon the last five words of section 405, subsection 2, *viz.*, "by means of any fraud." How so if what took place merely amounted to a breach of contract? If when a charge is laid under the main part of section 405, subsection 2, obtaining credit by false pretences, the facts must be treated as disclosing only that a dishonest man broke his contract how could they be otherwise regarded in a charge based upon the last limb of that section? If it is a breach of contract in one case it is so in the other. One who breaks a contract may be dishonest but the breach is not a crime.

It is also suggested that in cases such as this where there is a promise to pay in the future with words and conduct preceding it the Court cannot make a finding of fraudulent intent or at all events a finding in that connection capable of being regarded as

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an existing fact. My brother SLOAN referred to *Reg.* v. *Woodman* (1879), 14 Cox, C.C. 179 where the existing fact said to justify a false pretence charge was the intent of the prisoner. Mellor, J. is quoted with approval as saying: "How can you define a man's mind?" I suggest with respect that this task is undertaken by Courts every day and occasions no difficulty to a fact-finding judge or to an intelligent jury. In no other way can fraud be found. *Mens rea* or intent is inseparable from the administration of criminal law. Why should the fact that the transaction included a promise to pay in the future prevent an inquiry into this question?

However, while I have, with deference, indicated my own view that the finding of the trial judge supported by the evidence and the admission of counsel for the accused that the latter at the inception of this transaction had the fraudulent design to deprive complainant, as well as many others, of his and their property by the use of falsehoods and by a demeanour intended to instil an unwarranted confidence related to an existing fact and justified a conviction the authorities disclose a different viewpoint. We must treat it apparently as a successful attempt by the accused to persuade complainant to extend credit without more representations than usually transpire in an ordinary sale and purchase. It differs little from *Reg.* v. *William Jones* (1898), 19 Cox, C.C. 87. There, however, Lord Russell, C.J., stressed the fact that no statements were made or words uttered that might be considered as a representation concerning an existing fact. It is suggested that had more taken place in the case at Bar when credit was obtained a conviction might have been upheld. This simply means that additional evidence by words and conduct would disclose intent and enable the Court to "define a man's mind." It means that with additional facts there would be more than a scintilla of evidence to go to the jury. I suggest that properly viewed we have more than a scintilla in the case at Bar.

In *Reg.* v. *Gordon* (1889), 23 Q.B.D. 354, also referred to by my brother SLOAN, we find at least a glimmer of an attempt to advance the rational view that if one by speech or conduct plants in the mind of another the false conviction that his inten-

tions are honest and obtains property or credit by that deceit a conviction ought to follow. There Wills, J. (p. 360) found it

> difficult to see why an allegation as to the present existence of a state of mind may not be under some circumstances as much an allegation of an existing fact as an allegation with respect to anything else.

I have suggested that the state of mind of the accused is as much a question of existing fact as the state of his pocket "or the state of his digestion." Why should *mens rea* be excluded from one type of transaction, *viz.*, obtaining money, property or credit by false pretences because a promise to pay in the future appears, not as the whole case but as one element only? When a swindler spends a quarter of an hour, as in this case, in a successful effort by false conduct and false words, few or many (if too few there may not be more than a scintilla) to induce complainant to part with goods or credit the real basic inducing false representation is not the concluding incident in the whole proceedings, *viz.*, the promise to pay. The swindler must first succeed in his fraudulent design to obtain credit before the question of repayment is even considered. This final promise to pay is the outcome of the fraud; not the fraud itself. To make it basic when clearly it is not; to ignore the existing facts that led up to it and to focus whole attention on the final settlement of terms of repayment discloses that, as sometimes conceded decisions are based, not on logic but on expediency. One might visualize a situation where after the accused by one or more false statements coupled with a disarming demeanour convinced his victim that he meant what he said (when in fact he did not) the complainant would say to him "You have convinced me of your honest intent and because of it I will grant you credit," to which the accused would reply, "Very well, I accept it" and then with complainant proceed to discuss terms of repayment. This latter statement, uttered after the swindler's purpose was accomplished is treated as decisive colouring the method of approach. It is treated as if there could be no inducing existing fact prior to the discussion of terms of repayment although it is clear that this point would never have been reached if the complainant had not been induced by falsehood to advance credit. This undue emphasis on the final episode is to mistake result for cause. Yet cases treat the situation as if there was no representation whatever by "words or otherwise"

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of an existing fact, only some sort of representation *in futuro*. We know at least that the goods or credit was parted with *in præsenti;* that at least was, at the time, an existing fact; it would appear that the means that brought it about was not.

That the *ratio decidendi* in the cases is based upon expediency is sometimes stated. Where a promise to pay in the future is an element it is said that to treat it as a representation concerning an existing fact would make it difficult to distinguish between obtaining property or credit by false pretences and an ordinary breach of contract; exasperated creditors it is suggested would make unfair use of the criminal law to collect from debtors. This, with deference, amounts to a refusal to apply ordinary rules of construction to statutes; it suggests that Courts and juries cannot be trusted to draw the line of demarcation between a false pretence to enter into a pretended contract by which property or credit is parted with and a promise to pay in the future given and the breach by a dishonest man of a contract duly entered into by parties originally *ad idem*. In the latter case, of course, there could be no deception or false pretence at the inception of the contract and a breach by one of the parties whether honest or not would give rise only to a civil action. That is not so in the former case. Because however of alleged inability to make a distinction *ex facie* perfectly clear an arbitrary rule of construction based upon expediency is laid down by the Courts. My brother SLOAN referred to this quotation from Stephen's History of the Criminal Law of England, 1883, Vol. III., p. 161, based on an English statute:

> The words, "whosoever shall by any false pretence obtain from any other person any chattel, . . . with intent to defraud," seem simple enough, but they are obviously open to an interpretation which would make any dishonest breach of contract criminal.

If the language is "obviously open" to that interpretation why not give effect to it? Legislatures could make a dishonest breach of contract a crime if so disposed. They have not however done so. He referred also to *The Commonwealth* v. *Hutchinson,* 2 Pars. Eq. Cas. 309, an American case where the same viewpoint is expressed and the alleged difficulty of distinguishing between a breach of contract and a crime referred to; it is given as a reason for not following "where the argument leads." It is often

found that lines of demarcation are not distinct: sometimes the one ends and the other begins in a penumbra but Courts are not thereby excused from grappling with the problem. Here however the distinction is clear; there is no twilight zone.

When the principle of the cases is applied to section 405 (2) of the Code, *viz.*, unlawfully obtaining credit by false pretences, objections more clearly appear. Credit from its nature can only be obtained by a promise to pay in the future. If one presented a false written statement to a complainant disclosing, or pretending to disclose, a balance at the bank, and if without uttering a word except a promise to pay in the future he obtained credit a conviction, I apprehend, ought to be recorded if any meaning at all is to be given to the phrase "by words or otherwise." The false printed statement I apprehend would be treated as disclosing an existing fact. What difference between persuading one to extend credit by a false document in one's hand or by false words in one's mouth? And if the former course of conduct reveals an existing fact why not the latter?

My brother SLOAN referred to *Rex* v. *Thimsen* (1940), [*ante*, p. 103] 73 Can. C.C. 315; he stated that his reasons in the case at Bar, at least in one aspect, amplify the reasons given by him in that case. This suggests that, to some extent at all events, the two cases call for similar treatment. With deference, I suggest they are not alike in fact or principle. There, one without legal authority, having no licence as required by statute, collected a sales tax from complainant and kept it; he not only deprived His Majesty of revenue, but also defrauded complainant who had to pay the tax, in part at least twice over. The false pretence in my view (it was not accepted by the majority who took a different view of some facts and treated other as material that I thought were not) was that where one, without authority sends accounts to another containing inferentially a demand for payment, including therein a sales tax, with the design at the outset to defraud that act involved a false representation of an existing fact. True, accused did not say he had a licence; no thought was given to that aspect. Its absence merely established, as I stated in my reasons, that accused had in fact no authority to collect these taxes much less to keep them. It would

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be an unnecessary indulgence to a swindler to decline to make use of that fact. If one to get money for himself falsely represented that he had authority from a company to collect its accounts from customers, and sent them out, he would if he was successful be obtaining money by false pretences. I hope it would not be fatal to a conviction if he also promised to pay the sums collected to the company at a future date. This as I viewed it illustrates the true position and method of approach in *Rex* v. *Thimsen.*

I have indicated my own view but will not formally dissent; it may be that a higher Court, if so disposed, will take notice in modern days of a comparatively new type of swindler known as confidence men and adapt the law to meet the case. I would allow the appeal.

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

SLOAN, J.A.: The appellant was convicted (with another) that in incurring a debt or liability to one John Tarves he unlawfully did obtain credit under false pretences from the said John Tarves with intent to defraud. The charge was laid under section 405, subsection 2 of the Code and the facts are that the appellant in incurring a debt for the purchase of some farm produce from Tarves obtained credit upon the mere promise he would pay for such produce at a later date.

The evidence of Tarves as to the representation upon which he granted the credit follows:

Did you rely, or believe these men? I did.

When they said they would come back and pay? Yes, I thought they were honest men. They looked honest men, to me.

And it was on the strength of that belief, that you let them have the produce? Yes.

You let them have the produce—that is, the potatoes and the hay—because you believed their promise that they would pay you? I did.

. . . .

Now, was there any specific representation that they made, when they got the potatoes, that you say is untrue? Well, they never came back.

Well, it comes to this: That you believed their promise? I did.

And relied on their promise? Yes.

Do you say they made any false pretence? Well, they did not come back Monday or Tuesday. That is false pretence, I should say—when they

promised, faithfully, to come [and] . . . I thought they were honest men.

The appellant conceded before us that he obtained the credit in question with intent to defraud but contends that, as the representation upon which the credit was obtained was a mere promise to make a future payment that such representation is not a "false pretence" within the meaning of that phrase as defined by section 404 of the Code in that it is not a representation "of a matter of fact either present or past." In my view that contention is sound and I propose to outline the authorities upon which I base my conclusion.

Goodhall's Case (1821), R. & R. 461. In that case the prosecutor was a butcher and the prisoner came to his shop to purchase some meat. The butcher did not trust him but upon the prisoner promising to pay upon delivery of the meat the butcher sent it to him. The bill was not paid and prosecution and conviction followed. The indictment was founded on the provisions of 30 Geo. 2, Cap. 24, Sec. 1 (*a*) which reads (in part):

> That all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person, . . . , goods, . . . , or merchandizes, with intent to cheat or defraud any person of the same, shall be deemed offenders against law and the publick peace.

The jury found that the prisoner when he made his promise had no intention of paying for the meat. The learned trial judge (Mr. Baron Garrow) respited the judgment and the matter was considered by the Court for Crown Cases Reserved:

> They held the conviction wrong; being of opinion, this was not a pretence within the meaning of the statute. It was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it.

Reg. v. *Lee* (1863), 9 Cox, C.C. 304. In that case the prisoner represented to the prosecutor that he needed money to pay his rent which was owing and the prosecutor loaned him £10 to be paid to the prisoner's landlord. The statute invoked was 24 & 25 Vict., Cap. 96, Sec. 88 which reads in part as follows:

> Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour, . . .

The jury found the prisoner's statement that he was going to pay the said sum to his landlord was a false pretence upon which

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the prosecutor advanced the money in question and the prisoner was convicted. The judgment of the Court of Criminal Appeal quashing the conviction was delivered by Cockburn, C.J., who said (p. 306):

> The money was advanced on the credit of the false pretence that the prisoner was going to pay his rent; but that is not a false pretence of any existing fact, although it is found that the prisoner had not the intention of paying his rent.

Reg. v. *Woodman* (1879), 14 Cox, C.C. 179. In that case the prisoner was charged with obtaining money by false pretences by representing to the prosecutor that he (the prisoner) wanted a loan to enable him to take a public house whereas in fact he wanted the money for another purpose. At the close of the Crown's case it appeared that the learned trial judge (Mr. Justice Mellor) thought no case had been made out as the pretence was the expression of a future intention. He said:

> The old rule is, there must be a false representation of that being alleged to be a fact which is not a fact.

Ravenhill for the prosecution then advanced the same contention as Crown counsel advanced in this case alleging that "the existing fact was the intention of the prisoner" to which Mellor, J. replied:

> How can you define a man's mind? It is a mere promissory false pretence.

After consulting with Denman, J. he decided there was no case to go to the jury.

Reg. v. *Gordon* (1889), 23 Q.B.D. 354. In that case the prisoner was convicted on an indictment under 24 & 25 Vict., Cap. 96, Sec. 30, charging that by false pretences he fraudulently induced the prosecutor to give him a promissory note for £100. On the evidence it was held that the prisoner had made a false pretence of an existing fact but several observations of Wills, J. call for consideration. During the argument he said (p. 357):

> Suppose the defendant said, "I have the intention of advancing 100*l.*," and he, in fact, had no intention of the kind.

To which observation counsel, in my opinion, properly replied by saying: "That would not be a sufficient false pretence." Lord Coleridge, C.J. in delivering judgment said at p. 359:

> I am far from saying that . . . much may not be found in the suggestion of my brother Wills in the course of the argument, but that has not been argued out, and I base my judgment on a broader and less refined ground.

Wills, J. in delivering judgment then amplified what he had in mind, saying (p. 360):

I am glad that it is possible to support the conviction without venturing on the somewhat dangerous ground to which I referred in the course of the argument, and rendering it necessary to distinguish between a pretence to do something, and a statement of intention. I find it difficult to see why an allegation as to the present existence of a state of mind may not be under some circumstances as much an allegation of an existing fact as an allegation with respect to anything else. For example, suppose that by an arrangement for the settlement of litigation, a man was to pay a sum of money, and when the time came he said: "I shall not pay until I know that A. has the intention of acceding to this arrangement. I do not insist upon having his promise. I shall be content if I know what his present intention is. Otherwise I shall not pay." Suppose B., who was to get the money, then told him that A. had that intention, and he believed B. and paid the money upon the faith of B.'s assurance, and all the while B. knew that A.'s intention was exactly the contrary to what he had stated. I should have thought that the allegation as to A.'s intention was one of an existing fact, capable of supporting an indictment for obtaining money by false pretences.

. . . . .

It will be noted that Wills, J. gives a hypothetical example dealing with the circumstances of a very special case. It might well be in that kind of case that B.'s expression of A.'s present intention would be a statement of an existing fact and one in which the observation of Lord Bowen in *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483 that

the state of a man's mind is as much a fact as the state of his digestion

would be in point. But that is not this case. The representation here relied upon by the prosecutor was not the intention of the appellant but his expressed promise. If he had disclosed his intention he would not have got the credit and as Wills, J. points out (23 Q.B.D. 360)

there [is] always [the] danger of confounding intention with a representation . . .

In Archbold's Criminal Pleading, 30th Ed., 721, the learned author makes this comment on *Gordon's* case:

The Court . . . specially refrained from deciding the question there raised by Wills, J., whether a statement of present intention is a sufficient representation of an existing fact, and *semble*, that it might be unsafe to base an indictment under the Larceny Act, 1916, . . . upon such a statement alone.

Reg. v. *William Jones* (1898), 19 Cox, C.C. 87. The prisoner in that case entered a restaurant and ordered a meal. Having eaten the meal he advised the restaurant-keeper that he had no

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money and could not pay the bill. He was indicted on two counts. The first count was for obtaining goods by false pretences (24 & 25 Vict., Cap. 96, Sec. 88); the second was for fraudulently obtaining credit under the Debtors Act, 1869 (32 & 33 Vict., c. 62, s. 13). He was convicted on both counts. In the Court of Criminal Appeal counsel for the Crown sought to uphold the conviction on the false pretence count by contending in effect that there was a false pretence of an existing fact by the prisoner in that by his conduct there was an implied representation as to his present ability to pay for his meal. This argument was rejected by the Court which quashed the false pretence count. Lord Russell, C.J. in delivering the judgment of the Court, said (p. 89):

> It is to be observed that all the man did was to go into the place, order food, eat it, and not pay for it. No question was put to him by the prosecutor, no inquiry was made, and no statement was made by the prisoner. The question is, whether that can be regarded as a state of things justifying a jury in finding that the prisoner obtained these consumable articles by false pretences. We do not wish to say one word to weaken the effect of the cases which show that there can be false pretences by conduct, as in the well-known cap and gown case, where the prisoner wore a cap and gown with the intention of leading persons to believe that he was a member of the University; or again, the numerous cases as to cheques given on a bank where the defendant must have known of the want of funds to meet the cheque. But in the present case there was no statement on the part of the prisoner, and we think that it ought not to have been left to the jury; in other words, that there was no evidence that the prisoner obtained these goods by false pretences. . . .

The Court then considered the fraud aspect and sustained the conviction on that count. The relevant section of the Debtors Act, 1869 (32 & 33 Vict., c. 62, s. 13 (1)) reads as follows:

> Any person shall in each of the cases following be deemed guilty of a misdemeanour, . . . ,
>
> (1.) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud.

This section is the same as Code section 405, subsection 2 (the section in question here) except that the word "other" does not appear in section 405, subsection 2. The appellant herein was not charged with obtaining credit by means of fraud but by false pretences and that there is a manifest difference between obtaining goods by false pretences and by fraud is recognized in *Rex* v. *Benson* (1908), 21 Cox, C.C. 631 and in *Rex* v. *Carpenter*

(1911), 22 Cox, C.C. 618, at 622-3, Channell, J. in summing up to a jury expressing it thus:

. . . what is necessary to establish the offence of obtaining either money or credit by false pretences is that there must be a misstatement of an existing fact, either by stating that a fact exists which does not exist, or to state that a fact does not exist which does exist. It must be a statement of existing fact as distinguished from mere promise or statements about the future, or expectations, and things of that sort. That is the main point which distinguishes the obtaining of money or credit by false pretences from obtaining credit by fraud other than false pretences.

And in *Rex* v. *Thompson* (1910), 5 Cr. App. R. 9, at p. 12, Bray, J. in delivering the judgment of the Court said:

One of the counts alleged that he obtained hay by fraud. The cases establish this: that if a man never had any intention to pay, that is fraud other than false pretences.

Mott v. *Milne et al.* (1898), 31 N.S.R. 372. In that case the prisoner was charged in the terms of the following indictment:

That Lottie Mott in October, 1896, at Truro, did obtain from James M. Milne (the informant), a suit of clothes for one W. V. Woodcock, under the false pretence that she would pay for the said suit of clothes the following week.

As one would expect she was acquitted and brought an action against Milne *et al.* for damages for arrest and imprisonment. Ritchie, J. (McDonald, C.J. concurring) said at pp. 384-5:

Section 358 [now section 404] of the Criminal Code defines a "false pretence" to be a representation, either by words or otherwise, of a matter of fact, either past or present, which representation is known to the person making it to be false, &c. By no ingenuity can the representation in the information "that she would pay for the suit of clothes the following week," be twisted into a representation of fact, either past or present, and any belief that such a promise was a false pretence within the meaning of the Code, if entertained by defendant, was in my opinion, utterly unreasonable.

It will have been noted that in the English cases to which I have referred the relevant statutes under which the charges were laid merely refer to obtaining goods or credit by false pretences without a statutory definition of what is included in that phrase but in all cases the Courts have furnished the definition and limited the expression to representations of a past or present fact. Stephen in his History of the Criminal Law of England, 1883, Vol. III., at p. 161, states the reason why this is so and in reference to the language of 24 & 25 Vict., Cap. 96, Sec. 88, says:

The words, "whosoever shall by any false pretence obtain "from any other person any chattel, . . . with intent to defraud," seem simple enough, but they are obviously open to an interpretation which would make any

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dishonest breach of contract criminal. A man who buys goods, which he does not intend to pay for may be said to obtain them by a false pretence of his ability and intention to pay. The courts, however, soon held that this was not the meaning of the statute, and that in order to come within it a false pretence must relate to some existing fact. . . . A mere lie told with intent to defraud, and having reference to the future, is not treated as a crime. A lie alleging the existence of some fact which does not exist is regarded as a crime if property is obtained by it.

In 1899 the following provision was enacted (Summary Jurisdiction Act, 1899 (62 & 63 Vict., Cap. 22)):

3. Where a court of summary jurisdiction proposes to deal summarily in pursuance of this Act with a charge of obtaining by false pretences from any person any chattel, money, or valuable security with intent to defraud, the court shall, after the charge has been reduced to writing and read to the person charged, state in effect that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed, and that a promise as to future conduct not intended to be kept is not by itself a false pretence, and may add any such further explanation as the court may deem suitable to the circumstances.

This enactment apparently codifies the law as it then existed by reason of the judicial interpretation of the meaning of "false pretences" and compels magistrates exercising summary jurisdiction under the Summary Jurisdiction Act, 1879 (and now under the Criminal Justice Act, 1925), to exemplify the law to be applied in false pretence cases before them.

It will be noted that this section is limited to the obtaining of "any chattel, money, or valuable security by false pretences." The relevant sections of our Code—404 and 405, subsection 2—limit the false pretence to a present or past fact in relation not only to goods capable of being stolen but to obtaining credit as well.

The Larceny Act, 1916 (6 & 7 Geo. 5, Cap. 50), defines the present offence, in England (in part) as follows:

32. Every person who by any false pretence—

(1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; . . . ; shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for any term not exceeding five years.

The provisions of the Summary Jurisdiction Act, 1899 *(supra)*, would of course apply in proceedings in which summary jurisdiction is exercised.

The King v. *Nowe* (1904), 8 Can. C.C. 441. In that case Graham, E.J. delivered the judgment of the majority of the Court wherein it was held after a careful and exhaustive examination of the English, Canadian and American authorities that false representations amounting to mere promises or professions of intention are not false pretences within the meaning of the relevant section of the Code. If I may say so with respect I concur in the reasoning and conclusion of Graham, E.J. To the American cases cited by him I would add *The Commonwealth* v. *Hutchinson,* 2 Pars. Eq. Cas. 309 because of the apt language by King, J. who said in relation to the mischief of punishing breaches of contract as crimes:

> Although in ethics every misrepresentation is morally wrong, yet if so severe a standard of conduct is to be introduced into our Criminal Code a breach of contract and a crime will scarcely be divided by an appreciable line and criminal tribunals will hereafter be employed in punishing infamously acts which have heretofore been understood as only creating civil liabilities. Such a rule might in some instances justly chastise a bad man but it could not fail to be terribly abused by exasperated or reckless creditors smarting under losses and stimulated by the fierce spirit of revenge.

The American penal Code on the subject is to the same effect as ours as appears from Wharton's Criminal Law, Vol. 2, p. 1173, where it is stated:

> A false pretence, under the statute must relate to a past event or existing fact. Any representation with regard to a future transaction is excluded.

Before leaving *The King* v. *Nowe,* it is of interest to note the following language of Graham, E.J. at p. 444 as follows:

> It was suggested, at the argument, that the words used constituted a false pretence as to the existing state of his mind at the time, and this was a present matter of fact. But there was no representation whatever as to the state of his mind, except, of course, that involved in his promise to return the article by a given time. And it has been always held that such a promise as to future conduct does not constitute a false pretence.

It is remarkable to see how that argument has persisted down the years and to note with what regularity it has been rejected by the Courts. In 1879 Mellor, J. rejected it—*Woodman's* case, *supra.* In 1898 it was rejected by a strong Court in the *Jones* case, *supra.* Then in 1904 in Canada it was again held untenable in *Nowe's* case, *supra.* In 1906 it again came up in an indirect way in *The King* v. *Richard* (1906), 11 Can. C.C. 279 wherein it was sought to convict the prisoner for obtaining a cheque by false pretences. The case arose out of an election bet

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and the complainant and prisoner gave their respective post-dated cheques to a stakeholder to abide the result of an election. The prisoner lost and the stakeholder handed both cheques to the complainant who destroyed his own and presented the prisoner's cheque to the bank but discovered that the prisoner had no account. He was acquitted because Hutchinson, J. held that there was not in a post-dated cheque a false representation of a fact present or past and it implied no more than a promise to have sufficient funds in the bank on the date thereof.

Rex v. *Bancroft* (1909), 3 Cr. App. R. 16. In that case the prisoner canvassed for advertisements for a future publication and represented to persons that the book was in order and about to be published. The book never was published nor in order to be published. Upon the trial of the prisoner he was convicted for obtaining money by false pretences. His appeal to the Court of Criminal Appeal was dismissed. The Lord Chief Justice (Lord Alverstone), after reviewing the evidence, said (p. 21):

> In these circumstances it was for the jury to say whether it was a statement made of an existing state of facts that he intended to get it published in May, and that the thing was in order for publication in May, . . .

To my mind, with respect, the facts of the case fell within the principle enunciated in *Reg.* v. *Bates and Pugh* (1848), 3 Cox, C.C. 201. While the representation that the advertisements would appear in the future was only the representation of something to be done *in futuro* it was coupled with reference to a present existing fact, *i.e.*, that the book was in order for publication. With deference I am in agreement with the result of that case but not with the reasons given by the Lord Chief Justice.

His view that it was for the jury to say whether the prisoner's statement that he intended to get the book published was the statement of an existing fact is apparently based upon an excerpt he quoted from Archbold's Criminal Pleading, 23rd Ed. (pp. 20, 21), at p. 600 as follows:

> A promise to do a thing *in futuro* may involve a false pretence that the promisor has the power to do that thing, for which false pretence the promisor may be indictable.

On turning to the 23rd edition of Archbold's Criminal Pleading, at p. 600 I find the authority for that statement of the law to be *Reg.* v. *Giles* (1865), 10 Cox, C.C. 44. In that case a woman

was deserted by her husband and the prisoner intended to convey to the deserted wife, in the words of Erle, C.J., who delivered the judgment of the Court (p. 48),

> that she [the prisoner] had not only the will but the power to bring [the] husband back.

Later he said (p. 49):

> The question of the prosecutrix was, by implication, "Have you the power to get my husband back, and will you exercise that power for me?" The prisoner then having ascertained the utmost value that could be extracted from the prosecutrix, said that she could do it, and that she would do it.

It is manifest from a reading of the case that there was the representation of a present fact, *i.e.,* the capacity or power of the prisoner to bring the husband back to the deserted wife and I do not quite see how it supports the quoted proposition laid down in the earlier edition of Archbold and repeated in the latest edition (the 30th) at p. 713. I hasten at once to say that I do not suggest the statement is erroneous but in my view it can have but a very limited application, *e.g.,* to the facts disclosed in *Regina* v. *Copeland* (1842), Car. & M. 516, where the prisoner, a married man, obtained a promise of marriage from the prosecutrix which she later refused to ratify. He then threatened to bring an action against her for breach of promise of marriage and by this means obtained money from her. On an indictment against him for obtaining money under false pretences the pretences laid were, first, that he was unmarried; secondly that he was entitled to bring and maintain his action against her for breach of promise of marriage. The second particular of the pretence charged carries with it an irresistible inference that he was a single man and in a position to maintain a prospective and future action. There was, in other words, an implied representation of his present capacity to fulfil his future intention. And see *Reg.* v. *Jennison* (1862), 9 Cox, C.C. 158, and note the observation of Morris, C.J. in argument in *The Queen* v. *Murphy* (1876), Ir. R. 10 C.L. 508, at p. 511, where from the sending of one half a bank note possession of the other half could be implied. On the other hand a mere promise to pay for goods in the future does not carry with it as a necessary implication the representation that the promisor has the present capacity for payment nor that his credit is good.

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Coming back then to *Bancroft's* case, *supra,* I am unable to see how the mere promise or statement of an intention to publish an advertisement in a future publication can be said to extend by necessary implication to a representation of the present power to carry out that intention. As I pointed out, however, the prisoner did in that case in addition to the mere promise make a present representation, *i.e.,* that the book was in order or ready for publication. But in my view, with great deference, his mere promise was not one which would fall within the said statement of Archbold cited as the basis of the judgment of the Lord Chief Justice. Again, with great respect, in my opinion *Bancroft's* case was "feebly argued" to use the expression of Palles, C.B. in *The Queen* v. *Dee* (1884), 14 L.R. Ir. 468, at 485. Counsel for the appellant cited but two cases, *viz., Reg.* v. *Speed* (1882), 15 Cox, C.C. 24 and *Reg.* v. *Gordon, supra.* Counsel for the Crown was not called upon. In any event as MARTIN, J.A. pointed out in *Rex* v. *Anderson* (1935), 50 B.C. 225, at p. 232, the Supreme Court of Canada is the only Court whose decisions are binding upon us in criminal matters. . . .

Rex v. *Gurofsky* (1919), 31 Can. C.C. 59. The prisoner was convicted of obtaining money by false pretences. He was a ticket agent who sold tickets to foreigners desiring transportation to Europe. The foreigners concerned had some time before bought tickets but had been refused leave to enter the United States *en route.* On the occasion which gave rise to the prosecution the prisoner charged them $25 in addition to the price of the tickets and guaranteed for this consideration that they would be permitted to pass the border and would not get into trouble. The Appellate Division of the Supreme Court of Ontario quashed the conviction holding that the guaranty was in its nature promissory and not a false representation of fact.

Rex v. *Thimsen* (1940), [*ante,* p. 103]; 73 Can. C.C. 315. That is a judgment of this Court which speaks for itself and these present observations are in one aspect an amplification of what I said in that case.

I would also cite in support of my view Kenny's Outlines of Criminal Law, 14th Ed., 251-53.

From my reading of the authorities I consider the following relevant principles established:

(1) False representations amounting to mere promises or professions of intention are not false pretences within the meaning of section 404 of the Code.

(2) From the nature and character of a representation relating to the future a representation of a present fact may be implied but only when that implication is necessarily and irresistibly involved in the expressed promise or profession of the future intention.

Applying these principles to the case at Bar I would allow the appeal and set aside the conviction for it is my view, hereinbefore expressed, that a mere promise to pay for goods in the future does not involve the necessary and irresistible representation of a present fact and is not in consequence a false pretence within the meaning of section 404 of the Code.

Appeal allowed.

O'FALLON v. INECTO RAPID (CANADA) LIMITED, W. T. PEMBER STORES LIMITED AND PACIFIC DRUG STORES LIMITED.

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1939

March 8;
May 16.

Negligence—Dangerous goods—Sale of—Duty to give adequate warning—Insufficiency of—Liability of manufacturer and wholesaler—Sale of Goods Act—Quantum of damages—R.S.B.C. 1936, Cap. 250, Sec. 21.

The defendant Inecto Rapid (Canada) Limited manufactured a hair dye and the defendant W. T. Pember Stores Limited was a wholesale distributor of the product which was retailed by the defendant Pacific Drug Stores Limited from its store in Vancouver. The plaintiff sent her son to the Vancouver store to purchase a hair dye known as Inecto Rapid. The store manager made the sale of the two bottles ordered and gave the messenger a copy of instructions in the form of a pamphlet. The plaintiff denied that she received the pamphlet. The use of the dye by the plaintiff caused a rash and blistering which required the services of a physician and rendered her unfit for work for five months. In an action for damages it was held that while this dye has a harmful effect in the case of a very few persons its toxic qualities are such that

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it is very harmful to a limited number of persons who have healthy skins. The law requires that a dye containing toxic ingredients must be sold only with the clearest warning to the user of the danger involved. The warning should be on the container as a pamphlet may easily not come to the attention of the user and although the plaintiff knew that Inecto Rapid was harmful in some degree had there been a proper warning on the container such as the law requires she probably would not have used it and judgment was given against the manufacturer and wholesaler.

Held, on appeal, affirming the decision of MANSON, J., that there was evidence to support the view of the learned trial judge that harmful effects other than a rash might (and did actually) follow the use of this hair dye which could have been avoided by more detailed instructions.

APPEAL by defendants Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited from the decision of MANSON, J. of the 12th of November, 1938 (reported, 53 B.C. 266) in an action for damages the plaintiff having suffered extensive injuries to her head, neck and the upper part of her body from the use of a hair dye known as Inecto Rapid. The plaintiff purchased two bottles of Inecto Rapid from the defendant Pacific Stores Limited in February, 1938. Inecto Rapid was manufactured by the defendant Inecto Rapid (Canada) Limited and the defendant W. T. Pember Stores Limited were the wholesale distributors of the product. The action was dismissed as against the Pacific Drug Stores Limited and the plaintiff recovered judgment against Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited.

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

Burnett, for appellants: The learned judge found that the dye was harmful only in one case in a thousand. The plaintiff knew of the danger and she had notices to make a test. The law requires a warning but not necessarily on the container. Knowing of the danger she cannot recover. See *Farr* v. *Butters Bros. & Co.*, [1932] 2 K.B. 606. It is not necessary to have full knowledge of the danger. That she voluntarily assumed the risk see *Woodley* v. *Metropolitan District Railway Co.* (1877), 2 Ex. D. 384. This case comes within section 21 of the Sale of Goods Act. It is a sale under a trade name. After the order is

drawn up it cannot be changed: see *In re St. Nazaire Company* (1879), 12 Ch. D. 88, at p. 91; *Hession* v. *Jones,* [1914] 2 K.B. 421.

Marsden, for respondent: Our action is in tort: see Underhill on Torts, 13th Ed., 180. The moment we prove there is an inherently dangerous article in the medicine then the burden shifts: see *Donoghue* v. *Stevenson,* [1932] A.C. 562, at p. 602. We would have no case if there had been an adequate warning, but the learned judge found there was not sufficient warning, that giving the pamphlet in the stores was not sufficient: see *Parker* v. *Oloxo, Ltd.,* [1937] 3 All E.R. 524; *Farrant* v. *Barnes* (1862), 11 C.B. (N.S.) 553, at p. 560; *Clarke* v. *Army and Navy Co-operative Society,* [1903] 1 K.B. 155, at p. 164.

Burnett, in reply, referred to *Willis* v. *The Coca Cola Company of Canada Ltd.* (1933), 47 B.C. 481.

Cur. adv. vult.

16th May, 1939.

MARTIN, C.J.B.C. concurred in dismissing the appeal.

MACDONALD, J.A.: I would dismiss the appeal. The facts and issues are outlined in the judgment under review. The following statement in the reasons for judgment is warranted by the evidence [53 B.C. 271]:

> The only point which gives real difficulty is that I am satisfied that the plaintiff knew that Inecto Rapid was harmful in some degree at least before she used it on the occasion in question. There is no evidence that she knew that it would produce anything more than a rash. Had there been a proper warning on the container such as the law, in my view, requires, the probability is that she would not have used it. Under these circumstances I think she is entitled to recover as against the defendants, Inecto Rapid (Canada) Limited and W. T. Pember Stores Limited.

That the respondent assumed certain risks is clear; to improve her appearance she was willing to assume the risk of a rash appearing on the skin. She did not assume the risk encountered, *viz.,* an eruption and blistering of the skin requiring the services of a physician. He found severe inflammation from the scalp to the neck and face. This was not caused by lowered vitality or abnormality on her part; it was attributable solely to the use of the hair dye. As a result she was unfit for work for some months and may suffer reactions in the future.

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Dr. Cleveland, a dermatologist, testified that the dye was dangerous. It should not be used without a previous test. Mr. Thompson, a chemist, made an analysis and found it to be deleterious. I am not stating an independent conclusion. It was for the trial judge to find the facts. There was evidence to support his view that harmful effects, other than a rash, might (and did actually) follow the use of this hair dye. It could have been avoided by more detailed instructions.

The action was dismissed against the Pacific Drug Stores Limited, the retailer, from whom the customer procured it. Judgment was entered only against the two appellants, one the manufacturer of the liquid and the other, the wholesale distributor. Dismissal against the retailer was based on section 21 of the Sale of Goods Act, R.S.B.C. 1936, Cap. 250, presumably because it was sold under a trade name. Whether or not that fact alone or other provisions of the section protects a seller of articles, dangerous *per se* or at least dangerous if sold unaccompanied by detailed instructions, need not be discussed as no appeal was taken from that part of the decision. It was submitted that the action, on the same ground, should be dismissed against the wholesaler, W. T. Pember Stores Limited. I do not agree. *Griffiths* v. *Conway, Ltd.*, [1939] 1 All E.R. 685 may be referred to.

MCQUARRIE and SLOAN, JJ.A. concurred in dismissing the appeal.

O'HALLORAN, J.A.: In my view the judgment of Mr. Justice MANSON should not be disturbed. I would dismiss the appeal accordingly.

Appeal dismissed.

Solicitor for appellants: *E. A. Burnett.*
Solicitor for respondent: *P. S. Marsden.*

GAYDICH v. MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION.

C. A.
1940
May 29, 30; *July* 3.

Insurance, accident—Premium paid agent—Not paid by agent to company until after the accident—Policy issued before second application signed—Not signed until after accident—Effect of.

On January 30th, 1939, the defendant's agent H. received the plaintiff's application for accident insurance and at the same time the plaintiff, who was a logger, paid H. the premium. H. forwarded the application to the defendant company and upon receiving it the defendant wanted further information as to indemnity received from another company on a policy with regard to a previous accident. This was furnished at once. On April 1st, 1939, the defendant issued the policy and forwarded it to H. with a new application for the plaintiff's signature but the company inserted the second application as part of the policy with the plaintiff's signature to it though in fact the second application was not signed by the plaintiff until the following June. H. forwarded the policy to the plaintiff but it was returned owing to the plaintiff's change of address, and H. retained it. On May 15th the plaintiff was injured in the course of his logging operations and was taken to the Nanaimo Hospital. In June the plaintiff's brother received the new application from H., had it signed by the plaintiff and returned it to H. In July the plaintiff received the policy from H. H. did not pay the premium to the defendant until June 28th, 1939, but testified that he had a running account with defendant and did not pay the premiums until billed for them. The plaintiff recovered judgment for the amount claimed for his disability period under the terms of this policy.

Held, on appeal, affirming the decision of HARPER, Co. J., that the defendant disputed liability on the grounds (1) that the premium did not reach it before the accident and (2) because the second application was not signed by assured before the accident. As to the first the premium was paid to the agent and he had a running account with the company. As to the second the new application was a mere formality. The defendant had the required information months before the accident and acted upon it. If it was more than a formality it would not have issued the policy until the second application was actually received.

APPEAL by defendant from the decision of HARPER, Co. J. of the 3rd of May, 1940, in an action to recover the sum of $255 on an accident-insurance policy. On January 30th, 1939, the defendant's agent one Hyman received from the plaintiff an application for accident insurance and the plaintiff paid the premium to Hyman at the same time Hyman forwarded the application to the defendant. The defendant desired further

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information in regard to a previous accident and this information was furnished at once. On April 1st the defendant issued the policy and forwarded it to Hyman with a new application for the plaintiff's signature. Early in May Hyman forwarded the policy to the plaintiff but it was returned owing to plaintiff's change of address. The new application was not signed by the plaintiff until June when after signing it the plaintiff returned it to Hyman. The plaintiff was injured in the course of his employment as a logger on May 15th, 1939, and was taken to the Nanaimo Hospital. In July the plaintiff saw Hyman when he received the policy and told Hyman of the accident. Hyman did not forward the premium to the defendant until June 28th, 1939. Hyman testified he had a running account with the defendant and it was common practice not to pay premiums to the head office until billed for it. The plaintiff recovered judgment under the policy for $255 for the disability period from the 15th of May until the 30th of September, 1939.

The appeal was argued at Vancouver on the 29th and 30th of May, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

Paul Murphy, for appellant: We say he was not insured at the time of the accident. He made application in January, 1939, and went away and did not appear again until June 15th following. When the company received the application it wanted more particulars as the man had previously lost one eye and he had been injured previously for which he had received benefit from another company. It issued a policy on April 1st, 1939, and sent it to its agent Hyman with another application form but owing to change of address the new application was not signed until June. The man was injured in an accident on May 15th. We say there was something further to be done prior to the injury: see *Mowat* v. *Provident Assurance Society* (1900), 27 A.R. 675; 32 C.J. 1124-5; *Canning* v. *Farquhar* (1886), 16 Q.B.D. 727; *Donovan* v. *Excelsior Life Ins. Co.* (1916), 31 D.L.R. 113; *Looker* v. *Law Union and Rock Insurance Co.,* [1928] 1 K.B. 554.

D. A. Freeman, for respondent: Hyman had the forms and documents. He was the plaintiff's agent. He received the

original application and the premium and he forwarded the application to head office and the policy was duly issued on April 1st and sent to Hyman for delivery. He held the policy for the plaintiff as he did not know the plaintiff's address: see *New York Life Ins. Co.* v. *Dubuc*, [1926] S.C.R. 272; *North American Life Assurance Co.* v. *Elson* (1903), 33 S.C.R. 383. The policy was mailed by Hyman to the plaintiff prior to the accident. The policy was returned owing to change of address and Hyman held it as his agent: see *Canada Hail Ins. Co.* v. *McIsaac* (1918), 39 D.L.R. 714. Having accepted the premium the company is bound: see *Yorkshire Insurance Co.* v. *Craine*, [1922] 2 A.C. 541.

Murphy, replied.

Cur. adv. vult.

3rd July, 1940.

MACDONALD, C.J.B.C.: Appeal from the judgment of His Honour Judge HARPER, in favour of respondent the successful plaintiff in an action to recover a sum due under an accident-insurance policy. Respondent was injured in logging operations and if he had an insurance contract he is entitled to his judgment. Appellant, although its agent received the premium and also the policy duly issued before the accident, disputed liability on the grounds that (1) the premium did not reach it before the accident, and (2) because a second application for insurance later referred to was not signed by the assured before the accident no contract was effected. The second ground only was argued, at all events it alone merits consideration: the premium was paid to the agent and he had a running account with the company.

The first application for a policy signed by respondent was prepared by one Hyman, an insurance agent and intermediary between the assured and the company. Clearly from the evidence Hyman was respondent's agent; the evidence supports that view. It follows that delivery of the policy (and it was delivered) to Hyman was delivery to respondent. I would not hold, where an agent solicits insurance from the general public, collects the premiums, and forwards the applications, all on behalf of the assured and for the benefit of the company that he

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has no authority to accept delivery of the policies; nor would I hold that no policies were issued at all nor a contract effected unless the policies reached, not only the agent but also the assured, in this case a logger located in remote parts of the country. It becomes a binding contract when issued and delivered in the terms of the application to one authorized to receive it on behalf of the assured.

One other difficulty remains, which however on being stated disappears. Respondent on January 30th, 1939, at Hyman's request signed the application for insurance (Exhibit 1) already referred to. In answer to question 10 of the application enquiring whether or not the applicant

ever made claim for or received indemnity on account of an injury or illness? If so, what companies, dates, amounts and causes?

he answered:

Yes 1935 Home Ins.

In answer to question 17 he agreed that the application should not be binding until accepted by appellant nor until accepted by the insured "while in good health and free from injury." This created no difficulty; appellant did accept the policy through his agent while in good health and free from injury.

The alleged difficulty in respect to the answer to question 10 arose because when the application of January 30th was received by appellant it wanted further information; accordingly it wrote the following letter to respondent's agent:

Vancouver, B. C.,
March 14, 1939.

Mr. S. Hyman,
c/o The Great West Life Assurance Co.,
Royal Bank Building,
Vancouver, B. C.

Dear Mr. Hyman: *Re*: *Application—Louis Gaydich.*

Our head office has drawn our attention to the fact that a clear answer has not been given to question No. 10 of Mr. Gaydich' application, which reads, "Have you ever made claim for or received indemnity on account of any injury or illness? If so, what companies, dates, amounts and causes?"

An affirmative answer has been shown, but unfortunately, the date, name of company, and the nature of the disability has not been shown. Neither has the amount of indemnity received been shown.

Will you please let us have this information at your earliest convenience?

Yours very truly,
MUTUAL BENEFIT H. & A. ASS'N.,
Per M. Reynolds.

What was required was merely such further information from the agent as would enable the company to amend the application of January 30th. Hyman complied with that request; he, to quote his evidence, "made it a point to get information from the Home Insurance Company and having received it duly notified the appellant" by letter. Long before the accident therefore it received from respondent's agent the information sought and being satisfied with it amended the original application accordingly without the signature of the assured.

The additional information in substitution for the original answer, *viz.*, "Yes 1935 Home Ins" was this: "Lumbar Sacro Strain June 15/35 Home Assurance Co. of Canada $576.20." Appellant felt justified on receipt of the letter from Hyman in, as stated, amending the answer to question 10 in the original application and also in inserting that application so amended in the policy itself; the application for insurance became part of the policy. Appellant then issued the policy and mailed it, presumably to the assured but at all events it finally reached the hands of his agent. There is no question of deceit; the additional information furnished was accurate: it was embodied in the policy and appellant raised no question as to whether or not because of the new facts a policy should or should not be issued.

Hyman left town before receipt of the policy, and upon returning to Vancouver on May 16th, 1939, found it on his desk. In his opinion it had been lying there for some time. He said:

> It had evidently been sent out by the company to Mr. Gaydich and been returned to them, and they forwarded it to me for delivery.

The accident to respondent occurred on May the 15th. I would say at once on this evidence that the policy reached the agent's office before May 15th: hence it was delivered before the accident occurred. It would be absurd to find that no contract was effected because through absence from the office the agent entitled to accept delivery did not have the policy in his physical possession until after the accident; delivery and receipt at his place of business was sufficient.

Appellant's further submission was that although it received the additional information, included it in the policy and sent it to respondent's agent no contract was effected because it also sent to the agent along with the policy a second application containing

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the substituted answer to question 10 with the request that he should get respondent to sign it. He could not be located at his job until after the accident: respondent then signed it as of the date April 1st, 1939: the accident as stated occurred on May 15th of that year.

This request for a second application was a mere formality: appellant had the information months before and acted upon it. No doubt having issued a policy based upon the letter giving the additional facts, appellant for its own records wanted a formal second signed application. If it was more than a formality it would not have issued the policy until the second application, now deemed so important, was actually received.

I think a recital only of the foregoing facts is necessary to dispose of the appeal: it should be dismissed.

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

O'HALLORAN, J.A.: I concur in dismissing the appeal.

Appeal dismissed.

Solicitors for appellant: *Murphy & Murphy.*
Solicitors for respondent: *Freeman & Freeman.*

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1940
June 3, 4;
July 3.

GONZY AND BACEDA v. LEES.

Negligence—Automobile collision—Son of owner driving car—Solely responsible for accident—Liability of owner—"Living with and as a member of the family of the owner"—Interpretation—B.C. Stats. 1937, Cap. 54, Sec. 11 (1).

In an automobile collision the son of the owner was driving one of the cars and was killed. He was held to be solely responsible for the accident. The son lived with his parents on their farm and the automobile was used in working the farm. About one month prior to the accident the father went to Alberta on business and did not return until after the accident. Before leaving he gave specific instructions that the boy was not to take the car on the highway. The father was the only one in the family who had a driver's licence. In an action for damages the occupants of the other car recovered judgment against the father.

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Held, on appeal, reversing the decision of MURPHY, J., that as to the interpretation of section 74A of the Motor-vehicle Act as enacted by section 11 (1) of Cap. 54, B.C. Stats. 1937, before the statutory relationship of agency can be created two conditions must be present, namely (a) living with his father and (b) as a member of his family. The words "living with" ought to be given an interpretation to carry out the intention of the section and should be construed to mean an actual living together of the father and son to the extent that the father would have the present capacity to exercise immediate control over the son's use of his automobile. The plaintiffs have failed to bring the father within the section: the son was not "living with" him within the meaning of the phrase and the appeal should be allowed.

APPEAL by defendant from the decision of MURPHY, J. of the 22nd of February, 1940, in an action for damages resulting from a collision between the defendant's car and a car driven by the plaintiff Gonzy. The plaintiffs, Gonzy and Baceda, are musicians and Gonzy was in charge of a travelling orchestra that moved from town to town playing dance music. Gonzy had a motor-car with a trailer attached in which they carried their instruments. On the night of the 29th of September, 1939, the orchestra was playing at Rosedale, B.C., where they remained until about 1.30 in the morning of the 30th of September. They then started for Vancouver on the Trans-provincial Highway. Gonzy was driving with Baceda in the front seat with him. When they reached a point about two and one half miles west of Chilliwack the driver swore that he saw two cars coming towards him, one trying to pass the other so he slowed down and came to a stop well on the side of the road with his two right wheels off the paved highway. The car going east that was trying to pass the other car crashed into the front of his car. Both plaintiffs were severely injured. The car that crashed into the plaintiffs was driven by the defendant's son who was killed in the accident. The defendant who is a farmer near Chilliwack owned the car and about a month prior to the accident went to Alberta on business where he remained until after the accident. The boy lived with his parents. The defendant was the only one in his family who had a driver's licence and when he went away had given express instructions that the boy was not to be allowed to drive the car during his absence. The damages were assessed at $3,000.

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The appeal was argued at Vancouver on the 3rd and 4th of June, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Sullivan, K.C. (*Sturdy,* with him), for appellant: The car was driven by the defendant's son. First the learned judge misdirected himself on the question of negligence and secondly he misconstrued section 74A of the Motor-vehicle Act. The plaintiffs were touring musicians. They were going in their car from Rosedale to Vancouver on the Trans-provincial Highway westerly, when they collided with the defendant's car which was travelling east towards Chilliwack. The road was eighteen feet wide. The defendant's son was about to pass another car travelling the same way that he was. His speed at the time was 25 miles an hour and the evidence discloses that there was only one light on the plaintiff's car. The boy's father gave specific instructions before he went away that the boy was not to be allowed to use the car. The Legislature never intended that there should be responsibility when no leave was given to drive the car. If the plaintiff's car had had proper lights there would have been visibility for 600 feet. There must be consent before liability can be imposed on the father.

McAlpine, K.C., for respondents: This accident happened on a straight road. The lights on the plaintiff's car were all right when they left Chilliwack and assuming there was only one light it could be seen distinctly for over 100 feet. When one is attempting to pass another car he must go to his wrong side of the road and if he attempts to pass he does so at his peril. He must be sure there is no car coming in the opposite direction. The liability of the father arises under section 12 of Cap. 44 of the statutes of 1927, and the word "entrusted" is inserted by section 7 of Cap. 44, B.C. Stats. 1929: see Maxwell on Statutes, 8th Ed., 1-4.

Sullivan, in reply, referred to *Lloyd* v. *Dominion Fire Insurance Co. (No. 2)*, [1940] 2 W.W.R. 210.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: We stated at the hearing that in our opinion George Lees the deceased son of appellant was wholly

responsible for the accident. The question of appellant's liability, if any, by virtue of chapter 54, section 11 (74A (1)), B.C. Stats. 1937, for damages awarded remains. In B.C. Stats. 1926-27, Cap. 44, Sec. 12, a new section relating to minors was inserted as 18A; it read:

18A. So long as a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating a motor-vehicle on any highway; but nothing in this section shall relieve the minor from liability therefor.

Here for the first time appeared the phrase "living with or as a member of the family." Our attention was not directed to, nor do I recall, any decisions construing these words. By B.C. Stats. 1929, Cap. 44, Sec. 7, this section was amended by striking out the words "a motor-vehicle on any highway" and substituting therefor "on any highway a motor-vehicle entrusted to the minor by the parent or guardian." By the trend of legislation therefore a limitation was placed upon the obligation of the parent or guardian. Formerly it was enough if the minor was "living with [the parent or guardian] or as a member of the family"; by the 1929 amendment the motor-vehicle had to be "entrusted" to the minor so living as aforesaid. The question of "entrustment" was considered in several cases, *e.g.*, (*Ritchie* v. *Gale* (1934), 49 B.C. 251, at 266).

By B.C. Stats. 1937, Cap. 54, Sec. 11 (74A (1)) a new section was inserted applicable to this case. It reads as follows:

74A. (1.) In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway, every person driving or operating the motor-vehicle who is living with and as a member of the family of the owner of the motor-vehicle, (and every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle,) shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; . . .

Respondent's counsel did not, as I understood him, rely very strongly on the second limb of this section; I have enclosed it in parenthesis. There was a case, supported by evidence presumably accepted by the trial judge, that appellant consented, not only impliedly but expressly to his son driving the car. If that is so the latter acquired possession of it with appellant's consent.

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However as, in my view, the evidence discloses that appellant did not give deceased permission to drive the car on the highway and warned him not to do so this part of the section is not applicable.

Reading the section therefore with this part omitted, it will be observed that it is not limited to minors. *Ex facie* therefore it has a wider application than the section referred to in the 1929 statutes. Liability now depends upon the meaning of the words "living with," as there is no doubt deceased was a member of the owner's family. Where we are concerned with a statutory liability, altering the common law, words creating it should not be given a wider construction than they fairly and reasonably suggest. The deceased, at the time of the accident, must have been "living with" the owner of the motor-vehicle if the latter is responsible for his negligence. It is not enough as formerly in the case of minors that deceased should be merely a member of the owner's family; if that were so there would be no question of appellant's liability. That, in effect, is the contention of the respondent: we were virtually asked to construe it as if the words of limitation, *viz.*, "living with" were not included in the section: these words restrict its application.

It is also important to observe that, without any break in the domestic family relationship, the section contemplates the possibility that members of a family may not at all times be living together. There is therefore, for the purposes of the Act, a clear assumption that the "owner," usually the head of the house, or the son, may not, under certain conditions be "living" with each other: if this is not so the phrase "living with" is meaningless and unnecessary.

What then does the phrase "living with" imply? It contemplates such a physical relationship between the owner and driver of the car as would enable the former to control the driver's conduct; the owner could not exercise control if, as here, he was absent from home in a neighbouring Province on business for a period of four months, "living" at hotels and elsewhere in the meantime. It is, I think, unreasonable to so construe the section that an owner, while absent, must at his peril lock up or dismantle his car, *a fortiori* where, as in this case, it was used in

farming operations; the son had authority to so use it: he was forbidden to take it on the highway. The word "with" must not be overlooked: it means "alongside of" "accompanying," etc. The son could only be "with" his father during the latter's absence by going with him. Further the phrase does not mean "living with" the family: it is "living with" the owner and "as a member of the family of the owner."

It is not necessary to express an opinion in respect to other cases that might arise where, for example, absence of the owner from home might be of comparatively short duration: I only find in this case that there was for temporary purposes such a severance of family relationship as resulted in the deceased "living" not "with" but apart from the owner. As the owner could not "live," that is to say, eat, sleep and associate with the family he ought to be treated, having regard to the intent of the statute as "living" elsewhere during that period. The words "living with," as stated, are words of limitation designed to serve a specific protective purpose fixing liability on the owner only when he has a reasonable opportunity to guard his interests.

Our attention was called to a portion of the evidence of the appellant (owner) on examination for discovery said to conflict with his evidence at the trial. When examined on discovery he stated that his deceased son "did drive this car with his knowledge" thus, as already intimated, bringing into play the second limb of the section. The question was not further elucidated but it is clear from the evidence of the deceased's mother that he had permission only to use it on the farm. When her husband's statement was called to her attention she said he referred to its use in this way. As the owner, although we must assume he was present, was not further questioned or cross-examined on the point we should conclude that this explanation ought to be accepted. I would allow the appeal.

SLOAN, J.A.: The plaintiffs in the action were travelling toward Vancouver on the Pacific Highway in an automobile and when about two and one half miles west of Chilliwack an automobile driven by one George Lees travelling in the opposite direction toward Chilliwack crashed head on into their car.

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George Lees was killed. He was driving the automobile of his father—James Lees—the defendant. The Court below found George Lees guilty of negligence and awarded damages to the plaintiffs against the father James Lees.

The appellant urged two grounds of appeal before us. He first submitted that the learned trial judge erred in finding George Lees guilty of negligence and in absolving the plaintiffs from blame. Secondly it was contended, in the alternative, that James Lees could not be held responsible for the negligence of his son.

We stated at the hearing that we could see no good reason for interfering with the finding of negligence made below and that left for our reserved consideration the sole question of the father's liability. The answer to that turns upon the construction of the 1937 amendment to the Motor-vehicle Act (B.C. Stats. 1937, Cap. 54, Sec. 11), which reads as follows: [already set out in the judgment of MACDONALD, C.J.B.C.]

It is clear from the language of the section that upon fulfilment of the conditions precedent therein provided an irrebutable presumption of agency arises and consequent liability attaches. Before the statutory relationship of agency can be created (so far as this case is concerned) two conditions must be present: The son must be (a) living with the father and (b) as a member of his family. That the son was a member of his father's family admits of no argument, but whether or not he was "living with" his father within the meaning of the section at the time in question poses another and more difficult problem. The fact is that at the time of the tragic occurrence the father was not in this Province but on a business trip to Alberta. What then is the meaning to be given to the expression "living with" as contemplated in the section? The intent of the section is to fix the owner with a vicarious kind of liability if the driver of his car has it with his consent either express or implied. It would seem the Legislature considered that when a member of the owner's family living with him, had his car, from that circumstance consent could be implied and in consequence liability would attach to the owner. If that is so then "living with" ought to be given an interpretation to carry out the intention of the section

and should be construed to mean an actual living together of the father and son to the extent that the father would have the present capacity to exercise immediate control over the son's use of his automobile. I cannot agree that we are to construe "living with" in the section as carrying with it the general idea of continued co-habitation exemplified, *e.g.*, in the expression "The husband is living with his wife" even though the husband happened to be absent from home on a prolonged business trip.

Unless the section is given a limited interpretation it is manifest that the most startling results would flow from it. In this case the father expressly told the son he was not to drive the car during his absence but suppose the father had, in an excess of caution, padlocked the garage doors and the son in the father's absence from the Province had broken open the doors, taken the car out and had an accident? Could it be said that the Legislature ever intended to fix the father with liability under a circumstance of that kind? I think not and yet that result would be inescapable unless "living with" means actually living together and not some sort of constructive co-habitation. I am unable to see how "living with" in the section includes a circumstance such as we have here where the owner is in fact living apart from his family to the extent that his capacity and right to exercise control over his car and its use by the members of his family cannot be immediately exercised.

I wish to make it clear that in my view the element of control is only of importance in an endeavour to arrive at the meaning to be attached to "living with" as used in the section. In a simple and ordinary case where the son is living at home with his parents the question of whether control is or is not in fact exercised by the father is not relevant, on this branch of the section, to the issue of liability. The Legislature has, in my opinion, assumed that that control would or ought to be exercised in that class of case and has fixed the owner with responsibility once the two factors, and two factors only, are established, *i.e.*, that the driver was (a) living with the owner and (b) as a member of his family.

It is my view for the reasons enunciated above that the plaintiffs have failed to bring the father within the section: the son

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was not "living with" him within the meaning I attach to that phrase.

With respect I would allow the appeal.

O'HALLORAN, J.A.: The learned trial judge has found the respondents sustained loss and damage resulting from the negligent driving of the appellant's motor-car on a highway by his seventeen-year-old son. This Court agreed with that finding but reserved for consideration the consequential question, whether section 74A (1) of the Motor-vehicle Act, Cap. 195, R.S.B.C. 1936, as enacted in 1937, renders the appellant liable for his son's negligence. That section reads in material part as follows: [already set out in the judgment of MACDONALD, C.J.B.C.]

Counsel for the respondents contended the son was "living with and as a member" of the appellant's family. He argued the section required the consent of the owner specifically in all but the "family" *genus* and therefore that physical possession of the motor-car by the son as a member of that *genus, eo ipso* implied the appellant's consent, or at all events rendered his consent unnecessary. Whatever may be the strength of that submission otherwise, it loses its cogency when we refer to section 19 of the same Act. The language used to define the "family" *genus* obviously imports some measure of authority and control by the motor-car owner over the members of that *genus*. Otherwise no basis for his responsibility would exist. Furthermore the "family" *genus* obviously includes subordinate classes of people to whom the owner of a motor-car may stand in quite different relations of responsibility. The appellant's son belonged to one of those classes, *viz.*, "a minor over the age of fifteen years." Section 19 concerns that class.

By that section "a minor over the age of fifteen years" shall not drive or operate a motor-car upon any highway, unless granted a driver's permit,

> . . . upon application of a parent or guardian . . . in the prescribed form verified by statutory declaration . . .

(unless dispensed with as therein provided).

Paragraph 3 of the "prescribed" statutory declaration reads:

> I am aware that so long as the said minor is living with me or is a member of my family, I am civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the said minor

in driving or operating on any highway, a motor-vehicle entrusted to him (her) by me.

Section 74A (1) enacted first in 1937, is expressly related not only to section 19, but to the above "prescribed" declaration. The "family" *genus* to which I have referred, seems to have taken form in this "prescribed" declaration which came into force on 27th August, 1935. When section 74A (1) was enacted more than two years later, it perpetuated in almost exact words the description of the "family" *genus* as defined in the "prescribed" declaration. No question should arise whether the prescribed declaration is *intra vires* the statute, since in 1937 the Legislature with the prescribed declaration before it, adopted the principle of the "family" *genus* there described and incorporated it in section 74A (1).

As the "family" *genus* takes its origin from section 19 and the "prescribed" declaration thereunder approved in the manner stated, it follows that this *genus* when referred to in section 74A (1) must be read as surrounded by the essentials and incidents which surround it in the prescribed declaration. They are not expressly excluded therein. That is to say consent to physical possession, express or implied, is an essential to the existence of any responsibility the statute may impose upon the owner. Reading sections 19, 74 and 74A (1) together with the "prescribed" declaration, the appellant's consent must be regarded as a condition precedent to statutory responsibility on his part. This "minor over the age of fifteen years" without a driver's permit, comes within a subordinate class of the "family" *genus* excluded by section 19 and the declaration from section 74A (1), unless the minor was driving the appellant's motor-car with his express or implied consent. That is to say in the case of this "minor over the age of fifteen years," physical possession of his father's motor-car does not render his father liable, unless the father had consented thereto expressly or by implication. Whether such consent existed then becomes a question of fact.

This brings us to the facts. The son did not have a driver's permit. The father testified that he had expressly forbidden his son to drive his car on a highway. He said "I have often told him he would never get permission from me to use the car."

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Moreover the father had been absent from home some three weeks on a temporary visit to Alberta when the accident happened. He gave evidence that before leaving for Alberta he had repeated his injunction against the boy's driving. This was corroborated by the mother. It is true that in his discovery examination, he said the boy had driven the motor-car on other occasions with his knowledge; but at the trial this was explained to refer only to driving the car on the farm, where it was used for farm purposes, as they did not have a horse. This is entirely different from driving on a highway as expressed in the statute, *vide* sections 19 and 74A (1). The discovery examination question did not indicate any distinction between driving on the farm and driving on a highway, so that the appellant's explanation at the trial, corroborated as it is by the mother and daughter, was not inconsistent with his answer given on discovery. In my view no facts were established in evidence from which the father's consent could be reasonably implied.

We have these facts: (1) the son was "a minor over the age of fifteen years" within section 19, *supra;* and (2) the son did not have a driver's permit and was driving the motor-car without the appellant's consent express or implied; in fact was driving it in spite of his father having forbidden him to do so. It follows from what has been said that the son cannot be included in those classes of persons in section 74A (1) deemed to be employed as the servant or agent of the appellant. This conclusion is not without other support. If the father's consent is to be excluded by the son's physical possession, one may well ask why should the father's consent be required under section 19 (2)? For if his consent is excluded he would be liable in any event whether he had consented or refused. Again one may well ask why should the father be required in the declaration prescribed by section 19 (2) to declare he is aware he is liable civilly for the negligence of the minor while driving a motor-car which he has "entrusted" to him, if he is liable civilly even if he did not "entrust" the motor-car to him?

The impact of section 19 (2) upon section 74A (1) has not been excluded by apt words showing that physical possession alone fixes liability upon the father without relation to his consent

express or implied. If the appellant is liable in this case, he would for the same reason be liable, if the son had taken the motor-car from him by force, or had stolen it from a down-town garage in which the appellant had stored it. But if such an important change in the father's common-law liability had been intended, the Legislature would have expressed its purpose in clear and unequivocal language. In its absence the Courts will not apply a construction which produces results so notably at variance with the accepted common and statute law.

Of course if the Legislature had said that physical possession —consent or no consent—made the father liable, that would end it. But if the Legislature has employed words and phrases which read in one way may mean that, and read in another way may not, the reasoning employed in determining the nature of the statutory responsibility imposed, should favour a construction which does not impose liability on the father without some act or omission on his part from which his responsibility for the son's physical possession may be established, as opposed to a construction which does impose liability on him without any such act or omission. In this case the appellant had refused his consent. That refusal eliminates any statutory implication of consent on his part, such as could arise, notwithstanding his refusal to consent, if the statute had provided (which it does not) that physical possession by a member of his family should be deemed possession with his consent.

With respect, I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Sullivan & McQuarrie.*

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

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Aug. 22.

VOWLES v. ISLAND FINANCES LIMITED.

Sale of goods—Conditional sale agreement—Assignment of to defendant—Ownership—"Sale"—Car remains in possession of vendor—Subsequent sale of car to plaintiff by vendor—Receipt of car by plaintiff in good faith and without notice of previous sale—R.S.B.C. 1936, Cap. 250, Sec. 32 (1).

Mutual Auto Sales, engaged in the business of buying and selling cars agreed to sell a Plymouth car to one Hoornaert under a conditional sale agreement on the 1st of March, 1939. On the same day Mutual Auto Sales assigned and transferred to Island Finances Limited all its right title and interest in said agreement and in the property referred to therein. Hoornaert did not take delivery of the car but left it on the premises of Mutual Auto Sales. On the 6th of March, 1939, Mutual Auto Sales sold the car to the plaintiff Vowles who paid for the car and took it away. Vowles remained in possession of the car until the 16th of June, 1939, when it was seized by Island Finances Limited as assignee of the Hoornaert conditional sale agreement. In an action by Vowles for the return of the car or alternatively its value, it was held that as Mutual Auto Sales continued in possession of the car until it was sold to the plaintiff who received same in good faith and without notice of the previous sale to Hoornaert, section 32 (1) of the Sale of Goods Act applied and the plaintiff is the owner of the car.

Held, on appeal, affirming the decision of SHANDLEY, Co. J., that the learned trial judge reached the right conclusion.

Per MACDONALD, C.J.B.C. and SLOAN, J.A.: On the submission that the learned trial judge was in error in law in holding that the agreement to sell to Hoornaert was a "sale" within section 32 (1) of the statute, it is agreed that there was no sale to Hoornaert within said section 32 (1). According to the terms of the agreement to sell between Mutual Auto Sales and Hoornaert the said automobile was to remain the absolute property of the vendor until the full purchase price thereof was paid. It follows that the transaction was not a "sale" within said section 32 (1) as that section is predicated upon the hypothesis of a previous sale in which the property in the goods is transferred and not an agreement for sale in which property does not pass to the purchaser until the conditions of the contract are fulfilled. But Mutual Auto Sales assigned the Hoornaert conditional sale agreement to the appellant which assignment by its terms and by reason of section 14 of the Conditional Sales Act effectively transferred the assignor's right of property in the automobile question to the appellant, the assignee. The effect of that assignment is a "sale" of the automobile to the appellant by Mutual Auto Sales and one which satisfies the statute.

APPEAL by defendant from the decision of SHANDLEY, Co. J., of the 4th of April, 1940. On the 1st of March, 1939, the

Mutual Auto Sales, a firm dealing in automobiles sold a Plymouth sedan automobile to one Hoornaert for $551. The purchaser paid $145 cash and the balance was payable under a conditional sale agreement and on the same day Mutual Auto Sales assigned said agreement to the defendant. Hoornaert never took possession of the car and it remained continuously in possession of Mutual Auto Sales until the 6th of March following. The conditional sale agreement and the assignment thereof was recorded under the Conditional Sales Act on the 3rd of March, 1939. As a result of seeing an advertisement the plaintiff went to the premises of Mutual Auto Sales on the 6th of March and purchased the car in question for $495, paying $120 cash and turning in his old car at the value of $375. The plaintiff having no knowledge of the sale to Hoornaert took immediate possession of the car and operated it until June 16th, 1939, when the defendant Island Finances Limited caused it to be seized claiming it was entitled to do so under the terms of the conditional sale agreement and the assignment thereof as Hoornaert had made default of the instalment under the agreement of the 1st of March, 1939, and by virtue of section 14 of the Conditional Sales Act. In an action for repossession of the car and damages for wrongfully retaining possession thereof, the plaintiff recovered judgment.

The appeal was argued at Vancouver on the 27th and 28th of May, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Manzer, for appellant: The plaintiff's case rests on section 32 (1) of the Sale of Goods Act. The conditional sale agreement and assignment thereof were duly registered on the 3rd of March, 1939, and the sale to the plaintiff was made three days later. He must establish a previous sale within said section 32 (1) of the Act. The defendant's title was prior in point of time. That there was not a sale within the meaning of the Sale of Goods Act and section 32 (1) does not apply to this case see *C.C. Motor Sales Ltd.* v. *Chan,* [1926] S.C.R. 485, at p. 490, Halsbury's Laws of England, 2nd Ed., Vol. 29, pp. 113 and 115. The burden is on them to show seller was in continuous possession: see *Bradshaw* v. *Epp,* [1937] 3 W.W.R. 577, at p. 585; *Staffs Motor Guarantee, Ld.* v. *British Wagon Co.,* [1934]

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2 K.B. 305; *Union Transport Finance, Ld.* v. *Ballardie,* [1937] 1 K.B. 510; *Mitchell* v. *Jones* (1905), 24 N.Z.L.R. 932. We say he had statutory notice when we registered the conditional sale agreement and assignment thereof on March 3rd, 1939: see *Whitney-Morton & Co.* v. *A. E. Short Ltd.* (1922), 31 B.C. 275; *Globe Financial Corporation, Ltd.* v. *Sterling Securities Corporation Ltd.,* [1932] 1 W.W.R. 347; *W. J. Albutt & Co.* v. *Continental Guaranty Corporation of Canada* (1929), 41 B.C. 537. There is an obligation on persons purchasing cars to search the record: see *Dulmage* v. *Bankers Financial Corporation, Limited* (1921), 67 D.L.R. 594.

Whittaker, K.C., for respondent: The seller was in continuous possession. There is ample evidence and it was so found. The seller had the car out for demonstration at times but his possession was continuous. The car was bought by the plaintiff without notice of the previous sale: see *Bender* v. *National Acceptance Corporation Ltd.* (1928), 63 O.L.R. 215, at p. 216; *Union Transport Finance, Ld.* v. *Ballardie,* [1937] 1 K.B. 510. The case of *Globe Financial Corporation, Ltd.* v. *Sterling Securities Corporation Ltd.,* [1932] 1 W.W.R. 347 is distinguished but see *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601, at p. 608. As to the effect of registration under the Conditional Sales Act see *Commercial Securities (British Columbia) Ltd.* v. *Johnson* (1930), 43 B.C. 61 and on appeal (1931), at p. 381; *Commonwealth Trust* v. *Akotey* (1925), 94 L.J.P.C. 167, at p. 169.

Manzer, in reply, referred to *In re John Robinson & Sons Ltd.* (1931), 12 C.B.R. 421 and *Kerr* v. *Motorcar Loan Co. Ltd.,* [1930] 2 W.W.R. 367.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: I agree with my brother SLOAN. While the words in section 32 (1) are "having sold goods" they must be interpreted as if the word "sale" were used in an appropriate context. The phrase is necessarily used in the same sense as the word "sale" found later in the section. We must therefore turn to section 8 of the Sale of Goods Act referred to by my brother SLOAN for a definition of that word. It applies to a sale

of "property in goods" and such a "sale" was made to appellant. That being so, with possession remaining in the hands of the vendor, section 32 (1) comes into play.

SLOAN, J.A.: This is an appeal from a judgment of SHANDLEY, Co. J., wherein the appellant (defendant) was ordered to deliver a certain motor-vehicle to the respondent (plaintiff) or to pay the respondent its money value.

The action arose out of the following facts: On March 1st, 1939, the Mutual Auto Sales was engaged in the business of buying and selling motor-cars and on that date agreed to sell a 1932 Plymouth automobile to one Leon Hoornaert under a conditional sale agreement. On the same date the Mutual Auto Sales assigned and transferred to the appellant Island Finances Limited all its right title and interest in the said agreement "and in the property referred to therein."

Hoornaert did not take delivery of the said automobile and on the 6th of March, 1939, the Mutual Auto Sales delivered it to the respondent Vowles under a contract of absolute sale for cash. Vowles remained in possession of the car until the 16th of June, 1939, when it was seized by the appellant as assignee of the Hoornaert conditional sale agreement. The respondent thereupon brought his action demanding the return of the car from the appellant or alternatively its value.

The learned trial judge said in his reasons for judgment:

> I therefore find as a fact that the said Mutual Auto Sales had continual possession of the said automobile until it was sold to the plaintiff who received same in good faith and without notice of a previous sale to Hoornaert and that being so I see no escape from the plaintiff's counsel's contention that the effect of section 32 of the Sale of Goods Act is to make the plaintiff the owner of the automobile.

There is evidence to support the finding of fact therein set out. The real question is whether or not the learned judge below was right in law in his application and interpretation of section 32 (1) of the Sale of Goods Act, R.S.B.C. 1936, Cap. 250.

Counsel for the appellant submitted that the learned trial judge was in error in law in holding that the agreement to sell to Hoornaert was a sale within section 32 (1) of the statute. With respect, I agree that there was no sale to Hoornaert within said section 32 (1) which reads as follows:

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32. (1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for the sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

For the purpose of the Sale of Goods Act "sale" is interpreted therein by section 8, subsections (3) and (4), as follows:

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a "sale"; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an "agreement to sell."

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

According to the terms of the agreement to sell between Mutual Auto Sales and Hoornaert the said automobile was to remain the absolute property of the vendor until the full purchase price thereof was paid. It follows that this transaction was not a sale within said section 32 (1) as that section is predicated upon the hypothesis of a previous sale in which property in the goods is transferred and not on an agreement for sale in which property does not pass to the purchaser until the conditions of the contract are fulfilled. That the distinction is recognized may be seen by the language used in the section itself. It is not without significance to note that the phrase "without notice of the previous sale" uses the sole word "sale" and not "agreement" or "contract for sale." There can be no sale within the Act in my opinion until the conditions precedent in the agreement for sale are fulfilled and performed. (Section 8 (4)).

The learned trial judge and counsel for the appellant however, with deference, seem to have overlooked one aspect of this matter. As pointed out above the Mutual Auto Sales assigned the Hoornaert conditional sale agreement to the appellant which assignment by its terms and by reason of section 14 of the said Conditional Sales Act effectively transferred the assignor's right of property in the automobile in question to the appellant, the assignee.

The effect of that assignment is a "sale" of the automobile to the appellant by Mutual Auto Sales and one which satisfies the statute. Thus while appellant's contention in relation to the Hoornaert agreement for sale is, in my opinion, sound, nevertheless by reason of the said assignment there is the prior sale to the appellant which became in law the owner of the automobile. Possession remained in the vendor Mutual Auto Sales, who sold to the respondent Vowles and in consequence, in my view, section 32 (1) applies and is effective to transfer the property in the said automobile to the respondent. *Bender* v. *National Acceptance Corporation Ltd.* (1928), 63 O.L.R. 215.

In my opinion registration of the Hoornaert conditional sale agreement and the assignment thereof is not notice to the respondent of the previous sale to the appellant. Filing of a conditional sale agreement may be (by reason of section 2 of the Conditional Sales Act) constructive notice to subsequent purchasers or mortgagees claiming from the buyer, but that is not this case where the title in the respondent comes from or under the vendor. The fact that all conditional sale agreements of motor-vehicles must be registered with the Commissioner of Provincial Police at Victoria (section 2, subsection (8) *et seq.* of Conditional Sales Act) did not impose any obligation upon the respondent to search the title to the car but conferred a benefit upon him of which he might or might not voluntarily elect to take advantage.

There is nothing in the Conditional Sales Act that I can see by which the mere fact of registration fastens notice upon the respondent. In this connection it may be noted that by section 41 of the Land Registry Act, R.S.B.C. 1936, Cap. 140, mere registration of a charge against land gives notice of the said charge "to every person dealing with the land." There is no such provision in the Act relating to the conditional sale of chattels, and according to authority the Courts should not be astute to extend the doctrine of constructive notice to commercial transactions. Scrutton, L.J. in *Greer* v. *Downs Supply Co.*, [1927] 2 K.B. 28, at pp. 35-6 said:

> Now that finding could only be relevant if the doctrine of constructive notice, whereby a person is deemed to have known that which he might have discovered upon inquiry, can properly be applied in purely commercial trans-

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actions. Upon this question I would refer to the classical judgment of Lindley, L.J. in *Manchester Trust* v. *Furness*, [1895] 2 Q.B. 539, 545, where he says: "As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is not time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country." These words of Lindley, L.J. met with the full approval of Lopes and Rigby, L.JJ.

I would not, in the absence of authority, statutory or otherwise, hold the registration of the Hoornaert conditional sale agreement and its assignment to the appellant notice to Vowles under the circumstances herein.

There is nothing of law or fact in this case to prevent the application and operation of said section 32 (1) and in consequence, in my opinion, the learned judge below, although in error in holding that there was a sale to Hoornaert, reached the right conclusion in finding for the respondent and the appeal should be dismissed.

O'HALLORAN, J.A.: The expression "having sold goods" in the first line of section 32 (1) of the Sale of Goods Act, Cap. 250, R.S.B.C. 1936, should not be diverted from its natural and ordinary sense when employed there generically in a comprehensive way as I think it is to include both absolute and conditional sales within the meaning of section 8 of the same Act. Therefore it includes the conditional sale from Mutual Auto Sales to Hoornaert, the more so as in the language of section 32 (1) the former remained in "possession" of the motor-car and "the documents of title" thereto. The respondent took delivery of the motor-car from Mutual Auto Sales in the ordinary course of business under an absolute sale in good faith and without notice of the previous conditional sale to Hoornaert. In these circumstances he acquired good title under section 32 (1) *supra; vide Union Transport Finance Ld.* v. *Ballardie*, [1937] 1 K.B. 510,

which at pp. 514-17 seems to have been decided squarely on the interpretation of a similar section of the Factors Act.

Registration of the Hoornaert conditional sale agreement could not fix the respondent with notice thereof in the absence of a statutory provision to that effect such as exists for example in the case of transactions relating to land by section 41 of the Land Registry Act, Cap. 140, R.S.B.C. 1936. Even if it could be applied otherwise, section 3 of the Conditional Sales Act, Cap. 48, R.S.B.C. 1936, cannot be invoked as Mutual Auto Sales did not deliver possession of the motor-car to Hoornaert. The learned trial judge so found and his finding is supported by the evidence. In any event by section 32 (1) of the Sale of Goods Act, *supra,* Mutual Auto Sales being in possession of the motor-car, the absolute sale to the respondent had "the same effect as if it were expressly authorized" by Hoornaert.

The effect of what has been said is not lessened by my inability to regard the assignment of the Hoornaert conditional sale agreement by Mutual Auto Sales to the appellant as a contract of sale within the meaning of sections 8 and 32 (1) of the Sale of Goods Act, *supra.* For by section 14 of the Conditional Sales Act, *supra,* any rights transferred by the assignment were "for enforcement of the conditional sale." The assignment of its essence was not a contract of sale but a security for financing the conditional sale. The substance governs and not the form—*vide* the decision of this Court in *Monarch Securities Ltd.* v. *Gold* [*ante,* p. 70]; [1940] 3 D.L.R. 124. As such the assignment was a "transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security." Section 74 (3) expressly excludes a transaction of this nature from the ambit of the Sale of Goods Act. This phase of the question does not appear to have arisen in *Bender* v. *National Acceptance Corporation Ltd.* (1928), 63 O.L.R. 215.

In my view the learned trial judge reached the right conclusion. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Heisterman & Manzer.*
Solicitors for respondent: *Whittaker & McIllree.*

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COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN *ET AL.*

Injunction—Foreign dentist—Advertising in British Columbia—Dentistry Act—Validity—R.S.B.C. 1936, Cap. 72, Sec. 63—B.C. Stats. 1939, Cap. 11, Sec. 3.

Section 3 of the Dentistry Act Amendment Act, 1939, enacts: "No person not registered under this Act shall, within the Province, directly or indirectly offer to practise, or hold himself out as being qualified or entitled to practise, the profession of dentistry either within the Province or elsewhere, and no person shall, within the Province, directly or indirectly hold out or represent any other person not registered under this Act as practising or as qualified or entitled or willing to practise the profession of dentistry in the Province or elsewhere, or circulate or make public anything designed or tending to induce the public to engage or employ as a dentist any person not registered under this Act."

The defendant Cowen, who practises his profession as a dentist in the city of Spokane in the State of Washington and who is not a member of the College of Dental Surgeons of British Columbia advertised in the daily newspaper of the defendant, the News Publishing Company at Nelson, British Columbia, in respect of his practice of dentistry in Spokane. In an action for an injunction to prevent further publication of these advertisements:—

Held, that the pith and substance of the Dentistry Act is a matter over which the Province has jurisdiction and the legislation in question falls within the provisions of section 92 of the British North America Act. The plaintiff is entitled to an injunction as prayed.

ACTION for an injunction to prevent further publication of advertisements in the daily paper of the defendant the News Publishing Company at Nelson, B.C., on behalf of and by the authority of the defendant Cowen, holding him out as a dentist practising in the city of Spokane in the State of Washington, U.S.A. The defendant, Cowen, is not a member of the College of Dental Surgeons of British Columbia. The further facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 3rd of September, 1940.

Maitland, K.C., and *Remnant*, for plaintiff.
J. W. deB. Farris, K.C., for defendants.

Cur. adv. vult.

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MURPHY, J.: Defendant Cowen is a dentist practising his profession in Spokane in the State of Washington. Defendant News Publishing Company Ltd., publishes a daily newspaper in Nelson, B.C. On behalf and by the authority of defendant Cowen the News Publishing Company has published in its daily paper advertisements holding him out as a dentist practising in Spokane and clearly intended to induce residents of British Columbia to go to his office in that city and have their dental work done there. Action is for an injunction to prevent further publication of these advertisements. It is not questioned that under the British North America Act a Province may by appropriate legislation regulate the practice of dentistry within its territorial limits. British Columbia has passed such legislation known as the "Dentistry Act." This Act requires all dentists to be registered under its provisions as a condition precedent to practising their profession in British Columbia and prohibits any person not so registered from practising dentistry in the Province. Amongst many other regulations the Act contains the following, enacted in 1939:

3. Said chapter 72 is further amended by numbering present section 63 as subsection (1) and adding thereto the following as subsection (2):

[Already set out in head-note.]

Defendants contend that this section is *ultra vires* in so far as the prohibition therein set out applies to dentists not registered under the Act who practise their profession outside the territorial limits of the Province. The Judicial Committee in *Toronto Electric Commissioners* v. *Snider* (1925), 94 L.J.P.C. 116, at p. 123 sets out the method of procedure to be followed where such a question of *ultra vires* is raised:

The Dominion Parliament has, under the initial words of section 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the Provinces by section 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in section 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must, therefore, be whether the subject falls within section 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in section 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of section 91.

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The first question to be considered therefore is, does the subject dealt with by the Dentistry Act fall within section 92. Subsection (16) of section 92 of the B.N.A. Act authorizes the Legislature to exclusively make laws in relation to all matters of a merely local or private nature in the Province. The preservation of the health of the residents of the Province, in so far as it may be affected by the practise of dentistry, is clearly in my opinion a matter of merely local or private nature in the Province. The pith and substance of the Dentistry Act is I think to prevent the possibility of impairment of the health of residents of British Columbia through the practise of dentistry by persons who may not measure up to the standards required by the Dentistry Act. The test set up by that Act to show possession of the required ability and skill by any dentist, whether resident in the Province or not, is registration under its provisions. The local evil aimed at by the legislation is this possibility of impairment of health of residents of British Columbia and it was to prevent its occurrence, in so far as the Province could do so within its legislative powers, that the Dentistry Act was passed. It is argued for defendants that the pith and substance of the subsection in question is the elimination of competition. A study of its provisions will I think, however, show that this is not the case. A dentist wherever resident and wherever practising, if registered under the Dentistry Act, is not affected by the prohibitions of said subsection. Defendants next contend that the prohibition contained in said subsection is *ultra vires* in so far as its provisions affect unregistered dental practitioners resident outside the Province where the facts are as here that such practitioners only hold themselves out as proposing to do dental work outside the territorial limits of British Columbia. It is argued that this being so the evil aimed at is no longer local. The Province of course can pass no legislation purporting to regulate the practice of dentistry beyond its territorial confines and it has not attempted to do so in the section quoted. To my mind the evil aimed at by the Act remains local within the meaning of subsection (16) of section 92 of the B.N.A. Act even though its occurrence is caused by dental work done outside the Province. The wording of the advertisements in question herein clearly

shows, as already stated, that they are intended to induce residents of British Columbia to go to defendant Cowen's office in Spokane to have their dental work done. Such residents would ordinarily return to British Columbia and if their health was impaired as a result of the dental work done in Spokane the evil I think would still be local within the meaning of said subsection (16) for the impairment of health would be existent in the Province and would be suffered by residents of the Province. The cause of the evil would be extraprovincial dentistry; the evil resulting would have its *situs* within the Province. If that is so then *Rex* v. *Western Canada Liquor Co.* (1921), 29 B.C. 499, at pp. 507-8, as I read it, is decisive of this case. But if this view is incorrect a study of said subsection (2) will show that it purports to control only acts done within the territorial limits of the Province. If I am right in my view of what constitutes the pith and substance of the Dentistry Act then I think it clearly follows that the Province can utilize its power of controlling advertisements appearing within its territorial limits to lessen the likelihood of the occurrence to residents in the Province of the local evil aimed at. Again the object of the advertisements in question must be kept in mind. It is, to repeat, to induce residents of British Columbia to have their dental work done outside the Province by an unregistered dentist. The view of the Legislature is that dental work done by an unregistered dentist may impair the health of such Provincial residents as submit themselves to it. It would seem to me that in such circumstances the Province can utilize the power which it admittedly has to prevent unregistered dentists resident within the Province from holding themselves out as dental practitioners to likewise prevent unregistered dentists resident outside the Province from doing anything within the territorial limits of the Province intended to make more probable the occurrence of what in the view of the Legislature is an evil calling for legislative action. It would be a strange anomaly if the Province could not utilize this power to impede, as far as its exercise would render possible, the occurrence of the evil aimed at by the Dentistry Act, provided that the Province, as is the case here, confined the exercise of such power within its territorial limits.

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I hold the legislation in question falls within the provisions of section 92.

The next question to be considered, as indicated by the Judicial Committee in the passage cited, is whether the subject of the legislation in question falls also under an enumerated head of section 91. It is argued on behalf of defendants that it does fall within subsection (2)—"the regulation of trade and commerce." The argument is put forward in this way: The making and fitting of dentures are an important part of the practice of dentistry; dentures are goods, citing *Lee* v. *Griffin* (1861), 30 L.J.Q.B. 252 and therefore articles of commerce; advertising is an essential requisite for the successful carrying on of trade and commerce. Again I think a study of the subsection in question will furnish the answer. It does not purport to deal with dentures or any goods but with the holding out within the Province by an unregistered dentist of ability to do dental work either within or without the Province. In my opinion there is nothing in its language that can be construed as an indirect attempt to interfere with interprovincial or international trade. But even if it does incidentally affect such trade I would still be of opinion that there is no such conflict between the subsection and the trade and commerce subsections as would require said subsection to be held *ultra vires* if, as I have held above, the pith and substance of the Dentistry Act is a matter over which the Province has jurisdiction. The decision in *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708, at p. 720 would, I think, govern the situation. Here, as there, the legislation in question is confined to regulating acts that take place wholly within the Province. It is further argued that the subsection in question is in conflict with the general clause regarding peace, order and good government contained in the opening paragraph of section 91 of the B.N.A. Act and therefore *ultra vires.* The second of the propositions laid down by the Judicial Committee in *Attorney-General for Canada* v. *Attorney-General for British Columbia,* [1930] A.C. 111, at p. 118 appear to me to effectively answer this argument:

(2.) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such

matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348. It cannot I think be contended that the practice of dentistry in British Columbia is a matter unquestionably of such national interest and importance as to oust the jurisdiction of the Province in relation thereto in favour of the Dominion jurisdiction under the peace, order and good government clause. It follows that, in my opinion, plaintiff is entitled to an injunction as prayed. By agreement between the parties there will be no order as to costs.

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Injunction granted.

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May 28, 29; *July* 3.

Negligence—Contributory negligence—"Ultimate" negligence—Automobile strikes pedestrian—Rights of a pedestrian on public streets—Duty of driver of an automobile.

Between 2 and 3 o'clock in the afternoon of June 24th, 1939, the defendant was driving his car from Port Alberni to Great Central Lake westerly on the River Road on Vancouver Island. On entering the Indian Reserve where the Indian dwellings are on the north side of the road and the Somass River flows past close to the south side, he was travelling at about 25 miles an hour. The deceased, an Indian woman left her house on the north side with three pails on one arm and a pair of oars under the other with a trench coat drawn over her head like a hood. On reaching the road she proceeded across in a slanting direction (south-westerly) with her back to the east. When nearly half way across the road she was struck by the right front of the defendant's car and thrown to the north side of the road. She died the same afternoon. The defendant stated that just prior to the impact he saw what appeared to him a bundle of sacks in the grass on the side of the road and at this moment his attention was diverted by the movements of a man who was fishing from a boat on the river. He did not see the woman before he struck her. She left no dependants and in an action by the administrator for damages for loss of expectation of life it was held that the defendant was guilty of negligence but the deceased woman was equally guilty of negligence causing the accident for had she looked before stepping on to the road she must have seen the defendant's car coming.

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Held, on appeal, reversing the decision of MCDONALD, J. (MACDONALD, C.J.B.C. dissenting), that notwithstanding the failure of the deceased woman to look to the east before entering the road, the defendant by the exercise of reasonable care could have avoided running into her and by failing to do so was wholly responsible for the accident.

APPEAL by plaintiff from the decision of MCDONALD, J. in an action tried by him at Nanaimo on the 11th of April, 1940, and brought by the administrator of the estate of Maggie Lauder, deceased, for damages for the death of the said Maggie Lauder caused by the alleged negligence of the defendant on the 24th of June, 1939, on the River Road near Alberni, on Vancouver Island. Between 2 and 3 o'clock in the afternoon the defendant was driving his car westerly from Port Alberni on the River Road towards Great Central Lake and at the time of his entering the Indian Reserve the deceased who had left her house on the north side of the road in the Reserve with three small pails and a pair of oars, proceeded across the road towards the Somass River which flowed past near the south side of the road. She walked in a diagonal direction (south-westerly) across the road with her back to the east. On reaching the middle of the road she was struck by the defendant's car and thrown to the north edge of the paved portion of the road. The road was paved to a width of about fourteen and one half feet with about two feet of gravel on each side. The defendant's attention was distracted at the time by a man who was fishing from a boat on the river and did not see the deceased prior to hitting her. He was proceeding at about 25 miles per hour. The deceased died from her injuries about three hours after the accident. She was an Indian woman and about 59 years old. It was held on the trial that the driver and the deceased woman were equally at fault and the damages assessed at $1,500 were divided accordingly.

Maitland, K.C., and *Remnant*, for plaintiff.
McAlpine, K.C., for defendant.

Cur. adv. vult.

15th April, 1940.

MCDONALD, J.: The defendant, in this case, gave his evidence with a candour which is very refreshing when one considers the

evidence which is often heard in cases arising out of automobile accidents. It is doubtful, indeed, that the defendant could have been held liable at all, had his evidence not been so frankly offered. Having this in mind, I think it is but just that I should, as I do, accept the whole of his evidence. That evidence amounts in substance to this: On the 24th day of June, 1939, the defendant was driving his motor-car at a speed not exceeding 25 miles an hour, through the Indian Reserve which lies just westerly from the townsite of Alberni. The day had been showery, but visibility was good. As he had arrived somewhere in the vicinity of the house where the deceased Maggie Lauder, a widow, resided with her son on the northerly side of the road, he saw what appeared to him to be a bundle of sacks lying in the long grass, a short distance west of the house and on the northerly side of the road. He observed no movement in this object. Just at this moment his attention was attracted by the movements of a man who was fishing from a boat on the Somass River which runs along the southerly side of the road. He observed, as he says, that the man was in a rather precarious position. While his attention was thus off the road the deceased Maggie Lauder, carrying on her left arm three small berry-pails, and under her right arm two oars about five feet long, and wearing her son's trench coat drawn well forward over her head like a hood, proceeded to cross the road from the northerly side, and was struck by the right head-light of defendant's car, and killed. Her eyesight was none too good and her vision was to some extent obstructed by the fact that her coat was drawn forward partly over her eyes. She was walking, her daughter-in-law says, somewhat stooped forward. I have no doubt at all that what the defendant had seen and was thought to be sacks in the grass, was this unfortunate woman. Under these circumstances the defendant is guilty of negligence in law, for it was his duty to keep his eye on the road. Had he done so, it seems clear that as the woman moved on to the road he could have seen her in time to have swerved to his left and avoided the accident. On the other hand I think that the deceased woman was equally guilty of negligence causing the accident, for had she looked at all before stepping on to the road she must have seen defendant's car

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coming. On these facts I think the deceased woman and the defendant were equally guilty of negligence causing the accident.

The deceased woman lived with her son and daughter-in-law. She was 59 years of age, and in her simple and unaffected way, evidently lived a happy and useful life, helping with the household duties, working in her garden, and very helpful in any case of sickness among her friends and neighbours. She left no dependants, and this action is brought by the administrator for damages for her loss of expectation of life. In these cases it is always difficult to assess damages. I have examined the many cases which have been brought to my attention by counsel, and am trying to be as reasonable as I can when I assess damages at $1,500. There will be judgment accordingly.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 28th and 29th of May, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

Maitland, K.C., for appellant: Maggie Lauder, an Indian woman, was killed within the Indian Reserve on the River Road near Alberni. This is a paved road and a straight level road through the Reserve. She was the only one on the road and was walking across in a diagonal direction with her back to the driver. The defendant admits he did not see her and from this the only inference that can be drawn is that he was not looking ahead for some appreciable time before he struck her. It is a straight case of negligence as through the Reserve it is the duty of a driver to watch the road in front of him: see *Stanley* v. *National Fruit Co. Ltd.*, [1931] S.C.R. 60, at p. 69; *Rainey* v. *Kelly*, [1922] 3 W.W.R. 346; *Hocking* v. *British Columbia Motor Transportation Ltd.* (1932), 46 B.C. 307, at pp. 308-9; *Johnson* v. *Elliott* (1928), 40 B.C. 130, at p. 133; *MacGill* v. *Holmes* (1927), 39 B.C. 65, at p. 68; *Gibson* v. *B.C. District Telegraph and Delivery Co. Ltd. and Petipiece* (1936), 50 B.C. 494, at p. 497; *Thompson* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 230, at p. 235; *Mosher* v. *Parker* (1938), 53 B.C. 380. She has a right to assume when entering the road that no one will run her down. She was there first: see *Perdue* v. *Epstein* (1933), 48 B.C. 115; *Radley* v. *London and North Western*

Railway Co. (1876), 1 App. Cas. 754, at p. 759; *Winnipeg Electric Co.* v. *Geel*, [1932] A.C. 690, at p. 698; *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41; *Kleisinger* v. *Diminyatz*, [1937] 1 W.W.R. 600, at p. 601.

McAlpine, K.C., for respondent: The deceased was guilty of negligence. She walked on to the road without looking to see if there was any traffic in sight. If she had looked she would have seen the defendant coming from the direction of Alberni. Instead of walking straight across she went in a diagonal direction westerly and was unnecessarily long on the road without looking behind her: see *Cotton* v. *Wood* (1860), 8 C.B. (N.S.) 568, at p. 571; *Cassels* v. *Toronto Transportation Commission*, [1938] 1 D.L.R. 746, at pp. 756-7; *Banks* v. *City of Vancouver and Kitson* (1939), 54 B.C. 364; *Petroleum Heat & Power Ltd.* v. *British Columbia Electric Ry. Co.* (1932), 46 B.C. 462; *Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129; *Swadling* v. *Cooper*, [1931] A.C. 1, at p. 9.

Maitland, in reply, referred to *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23, at p. 25; *Rex* v. *Carr* (1937), 68 Can. C.C. 343.

Cur. adv. vult.

3rd July, 1940.

MACDONALD, C.J.B.C.: The findings of fact of the learned trial judge cannot be questioned. I would add an additional finding in respect to *situs*. The collision between respondent's car and the deceased pedestrian, an Indian woman, did not, as Mr. *Maitland* contended, occur after the latter walked diagonally across the road as far as the centre of the highway; on the contrary, it occurred a few feet only from the right-hand edge of the northerly side of the paved road running from east to west, the direction respondent was travelling. The physical evidence, mainly the position of the body, makes this clear. Respondent also—and the trial judge accepted "the whole of his evidence"—gave specific testimony on this point. One witness, a daughter-in-law, did say that the deceased "was in the middle of the road" when struck, but her evidence was more an inference than a statement of fact and, as indicated, where in conflict with respondent's evidence was not accepted. He approached the point of impact

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in his car at a moderate speed keeping about two feet from the edge of the pavement on the right side of a road only 18 feet in width. This, he said, was the position of his car "at the time of the impact." The body of the unfortunate woman was found "partly in the grass" (at the side of the road) "and partly on the road." The trench coat deceased was wearing—it was merely suspended from her head, and therefore susceptible to currents of air that would carry it away—was found in the middle of the road. The position of this coat after the accident was the only basis said to support the view that the collision occurred at that point; that, of course, is not conclusive. The position of the body in line with the point of impact and at the edge of the road was the best proof and confirmed respondent's evidence. This is supported by another witness who was driving from 75 to 100 feet behind respondent at the same moderate rate of speed, *viz.*, around 25 miles an hour; he was astride the imaginary centre line and noticed respondent was driving "pretty well on the right-hand side of the road." He, too, noticed the body on the side of the road—the right or northerly side. This evidence and the judge's findings place that point beyond controversy. I refer to it only because it was urged that the deceased reached a point on the highway before the accident where she ought to be clear of traffic from the east. It is not necessary to discuss the case based on that false premise; it would be irrelevant to do so. The truth is deceased was struck after she proceeded three or four feet across the highway: she was heavily laden at the time with two oars and three pails; her vision, too, was obscured by the coat referred to and lastly she did not turn her eyes to the left to see if the way was clear.

The trial judge after outlining the foregoing and other material facts said [*ante*, p. 377]:

> Under these circumstances the defendant [respondent] is guilty of negligence in law, for it was his duty to keep his eye on the road. Had he done so, it seems clear that as the woman moved on to the road he could have seen her in time to have swerved to his left and avoided the accident.

It was submitted by Mr. *Maitland* that the foregoing statement by the trial judge amounted to a finding of sole responsibility on respondent's part. That, with deference to contrary views, is not so. One must look at the whole reasons to gather the meaning

of isolated sentences; when that is done this contention suffers dissolution. It should be enough to say that if this was intended to be a finding that one only was responsible an experienced and capable judge would not at once proceed to apply the Contributory Negligence Act; it would be presumptuous to say that he was not aware that it can only be invoked when joint negligence is found. It overlooks the further fact that the trial judge in the next paragraph referred to "equal" negligence of the deceased woman "causing the accident." He said of her [*ante*, p. 377]:

> On the other hand I think that the deceased woman was equally guilty of negligence causing the accident, for had she looked at all before stepping on to the road she must have seen defendant's car coming.

Had he added that she too by looking and stopping could have avoided the accident there could be no controversy on this point; the negligence of both would then have been stated in the same terms. That inference however is there just as clearly as if stated in so many words. Clearly that is what the trial judge meant: it is an inescapable inference from the evidence that if respondent had kept his eyes on the road he could of course have avoided the accident. So too if the deceased had turned her eyes to that part of the road where it was her duty to cast them she too could have avoided the accident. That is why the trial judge referred to both as "equally guilty of negligence causing the accident" and applied the Act.

On these findings of equal and joint negligence based on facts that cannot point in any other direction, I cannot, with respect to other views, understand why difficulty should be encountered in supporting this judgment. Clearly both parties approached the point of impact negligently, respondent by permitting his attention to be diverted by the action of a fisherman in a boat on the river flowing to the south side of the road; the deceased by emerging from tall grass and bracken at the north side of the road with her vision obscured not only not taking the precaution to look but partially at least incapacitating herself from doing so. That primary negligence of each unlike in *Swadling* v. *Cooper*, [1931] A.C. 1, where an interval of time intervened continued without deviation up to the moment of impact. The trial judge could not do otherwise than conclude that [*ante*, p. 378]:

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On these facts I think the deceased woman and the defendant were equally guilty of negligence causing the accident.

To ignore these findings and to substitute one of ultimate negligence or sole responsibility on respondent's part, cannot with deference be justified by reason or authority. If it is suggested that we should investigate the facts independently, ignore the findings of the trial judge and fix sole responsibility on respondent I suggest this would be a departure from our proper functions: in any event if we did so we would find that a similar suggestion might be made with greater force in respect to the deceased; one on foot may more readily avoid an accident than one in a car. The simple truth was as the trial judge perceived that while both were on the highway for a few moments before the impact neither were looking where in law they were obliged to look: this as stated continued without deviation and without an opportunity for a last chance effort by either up to the moment of impact and because of it the accident occurred.

I am aware that I have discussed the case at greater length than its simplicity warrants; it would be difficult to find a clearer case where an Appeal Court would not be justified in interfering with a finding of joint negligence nor one where there should be less need to refer to authorities. I would dismiss the appeal.

MCQUARRIE, J.A.: I accept the findings of the learned trial judge as to the negligence of the respondent. In that connection reference should be made to the reasons for judgment of the judge below, and more particularly his statement [*ante*, p. 377]:

> I have no doubt at all that what the defendant had seen and was thought to be sacks in the grass, was this unfortunate woman. Under these circumstances the defendant is guilty of negligence in law, for it was his duty to keep his eye on the road. Had he done so, it seems clear that as the woman moved on to the road he could have seen her in time to have swerved to his left and avoided the accident.

Reference should also be made to the evidence in chief of the respondent and particularly his statement as to letting his eyes wander from the road, where they should have been at all times, to a man fishing in a canoe on the river. The respondent makes use of the following words:

> After I passed Alberni, I was proceeding towards Great Central along the River Road; and as I said, the weather was fine, interspersed with showers. As I drove along, about a quarter of a mile out of the business district of

Alberni, the road in that area banks the river, and the river is open on the left; I looked ahead as I was driving, and I saw no car coming, nor any pedestrians, nor any sign of life; and just then I saw a quick flashing movement on the left which attracted my attention for a fraction of a minute I would judge; and I saw a canoe going up stream, powered by an outboard motor, I believe, and balanced precariously at the out section of the canoe was a fisherman, who was lashing the water with a line and fly.

It will be seen that the appellant paid a good deal of attention to what was happening on the river and with his automobile travelling at between 20 and 25 miles per hour (the admitted speed) he must have travelled a considerable distance with his eyes off the roadway. And then again, the respondent stated:

As I glanced over to the right, when my gaze returned to the centre of the road, I saw a sudden blur of sacks appearing over my right light . . . at the same time I felt a slight jar, and I couldn't conceive what had happened; but I slowed down, and glanced through the rear window, after looking to see if there were any cars coming in the centre of the road there towards me. I should say on the road, for some distance I saw nothing, and then I saw a sack or a bundle of sacks in the middle of the road. . . . And I pulled the car into the right of the road and stopped immediately, and ran back, and there I was horrified to find the body of an Indian woman.

This statement also indicates that the respondent was not keeping a proper look-out so far as the road was concerned, and clearly a person operating a dangerous vehicle, such as a motor-car is, in that manner might kill several persons in the course of a few weeks' travel, and surely he could not escape liability by saying that his attention was momentarily distracted by something that was going on outside of the road limits.

The learned trial judge also finds [*ante*, p. 377]

that the deceased woman was equally guilty of negligence causing the accident, for had she looked at all before stepping on to the road she must have seen the defendant's car coming.

In my opinion no evidence was presented which would justify any such finding. It is true that the Indian woman was more or less encumbered with the oars which she was carrying as well as by the trench coat she was wearing over her head, but I think she had a perfect right to walk out on to that roadway with every assurance that approaching drivers, if there were any, would see her and avoid running into her. She must have been a noticeable figure on the highway and there was absolutely no excuse for the appellant running her down as he did.

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I would allow the appeal and hold the respondent entirely responsible for the death of the deceased.

O'HALLORAN, J.A.: The respondent motorist and the deceased pedestrian were found equally at fault in the Court below. In my view, with respect, the negligence of the motorist renders him solely responsible for the accident. The learned trial judge having said that it was the motorist's duty to keep his eyes on the road, then found (and it is supported by the evidence) [*ante*, p. 377]:

> Had he done so, it seems clear, that as the woman moved on to the road he could have seen her in time to have swerved to his left and avoided the accident.

That is to say, if the motorist had kept his eyes on the road, he should have seen the pedestrian, "as she moved on to the road" in time to have avoided hitting her. This is a finding that the motorist failed in his duty to avoid the risk of collision. The motorist becomes solely responsible because he did not avoid the consequences of the pedestrian's lack of care, when he had the present ability to do so. To my mind the decision of this case is governed by the principles applied in *Butterfield* v. *Forrester* (1809), 11 East 60; 103 E.R. 926 and *Davies* v. *Mann* (1842), 10 M. & W. 547; 152 E.R. 588.

I would allow the appeal.

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

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

Solicitors for respondent: *Farris & Company.*

REX v. LEE CHEW.

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1940
June 11;
Aug. 22.

Criminal law—Charge of being in possession of opium—Sale of opium by one Chinaman to another—Purchase price paid—Opium not delivered to purchaser—Application of section 5, subsection 2 of Criminal Code.

Section 5, subsection 2 of the Criminal Code reads: "2. If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

The accused (a Chinaman) met an opium-runner (a Chinaman) in a doorway for the purpose of purchasing a deck of opium from him. He paid the opium-runner $2 but before the deck of opium was handed to him the police appeared and they were both arrested. The opium-runner threw away the deck of opium as the policeman was about to seize him. A charge of having opium in his possession was dismissed.

Held, on appeal, reversing the decision of police magistrate Wood (McQUARRIE, J.A. dissenting), that the above section of the Criminal Code applies. Custody or possession in the hands of the runner "with the knowledge and consent" of the accused is by virtue of this section the latter's custody and possession. The basic feature calling for the application of the section was the "previous arrangement" and the "purpose of" the meeting.

APPEAL by the Crown from the decision of police magistrate Wood on a charge that the accused did unlawfully have in his possession a drug, to wit, opium, on the 12th of January, 1940. At about 8.30 in the evening of the 12th of January, constable Merton and detective corporal Haywood were on the south side of Pender Street between Carrall and Columbia Streets and were keeping observation on the unit block number 21, on the north side of East Pender Street. They saw one Jay Yen turn the corner at Carrall Street and proceed east until he came to the doorway of number 21, where the accused, Lee Chew was standing. The two policemen immediately ran across the road to the north side and Merton seized hold of Jay Yen, the accused having stepped back into the doorway two paces when Haywood seized him. About three feet back of the door, steps went up to the second floor. Haywood swore he saw the accused throw a small white package behind him and Merton picked up the package on the sixth step of the stairs. The accused swore

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he paid Jay Yen $2 for opium but he said he never got the opium. Both men were taken to the police station. The charge was dismissed.

The appeal was argued at Vancouver on the 11th of June, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

Donaghy, K.C., for appellant: The accused was not found in actual possession of the opium. The question is what is "possession": see *The Queen* v. *Wiley* (1850), 20 L.J.M.C. 4; *Rex* v. *Berger* (1915), 84 L.J.K.B. 541. Section 5, subsection 2 changes the law: see *Regina* v. *John Gerrish and Elizabeth Brown* (1839), 2 M. & Rob. 219. As to what constitutes consent see *Dewhurst* v. *Pearson* (1833), 2 L.J. Ex. 143. As to "possession" see *Rex* v. *Young* (1917), 24 B.C. 482; *Reg.* v. *Dring* (1857), 7 Cox, C.C. 382; *Rex* v. *Pritchard* (1913), 9 Cr. App. R. 210. A presumption of theft arises from recently stolen goods being in one's possession: see *Rex* v. *Theriault* (1904), 11 B.C. 117; *Rex* v. *Pawlett* (1923), 40 Can. C.C. 312.

McAlpine, K.C., for respondent: The criminal law of England is not changed by section 5, subsection 2 of the Criminal Code. This case must not be confused with the right to possession. It was found he was not in possession and the learned magistrate could reasonably so find.

Donaghy, replied.

Cur. adv. vult.

22nd August, 1940.

MACDONALD, C.J.B.C.: The respondent was charged for that he the said Lee Chew

at the city of Vancouver on the 12th day of January, A.D. 1940, did unlawfully have in his possession a drug, to wit, opium, contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto.

The Crown is appellant from the decision of the magistrate dismissing the charge. As we are concerned only with a question of law we must take our facts from the findings of the magistrate. His Worship found

that the accused, by previous arrangement, met the other man who was an opium-runner at the door of certain premises in Chinatown for the purpose of buying from him a deck of opium for two dollars. The accused handed over the two dollars to the runner, and the runner had the deck in his hand

ready for delivery, but before the transaction was quite completed the police rushed them and the deck was thrown up the stairs inside the doorway. He further found

that the runner had done the throwing and that the deck had not actually been passed into the hand of the accused.

The facts of course are all important. It will be observed that there was a "previous arrangement" between the accused who at the time in question had $2 in his possession and the runner who had opium in his hand ready for delivery upon receipt of it. This means that the arrangement or agreement arrived at previously between the parties was that the opium should pass to the custody of and come into the possession of the accused; only the intervention of the police prevented it. There is no room for the suggestion that the accused might have changed his mind and have refused to accept the drug or to pay over the $2: the facts contemplate that were it not for the police an almost completed act would have been a completed act. The parties were in the very act of completing it when frustrated by the police.

There is no doubt that the deck physically never reached the hand of the accused; there is equally no doubt that had the police not intervened accused's constructive control over this deck of opium would have become actual control. He had by the terms of the "previous arrangement" the right to its custody.

If any meaning is given to a literal reading of section 5, subsection 2 of the Criminal Code it must apply to this case. We held in *Rex* v. *Cho Chung* [*ante*, p. 234] that this section applies to a charge under The Opium and Narcotic Drug Act, 1929. We were asked in that case for future guidance virtually to define with particularity the cases to which this section applies. We stated that we would adhere to the salutary rule of basing the decision on the facts before us. The issue in this case is whether or not in law the facts bring it within the purview of section 5, subsection 2. It reads as follows: [already set out in head-note.] We have here two persons, one of them, namely, the runner, with the knowledge and consent of the accused (because of the previous arrangement) had in his "custody or possession" a deck of opium. The section provides that on that state of facts "it shall be deemed and taken to be in the custody and possession of each and all of them." Custody or possession in the hands of the runner

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"with the knowledge and consent" of the accused is by virtue of this section the latter's custody and possession. Here the basic feature calling for the application of the section was the "previous arrangement" and the "purpose of" the meeting. In other cases other facts may call it into play; hence the need of confining the decision to the facts of this case. No decisions preclude this view. I would allow the appeal.

MCQUARRIE, J.A.: The learned magistrate in his reasons for judgment states:

> Mr. *McAlpine* contends that there cannot be any possession without control by the accused and that [he] had no control. . . Mr. *Donaghy* conceded that contention would be unanswerable were it not for section 5, subsection 2, of the Code,

which is set out in the reasons for judgment. On the facts as found by His Worship I am of opinion that this case does not come within said section 5, subsection 2 of the Code. I would therefore dismiss the appeal.

5th September, 1940.

After having had the privilege of perusing the reasons for judgment of the learned Chief Justice herein, I think it fitting that I should extend the reasons for dissent filed by me when judgment was pronounced on the 22nd ultimo. I would therefore add to my said reasons the following:

I do not suggest that in a proper case subsection 2 of section 5 of the Criminal Code does not apply to a charge under The Opium and Narcotic Drug Act, 1929. It is well settled that it does apply. I only contend that the facts as found by the learned police magistrate do not bring this case within said subsection 2. An "opium-runner," as I see it, makes a regular business of purveying opium just as a "bootlegger" made a regular business of purveying liquor in the old prohibition days. All the respondent did here, at the very most, was to place an order with the "opium-runner" for a deck of opium at the time he handed him the $2 and, owing to the premature action of the police, he never got the opium, which was otherwise disposed of by the opium-runner. At no time did the respondent have any control over or possession, constructive or otherwise, of the drug. The respondent was in the same position as if the opium-runner had himself smoked or lost the opium before he returned to the

respondent. In such a case the respondent, notwithstanding said subsection 2, could not have been successfully convicted of having the noxious drug in his possession. In every case the facts must be the controlling feature. That was established in *Rex* v. *Cho Chung,* [*ante,* p. 234] referred to by counsel, and is so affirmed in the reasons for judgment of the Chief Justice herein. With due deference I do not think the learned Chief Justice is correct in holding that because there was acquiescence or knowledge on the part of the respondent by reason of a previous arrangement, to the opium-runner having the drug in his possession said subsection 2 applies here. In my opinion it could not have been the intention of Parliament that subsection 2 should apply to such a case as this otherwise more appropriate language would have been used. I think that if two or more persons had joined in giving the order for the opium and it had been delivered to one of them it would have been "deemed and taken to be in the custody and possession of each and all of them" by virtue of said subsection 2, but that is as far as it goes. The runner was not in the same position or relationship to the respondent as the two or more persons in the supposititious case I have stated were to each other. The runner was in the position of a vendor and the respondent of a purchaser, which is an entirely different thing.

SLOAN, J.A.: I agree with the Chief Justice.

Appeal allowed, McQuarrie, J.A. dissenting.

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June 20, 21, 24; *Aug.* 22.

CRAWFORD v. GARDOM AND INDEPENDENT MILK PRODUCERS' CO-OPERATIVE ASSOCIATION.

Malicious prosecution—Charges of making false entries with intent to defraud—Charges dismissed—Further information on same charge—Trial—Dismissed—Reasonable and probable cause.

The plaintiff was a director and the secretary of Twigg Island Dairy Limited of Vancouver and the defendant Gardom was president and manager of the Independent Milk Producers' Co-operative Association. Under contract of the 1st of May, 1938, the Twigg Island Dairy Limited received its supply of milk from said association and the price paid for milk used on the fluid market was materially more than the price paid for milk used for ice-cream and other products manufactured. The defendant Gardom preferred two charges against the plaintiff that being an officer of the Twigg Island Dairy Limited with intent to defraud the said association made false entries in statements rendered by the Twigg Island Dairy Limited to the said association showing the amount of raw milk used in the manufacture of ice-cream from the milk purchased from the said association. The charges were dismissed by police magistrate Matheson on the 13th of September, 1939. On the 14th of September, 1939, Gardom preferred a similar charge that was heard by police magistrate Wood who did not commit the plaintiff but bound him over to appear for trial if called upon by the Attorney-General. The Attorney-General did call upon him to face trial and the charge was dismissed. The plaintiff brought this action for malicious prosecution which was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the question of whether there is reasonable and probable cause is one of fact for the trial judge, and from perusal of the record it appears there is ample evidence after full weight is given to all the circumstances to support a finding of reasonable and probable cause.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 18th of April, 1940, in an action for damages for malicious prosecution. The plaintiff is a dairyman and a director and secretary of the Twigg Island Dairy Limited of Vancouver. The defendant Independent Milk Producers' Co-operative Association incorporated under the Co-operative Associations Act, R.S.B.C. 1936, Cap. 53, has its head office in Vancouver and the defendant Gardom is president and manager thereof. The Twigg Island Dairy Limited received its supply of milk from the defendant association until the Fall of 1939. Under the contract the price paid for fluid milk was 48 cents per pound butterfat and for ice-

cream and everything else the price varied from 20 cents per pound. On July 18th, 1939, the defendant Gardom preferred a charge against the plaintiff for making false entries in the books of account of the Twigg Island Dairy Limited as to the statements of disposition of milk purchased from the association, and on the 16th of August and before the summons came on for hearing Gardom laid a second charge of making false entries in a material particular in statements rendered by Twigg Island Dairy Limited to said association showing the amount of raw milk used in the manufacture of ice-cream from the milk purchased from the association. Both charges were heard together by police magistrate Matheson and dismissed on the 13th of September, 1939. On the next day Gardom again preferred a charge against the plaintiff of making false entries in a material particular in statements rendered by the Twigg Island Dairy Limited to said association showing the amount of raw milk used in the manufacture of ice-cream from the milk purchased from the association. The plaintiff was brought before police magistrate Wood in Vancouver on said charge and the plaintiff was bound over to appear for trial in the County Court Judge's Criminal Court if called upon by the Attorney-General. The Attorney-General called upon him to face his trial and he was tried by HARPER, Co. J. on the 30th of November, 1939, when the charge was dismissed. The plaintiff claims he was injured as to his reputation and suffered pain of mind and was prevented from attending to his work and incurred expenses in defending himself against said charges.

The appeal was argued in Vancouver on the 20th, 21st and 24th of June, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

W. S. Owen (*J. A. McLennan*, with him), for appellant: They charged at a much lower rate for milk used for ice-cream and the plaintiff was accused of making false returns as to the amount used for ice-cream. The first charge was dismissed and Gardom immediately lodged another charge in the same form. Crawford was sent up for trial. It was heard by HARPER, Co. J. who dismissed it. This is an action for damages and the learned

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judge would not allow us to show Gardom's attitude when the first charge was dismissed. The day after the first charge was dismissed Gardom preferred another charge in the same form. The learned judge persisted in preventing Crawford when on the stand from showing the attitude of Gardom. The charge related to what took place between certain dates and the learned judge allowed in evidence of what took place outside that period. The loss of milk that sticks to the cans and loss of spilling was paid by us at the ice-cream prices. He found no proof of want of reasonable and probable cause: see *Herniman* v. *Smith,* [1938] 1 All E.R. 1. Starting a second prosecution is evidence of malice: see *Chambers* v. *Robinson* (1726), 2 Str. 691; Halsbury's Laws of England, 2nd Ed., Vol. 22, p. 20, sec. 29; *Barrett* v. *Long* (1851), 3 H.L. Cas. 395; *Cruise* v. *Burke,* [1919] 2 I.R. 182. Honest belief must be founded on a reasonable basis: see *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247, at p. 250; *Manning* v. *Nickerson* (1927), 38 B.C. 535; *Jones* v. *Eckley* (1928), 40 B.C. 75, at p. 78; *Brown* v. *Hawkes,* [1891] 2 Q.B. 718; *Ibbotson* v. *Berkley* (1918), 26 B.C. 156; *Fitzjohn* v. *Mackinder* (1861), 30 L.J.C.P. 257; *Fancourt* v. *Heaven* (1909), 18 O.L.R. 492. He must prove the statements were false: see *Ayres* v. *Elborough* (1870), 22 L.T. 106; *Rex* v. *Bell* (1929), 41 B.C. 166, at p. 170. Having the advice of a solicitor does not absolve him: see *Smith* v. *Rural Municipality of Lacadena, No. 228, and McTaggart,* [1924] 1 W.W.R. 36, at pp. 42-3.

Clyne, for respondents: Appellant must prove both malice and absence of reasonable and probable cause. When malice is involved the trial judge is in a special position to decide the question of malice. There were only two prosecutions. On the second charge it was a preliminary hearing before magistrate Wood and the Attorney-General decided to go on with the prosecution: see *Rex* v. *Hannay* (1905), 11 Can. C.C. 23. It is recognized a magistrate may make a mistake and a second charge is justified: see *Bradshaw* v. *Waterlow & Sons, Limited,* [1915] 3 K.B. 527. The fact that two prosecutions were made is not necessarily malice. There were reasonable grounds. There were two pages torn out of their books that applied prior to January,

1939. There was reasonable and probable cause in this case: see Roscoe's Evidence in Civil Actions, 20th Ed., Vol. II., p. 880; *Chatfield* v. *Comerford* (1866), 4 F. & F. 1008; Halsbury's Laws of England, 2nd Ed., Vol. 22, p. 16; *Walters* v. *W. H. Smith & Son, Limited,* [1914] 1 K.B. 595. Evidence of obtaining the opinion of counsel is admissible: see Phipson on Evidence, 7th Ed., 152; *Edden* v. *Thorniloe* (1842), 6 Jur. 265.

Owen, replied.

Cur. adv. vult.

22nd August, 1940.

MACDONALD, C.J.B.C.: Although inclined to the view that respondent might have obtained redress, if entitled to it by a civil action I cannot say that the learned Chief Justice of the Supreme Court who tried the action was clearly wrong in dismissing it. One ought to be satisfied, without qualification, when invoking the criminal law that one is serving, not private but public interests. The trial judge found as a question of fact that there was not want of reasonable and probable cause in laying an information. There were several features in connection with it suggesting the view that respondents' motives were not altogether unmixed; these features together with the fact that the respondents did not rest after laying one information but laid a second one might have led the trial judge to take a different view at all events were it not for the intervention of the Attorney-General. On the other hand the magistrate dealt with the first information in a very summary manner treating it as an abuse of the processes of the Court without I think fully considering the facts. When the second information was laid, as intimated, the magistrate gave it more detailed consideration and while not committing appellant bound him over to appear for trial if the Attorney-General so directed. As the Attorney-General, forming we must assume an independent judgment, did direct a prosecution and upon trial the county court judge, while dismissing it, at least did not regard it as unwarranted. I would not say, in view of the finding of fact referred to that we ought to interfere. This coupled with a finding of absence of malice disposes of the matter.

SLOAN, J.A.: This is an appeal from a judgment of MORRISON, C.J.S.C. dismissing the plaintiff's claim for damages in

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an action for malicious prosecution. The learned trial judge found that there was not want of reasonable and probable cause and that there was absence of malice.

In my opinion the appeal fails. Lord Atkin in delivering the judgment of the House of Lords in *Herniman* v. *Smith*, [1938] 1 All E.R. 1, at p. 8 pointed out that the question of whether there was reasonable and probable cause is one of fact for the trial judge. Here the learned trial judge upon a consideration of the facts found that there was not want of reasonable and probable cause. It is true, with respect, that the learned judge below throughout the trial and in his reasons for judgment did not give the circumstances surrounding the discharge of the accused on the first charge and the laying of the second charge that full consideration which such occasions demanded but nevertheless I cannot say that in the result he reached an erroneous conclusion of fact on this branch of the case. It is our duty as MARTIN, J.A. (later C.J.B.C.) said in *Hall* v. *Geiger* (1930), 43 B.C. 116, at p. 118

> to review all the circumstances that were before him to see if his conclusion may be supported, . . .

and from a careful perusal of the record it seems to me that there is ample evidence, even after full weight is given to all the circumstances of the case, to support a finding of reasonable and probable cause as defined by Hawkins, J. in *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167; a definition approved by the House of Lords in *Herniman's* case, *supra*.

There is yet another aspect of this matter. In my view this case may well be determined in the defendants' favour by the application of the principle enunciated in *Bradshaw* v. *Waterlow & Sons, Limited*, [1915] 3 K.B. 527. In that case judgment was entered for the defendants in an action by the plaintiff for malicious prosecution on the ground that there was no evidence of absence of reasonable and probable cause. The plaintiff had been unsuccessfully prosecuted under the provisions of the Prevention of Corruption Act, 1906 (6 Edw. 7, Cap. 34). By section 2 of that Act the consent of the Attorney-General was a condition precedent to the prosecution of an offender. Pickford, L.J. in his judgment (in which Lord Cozens-Hardy, M.R. and Warrington, L.J. agreed) said at p. 535:

In this case also the facts have been laid before the Attorney-General to obtain his fiat under the Prevention of Corruption Act, 1906, and it is difficult to see how under those circumstances there can be said to be an absence of reasonable and probable cause when the Attorney-General had granted his fiat and the facts were not shown to be unfairly put before him.

The facts herein present a stronger case for the application of that reasoning than in *Bradshaw's* case, *supra*. The magistrate herein did not commit the plaintiff but bound him over to appear for trial in the County Court Judge's Criminal Court if called upon by the Attorney-General. The Attorney-General did call upon the plaintiff to face his trial and through Crown counsel appointed by him conducted the prosecution before HARPER, Co. J.

I do not pause here to make any comment upon the practice adopted by the magistrate nor to enquire whether in law there is any sound foundation for it but merely record what in fact was done.

The direction of the magistrate left the prosecution of the plaintiff suspended and it would have remained suspended indefinitely had not the Attorney-General intervened and carried it on. If as in *Bradshaw's* case, *supra,* the mere consent of the Attorney-General that a prosecution proceed is enough to establish reasonable and probable cause then where the Attorney-General not merely consents to the prosecution but exercises an independent judgment on the facts and then, in consequence, orders and directs the conduct of the prosecution it must follow because of *Bradshaw's* case, *supra,* that there was reasonable and probable cause for the defendant's initial and subsequent commencement of criminal proceeding against the plaintiff. There is no suggestion that the facts upon which the Attorney-General acted were unfairly put before him.

In *Hicks* v. *Faulkner, supra,* at p. 170, Hawkins, J. said:

> To succeed in an action for malicious prosecution, the plaintiff must allege and establish two things—absence of reasonable and probable cause, and malice. The affirmative of these allegations is upon him. Failing to establish both of them, he fails altogether.

And see *Perry* v. *Woodward's Ltd.* (1929), 41 B.C. 404.

In this case the plaintiff failed to establish absence of reasonable and probable cause.

I would dismiss the appeal.

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CRAWFORD v. GARDOM AND INDEPENDENT MILK PRODUCERS' CO-OPERATIVE ASSOCIATION

O'HALLORAN, J.A.: What occurred prior to and at the time of the laying of the first information was not sufficient in itself in my view to support an action for malicious prosecution. However, the refusal of magistrate Matheson to commit the appellant for trial and the conduct of the respondent thereafter coupled with the laying of a second information based upon the same evidence were additional factors in the light of which, what occurred before might be shown in a different perspective. Was the perspective so changed thereby, that it may be said the appellant should have succeeded at the trial? While the answer to that question is not free from doubt, I incline to the view on the record before us, that even if the learned trial judge had given greater weight than he did to these additional factors, yet he could have reasonably reached the same conclusion.

Some emphasis has been placed on *Bradshaw* v. *Waterlow & Sons, Limited,* [1915] 3 K.B. 527, where the consent of the Attorney-General was a statutory condition precedent to the initiation of the prosecution. Obviously his consent became a material element in that case to decide whether the prosecutor had reasonable and probable cause to commence the prosecution. I do not read the *Bradshaw* case to extend beyond that. In this case on the other hand the Attorney-General did not control the initiation of the prosecution. In principle his subsequent action in calling upon the appellant to face trial after magistrate Wood had found there was a case to meet, should not have a more determinative bearing on the question of reasonable and probable cause, than if the appellant had been committed for trial by magistrate Wood. In *Hall* v. *Geiger* (1930), 43 B.C. 116, this Court refused to accept commitment for trial by the magistrate as *prima facie* proof of reasonable and probable cause. Finally if the subsequent action of the Attorney-General did affect the question of reasonable and probable cause it is not in any event a determining element therein.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Campney, Owen & Murphy.*
Solicitors for respondents: *Macrae, Duncan & Clyne.*

REX v. BRONNY.

C. A.
1940
Sept. 17.

War measure—Defence of Canada Regulations, No. 16 (d)—Charge under—In possession of plan of internment camp—R.S.C. 1927, Cap. 206, Sec. 3.

Regulation 16 of the Defence of Canada Regulations passed pursuant to the War Measures Act provides "No person shall, in any manner likely to prejudice the safety of the State or the efficient prosecution of the war, obtain, record, communicate to any other person, publish, or have in his possession any document or other record whatsoever containing, or conveying any information being, or purporting to be, information with respect to any of the following matters, that is to say:—

(d) the number, description or location of any prisoners of war."

On a charge under the above regulation the accused was found to have in her possession a drawing or pencil sketch containing an accurate description of an internment camp for enemy aliens in the Province of Alberta and in which her husband is confined. It disclosed with particularity the various buildings, erections, roads and open spaces in the camp with markings clearly identifying it. She was convicted.

Held, on appeal, affirming the decision of LENNOX, Co. J., that the accused had in her possession a "document" containing information with respect to the "location of prisoners of war" being a military camp where prisoners of war are confined with others who should not be at large in this time of emergency. It may be inferred that the document was not intended to satisfy curiosity only but rather to serve other purposes of a more sinister nature. The Court need only to be satisfied with that degree of certainty necessary in criminal prosecutions that the conduct of the accused in having this document in her possession was "likely to prejudice the safety of the State." It is of paramount importance to protect the State not merely from positive injury but from the likelihood of it.

APPEAL by defendant from her conviction by LENNOX, Co. J., on the 28th of June, 1940, on a charge that she unlawfully did contravene regulation 16 of the Defence of Canada Regulations for that the said Elizabeth Mary Bronny did . . . unlawfully have in her possession in a manner likely to prejudice the safety of the State or the efficient prosecution of the war a document or other record containing information purporting to be information with respect to the location of prisoners of war, to wit, a sketch or plan of the internment camp for enemy aliens known as Kananaskis situated at Seebe in the Province of Alberta. . . .

The appeal was argued at Victoria on the 17th of September, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

Coulter, for appellant: The offence is based on regulation 16 (d) of the Defence of Canada Regulations passed pursuant to sec-

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tion 3 of the War Measures Act. The police searched the appellant's premises on Lulu Island where certain plans were found including a rough plan of the internment camp at Kananaskis in the Province of Alberta. The accused's husband who is a German is confined there. We submit that there is not sufficient evidence to support the conviction.

Geo. A. Grant, for the Crown, was not called on.

The judgment of the Court was delivered by

MACDONALD, C.J.B.C.: We will not call upon you, Mr. *Grant;* we are satisfied on the evidence that we should not interfere with this conviction recorded under a regulation passed pursuant to the War Measures Act, R.S.C. 1927, Cap. 206. It reads as follows: [already set out in head-note.]

The accused had in her possession a drawing or pencil sketch containing an accurate description of an internment camp for enemy aliens in the Province of Alberta and in which her husband is confined. It disclosed with particularity the various buildings, erections, roads and open spaces in the camp with markings clearly identifying it. She had other documents not necessary to consider.

There is no doubt from the evidence that accused had in her possession a "document" containing information with respect to the "location of prisoners of war." The evidence disclosed that it is a military camp where prisoners of war are confined with others, who in the opinion of the authorities should not be at large in this time of emergency.

Possibly, as Mr. *Coulter* strongly urged, the sketch was drawn as accused testified by a friend recently released from this camp after a period of internment: he wanted, he said, to show the accused the character of the place where her husband was confined. We may infer, however, as did the trial judge, that it was not intended to satisfy curiosity only, but rather to serve other purposes of a more sinister nature. In any event an offence was committed. This regulation must be interpreted in the light of the purpose for which it was enacted. It need not be established that it would affect the safety of the State; it is enough if it is "likely" to do so. Its safety might be seriously jeopardized

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if one or more prisoners of war escaped and that might readily be facilitated by the possession, in the hands of a confederate, of a detailed description of the ground.

Rex v. *Stewart* (1940), 73 Can. C.C. 141, may be referred to. There, in respect to other regulations passed pursuant to the same Act, the Chief Justice of Ontario considered whether or not *mens rea,* knowledge or a guilty mind is essential to a conviction thereunder. We agree with the views therein expressed. We have only to be satisfied with, we think, that degree of certainty necessary in criminal prosecutions that the conduct of the accused in having this document in her possession was "likely to prejudice the safety of the State," and as indicated we test that question in the light of the purpose of the regulations and the mischief it is sought to curtail. It is of paramount importance to protect the State, not merely from positive injury but from the likelihood of it. We would not be justified therefore in interfering with the conviction.

Appeal dismissed.

Solicitor for appellant: *H. S. Coulter.*
Solicitor for respondent: *Eric Pepler.*

LAUDER v. ROBSON.

C. A.
1940
Sept. 10, 17.

Practice—Appeal to Supreme Court of Canada—Application for leave—R.S.C. 1927, Cap. 35, Sec. 39 (b).

Where the only true ground that could be advanced, namely, that this Court did not reach the right conclusion on the facts, an application for leave to appeal to the Supreme Court of Canada will be refused.

The circumstance that members of this Court differed is not *per se* a ground for giving leave to appeal, doubly so when the differences related to facts.

cons'd Benson v Harrison [1923] 3 D.L.R. 666

APPLICATION for leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of the 3rd of July, 1940, (reported, *ante,* p. 375) allowing the appeal from the judgment of MCDONALD, J. of the 15th of April, 1940, in an action for damages by the administrator of the estate of Annie Lauder, deceased, for her death caused by the alleged negligence of the defendant on the 24th of June, 1939, on the River Road near Alberni, on Vancouver Island. Heard by MACDONALD,

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C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A. at Victoria on the 10th of September, 1940.

McAlpine, K.C., for the application referred to *Jennings* v. *Canadian Northern Ry. Co.* (1925), 35 B.C. 495; *Babbitt* v. *Clarke,* [1926] 3 D.L.R. 342, at p. 344; *Newcom* v. *Home Ass'ce Co.,* [1930] 1 D.L.R. 783.

Maitland, K.C., contra, referred to *McQuillen et al.* v. *White et al.,* [1937] O.W.N. 571 and [1938] S.C.R. 30; *Lovell* v. *Lovell* (1907), 13 O.L.R. 587; *Smith et al.* v. *Wright,* [1920] 1 W.W.R. 324; *Doane* v. *Thomas* (1922), 31 B.C. 457; *Dorzek* v. *McColl Frontenac Oil Co., Ltd.,* [1933] S.C.R. 197.

McAlpine, in reply, referred to *Channell* v. *Rombough* (1924), 34 B.C. 52.

Cur. adv. vult.

On the 17th of September, 1940, the judgment of the Court was delivered by

MACDONALD, C.J.B.C.: We would not give leave to appeal; we should only grant leave if some important question of law is involved. Here the principles of law were simple, dependent on the facts. The majority held that by the true interpretation of the evidence one only of the parties concerned was responsible for this accident. If that is so it is a simple question of law that the Contributory Negligence Act could not be invoked. I, in a dissenting judgment, thought that not only did the trial judge find that the continuing negligence of both caused the accident but also that the evidence supported it. Had that view prevailed it would again be a simple question of law to decide that the Act did apply. This case therefore was solely concerned with facts. The circumstance that members of this Court differed is not of course *per se* a ground for giving leave to appeal, doubly so when the differences related to facts. If judges differed on a question of law it might be taken into consideration in deciding whether or not the point was important. Here there was no difference as to the law once the facts were determined.

We cannot, therefore, give leave on the only ground that could be advanced, *viz.,* that this Court did not reach the right conclusion on the facts.

Application dismissed.

SMITH AND FISHER v. WOODWARD *ET AL.*

C. A.
1940
Sept. 19.

Practice — Taxation — Solicitor's bill of costs — Duty of taxing officer— Allocatur—Probate Rules 57 and 58.

It is no part of the duty of the taxing officer when taxing a solicitor's bill of costs under Probate Rules 57 and 58 to consider or decide out of what funds the bill when taxed is to be paid. The taxing officer completes his duties when he taxes the items in the bill presented to him.

APPEAL by plaintiffs from the decision of MANSON, J. of the 17th of August, 1940, dismissing an appeal from the district registrar at New Westminster who held that the bill of costs submitted by *F. Kay Collins* in the matter of the estate of Charles Woodward, deceased, and taxed by him were a proper charge against the estate. Under the will of Charles Woodward there were six executors, two sons, W. C. Woodward and P. A. Woodward, two daughters, Mrs. M. C. Fisher and Mrs. C. L. Smith and Messrs. Hodge and Mann, employees in the Woodward Stores. The two daughters were the only beneficiaries. Mrs. Elizabeth E. MacLaren, a grand-daughter of the deceased, being a child of a deceased daughter, Mrs. Sanders, made a claim in 1938 against the estate for a large sum based upon a letter alleged to have been given by Charles Woodward to her mother in 1907 and upon a letter given to herself by Charles Woodward in 1932. This letter she lost but she made a reconstruction of it from her own memory. After negotiations in which Mr. *F. Kay Collins* acted for the executors, Mrs. MacLaren's claim was settled by W. C. Woodward and P. A. Woodward paying her a large sum of money from their own funds. Mr. *Collins's* bill of costs was taxed before the district registrar at New Westminster he taking the position that under Probate Rules 57 and 58 no special order of the Court was required for that purpose. The *allocatur* of the district registrar recited that the bill of costs presented by *F. Kay Collins,* solicitor for the estate of Charles Woodward, deceased, be allowed in the sum of $882.30 to be paid out of the funds on other personal property of the estate in the hands of the executors.

The appeal was argued at Victoria on the 19th of September, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

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Maitland, K.C., for appellants: There were six executors of this estate, two sons, two daughters and two employees in the Woodward Stores. The two daughters only were beneficiaries. A grandchild of deceased, Mrs. MacLaren, who was the daughter of Mrs. Sanders, a deceased daughter of Charles Woodward, claimed a large interest in the estate, based on a letter written to her mother by Charles Woodward in 1907 and a letter she alleged was written to herself by Charles Woodward in 1932, which she lost. The executors took the opinion of Mr. *Locke, K.C.* as to the validity of Mrs. MacLaren's claim and he concluded that she had no valid claim. I acted for the two daughters and came to the same conclusion. Mrs. MacLaren and her solicitor came to Vancouver from Toronto and after negotiations her claim was settled by the two sons of the deceased who paid her a large sum from their own funds. The two daughters of deceased said they would not make any payments on Mrs. MacLaren's claim. Mr. *Collins* as solicitor for the executors taxed his bill. The point on this appeal is that it is no part of the duty of a taxing officer to decide out of what funds a bill when taxed is to be paid: see *In re Garner, Ex parte Pedley,* [1906] 2 K.B. 213; *Hall* v. *Macintyre* (1934), 48 B.C. 306. The two Woodwards had no right to employ counsel for the estate: see *Farhall* v. *Farhall* (1871), 7 Chy. App. 123. An *allocatur* is a judgment against the estate: see *In re Johnson. Shearman* v. *Robinson* (1880), 15 Ch. D. 548, at p. 551. The two sons are personally liable for their costs: see *Staniar* v. *Evans. Evans* v. *Staniar* (1886), 34 Ch. D. 470; *Re Roemer,* [1928] 3 D.L.R. 860; *Jones* v. *Toronto General Trusts Corporation* (1919), 17 O.W.N. 259; *Security Trust Co.* v. *Wishart* (1920), 51 D.L.R. 614; *Brown* v. *Burdett* (1888), 40 Ch. D. 244, at p. 254; *Security Lumber Co.* v. *Ross* (1920), 53 D.L.R. 485.

Collins, for respondents: There was an order for the passing of accounts and later a second order which included the taxation of costs. In all the items in the bill of costs there were instructions from all six executors. The executors have the right to be indemnified. The taxation is under Probate Rules 57 and 58 and the *allocatur* decides who is liable for payment: see *In re Geary. Sandford* v. *Geary* (1939), N.I. 152. The costs should

be paid out of the estate unless the executors are guilty of misconduct.

Maitland, replied.

The judgment of the Court was delivered by

MACDONALD, C.J.B.C.: In our opinion the appeal must be allowed. The registrar's function as a taxing officer is confined to taxing the bill of costs; he has no jurisdiction to pass judicially upon the question of whether or not the estate is liable to pay costs incurred by all or some of the executors. The question of the estate's liability, if any, in this case, where there is a serious dispute, or in fact in any case, cannot be settled at that stage. The taxing officer completes his duties when he taxes the items in the bill presented to him. At a later stage the executor or executors who have, rightly or wrongly, incurred costs may take steps to pass his or their accounts and if properly incurred secure payment from the estate. Clearly that stage has not yet been reached.

We were asked to order payment of the costs of this appeal out of the estate on the ground that the facts disclosed a reasonable course was pursued. It may or may not have been in the interest of the estate to incur these costs; that is not the decisive point. The respondent assumed the burden of supporting the position that the taxing officer had a right in law to decide whether or not the estate was liable to pay the costs incurred. He was unsuccessful; the costs therefore should in the usual way follow the event.

Appeal allowed.

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

Solicitors for respondents: *Collins, Green & Eades.*

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June 6; July 3.

JUNG HON MANN v. NORTHWESTERN MESSENGER & TRANSFER LTD. AND JONES.

Negligence—Pedestrian crossing street not at intersection—Run down by motor-cycle — Excessive speed — Contributory negligence—Damages—Percentage of liability.

At 11 o'clock in the morning of the 15th of September, 1939, Jung Yam Wing was walking on the south side of Pender Street between Main and Columbia Streets in Vancouver when he stepped off the sidewalk between two parked cars to cross the street. When he emerged from between the cars he was confronted with a car going east. He hesitated and the car stopped. He then suddenly started to run across the street and when about half way across the northerly half of the street he was run into by a motor-cycle with side-car attached which was going west at about 30 miles an hour and driven by the defendant Jones who was in the employ of the defendant company. Wing died from a fractured skull shortly after the accident. In an action for damages by the administrator of the Wing estate it was held that Wing was 40 per cent. responsible for the accident and the defendant Jones 60 per cent.

Held, on appeal, affirming the decision of FISHER, J. (SLOAN, J.A. dissenting as to the percentage of liability), that both deceased and Jones were guilty of negligence and the percentage of liability found by the learned trial judge was reasonable in the circumstances and should not be disturbed.

APPEAL by defendants from the decision of FISHER, J. of the 20th of February, 1940, in an action by the administrator of the estate of Jung Yam Wing for damages under the Administration Act for the shortening of his expectation of life and medical expenses, caused on the 15th of September, 1939, on Pender Street between Main and Columbia Streets in Vancouver by Robert E. Jones, servant of the defendant company in the care and operation of a motor-cycle and side-car. On the 15th of September, 1939, at about 11 a.m. the deceased who was walking on the south sidewalk of Pender Street between Main and Columbia Streets, stepped off the sidewalk between two parked cars and proceeded to run across the street. When he was clear of the two parked cars a car going east on Pender Street was close to him and he hesitated and the car then stopped; he then ran on to cross and when he reached the middle of the north half of the street he was struck by a motor-cycle with side-car attached which

was going west on that side of the street. The deceased's skull was fractured and he died shortly after the accident.

The appeal was argued at Vancouver on the 6th of June, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C. (*J. L. Farris,* with him), for appellants: It was held on the trial that the driver was 60 per cent. to blame and the deceased 40 per cent. Jones on the motor-cycle going west on Pender Street was travelling at between 15 and 17 miles an hour. The witness Clark who was driving east stopped his car as deceased ran out between two parked cars right in front of him. The deceased looked at him and hesitated but when Clark stopped the deceased ran on and went right in front of the motor-cycle. The motor-cycle stopped within two or three feet after the impact. There were parked cars on both sides of the street for the whole block. The proportions of fault are wrong in any case. The deceased crossed the road between the intersections: see *Vance* v. *Drew* (1925), 36 B.C. 241, at p. 244; *Taylor* v. *Ainslie,* [1931] 3 D.L.R. 26, at pp. 29-30.

Denis Murphy, Jr., for respondent: The defendant's speed was excessive. After deceased hesitated before Clark's car Jones, who was driving the motor-cycle, had a clear view for 50 feet and if he had been looking and going at a reasonable speed he would have had no trouble in stopping to avoid the accident: see *Perdue* v. *Epstein* (1933), 48 B.C. 115; *Rainey* v. *Kelly,* [1922] 3 W.W.R. 346; *Suffern* v. *McGivern* (1923), 32 B.C. 542.

McAlpine, in reply:

Cur. adv. vult.

3rd July, 1940.

MACDONALD, C.J.B.C.: We concluded after the hearing that the finding of joint negligence should stand. Judgment was reserved to consider the apportionment of damages made by the trial judge, *viz.,* 60 per cent. against appellant Jones and 40 per cent. against Jung Yam Wing; the latter was a pedestrian killed while crossing the street by a motor-cycle driven by the former.

I would not disturb the apportionment: substantial error only would justify interference. The division reflects the trial judge's view of the evidence; he thought appellant more negligent than

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Macdonald, C.J.B.C.

the deceased and as far as I can judge from reading the evidence without the assistance available to the trial judge through seeing the witnesses, I cannot say that he was clearly wrong. One who drives a motor-cycle at or near 30 miles an hour through a very busy street and kills a pedestrian has much to explain. Although appellant saw deceased from the moment he emerged from between two cars on the opposite side of the street acting in such an excited manner that he might be expected to dash anywhere he continued to travel at such speed that it was impossible to prevent hitting him: that was his own admission. I stress this fact of reckless driving—the trial judge found excessive speed—through a busy street on a wet pavement knowing that in this Chinese section of the city it is the practice for pedestrians, notwithstanding the by-law, to cross from kerb to kerb, anywhere in the block; "they are always doing that," appellant admitted.

In addition he was not properly equipped for driving at that speed. Although standard requirements called for brakes on rear, front, and side wheels, this motor-cycle was not so equipped. The trial judge was doubtless not satisfied with the evidence—I was not—professing to show that although the manufacturer presumably held a different view it made no difference whether or not the side wheel was braked. That was not appellant's defence; he said that before the accident it was in the repair shop and

> it had some repairs done on it and they had to take the side-car off to do the repairs and neglected or forgot, . . . , to put the side-car brake on and hook it back up again.

He operated it in that condition.

The evidence of tests made by witnesses for appellant with the brake off the side wheel during one trial and on during another was not conclusive. These tests were made at low speeds —15 to 25 miles an hour as the witness Deeley stated, or at 20 miles according to Howard. Appellant was not travelling at a low speed; he travelled, as one Crown witness whom the judge was entitled to believe testified, at 30 miles an hour until near the point of impact. No witness said that at 30 miles an hour or thereabouts a brake on the side wheel if applied might not have averted the accident. Doubtless applying the brake quickly would

cause the car to swerve or skid; that should not prevent its application when life was endangered.

Deceased's negligence consisted in crossing the street, not at an intersection, without maintaining an effective look-out; in addition he did not adopt a prudent course of conduct in continuing to cross. After escaping a knock down by a motor-car shortly after leaving the kerb he undoubtedly became confused but not to a degree, nor under circumstances that would exonerate him because of imminence of danger. His conduct and bewilderment was understandable; seeing this motor-cycle coming down the street at an excessive speed he committed an error of judgment by dashing towards the other kerb wrongly believing that it was the safer course to pursue. I do not understand why it should be suggested that this negligence of one not in a position to injure anyone nor having in his control an instrument of danger should be regarded as comparable to, much less greater than that of appellant travelling at far too great a speed without proper equipment on a busy thoroughfare knowing the usual state of traffic at that point. I would dismiss the appeal.

SLOAN, J.A.: There is evidence, which if believed, would support the finding of negligence made below, and I cannot say that the learned trial judge has reached an erroneous conclusion with regard thereto.

With deference however I consider that he erred in his division of responsibility. If, as found below, there was excessive speed under the circumstances and as one of those circumstances known to the appellant was that the residents of the Chinatown area were in the habit of crossing Pender Street as their fancy dictated instead of at the prescribed crossing, then it seems reasonable to assume that the deceased Chinese who had lived in Vancouver for 31 years must have known of the heavy vehicular traffic on that street. If he chooses to run out from behind a parked car into the midst of that traffic and conduct himself in the manner described in the evidence, then under the circumstances it seems to me he is the greater wrong-doer and in consequence one upon whom the greater burden of responsibility rests. I would assess his fault at 80 per cent. and that of the motor-cyclist at 20 per cent., and would allow the appeal to that extent.

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O'HALLORAN, J.A.: I agree with the learned trial judge that both the appellant motor-cyclist and the deceased pedestrian were guilty of negligence which contributed to the accident. Nor would I disturb the 60 per cent. degree of fault ascribed to the appellant motor-cyclist. As I view the evidence, he was more at fault than the deceased.

The appeal should be dismissed.

Appeal dismissed, Sloan, J.A. dissenting in part.

Solicitors for appellants: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitor for respondent: *Frank W. Elliott.*

Apld.
Arrow v Fleetwood
[1940] 3 DLR (2d) 631

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SILVER v. CUMMINS AND CUMMINS.

Contract—Sale of goods for ten years—Mutual covenants—Breaches of covenants by both parties—Buyers' breach result of seller's deceit——Damages.

By an agreement in writing dated December 18th, 1929, it was agreed that Cummins and his wife would buy from Silver not less than 2,000 mandolin-guitars annually for a period of ten years. They had agreed previously to purchase all their requirements from Silver during the ten-year term and not to purchase any other class of musical instruments without his consent. Silver agreed not to sell any of these instruments in New Zealand, South Africa, Australia, Canada, Great Britain and the United States except to the Cummins and that he would not divulge to or educate any person in the principles of salesmanship therefor practised by him in New Zealand in the course of said business. Both parties committed breaches of their respective covenants. Silver committed the first breach in June, 1932, when he began selling instruments in South Africa in a deceitful manner successfully designed to keep the Cummins ignorant of what he was doing. The Cummins purchased more than their annual quota of 2,000 instruments for the first two years but after that they failed to reach it. Neither party attempted to repudiate the contract upon becoming aware of the other's breach but kept the contract alive and continued to buy and sell instruments thereunder. The Cummins had operated in New Zealand and Australia and were operating in Canada where they had arrived in October, 1937. Silver issued a writ against them in June, 1938, and they counterclaimed for damages for breach of contract. On the trial Silver was awarded

damages in the sum of $6,536.29 for loss of royalties on the deficiency in purchases without costs and the Cummins were awarded $5,322.50 with costs on their counterclaim.

Held, on appeal, affirming the decision of FISHER, J., that Silver's appeal should be dismissed but reversing his decision as to the Cummins' cross-appeal and that it should be allowed. The breach of contract ascribed to the Cummins resulted naturally from the plan evolved by Silver which induced Cummins not to go to South Africa so that Silver might go there himself without Cummins' knowledge and caused Cummins to go to Australia both knowing it was a less profitable field. Cummins suffered from Silver's deceit and the maxim *omnia præsumuntur contra spoliatorem* applied. Silver's loss of royalties from Cummins' deficient purchases resulted naturally from the operation of Silver's deceitful plan of which his own anterior breach was an integral part. Moreover it was an implied condition of the contract under all the special circumstances that if Silver should sell instruments in any of the six countries referred to, then such sales would apply on Cummins' annual quota and on the total requirements under the contract.

APPEAL by plaintiff and cross-appeal by defendants from the decision of FISHER, J. of the 8th of May, 1939, whereby he awarded the plaintiff judgment on his claim for $5,670, and $866.29 interest amounting to $6,536.29 and no costs, and the defendants judgment on their counterclaim for $5,352.50 and costs to be taxed. The plaintiff formerly carried on in Australia and New Zealand the business of selling a musical instrument known as the mandolin-guitar. He had a large sales force and teaching staff amongst them Roi Cummins and his wife, he being a salesman and his wife a teacher and tuner. In 1929 the plaintiff and his staff were operating in Dunedin, New Zealand, and in December, 1929, Silver entered into an agreement with Cummins, his wife and five others whereby they were to purchase from Silver all his stock of mandolin-guitars at the landed cost plus 7s., 6d.; for the purchase of his furniture and fittings at cost price and also for the purchase of further mandolin-guitars over a term of ten years at the manufacturer's cost, freight and brokerage plus 7s., 6d. The plaintiff agreed on his part not to sell or be a party to the sale of mandolin-guitars to any other person in certain specified countries including South Africa and not to instruct others in his principles of salesmanship. The Oscar Schmidt-International Corp. of Jersey City, N.J., U.S.A. manufactured the instruments and one H. G. Finney

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was its managing-director during the time that the company supplied mandolin-guitars to the parties to this action. At the time of signing the agreement the defendants and associates formed a company known as the Dominion Academy of Music Limited and all purchases of instruments were made by it until 1933 when it went into voluntary liquidation. In the meantime, in 1931, four of the original associates left the company. In 1933 Cummins and his wife and the remaining member proceeded to Australia and incorporated a new company in the same name, and the company continued to purchase instruments through the plaintiff until 1937, and in October, 1937, Cummins and his wife came to Vancouver. In the meantime the plaintiff and his wife went to New York and in May, 1932, decided to go to South Africa. His wife remained in South Africa and he arranged with Finney to send instruments to his wife in South Africa and a first shipment was sent her in June, 1932. The plaintiff was in partnership with his wife in this venture and between July, 1932, and November, 1937, they sold 6,600 instruments in South Africa. The plaintiff concealed the South Africa business from the defendants and it was not until 1936 that they learned of it. From December 18th, 1929, to December 17th, 1937, the defendants purchased 14,715 instruments. In October, 1937, the Dominion Academy of Music Limited went into voluntary liquidation and the defendant Cummins and his wife alone went to Vancouver where they continued their business and up to the trial of the action purchased 2,650 more instruments. On each of these instruments $1.80 was paid to the plaintiff in addition to the manufacturer's cost, freight, broker's commission and customs' duty. The plaintiff alleges the defendants are liable in damages for breach of the agreement in that they did not purchase a minimum of 2,000 instruments a year, and the defendants allege the action is premature and they are entitled to damages for the plaintiff's breach of the agreement in selling instruments in South Africa.

The appeal was argued at Victoria on the 17th to the 19th of October, 1939, before MARTIN, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

Hossie, K.C. (*Ghent Davis,* with him), for appellant: The action arose out of a contract for the sale and supply of mandolin-guitars. The method of computing damages for the defendants was erroneous as in fact the plaintiff and his wife's operations in South Africa did not affect the defendant's sale of instruments in New Zealand, Australia or Canada and they suffered no damages at all. The profits made by the defendants are set out in balance sheets of their companies and evidence of the profits made by Mrs. Silver was put in by the respondents taken from the examination for discovery of Silver and not contradicted. The evidence is binding on the defendants: see *Anderson* v. *Smythe* (1935), 50 B.C. 112; *W. E. Sherlock Ltd.* v. *Burnett and Bullock* (1937), 52 B.C. 345; *Capital Trust Corporation* v. *Fowler* (1921), 50 O.L.R. 48, at p. 55. If the defendants had gone to South Africa their profits would have been less than what they were in Australia. Mrs. Silver's work for the first two years was successful but when you take the five years there was a larger sale in Australia. Clause 10 of the contract is void as being in restraint of trade, the restrictive covenant being too wide: see *Nordenfelt* v. *Maxim, Nordenfelt Guns and Ammunition Company,* [1894] A.C. 535, at p. 565; *Goldsoll* v. *Goldman,* [1915] 1 Ch. 292; *Attwood* v. *Lamont,* [1920] 3 K.B. 571; *Eastes* v. *Russ,* [1914] 1 Ch. 468; *Mason* v. *Provident Clothing and Supply Company, Limited,* [1913] A.C. 724; *Herbert Morris, Limited* v. *Saxelby,* [1916] 1 A.C. 688, at 706. The restriction covered the whole of the English-speaking world. The United States alone would take 25 years to cover. If clause 10 is void Silver was entitled to go to South Africa and the learned judge was wrong in depriving him of costs. The Cummins cannot recover on their counterclaim in the absence of the five others who were parties to the agreement: see *Cullen* v. *Knowles,* [1898] 2 Q.B. 380, at p. 381; *Johnson* v. *Stephens and Carter, Ld., and Golding,* [1923] 2 K.B. 857; *In re Mathews. Oats* v. *Mooney,* [1905] 2 Ch. 460. Two of the five others to the contract consented to the operations of the plaintiff in South Africa. The obligation to purchase a minimum of 2,000 instruments per year cannot be a penalty. The purchasers would only have to pay the actual damage suffered by the vendor,

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namely, $1.80 per instrument short of the 2,000 per year: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 189, sec. 177; *Clydebank Engineering and Shipbuilding Company* v. *Don Jose Ramos Yzquierdo y Castaneda,* [1905] A.C. 6; *The Protector Loan* v. *Grice* (1880), 5 Q.B.D. 592; *Dunlop Pneumatic Tyre Company Limited* v. *New Garage and Motor Company, Limited,* [1915] A.C. 79; *Diestal* v. *Stevenson,* [1906] 2 K.B. 345. The defendants claim their obligations under paragraph 5 of the agreement were dependent on the continued performance by the appellant of the covenants contained in paragraph 10 and the plaintiff having failed in this they are released from their obligations under paragraph 5. This is not so: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 224; *Huntoon* v. *Kolynos (Incorporated),* [1930] 1 Ch. 528, at p. 548; *Boone* v. *Eyre* (1777), 1 H. Bl. 273n; *Campbell* v. *Jones* (1796), 6 Term Rep. 570, at p. 573; *Bettini* v. *Gye* (1876), 1 Q.B.D. 183. If he relies on paragraph 10 he must elect to treat the contract as at an end: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 223, sec. 305; *Bentsen* v. *Taylor, Sons & Co. (2),* [1893] 2 Q.B. 274; *Wallis, Son & Wells* v. *Pratt & Haynes,* [1910] 2 K.B. 1003, at p. 1012. The party to whom the right of election falls must signify his election to rescind with very reasonable dispatch: see *Berners* v. *Fleming,* [1925] Ch. 264; *Marsden* v. *Sambell* (1880), 43 L.T. 120; *Primeau* v. *Mouchelin* (1905), 15 Man. L.R. 360; *Halkett* v. *Dudley (Earl),* [1907] 1 Ch. 590, at p. 597; *Bradley* v. *H. Newsom, Sons and Company,* [1919] A.C. 16; *Cornwall* v. *Henson,* [1900] 2 Ch. 298; *Dansk Rekylriffel Syndikat Artieselskab* v. *Snell,* [1908] 2 Ch. 127. They did not elect to repudiate the contract; they elected in fact to go on.

Locke, K.C., for respondents: The learned trial judge is in error in holding that the performance of paragraph 10 of the agreement in question is not a condition precedent to the plaintiff's right to recover. A condition precedent merely implies that some right is dependent upon a performance of the condition: see *Worsley* v. *Wood* (1796), 6 Term Rep. 710; *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; *Colley* v. *Overseas Exporters* (1921), 90 L.J.K.B. 1301. The parties have expressly declared this obligation of the plaintiff to be a condition precedent: see *Bettini*

v. *Gye* (1876), 45 L.J.Q.B. 209. The Court may look at the nature of the contract and the importance of the stipulation in relation to the object for which the contract was entered into: see *Graves* v. *Legg* (1854), 9 Exch. 710, at p. 717; *Behn* v. *Burness* (1863), 32 L.J.Q.B. 204; *Canadian Terminal System, Ltd.* v. *The City of Kingston,* [1936] S.C.R. 106. The entire consideration for payment of 7s., 6d. per instrument was the plaintiff's withholding competition and the performance of the promise is condition of defendants' obligation to pay: see *Bank of China, Japan, and the Straits* v. *American Trading Company,* [1894] A.C. 266; *Ellen* v. *Topp* (1851), 20 L.J. Ex. 241; *Measures Brothers, Limited* v. *Measures,* [1910] 2 Ch. 248; *Guy-Pell* v. *Foster* (1930), 99 L.J. Ch. 520. The breach goes to the root of the matter and has rendered the performance of the rest of the contract a thing different in substance from that stipulated for: *Huntoon Co.* v. *Kolynos (Incorporated)* (1930), 99 L.J. Ch. 321. The plaintiff having committed a breach has repudiated the contract: see *Frost* v. *Knight* (1872), 41 L.J. Ex. 78, at p. 80; *Mersey Steel and Iron Co.* v. *Naylor* (1884), 53 L.J.Q.B. 497, at p. 502; *General Billposting Company, Limited* v. *Atkinson,* [1909] A.C. 118. The cases relied on by the learned trial judge are not opposed to the defendants. In this case the transaction complained of is executory on both sides. The defendants submit the action is premature. The claim of the plaintiff to recover royalties is based on paragraph 5 of the contract. The contract is dated December 18th, 1929, and is for ten years. The clause contained in paragraph 5 of the agreement whereby it is alleged the defendants are obligated to purchase a minimum of 2,000 instruments a year is a penalty and they are entitled to relief under the Laws Declaratory Act. He will be getting paid for instruments he did not supply. The Court should relieve against the penalty: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 189, sec. 177; *Peachy* v. *The Duke of Somerset* (1721), 1 Str. 447, at p. 453. The plaintiff has suffered no damages as his profits in South Africa were far in excess of the amount he would be entitled to if the defendants had sold 20,000 instruments. The plaintiff alleges paragraph 10 of the agreement is void at law and not binding on the plaintiff.

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If this is so his action must fail as the agreement by the plaintiff in paragraph 10 is consideration for the defendant's promise on which the action is based: see *Hopkins* v. *Prescott* (1847), 16 L.J.C.P. 259; *Scott* v. *Gillmore* (1810), 3 Taunt. 226; 128 E.R. 90. The plaintiff alleges that the defendants elected not to treat the contract as repudiated and are therefore estopped from alleging any repudiation and the learned trial judge held the contract was never terminated and that by the defendants' conduct they were estopped from saying the contract was at an end and are only left to their counterclaim for damages. The learned judge was in error in holding the defendants were estopped: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 209, sec. 201. In the alternative the defendants are entitled to maintain their claim for damages for the breaches by the plaintiff of his agreement contained in paragraph 10 of the contract. The term "purchasers" is defined for the purpose of the agreement to include each of the purchasers as well as the group and the agreement contemplates that it will be carried out not necessarily by the original contracting purchasers but by some of them or a company substituted for the original purchasers. Eventually the two defendants to this action became the only continuing parties to the contract. The plaintiff by accepting their orders has accepted them as the parties to whom he is bound by paragraph 10 of the agreement. The learned trial judge estimated the profit of the defendants at $2.85 per instrument. The sales in South Africa exceeded the sales in Australia for two years by 1,900 instruments and from that he worked out the profits that would have been made in South Africa over the profit made in Australia. He referred to *Sprague* v. *Booth* (1909), 78 L.J.P.C. 164; Chitty on Contracts, 19th Ed., 151; Leake on Contracts, 8th Ed., 101 and 488-9; *Johnstone* v. *Milling* (1886), 55 L.J.Q.B. 162; *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited,* [1914] A.C. 461, at p. 471.

Hossie, replied.

Cur. adv. vult.

1st February, 1940.

MARTIN, C.J.B.C.: I agree with the result.

McQUARRIE, J.A.: I agree with my brother O'HALLORAN that the appeal of the appellant be dismissed and the cross-appeal of the respondents be allowed.

O'HALLORAN, J.A.: By an agreement in writing dated 18th December, 1929, to remain in force ten years, it was agreed, *inter alia,* that Cummins and his wife (the respondents) and associates under clause 5 thereof would buy from Silver (the appellant) not less than 2,000 mandolin-guitars annually, until they had purchased 20,000 instruments in all, when the annual quota requirement would cease. They had agreed previously under clauses 1 and 2 to purchase all their requirements from Silver during the ten-year term and not to purchase any other class of musical instruments without his consent. Under clause 10 thereof Silver agreed not to sell any of these instruments in New Zealand, South Africa, Australia, Canada, Great Britain and the United States of America, except to the respondents and associates (or with their consent), and that he would not divulge to or educate any person in the principles of salesmanship theretofore practised by him in New Zealand in the course of the said business.

Both parties committed breaches of their respective covenants. Silver committed the first breach. In June, 1932, he began selling instruments in South Africa (which he continued for five years), in a deceitful manner successfully designed to keep the respondents ignorant of what he was doing. While the respondents exceeded their annual quota of 2,000 instruments in the first two years, thereafter they failed to reach it. Neither party attempted to repudiate the contract upon becoming aware of the other's breach, but kept the contract alive and continued to buy and sell instruments thereunder. The respondents had operated in New Zealand and Australia and were operating in Canada, where they had arrived in October, 1937, when Silver issued a writ against them in June, 1938, for damages for breach of contract. They counterclaimed for damages for breach of contract. The action was tried by FISHER, J. in the latter part of March, 1939. The learned judge awarded Silver $5,670 damages for loss of royalties on the respondents' deficiency purchases, but marked his disapprobation of Silver's deceitful conduct by

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declining to award him costs. The respondents were awarded $5,332.50 damages with costs on their counterclaim in respect of Silver's encroachment in South Africa. Both parties appealed.

I would dismiss Silver's appeal. Consideration of the submissions of counsel thereon has not weakened the conclusions reached by the learned trial judge. However, I would allow the Cummins' cross-appeal. The breach of contract ascribed to the Cummins resulted naturally from the plan evolved by Silver and designed by him to influence and deceive Cummins as it did when carried out. Many authorities were cited but none of them is founded on facts bearing any similarity to the facts here. Cummins had been employed by Silver in this business for many years before acquiring it in December, 1929, and had no reason to distrust him. They both knew that Melbourne and Sydney had been operated before and that a large part of Australia was not virgin territory. As Australia was not a good business prospect for the reason stated, Cummins had decided to go to South Africa after he had finished New Zealand. In a letter he received from Silver dated 4th July, 1931 (Exhibit 40), the latter spoke of South Africa's then sound financial condition compared with Canada, and said:

> This looks as though finances in South Africa are in good shape, which is a matter not to be overlooked when figuring on your move after completing New Zealand.

Again on 19th October, 1931, Silver wrote him (Exhibit 8):

> South Africa in my opinion should be your next move. The depression has had but little effect there. . . . South Africa is in far better shape than any of the Colonies and her money is worth more. . . . Conditions in Canada are bad. In fact at this writing the Canadian dollar is off 11%. . . .

Sometime thereafter Silver in New York made up his mind to dissuade Cummins from entering the profitable South African field and go there himself instead, which he did in June, 1932, in breach of the contract. In order to carry out this purpose he induced Cummins by a deceitful scheme skilfully planned and conveyed to him (the detail whereof is not necessary to recite), to believe that South Africa was not a good business prospect, that it was operated by competitors and that conditions in Western Canada were more favourable. Cummins was deceived thereby and gave up the idea of going to South Africa. He decided (as Silver intended he should) to come to Canada. But

when he attempted to do so in February, 1933, the Canadian Immigration authorities refused him entry with a party of employees, so that contrary to original plans, he was forced in April, 1933, to go to Australia which both Silver and he knew was not virgin territory. In a letter from London where he had just arrived from New York on his way to South Africa, Silver on 15th June, 1932 (Exhibit 10), wrote a New York associate with whom he had been planning the scheme to mislead Cummins:

> It would be a great stroke should Cummins decide to work western Canada and upon receipt of my letter of June 26th he will no doubt do so, for it will appear as the logical move, South Africa being worked and I having nothing to do with prevailing on him to go to Canada.

Silver's plan operated so effectively that Cummins did not discover until 1936 that he had been encroaching in South Africa for four years.

During the first two years in South Africa Silver sold 5,300 instruments in breach of the contract. During his first two years in Australia Cummins sold 3,650 instruments or 1,650 less than Silver did in South Africa. The importance of this lies in the fact that up to the end of 1937 (the period involved in the litigation) Cummins' net deficit was 1,285 instruments. The learned trial judge in assessing Cummins' damages drew the inference from the evidence that if Cummins had gone to South Africa as he had planned until induced by Silver not to go, he would have sold at least as many instruments there in the first two years as Silver did. The evidence supports that inference. Accordingly if Cummins had gone to Africa, it is reasonable to infer he would have sold not less than 16,365 instruments over the eight-year period, during which the stipulated number in the contract was 16,000. Viewed in this light the Cummins' breach of contract was in fact brought about by Silver himself. His planned and deliberate deceptions to induce Cummins not to go to South Africa so that he might go there himself without Cummins' knowledge, caused Cummins to go to Australia. Australia was known to both of them to be a less profitable field (because it had been covered to a large extent a short time previously) than South Africa.

It was a method adopted by Silver to deprive Cummins of

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customers with consequent decrease in his annual purchases. Silver must be held to have contemplated that Cummins would make fewer sales in Australia than in South Africa. Cummins suffered by Silver's deceit and accordingly all presumptions are to be made against Silver, *"omnia præsumuntur contra spoliatorem"* and *vide* what was said by Selborne, L.C. speaking for the Court of Appeal in *Wilson* v. *Northampton and Banbury Junction Railway Company* (1874), 43 L.J. Ch. 503, at p. 505. Silver's anterior breach of contract, in the special circumstances of its deceitful planning and execution, must be regarded as the decisive cause of Cummins' incapacity to buy as many instruments from Silver as he would have otherwise. That is to say, Silver's loss of royalties from Cummins' deficient purchases followed naturally from the operation of Silver's deceitful plan in which his own anterior breach was an integral part. I should observe perhaps that the intimate relation of the two breaches arose not through any interdependence of the covenants, but through the special circumstances in which Silver's breach of his own independent covenant was planned and carried out by deceit. It is a legal maxim that no one can take advantage of his own deceit. A is not permitted to charge B for damage, when such damage has been brought about in fact by A himself as the consequence of his deceiving B. In my judgment the damage Silver complains of was caused by his own deceit. His suit should stand dismissed.

There is another ground upon which the judgment in Silver's favour cannot be upheld. To my mind it was an implied condition of the contract in the special circumstances referred to that if Silver should sell instruments in any of the six countries referred to, such sales would apply on Cummins' annual quota and on his total requirement of 20,000 instruments. This is supported by what Fry, L.J. said in *Hammond* v. *Bussey* (1887), 57 L.J.Q.B. 58, cited by Lord Dunedin in *Re R. and H. Hall Lim. and W. H. Pim (Junior) and Co.'s Arbitration* (1928), 139 L.T. 50, at 52, *viz.*:

"What may the Court reasonably suppose to have been in the contemplation of the parties as the probable result of breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?"

And further at p. 55, Lord Shaw cited Lord Esher's view in *Hammond* v. *Bussey, supra*:

"We must say, using our knowledge of business and affairs, what may reasonably be supposed to have been in the contemplation of the parties as the result of a breach of the contract under the circumstances."

If Cummins had said to Silver when the contract was being formed "Well now, if you should sell instruments in South Africa in breach of your covenant how will it affect my covenant to purchase 2,000 instruments annually?" It is reasonable that Silver facing business realities would have replied "If I do, the sales will apply on your contracted quota." I should think there is no doubt that two reasonable men would have agreed upon that at least—*vide* also *Dahl* v. *Nelson, Donkin, & Co.* (1881), 6 App. Cas. 38, Lord Watson at p. 59, and *Shirlaw* v. *Southern Foundries (1926), Ld.*, [1939] 2 K.B. 206.

In the latter decision MacKinnon, L.J. at p. 227, in effect applies Lord Watson's test by a graphic example:

"If, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

When this contract was being made if some bystander had suggested as an express provision, the implied condition I have mentioned it is reasonable to assume, that Silver and Cummins both facing business realities would have replied with a common "Oh, of course!" Their common desire was to sell as many instruments as they could. The business was mutually profitable and they had long been associated together. The existence of such an implied condition gathers additional force from clause 10 of the contract. Silver's covenant was not to sell "except with the consent of Cummins." If Silver wished to sell to an organization of his own in South Africa in the way he did, he should have approached Cummins for his consent. If Silver had done so, particularly at the time his breach took place, it is difficult not to imagine a discussion of the nature I have mentioned. It is not reasonable to assume that Cummins would have granted his consent to Silver's entry into the more profitable South African field without some reciprocal protection against the consequences of a deficiency in his own annual quota and total allotment while carrying on in the less profitable Australian field. The more so

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in view of the nature of clause 12, defining Silver's remedies in the event of a deficiency by Cummins.

In the result therefore I would dismiss the appeal of Silver with costs, but allow the cross-appeal of Cummins with costs.

Appeal dismissed and cross-appeal allowed.

Solicitors for appellant: *Davis, Pugh, Davis, Hossie & Lett.*
Solicitor for respondents: *A. J. Cowan.*

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REX v. WHITEHOUSE.

Criminal law—Murder — Evidence of accomplices — Corroboration—Summing-up—Criminal Code, Sec. 1014, Subsec. 2.

The accused was charged with the murder of one William Ingram who ran a lunch-counter at Fernie, B.C. He was struck on the head with an iron pipe which was covered with a split rubber hose, in an attempted hold-up, and died four days later. The accused, who was alleged to have struck the blow, was aided in the commission of the crime by two youths —Morgan and Haile—who performed part of the tasks assigned to them, but quitted the scene almost immediately before Ingram was struck down. The accused was convicted. In the charge the learned judge said in part as follows: "[Haile] admits he went with the accused—as you will see when I go into the evidence more minutely when I am dealing with the main question—until the accused had raised his hand to strike Ingram, and then Haile says he ran away. Now if that means that Haile abandoned the common intent; made up his mind that he would have nothing more to do with it then he would not be an accomplice because he would not have united in the commission of the crime. The crime up to that time had not taken place. . . . The same with regard to Morgan. Morgan says that the accused invited him to assist in this crime and whilst he does not say in words that he agreed to it, again according to his own testimony he did go with the accused; played a portion of the part that was assigned to him, but before the crime was committed—if it were a crime—before Ingram was struck he left, and again the question is for you to consider whether you believe that and whether you draw from that act the inference that he had abandoned the common intention and left because he didn't want to have anything more to do with it."

Held, that by this instruction the learned judge advised the jury that as a matter of law, Morgan and Haile would not be accomplices if the jury found that they had abandoned the common unlawful object of vio-

lently robbing him before the fatal blow was struck. He in effect instructed the jury that they must consider only two elements in order to find abandonment: (a) A change of mental intention, and (b) quitting the scene before the crime was finally consummated by the blow. Before a prior abandonment of a common enterprise may be found by a jury, there must be something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of the crime. There must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts in each case, but where possible it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause, that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. There has been misdirection prejudicial to the accused, the appeal is allowed and a new trial ordered.

Held, further, with respect to section 1014, subsection 2 of the Criminal Code, that there is not that "corroborative evidence . . . of such a convincing, cogent and irresistible character . . . that the jury, if they had [received the] proper direction, must have come to the same conclusion."

APPEAL from the conviction by MURPHY, J. and the verdict of a jury at the Spring Assize at Fernie on the 17th of May, 1940, on a charge of murder. William A. Ingram, who lived at Fernie, B.C., ran a lunch-counter there which he shut up at midnight on the 21st of November, 1939. He then started for his home, where he arrived at about 12.45 on the morning of the 22nd of November, 1939. He staggered into his house and blood was dripping from his head. On the arrival of a doctor it was found that he had been struck on the head by a dull instrument and was suffering from hemorrhage and concussion. He died on the 26th of November following. The evidence disclosed that the accused, who was about 22 years old, tried to get three young men to assist him in holding up Ingram on the night in question, and that two of them did go with Savage to waylay him just after 12 o'clock at night as Ingram was on the way home. Savage approached him with an iron pipe which was covered with a piece of hose, and just as he got near him and was about to strike the fatal blow the other two young men quitted the scene. The iron pipe with the hose around it was found later with human blood on it.

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The appeal was argued at Victoria on the 8th, 9th and 10th of October, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Davey, for appellant: As to whether McNaughton's evidence can be said to be corroborative evidence in law, it is for the jury to decide whether it is, and owing to the conflict with the evidence of Morgan and Haile, that goes to the weight of evidence. McNaughton was an accomplice and the trial judge failed to give the jury direction to the facts upon which the jury might have inferred that McNaughton was an accomplice: see *Rex* v. *Nowell* (1938), 54 S.C.R. 165; *Rex* v. *Mickey MacDonald,* [1939] O.R. 606. As to whether Morgan and Haile were accomplices, the learned judge directed that if they had abandoned the project before the blow was struck they were not accomplices. This is in conflict with section 69, subsection 2 of the Criminal Code: see Russell on Crimes, 9th Ed., 1477. They had a common design with Savage to rob Ingram with violence, and were therefore accomplices. Haile must give timely notice to his confederate of his abandoning the project before it can be said he is not an accomplice: see Russell, *supra,* p. 1491; 1 Hale, P.C. 617. It was the judge's duty to give all the evidence as to Haile and Morgan being accomplices: see *Vigeant* v. *Regem,* [1930] S.C.R. 396. The case for the defence was not properly put to the jury. The learned judge failed to direct the jury on the defence of not believing McNaughton: see *Baker* v. *Regem. Sowash* v. *Regem,* [1926] S.C.R. 92; *Canning* v. *Regem,* [1937] S.C.R. 421; *Rex* v. *Hislop,* [1925] 1 W.W.R. 887. He made a mistake in presenting to the jury statements made by Haile: see *Rex* v. *Brand,* [1928] 3 W.W.R. 641. Evidence was introduced that accused had been in gaol before and that he had passed worthless cheques. The accused has the right to be tried on the charge presented without reference to other wrong acts. On the question of corroboration see *Thomas* v. *Jones,* [1921] 1 K.B. 22, at pp. 33-6.

Colgan, for the Crown: There is not sufficient misdirection to change the judgment: see *Rex* v. *Nowell* (1938), 70 Can. C.C. 329; *Rex* v. *Baskerville,* [1916] 2 K.B. 658; *Rex* v. *Drew,* [1933] 1 W.W.R. 225, at p. 231. McNaughton, Morgan and Haile were together in the evening some time before Ingram was

attacked, but McNaughton left them some time prior to the assault showing clearly he would have nothing to do with it. He was not an accomplice: see *Rex* v. *Robinson,* [1915] 2 K.B. 342, at p. 348; *Rex* v. *Gordon and Gordon,* [1937] 2 W.W.R. 455; *Eagleton's Case* (1855), Dears. C.C. 518, at p. 538. There was no overt act on the part of McNaughton; there must be more than intent. The evidence does not disclose that he said anything; he merely listened. McNaughton cannot be an accomplice of an accomplice. It must be established that he was an accomplice of the accused: see Phipson on Evidence, 7th Ed., 471; *Rex* v. *Marks Feigenbaum,* [1919] 1 K.B. 431; *Rex* v. *Gray* (1904), 68 J.P. 327; *Hansen* v. *Dixon* (1907), 96 L.T. 32. The facts are different in all the cases cited by the appellant. In *Rex* v. *Mickey MacDonald,* [1939] O.R. 606, the witness did an overt act; also in *Rex* v. *Hislop,* [1925] 1 W.W.R. 887. He complains of evidence being allowed in as to Savage having been in gaol and as to his passing worthless cheques: see *Levesque & Graveline* v. *Regem* (1934), 62 Can. C.C. 241; *Rex* v. *Peckham* (1935), 25 Cr. App. R. 125; *Rex* v. *Wallace and Jenner,* [1939] V.L.R. 46; *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57. There is corroboration in this case in addition to McNaughton. As to how far the charge must go see *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217, at p. 245. On the question of abandonment, there must be an overt act: see *Rex* v. *Duffy* (1931), 57 Can. C.C. 186; *Rex* v. *Woods* (1930), 22 Cr. App. R. 41. On the contention that the learned judge did not charge on certain facts, it is submitted that section 1014, subsection 2 of the Criminal Code applies to this case.

Davey, replied.

Cur. adv. vult.

5th November, 1940.

MACDONALD, C.J.B.C.: I would allow the appeal. The conviction is set aside and a new trial ordered.

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

SLOAN, J.A.: The appellant, a young man of about 22 years of age, was convicted at the Fernie Assize before MURPHY, J. and jury for the murder of one William Ingram, a merchant of

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Fernie, who was struck down with an iron pipe in an attempted robbery. The appellant was aided and abetted in the commission of the crime by two youths—Morgan and Haile—who performed part, at least, of the tasks assigned to them although they fled the scene immediately before or just at the time Ingram was struck down by the appellant.

The appellant alleges wrongful reception of evidence, and, in several particulars, misdirection, and non-direction amounting to misdirection. In my opinion he is entitled to a new trial.

One of the passages in the charge of the learned judge to the jury to which our attention was drawn is as follows:

> [Haile] admits he went with the accused—as you will see when I go into the evidence more minutely when I am dealing with the main question—until the accused had raised his hand to strike Ingram, and then Haile says he ran away.
>
> Now if that means that Haile abandoned the common intent; made up his mind that he would have nothing more to do with it then he would not be an accomplice because he would not have united in the commission of the crime. The crime up to that time had not taken place. . . .
>
> The same with regard to Morgan. Morgan says that the accused invited him to assist in this crime and whilst he does not say in words that he agreed to it, again according to his own testimony he did go with the accused; played a portion of the part that was assigned to him, but before the crime was committed—if it were a crime—before Ingram was struck he left, and again the question is for you to consider whether you believe that and whether you draw from that act the inference that he had abandoned the common intention and left because he didn't want to have anything more to do with it.

As I read this instruction the learned trial judge advised the jury that, as a matter of law, Morgan and Haile would not be accomplices in the murder of Ingram if the jury found that they had abandoned the common unlawful object of violently robbing him before the fatal blow was struck by the accused. He then, in effect, instructs the jury that they must consider only two elements in order to find abandonment, namely, (a) a change of mental intention, and (b) quitting the scene before the crime was finally consummated by the blow.

With great respect to the learned trial judge, in my view, he has in this aspect of his charge, fallen into error prejudicial to the accused.

Can it be said on the facts of this case that a mere change of mental intention and a quitting of the scene of the crime just

immediately prior to the striking of the fatal blow will absolve those who participate in the commission of the crime by overt acts up to that moment from all the consequences of its accomplishment by the one who strikes in ignorance of his companions' change of heart? I think not. After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

There appears to be a dearth of authority on this point but in some support of what I have said I would refer to 1 Hale, P.C. 618, where it is said:

> A. commands B. to kill C. but before the execution thereof A. repents, and countermands B. and yet B. proceeds in the execution thereof, A. is not accessary, for his consent continues not, and he gave timely countermand to B. Co. P.C. cap. 7, p. 51. Plowd. Com. 474, *Saunder's Case;* but if A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessary.

In (1576) 2 Plowd. at p. 476, the following language is to be

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found in the notes to *The Queen* v. *Saunders and Archer* (the poisoned apple case):

> But yet in some cases the time may be material; for if I command one to kill J. S. and before the fact done I go to him and tell him that I have repented, and expressly charge him not to kill J. S. and he afterwards kills him, there I shall not be accessary to this murder, because I have countermanded my first command, which in all reason shall discharge me, for the malicious mind of the accessary ought to continue to do ill until the time of the act done, or else he shall not be charged; but if he had killed J. S. before the time of my discharge or countermand given, I should have been accessary to the death, notwithstanding my private repentance.

See also Russell on Crimes, 9th Ed., 1491, and *Rex* v. *Harris* (unreported) but referred to in Coutlee's Supreme Court Digest, 1875-1903, at p. 406 (erroneously cited in English & Empire Digest, Vol. 14, p. 114 as reported in 33 S.C.R. 23).

I expressly refrain from considering what consequence a genuine repentance manifesting itself in a report to the authorities might have. That aspect of the matter does not arise here.

That misdirection on this issue is prejudicial to the accused admits of no argument because if the jury found abandonment of the common enterprise in the terms of the instruction Haile and Morgan could not be regarded as accomplices and the careful warning on that aspect of the case by the learned trial judge would be disregarded by the jury.

We were invited by Crown counsel to apply section 1014, subsection 2 of the Code but there is not that

> corroborative evidence . . . of such a convincing, cogent and irresistible character . . . that the jury, if they had [received the] proper direction, must . . . have come to the same conclusion:

Rex v. Lewis (1937), 26 Cr. App. R. 110, at p. 113. The evidence of the two children relating the occurrences in the shed, is relied upon as corroborative evidence by the Crown but as it is equally consistent with the statement of the accused as with the contrary evidence of Morgan it in my view corroborates neither. *Thompson* v. *Coulter* (1903), 34 S.C.R. 261; *Elgin* v. *Stubbs* (1928), 62 O.L.R. 128; *Rex* v. *Drew*, [1933] 1 W.W.R. 225, at p. 231.

So far as the witness McNaughton is concerned, as suggested by appellant's counsel, there is some evidence from which the inference might be drawn by the jury, if instructed on this issue, that he too was acting in concert with the other three. *Rex* v.

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Bolster (1909), 3 Cr. App. R. 81. His evidence, if he should be found to be an accomplice would not be corroborative.

There is another reason why I would not apply said section 1014, subsection 2 to this case. I refer to the occasion when Morgan in giving evidence volunteered in answer to Crown counsel that Whitehouse "talked about passing some cheques" and that other occasion when McNaughton said in his evidence that he heard Morgan and Whitehouse "talking about when they were in gaol before." Counsel for the accused below neither moved for any consequential order nor instruction on this evidence. *Rex v. Lewis* (1937), 26 Cr. App. R. 110, but I deem it at least worthy of consideration when considering the Crown's reliance upon section 1014, subsection 2.

Because of the misdirection to which I made reference I would allow the appeal and order a new trial. I cannot say under all the circumstances of this case that the jury if properly directed must have inevitably reached the same conclusion.

O'HALLORAN, J.A.: I would allow the appeal and direct a new trial for the reasons given by my learned brother SLOAN.

MCDONALD, J.A.: I concur in the judgment of my brother SLOAN.

Appeal allowed, and new trial ordered.

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Patent — Infringement action — Furnace — Combination of top and rear radiators and breather—Sawdust burner or feed unit—Validity of patents—Jurisdiction—Can. Stats. 1935, Cap. 32, Secs. 54 to 60.

In an action for infringements of two patents, the defendants attacked said patents as being invalid both at the trial and before the Court of Appeal on a number of grounds set out in the defence. On the submission of counsel for the respondent that the Court being a provincial one had no jurisdiction to entertain such a defence and that the Exchequer Court of Canada alone can do so:—

Held, that this "action for infringement" comes within the scope of section 59 of The Patent Act, 1935, under the heading "Infringement" governing

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actions taken by a patentee or "persons claiming under him" to enforce and protect a patent, and not within section 60 under the heading "Impeachment" which governs proceedings taken to invalidate or avoid a patent, and so it follows that the Court below had the jurisdiction and the duty to "take cognizance" of the "matter of defence" pleaded which would "render the patent void" as said section 59 declares.

As to the alleged infringement of the first patent as regards the top and rear radiators and the air-ring or "breather" in his hot air heating system, the plaintiff claimed that the combination of top and rear radiators was the essence and substance of his invention.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that section 14 (1) of The Patent Act, Can. Stats. 1923, in force at the time of the application of this patent required that the specifications "shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege." No such claim was made directly or by implication in the specifications or claims. There was no infringement of the claims in the patent, and this branch of the appeal is allowed.

Held, further, on the evidence, that the knowledge and use of "breathers" was of a public and open character several years before the plaintiff applied for his patent, so that there cannot be an infringement and this branch of the appeal should be allowed.

As to the alleged infringement of the second patent, the feed unit generally known as a sawdust burner. It is installed in front of the furnace and directly beneath the hopper. It has to do with certain mechanical improvement in a well-known class of feed unit.

Held, on appeal (MARTIN, C.J.B.C. dissenting), that the granting of a patent is *prima facie* evidence of invention and there is no evidence to support the defence of lack of invention. The evidence disclosed that Daly manufactured a number of burners subsequently to the granting of the patent, and these burners complied with the specifications in Skelding's patent. This branch of the appeal is therefore dismissed.

APPEAL by defendants Daly and Hi-Power Furnace & Stoker Company from the decision of MORRISON, C.J.S.C. of the 7th of June, 1939, in a consolidated action for damages for the infringement of two patents of invention, namely, patent No. 283712 and patent No. 368050, and for an injunction restraining continuance of said infringement. The plaintiff claims: (a) A declaration that the said letters patent are valid. (b) A declaration that the defendants have infringed said patents by constructing, using and vending to others to be used, the feed units and hot air heating systems constructed according to the plaintiff's said inventions, only colourably differing from the plaintiff's said inventions. (c) An injunction restraining con-

tinuance of infringement of said invention. (d) Damages and accounts of profits and taking of necessary accounts and inquiries. The plaintiff is a master tinsmith, who on March 23rd, 1927, applied for and on October 2nd, 1928, obtained a patent for "new and useful improvements" in hot air heating systems which may be shortly termed a furnace. On November 26th, 1935, he applied for and on August 10th, 1937, obtained a patent for "a new and useful improvement in a feed unit" which may be shortly termed a sawdust burner.

The appeal was argued at Vancouver on the 15th, 16th, 17th, 29th and 30th of November, 1939, before MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.

J. A. McInnes (*Coady,* with him), for appellants: The combination of top and rear radiators is not an essential feature of plaintiff's patent. The top radiator is not new and the rear radiator is not new, and it is alleged the combination of the two is the essence of his invention. In the absence of specifications or claims of novel combination and of evidence of special objects and results of the combination, it is not an invention: see *Gillette Safety Razor Co. of Canada, Ltd.* v. *Pal Blade Corp. Ltd.,* [1933] S.C.R. 142, at pp. 147-8. It is clear from the evidence that the idea or art of combining top and rear radiators was in practice long before the plaintiff obtained his first patent, and it cannot support the monopoly claimed: see *Pope Alliance Corp.* v. *Spanish River Pulp & Paper Mills Ltd.,* [1928] S.C.R. 20; *Lightning Fastener Co. Ltd.* v. *Colonial Fastener Co. Ltd. et al. (Suit No. 13298),* [1933] S.C.R. 371, at 376; *Mauck* v. *Dominion Chain Co., Ltd.,* [1933] Ex. C.R. 120, at p. 130; *Robert P. Porter et al.* v. *Corpn. of City of Toronto et al.,* [1936] Ex. C.R. 217, at p. 227; *Imperial Tobacco Co. of Canada Ltd. et al.* v. *Rock City Tobacco Co. Ltd., ib.* 229; *Davis Log and Raft Patents Co.* v. *Cathels* (1927), 39 B.C. 57, at p. 62. The most the plaintiff can claim is a mere structural variation from former methods. He claims a monopoly on the "breather" or "air-ring." The defendant did not use a similar method in the construction of his furnace, and in any case this method was used by other furnace people long prior to the alleged invention. He

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only produced a combination of well-known elements without accomplishing any new results: see *Lamson Paragon Supply Co.* v. *Carter-Davis, Ltd.* (1930), 48 R.P.C. 133. The feed unit was not an infringement of the second patent because of difference in design and structure. The application for this patent should have been rejected under section 61 (2) of The Patent Act, 1935. It is merely an application of already well-known contrivances adopted to analogous uses and wholly lacking in novelty: see *Horton* v. *The Central Sheet Metal Works* (1935), 49 B.C. 303. Even if the plaintiff be entitled to his patent on the feed unit, there was no infringement thereof by defendants for the reason that the feed units or burners made by defendants were made under leave or licence of the plaintiff.

Bray (*Bayfield,* with him), for respondent: There is abundant evidence to support the finding of the trial judge. In order to succeed in an action such as the one at Bar, all that is necessary is to establish that the defendant has substantially and in pith infringed the invention of the plaintiff: see Fox's Canadian Patent Law and Practice, 265 and 287. The defendant may not impeach our patent and then plead leave or licence: see Fox, *supra,* 445; *Gray* v. *Billington* (1871), 21 U.C.C.P. 288; *Crossley and Others* v. *Dixon* (1863), 10 H.L. Cas. 293. He is in the wrong Court: see British North America Act, Sec. 91 (22). There is jurisdiction for infringement only: see *The King* v. *The Inhabitants of Great Bolton* (1828), 8 B. & C. 71, at p. 74. That he cannot get in his defence in this Court see *Horton* v. *The Central Sheet Metal Works* (1935), 49 B.C. 303. As to their contention of lack of novelty see *Galt Art Metal Co.* v. *Pedlar People Ltd.,* [1935] 2 D.L.R. 353; *Baldry* v. *McBain,* [1935] 4 D.L.R. 160; *Durkee Attwood Co.* v. *Auger,* [1938] 2 D.L.R. 255. It is a creature of the statute: see *Electric Fireproofing Co. of Canada* v. *Electric Fireproofing Co.* (1910), 43 S.C.R. 182; *Rice* v. *Christiani* (1931), 100 L.J.P.C. 202; *Imperial Tobacco Co. of Canada Ltd. et al.* v. *Rock City Tobacco Co. Ltd.,* [1936] Ex. C.R. 229. He is in the wrong Court to set up that our patent is invalid. As to the amount of infringement required see *Smith Incubator Co.* v. *Seiling,* [1937] S.C.R.

251. On the question of lack of novelty again see *Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531.

MacInnes, replied.

Cur. adv. vult.

29th March, 1940.

MARTIN, C.J.B.C.: This appeal is from a judgment of Chief Justice MORRISON upholding the plaintiff's claim that the two defendants who appeal have infringed two of his patents for alleged "new and useful improvements in hot air heating systems" and "in feed units," the first of which, No. 283712, was granted on 2nd October, 1928, and the second, No. 368050, on 10th August, 1937.

The defendants in answer to the charge of infringement denied it in general and in particular in their defence, and also attacked in their defence and at the trial and before us the said patents as being "invalid" on a number of grounds as set out in paragraph 5 of said defence.

It was submitted by respondent's counsel that the Court below being a Provincial one had no jurisdiction to entertain such a defence, and that the Federal Exchequer Court of Canada alone can do so, but after hearing the instructive and elaborate argument upon the question I am satisfied that this "action for infringement" comes within the scope of section 59 of The Patent Act, 1935, Cap. 32, under the heading "Infringement" (sections 54-9) governing actions taken by a patentee or "persons claiming under him" (section 55) to enforce and protect a patent, and not within section 60 under the heading "Impeachment," which governs proceedings taken to invalidate or avoid a patent, and so it follows that the Court below had the jurisdiction and the duty to "take cognizance" of the "matter of defence" pleaded which would "render the patent void," as said section 59 declares—*cf. Baldry* v. *McBain et al.,* [1936] S.C.R. 120; *Barber* v. *The Goldie Construction Co. Ltd.,* [1936] O.W.N. 383; *Bilinski* v. *Metrick and Canadian Metal Trap Co.,* [1937] O.W.N. 553; *Durkee Atwood Co.* v. *Auger,* [1939] 1 D.L.R. 103, and Fox's Canadian Patent Law and Practice, 504.

In the present case it is not to be overlooked that the plaintiff expressly invoked in his statement of claim the Provincial juris-

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diction to declare both his said patents to be valid and obtained a judgment to that end; but if his present objection to jurisdiction should prevail then the judgment he has so obtained in his favour must fall and be set aside to that extent at least.

Turning, then, to the alleged infringement of the first patent as regards the top and rear radiators and the air-ring, or "breather," I find myself so much in agreement with what my brother O'HALLORAN says on that question in his judgment that —except to note the latest case on the subject *National Elec. Products Corpn.* v. *Industrial Elec. Products Ltd.*, [1939] Ex. C.R. 282—it would not be profitable to add to it, and therefore these claims should be rejected and the appeal allowed.

As to the alleged infringement of the second patent, the feed unit sawdust burner, I can only reach the conclusion upon the evidence before us that the burners in question were either made pursuant to the plaintiff's leave or licence, or by defendant Le Blanc, and therefore no action for infringement lies against appellants, and so the appeal must be allowed on this claim also.

It only remains to note, as to costs, that while they should in general follow the event yet in particular those "of and occasioned by" the amendment of the notice of appeal granted, on 17th November during this hearing, to appellants, were then ordered to be borne by them in any event of this appeal.

MACDONALD, J.A.: I would allow the appeal with reference to the first patent but would dismiss it with reference to the second patent for the reasons given by my brother O'HALLORAN.

O'HALLORAN, J.A.: The respondent Skelding alleged the appellant Daly had infringed two of his patents in the manufacture of hot-air furnaces. The learned Chief Justice of the Supreme Court who tried the case found Daly had

> infringed upon the invention of the plaintiff by taking the substance of his invention.

Skelding asserted Daly had infringed the first patent in two ways: (1) By making a furnace with a combination of top and rear radiators and (2) by making a "breather," a device to improve combustion in the furnace. It is admitted Daly had not attached the "breather" to the type of furnace into which

he built the combination top and rear radiators, but had attached it to other types of furnaces. Skelding asserted also that Daly had infringed a second patent relating to a burner or feed unit, referred to generally as a sawdust burner. These three distinct questions of infringement will be considered separately. But first there is a question of jurisdiction.

I. Jurisdiction.

Daly pleaded, *inter alia,* the invalidity of the patents as a matter of defence in the action for infringement. His counsel pressed that contention at this Bar. Counsel for the respondent objected to the jurisdiction of the Court appealed from and of this Court to entertain that issue. He maintained the Exchequer Court of Canada alone had jurisdiction. The Patent Act, Cap. 150, R.S.C. 1927, and amending Acts was repealed and re-enacted by Cap. 32 of the Statutes of Canada, 1935. Sections 54 to 59 inclusive appear in the statute under the heading of "Infringement" while section 60 appears under the heading of "Impeachment." It is apparent therefrom that while the Exchequer Court is given jurisdiction to declare a patent invalid or void in a substantive action for its impeachment, yet the Provincial Courts (if I may call them so) are given jurisdiction also in an action for infringement. This is an action for infringement. By section 59 thereof

> The defendant, in any action for infringement of a patent may plead as matter of defence any fact or default which by this Act or by law renders the patent void, and the court shall take cognizance of such pleading and of the relevant facts and decide accordingly.

This section permits the defendant in an action for infringement to plead invalidity of the patents. In my view that is what the appellant has done here. The objection to jurisdiction should be overruled accordingly.

II. Combination of top and rear radiators in furnace (patent No. 283712).

Did Skelding in his application for the patent claim this combination as his invention? The statement of claim in general terms alleged infringement of the above patent granted for "hot air heating systems." At the end of the specification attached to the patent are eleven claims setting forth what Skelding claimed as his invention. But they do not contain any claim for

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a combination. It was not until Skelding's cross-examination at the trial that this combination of top and rear radiators emerged as the essence and substance of his invention. In cross-examination Skelding abandoned any claim for infringement of claims 1 through 5. Claims 10 and 11 relate to the "breather" (discussed hereafter) so that this aspect of the case centred on claims 6 through 9. When asked in what way Daly had infringed claim 6 Skelding said it was the way "the radiator fits on top of the combustion chamber." On further cross-examination he testified definitely that his claim for infringement was restricted to the combination of the top and rear radiators. Skelding made it very clear that claim 9 (which embodies claim 8 as well) was the only claim that covered this combination. Claim 9 reads:

> What I claim as my invention is: . . .
>
> 9. In a hot-air furnace having a casing enclosing a fire-pot, and a dome in communication with a smoke-header and a jacket depending from the smoke-header and within the casing through which the smoke is adapted to pass to increase the heat radiating areas of the furnace, said jacket comprising a vertical pipe having a dividing wall defining a down-flow and an up-flow passage.

I cannot read into that language a claim for invention of a combination of a top radiator and a rear radiator. In fact a top radiator is not mentioned at all as such in the specification or claims.

The learned trial judge appeared to take the same view; for when counsel for Daly asked Skelding in cross-examination,

> Is there any reference, Mr. Skelding, in claim 9 to a top radiator?

the learned judge stopped the witness answering with the remark

> THE COURT: Well, of course, having read it I can see . . . ; why do you ask these unnecessary questions? . . . There is no use asking the man what is not there. . . .

In the circumstances this ruling may be accepted as a definite finding by the learned trial judge that claim 9 does not refer to a top radiator. The learned judge had Daly's furnace before him in Court as well as photographs of several other furnaces, to all of which constant reference had been made by counsel and witnesses. Of course, if there is no top radiator there cannot be a combination of top and rear radiators. This finding of the Court below is borne out, by studying the position and relation of the fire-pot (3), the dome (4), the smoke-header (16) and the jacket (32) as denoted by those numbers on the drawings

attached to the specification. It is true that a radiator (5) is shown on the drawing. But one must conclude that if the essence and substance of the invention lay in the combination of that radiator (5) and the jacket (32) it would have been claimed specifically as such in claim 9 or in some other claim.

No such claim was made directly or by implication in the specification or claims. While a radiator is mentioned in claims 6 and 7, it is not mentioned in claims 8 and 9 although reference to the fire-pot and the dome is continued in these two latter claims. Again it is significant that the jacket or rear radiator is mentioned for the first time in claims 8 and 9 when reference to the radiator in claims 6 and 7 is excluded. It is not reasonable to assume that this would have been done if the combination of the radiator and the jacket was the essence and substance of the invention. It is true that in the specification and drawings a connection is shown between the radiator (5) and the jacket (32). But that connection is not shown or claimed anywhere therein to constitute a combination of top and rear radiators which Skelding asserted at the trial was the essence and substance of his invention. But even if such connection could be construed as a combination and if that were a new thing and patentable it is not protected by this patent, unless the patentee has incorporated it in a claim by express words or by plain reference. He has not done so. Section 14 (1) of The Patent Act, Can. Stats. 1923, Cap. 23 in force at the time of the application for the patent (23rd March, 1927) required that the specifications

> shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

In *Gillette Safety Razor Co. of Canada, Ltd.* v. *Pal Blade Corp. Ltd.*, [1933] S.C.R. 142, Rinfret, J., in delivering the judgment of the Court, said at p. 147:

> It follows that the nature of the invention protected by a patent and the extent of the monopoly thereby granted must be ascertained from the claims. The claims should be construed with reference to the specification and to the drawings, but, as pointed out by Lindley, M.R., in *The Pneumatic Tyre Company Limited* v. *The Tubeless Pneumatic Tyre and Capon Heaton, Limited* (1898), 15 R.P.C. 236, at 241, whether the patentee has discovered a new thing or whether he has not, his monopoly is confined to what he has claimed as his invention.

Rinfret, J. then quoted a passage from the speech of Lord Chan-

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cellor Loreburn (concurred in by Lord Halsbury, Lord Macnaghten and Lord Atkinson) in *Ingersoll Sergeant Drill Co.* v. *Consolidated Pneumatic Tool Co., Ltd.* (1907), 25 R.P.C. 61, at 82-3:

> Each claim in a specification is independent, and a plaintiff in an action for infringement must show that there has been an adoption of some new invention adequately described in a claim when fairly construed. . . . Obviously, the rest of the specification may be considered in order to assist in comprehending and construing a claim, but the claim must state, either by express words or by plain reference, what is the invention for which protection is demanded. The idea of allowing a patentee to use perfectly general language in the claim, and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the specification, is wholly inadmissible.

And *vide* also *B.V.D. Company Ltd.* v. *Canadian Celanese Ltd.*, [1937] S.C.R. 221, and *Smith Incubator Co.* v. *Seiling, ib.* 251. With respect therefore I must find there has been no infringement of claims 1 through 9, in patent No. 283712. This branch of the appeal should be allowed.

III. The "breather" (patent No. 283712).

It was asserted this device is protected by claims 10 and 11 of the specification attached to patent No. 283712. Daly testified he had not made a "breather" for eight years prior to the trial. However, that would be an infringement, if the device is patentable, since the patent issued in 1928. But the issue here is whether the device was patentable. An invention to be patentable must not have been in public use or on sale in Canada for more than two years prior to the application for the patent. *Vide* section 7 (1) of the 1923 Act, *supra*. This patent was applied for on 23rd March, 1927. Daly testified he had manufactured a "breather" seventeen years ago. Magone, a sheet-metal worker, gave evidence that the "Superior" furnace had a "breather" in it seventeen years ago. Owen, who sells McClary furnaces, testified "breathers" have been used in that furnace since 1910 at least. This evidence was not rebutted. The learned trial judge made no finding on this point but the weight of the evidence presented to the Court below substantiates Daly's contentions that the "breather" lacked novelty, and that Skelding was not the first and true inventor. The evidence points to the conclusion and on that evidence the proper conclusion is, that

the knowledge and use of "breathers" was of a public and open character several years at least, before Skelding applied for his patent in 1927. In these circumstances there cannot be infringement. The appeal should be allowed also in respect to this branch.

IV. The burner or feed unit (patent No. 368050).

This feed unit was referred to generally in the evidence as a sawdust burner. It is installed in front of the furnace and directly beneath the hopper. It has no relation to patent No. 283712, embraced in the previous references to "combination top and rear radiators" and "breather." Counsel for the appellant contended he had manufactured the burner under licence from Skelding granted in respect to a former patent which the latter held. Daly testified he had not made any sawdust burners since Skelding took his patterns back in February, 1937; that any burners made in his foundry after that date were made by one Leblanc who had rented part of his foundry. Skelding alleged infringement of his later patent No. 368050 granted 10th August, 1937; his cause of action did not include infringement of the former patent to which Daly referred. The weight of evidence supports the respondent in two respects. First: the evidence of McRae, Hassel and Thomas combined with the evidence of Daly's own book-keeper and shipping clerk Kane leaves no alternative but to find that Daly did manufacture a certain number of burners subsequently to February, 1937. Secondly, the evidence of McRae, Thomas and Hassel indicates that the burners Daly manufactured subsequently to February, 1937, complied with the specification in Skeldings patent, No. 368050. The appellants' defence of licence under a former patent must be rejected in the light of this evidence.

Counsel for the appellants contended next that the burner lacked invention. Skelding asserted the essence and substance of his invention in this language:

> The whole thing is fitting into the fire-box of the furnace. The grates are not taken out of the furnace. In every other furnace the grates are taken out. . . . It is the slope of the . . . grate which brings the fuel down to the other grate without removing the grate.

This patent has to do with certain mechanical improvement in a well-known class of feed unit. The subject-matter must lie in

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its particular mechanical mode. The point requires decision whether it involved an exercise of the inventive faculty or was it, as put by the learned President of the Exchequer Court of Canada, in *Mauck* v. *Dominion Chain Co., Ltd.,* [1933] Ex. C.R. 120, at p. 130,

> merely the product of that mechanical skill which normally results from habitual and intelligent practice.

Whether or no the burner was merely the product of that mechanical skill, the evidence does not disclose. In *Batho* v. *Invincible Renovator Mfg. Co. Ltd.* (1915), 25 D.L.R. 716, Cassels, J. held that the grant of a patent was *prima facie* evidence of invention. I find no evidence in the appeal book to support the defence of lack of invention; and *vide* section 59 of The Patent Act, *supra.* The defence evidence did not proceed further in this respect, than Daly's discovery evidence that nearly all sawdust burners are made on the same principle. But even if the principle were the same, but the method different, the method if patentable may be protected—*vide Imperial Tobacco Co. of Canada Ltd. et al.* v. *Rock City Tobacco Co. Ltd.,* [1936] Ex. C.R. 229, at 238, affirmed [1937] S.C.R. 398. As this defence must fail also I would dismiss this branch of the appeal.

In the result therefore the appeal should be allowed in respect to the infringements of patent No. 283712, but dismissed in respect to the infringement of patent No. 368050.

Appeal allowed in part, Martin, C.J.B.C. dissenting in part.

Solicitor for appellant: *J. M. Coady.*
Solicitor for respondent: *F. J. Bayfield.*

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Sept. 26, 27, 30; Oct. 1; Nov. 22.

Refd to Re Groves + Council of College of Dental Surgeons of B.C. 48 DLR (2d) 264 (BCSC)

Criminal law—Balance sheet of company—False by implication—Liability of director—Criminal Code, Sec. 414.

McLeod, who was president and managing director of the Freehold Oil Corporation Limited, obtained the sum of $40,336.46 on the 31st of March, 1937, from an associate named Miller through his secretary (Miller being away at the time) and deposited it to the credit of the Freehold Company. In repayment thereof he handed the said secretary six post-dated cheques of the Freehold Company aggregating the above sum and dated respectively the 8th, 9th, 10th, 12th, 13th and 14th of April, 1937. Three days later the Freehold Company's balance sheet was made up by the company's chartered accountants, showing current assets as of March 31st, 1937, to include "cash in bank $48,789.76." This amount included the sum of $40,336.46 obtained by the appellant as aforesaid. Four days later at a meeting of the directors the balance sheet was approved. The annual meeting of the company was called for April 14th and a copy of the balance sheet was directed to be forwarded to the shareholders with the notice calling the meeting. No disclosure was made to the shareholders of the six post-dated cheques. McLeod was convicted on a charge "For that between the 17th day of March, 1937, and the 17th day of April, 1937, then being a director of Freehold Oil Corporation Limited, a public company, he did unlawfully concur in making a statement of the financial position of the said Freehold Oil Corporation Limited, knowing the same to be false in a material particular, to wit: That the assets of the said company consisted of forty-eight thousand, seven hundred and eighty-nine dollars and seventy-six cents in cash, with intent to deceive the shareholders of the said Freehold Oil Corporation Limited."

Held, on appeal, reversing the decision of LENNOX, Co. J. (MACDONALD, C.J.B.C. and O'HALLORAN, J.A. dissenting), that while McLeod might have been charged with falsifying the balance sheet at large in not showing the true state of the company's affairs or that it was false in particular in not disclosing the liability for the loan, nevertheless he ought not to have been convicted of making a false balance sheet as alleged in the terms of the conviction, because in truth the company had in the bank to its credit the sum of $48,789.76, and that sum was an asset of the company no matter what liabilities there were against it. The Crown elected to complain of only one item, and that item by itself was unquestionably a true and not a false "material particular." The appeal is allowed and the conviction quashed.

Rex v. *Lord Kylsant* (1931), 23 Cr. App. R. 83, distinguished.

APPEAL by defendant from his conviction by LENNOX, Co. J. of the 30th of August, 1940, on a charge that between the 17th of March, 1937, and the 17th of April, 1937, he then being a director of Freehold Oil Corporation Limited, a public company, did

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unlawfully concur in making a statement of the financial position of the said Freehold Oil Corporation Limited, knowing the same to be false in a material particular, namely, that the assets of the said company consisted of $48,789.76, with intent to deceive the shareholders of the said Freehold Oil Corporation Limited.

The appeal was argued at Victoria on the 26th, 27th and 30th of September and the 1st of October, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Elmore Meredith, for appellant: The conviction was under section 414 of the Criminal Code. There are three ingredients of this offence. The third ingredient is deceit, and there is no fraud. On the 31st of March, 1937, the balance sheet was made out, and on that date Freehold Oil Corporation had in cash $48,789.76. This money was in the bank at that time. What he seeks to prove is not in the terms of the indictment. The particulars charge two offences. It is bad for duplicity and brings the charge under section 413 of the Code, which includes the ingredient of intention to defraud, and no fraud was alleged or proved. No charge is based on section 414. This is limited solely to deceit of shareholders. The $40,336.46 is the amount around which this whole case revolves. They say the $40,000 odd was borrowed. The Hargal shares were sold before the balance sheet was made out. Section 898 of the Code relates to formal defects and not to a defect in substance. This charge shows a defect in substance: see *Rex* v. *Molloy* (1921), 15 Cr. App. R. 170. That the indictment is bad on the ground of duplicity see *Rex* v. *Disney* (1933), 24 Cr. App. R. 49; *Rex* v. *Wilmot* (1933), *ib.* 63; *Rex* v. *Louie Chue* (1924), 34 B.C. 177; Crankshaw's Criminal Code, 6th Ed., 1057. As to the particulars forming part of the charge see *Rex* v. *Harcourt* (1929), 64 O.L.R. 566. A statement is not an entry in books: see Archbold's Criminal Pleading, 28th Ed., 659; *Rex* v. *Kelly* (1916), 27 Can. C.C. 94, at p. 104; *Rex* v. *Lord Kylsant* (1931), 23 Cr. App. R. 83. The Hargal Oil transaction was an actual sale. There is no evidence upon which a reasonable judge could find accused guilty. The cheques referred to were actually issued April 6th, 1937, and not on March 31st as alleged. Mrs. Lytel's evidence was vague and uncertain and should not be accepted

as sufficient to convict accused. Her evidence is contradicted in some respects by Miss Johnson. We had money or money's worth at the time the balance sheet was issued.

Soskin, for the Crown: No entries in the books of the company were made as to the alleged sale until the 8th of April, 1937. The charge in itself is a good one. An order for particulars is matter of discretion. All that is necessary is to look at the charge itself. It has to be false in a material particular: see *Rex* v. *Kylsant (Lord),* [1932] 1 K.B. 442. As to the particulars, it does not affect the indictment: see *The King* v. *Stevens* (1904), 8 Can. C.C. 387; *Rex* v. *Buck et al.* (1932), 57 Can. C.C. 290, at p. 293. The two cases of *Rex* v. *Disney* (1933), 24 Cr. App. R. 49, and *Rex* v. *Wilmot* (1933), *ib.* 63, apply to counts and not to particulars. The $40,000 was put in for the purpose of being shown in the balance sheets as they gave post-dated cheques for paying it back. This money was borrowed and put in Freehold account to deceive the shareholders. He was guilty of deceit: see *Gluckstein* v. *Barnes,* [1900] A.C. 240, at p. 250; *The Queen* v. *Aspinall* (1876), 2 Q.B.D. 48. I say it is false for it was acquired for the express purpose of misleading the shareholders. Under section 1014, subsection 2 no substantial miscarriage of justice has arisen in the conduct of this case.

Meredith, replied.

Cur. adv. vult.

22nd November, 1940.

MACDONALD, C.J.B.C.: With deference, I cannot agree that this appeal should be allowed: the evidence supports the conviction and, in my opinion, no technical difficulties arise to displace it. Nor can I, with great respect, accept my brother MCDONALD'S statement in his reasons for judgment that

> there is not throughout the whole of the present case any suggestion of fraud

nor the further statement that there is nothing to show a part of this cash, *i.e.,* $40,336.46, to have been as contended borrowed money.

As to the first we do not consider the evidence *de novo;* our inquiry relates to whether or not there was sufficient evidence to support the conviction: as to the second it is clear from the evidence referred to by my brother O'HALLORAN that not only

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was there sufficient evidence to support the finding of a loan but also that no other finding was rationally possible: no witness advanced any other view. As to the alleged absence of "any suggestion of fraud" it is not necessary to produce shareholders to testify that they were deceived; it is enough, if established beyond reasonable doubt, that a knowingly false statement was, with the concurrence of the accused, inserted in the financial statement. My brother SLOAN in *Rex* v. *Miller* [*ante*] 121, at p. 127; [1940] 2 W.W.R. 505, at 507 where the same balance sheet was considered (and where too this item was found to be a loan) in a conspiracy charge said, speaking for the Court:

> With reference to the appellant's submission that it was not shown that the Freehold balance sheet was falsified with fraudulent intent the law presumes an intention to defraud if it was intended, as it was here, that such false balance sheet should influence and be acted upon by those it was designed to reach.

Further counsel for appellant during the hearing conceded that "if it were undeniably a loan I agree it was done to deceive the shareholders." If, in fact, any direct evidence is necessary, from which intent to deceive may be inferred it will be found in the record.

Nor do I think that a misconception, if any, by the trial judge of the *ratio decidendi* in *Rex* v. *Lord Kylsant* (1931), 23 Cr. App. R. 83 detracts in any way from the findings of fact supporting the conviction: the fact is that the trial judge meant nothing more than this—that if he discussed the evidence he might apply in a general way some of the observations of the learned judges in that case.

Briefly, appellant was convicted under section 414 of the Code of unlawfully concurring in making a statement of the financial position of the Freehold Oil Corporation Limited, knowing it to be false in a material particular—then follows the one specific respect in which it was said to be false, *viz.*, that its assets consisted of $48,789.76 in cash. This statement was false in a material particular because as to $40,336.40 of that sum it was not a cash asset at all. He borrowed it for a few weeks to carry him over the meeting of shareholders: he gave too post-dated cheques in repayment, not only concealing it from the shareholders but destroying thereby any right to treat it as an asset.

Particulars were furnished pursuant to order: they are outlined by my brother McDONALD. It appears to be suggested in the prevailing reasons for judgment, although the point is not developed, that the conviction is bad because the particulars disclose an offence under section 413: at all events that point was advanced at the hearing. These particulars were intended to perform a proper function, *viz.*, to convey information to the accused. An exact statement of particulars should disclose that appellant borrowed $40,336.46 from Miller; gave post-dated cheques as referred to and inserted the amount borrowed in his financial statement as an asset of the company. Instead of doing so Crown counsel gave as particulars a statement of appellant's explanation for the presence of this sum in the balance sheet, *viz.*, through a sale of shares (which he had no authority to make) and a repurchase of shares. If it was said that the charge was bad because an essential element was omitted it is true that it could not be made good by particulars. That is not alleged: the complaint, as stated, is that the particulars disclose an offence under section 413 of the Code. Only one count was presented; all the evidence was directed to it and no one was misled. We were not directed to any authority nor am I aware of any showing that where the facts contained in particulars might if properly framed be the subject of another count, the only count considered is bad for duplicity.

I cannot, with great respect, agree with my brother SLOAN that the Crown's case was that the balance sheet was false because it omitted "to disclose as a liability, the amount of the borrowed money," in other words failed to show it as a debit item. The Crown's case is revealed by the charge, *viz.*, that this item represented to the shareholders to be a cash asset was false in a material particular—in fact it was wholly false; the omission my brother SLOAN referred to, *viz.*, to show it as a liability, was one of the reasons (but only one) why it was false; that omission made it false: in addition on the facts it was false to call it an asset. Nor can I agree that the Crown proceeded on the assumption that the charge was an act of omission. The wording of the charge disproves it: so also the extract from the evidence referred to by my brother SLOAN. It is there stated that this "was not a proper asset." The Court repeated the same view-point.

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The submission also that as the cash item of $40,336.40 was actually in the bank available for the company's use it was not therefore false to treat it as an asset is, with respect, not sound: it ignores the fact that it was borrowed money and therefore misnamed an asset. We might test it this way: if one borrowed $40,336.46 from an associate, giving him post-dated cheques in repayment and deposited this amount to his credit in the bank his bank pass book would fairly and honestly disclose a credit to this extent: if, however, he uses his bank pass book, containing this single entry as a balance sheet, calling it an asset and showing it to creditors to secure more credit, or for any other dishonest purpose, it would be literally a false statement. It is false in a material particular, not only because the liability is not shown—that is one reason—but also because he falsely represents it as an asset: it is a false declaration that he may be looked upon as one with cash resources at his disposal. In the case at Bar the false statement to the shareholders was that the Freehold Oil Corporation Limited had a good liquid cash position as a result of its business operations; in other words that a gratifying result was achieved, *viz.*, cash assets were accumulated to the extent of $40,336.46. I think, with respect, it is perfectly clear that this item standing alone paraded as an asset is not only false *per se* in a material particular: it is false in its entirety *a fortiori* because, as appellant knew, the post-dated cheques were largely at least paid before the meeting of shareholders; it was therefore not available for company use. Authority for this view, if it is required, will be found in the reasons for judgment of my brother O'HALLORAN. It is not, with deference, therefore accurate to say that the real complaint was an omission to disclose a liability. The charge itself, discussions in the course of the trial and the findings of the trial judge disproves this suggestion.

It was submitted in argument (and by my brother SLOAN in a slight reference refers to it) that no definite findings of fact directed to the charge were made by the trial judge: at all events it was submitted that he did not confine himself to a discussion of the only charge before him. This calls for examination: His Honour said:

After the most careful consideration—bearing closely in mind the maxim of reasonable doubt—I have come to the conclusion that the Crown has proved the charge against the accused.

I do not propose to enter into a dissertation on the evidence. Much of what I might say has been said by the eminent judges who heard the *Lord Kylsant* case (1931), 23 Cr. App. R. 83.

I may say, however, that I find that the $40,336.46 was a loan from Miller Court & Company to Freehold Oil Corporation Limited, and that as it was not shown as a loan in the balance sheet, said balance sheet did not disclose the true state of the company's standing financially; also, that this was done to deceive the shareholders to whom the balance sheet was sent, and others into whose hands it might come.

He meant of course that because this sum was not properly treated as a loan but rather as an asset the balance sheet as it stood "did not disclose the true state of the company's standing financially," in other words, it was false. We have here all the necessary findings to support the conviction; the question of reasonable doubt is not overlooked; the finding that $40,336.46 was a loan is definite; it is made clear that because it was not represented as a loan but as an asset, it did not disclose the true state of the company's standing financially, meaning, not generally, but in respect to this specific item; also that it was done to deceive the shareholders. I have already dealt with his reference to the *Kylsant* case.

The main objection is that immediately following the passage referred to the trial judge went on to say:

Even if I am wrong in that, and the money was given to purchase Hargal Co. Ltd. shares owned by the Freehold Oil Corporation Limited, the sale of these shares, according to defence witnesses, was only a contingent sale, with the Freehold Oil Corporation Limited bound to repurchase them on the happening or non-happening of a certain event, and as such should have been shown (that is, as a contingent liability) on the balance sheet, in order to show the proper picture of the assets and liabilities (that is, the financial standing) of the company.

The phrase "even if I am wrong in that" throws doubt, it was said, on the findings of fact. While the statement was, with respect, unnecessary it is not fatal to this conviction. The trial judge is alluding not to the Crown's case, already dealt with, but to the submission of the defence; he used the phrase "according to defence witnesses." He meant to say that their account of the presence of this item in the balance sheet, necessarily rejected by the finding of a loan, would, if true, not disclose a proper picture of the financial standing of the company. This, I think,

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even if not, as I suggest, quite harmless, may be disregarded without injustice to the accused. No substantial wrong occurred because the trial judge, after disposing of the true issues said that, viewing it either way, the balance sheet would be false.

I do not think we are confronted with any substantial technical difficulties: in any event, if such exist, section 1014, subsection 2 ought to be applied. A judge or a jury would inevitably arrive at the same result: the evidence was conclusive on the one basic point in the case.

I would dismiss the appeal.

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

SLOAN, J.A.: The appellant appeals from his conviction by LENNOX, Co. J. and although the evidence is voluminous the issue is one of comparative simplicity. The narrow question is whether or not the conviction can be supported having regard to the evidence. Because there has been considerable argument as to just what is the *corpus delicti* I reproduce, so far as relevant, the exact terms of the conviction as follows:

> . . . the said J. W. R. McLeod, . . . was arraigned upon the charge for that he the said J. W. R. McLeod . . . being a director of Freehold Oil Corporation Limited, a public company, did unlawfully concur in making a statement of the financial position of the said Freehold Oil Corporation Limited, knowing the same to be false in a material particular, to wit:— That the assets of the said company consisted of forty-eight thousand, seven hundred and eighty-nine dollars and seventy-six cents in cash, with intent to deceive the shareholders of the said Freehold Oil Corporation Limited, contrary to the form of the statute in such case made and provided, and pleaded not guilty; . . . and after hearing the evidence adduced as well in support of the said charge as for the prisoner's defence I find him guilty of the said charge as aforesaid and I accordingly sentence him to imprisonment for a term of eighteen (18) months with hard labour and to pay a fine of Five Thousand Dollars ($5,000). . . .

It will be noted that the accused was neither charged nor convicted of concurring in making a statement rendered false by the omission of material particulars but a false statement in a specific material particular. An ingenious attempt was made (in effect) to substitute particulars of the charge for the conviction but the appeal is from the conviction and not from the particulars. Further, I agree with my brother MCDONALD that the

particulars herein (set out in his judgment) are in most part not particulars of the offence charged but are particulars of an offence not charged.

Bearing in mind the precise terms of the conviction it is of interest to note what was the theory advanced below by the Crown. It is clear the Crown contended that the sum of $40,336.46 of the sum of $48,789.76, which appeared as an asset in the 1937 statement or balance sheet of the Freehold Company, was not in reality an asset of the company although standing to the credit thereof in the bank because it was borrowed money placed to the credit of the company without a corresponding entry of the loan on the liability side of the said balance sheet.

That such was the position of the Crown upon which issue was joined below is, in my view, put beyond question by the submission of Crown counsel upon the unsuccessful application of the accused to dismiss at the close of the Crown's case. The following appears from the record:

Meredith [counsel for the accused]: I would like to draw your Honour's attention to the charge which has been laid here [Reads charge]. Now, it has been proven conclusively, by three of the witnesses, perhaps four; it is undenied that this company had as an asset $48,789.76 in cash. Therefore there was no deception; there could be no deception or any intent to deceive in that particular. Not only did Mrs. Lytle confirm that this money was given to the company and was their money, $40,000 of it. Mr. Wray, a chartered accountant, says that, and Mr. Campbell. That has not been controverted, and there has been no suggestion that it is not true. The exhibits filed do not show that it is not true. That is the only case we have been asked to meet, and I submit that it has been fully and frankly met.

Soskin [counsel for the Crown]: [As to] the point raised by my friend that the sum of $48,000 is an asset of the company, certainly in my submission it is not a proper asset if the evidence of the Crown is correct, that is to say, that was money borrowed by the company. It cannot constitute a proper asset of the company. In other words, in portraying the position of the company, particularly under cash as an asset of the company, it cannot be when it is merely a loan.

. . . . .

Soskin: The contention of the Crown is that this is a loan, and it is indicated in the balance sheet as an asset.

THE COURT: . . . The question that Mr. *Meredith* is raising is a very simple one, it seems to me, and the point there is this, that the Crown says you have shown a certain amount of cash in the bank as an asset with intent to deceive.

Meredith: Yes.

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THE COURT: Now, there is undoubtedly the money in the bank . . . . , because it is certified by the bank. Whether it comes from a loan from [Miller] or from the sale of Hargal shares, it still is money in the bank.

. . . . .

THE COURT: . . . The assets of the company, you say, consist of $48,000, you mean part of the assets of the company are shown as consisting of $48,000 cash in the bank, with intent to deceive, that is what you mean.

Soskin: Yes, and it cannot be an asset when it is a loan, if it is a loan.

. . . . .

THE COURT: If as a matter of fact it was a loan, then to show it as an asset alone without a corresponding liability entry, leaving out the question of the Hargal shares altogether in the meantime, if it were a loan and accepted as an asset in the bank, and that it was a misleading balance sheet because it was shown as an asset, as a good asset on one side, it should be a liability on the other, but it is shown as an absolute asset of the company, which it was not. It was cash in the bank, but it was not an absolute asset of the company because there was a liability against that asset, and therefore the company—it was not a pure asset, it was an asset with a string on it, and not an asset alone.

Meredith: It was not an asset with a string on it. There were no strings on that.

THE COURT: There was liability for repayment.

Meredith: Yes, but there were no strings on this money.

THE COURT: Not on the actual money, but on an actual asset.

Meredith: I say that the company had the cash in the bank and could spend it in any way it had the power or right to do, and as the accountant said, it was perfectly good accounting practice on the basis my friend is seeking to put it, and if it was a deception on the part of the accused, it was a deception on the part of the chartered accountant in setting it up.

Soskin: I think in the *Lowe* and *Wilson* [*Lord Kylsant's?*] case, where a case of deception came in, where a false balance sheet or prospectus was published, and it admitted everything contained in it was true, but with the exception of something omitted which changed the complexion of it, my submission is that this bears on the same point. I submit, and my contention is that the correct view is that this is an absolute asset as set out here, and that this is an absolute asset of $48,000, whereas, in fact, it really is not, because they failed to disclose that this was a loan. This could not possibly have been a true asset of the company, because they did not disclose the other side.

. . . . .

It is clear from the foregoing excerpts, notwithstanding the form of the particulars, that the sole substantial complaint of the Crown was that the balance sheet was false in one particular, *i.e.*, in omitting to disclose the liability to repay the amount of the borrowed money.

This, however, was not the crime with which the appellant was charged nor for which he was convicted.

When we turn to the reasons for judgment of the learned trial judge the following appears:

After the most careful consideration—bearing closely in mind the maxim of reasonable doubt—I have come to the conclusion that the Crown has proved the charge against the accused.

I do not propose to enter into a dissertation on the evidence. Much of what I might say has been said by the eminent judges who heard the *Lord Kylsant* case (1931), 23 Cr. App. R. 83.

I may say, however, that I find that the $40,336.46 was a loan from Miller Court & Company to Freehold Oil Corporation Limited, and that as it was not shown as a loan in the balance sheet, said balance sheet did not disclose the true state of the company's standing financially; also, that this was done to deceive the shareholders to whom the balance sheet was sent, and others into whose hands it might come.

Even if I am wrong in that and the money was given to purchase Hargal Co. Ltd. shares owned by the Freehold Oil Corporation Limited, the sale of these shares, according to defence witnesses, was only a contingent sale, with the Freehold Oil Corporation Limited bound to repurchase them on the happening or non-happening of a certain event, and as such should have been shown (that is, as a contingent liability) on the balance sheet, in order to show the proper picture of the assets and liabilities (that is, the financial standing) of the company.

It is my opinion, with every respect, that the learned trial judge fell into error and overlooked the basic element in this case, *viz.*, that the accused was not charged at large (as in *Kylsant's* case) with the making of a false balance sheet but with the making of a balance sheet false in a material particular, to wit: that the assets consisted (*inter alia*) of $48,789.76 in cash.

To sum up it seems to me that there are three distinct positions taken in this case:

(a) That of Crown counsel who contended that of the sum of $48,789.76 in the bank to the credit of the company $40,336.46 thereof was not an asset of the company because the balance sheet failed to show a corresponding debit item of $40,336.46 for moneys loaned to the company.

(b) That of the learned trial judge who considered that as the loan was not shown, the balance sheet did not disclose the true state of the company's standing financially and therefore the accused could be found guilty of falsifying the said balance sheet, not by the omission of the liability item but by showing as an asset cash in the bank which in fact was there and which belonged to the company.

(c) The position (in the alternative) of the appellant who

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submitted in effect that while he might have been charged with falsifying the balance sheet at large in not showing the true state of the company's affairs or for that it was false in particular in not disclosing the liability for the loan (or as he alleged a contingent sale) nevertheless he ought not to have been convicted of making a false balance sheet as alleged in the terms of the conviction because in truth the company had in the bank to its credit the sum of $48,789.76 and that sum was an asset of the company no matter what liabilities there were against it. In other words, the Crown elected to complain of only one item and that item by itself was unquestionably a true and not a false "material particular."

In my view, with deference, this position taken by the appellant is the sound one.

As Crown counsel, before us, relied to a degree upon *Kylsant's* case, *supra,* I deem it advisable before leaving this case to say a word upon that one. The accused in that case won an acquittal upon two counts of the indictment but was convicted upon the third, *i.e.,* for publishing as a director a false prospectus. Sir John Simon, counsel for the accused, asked for particulars of the alleged falsity but later (p. 88) stated that he was satisfied that Crown counsel's opening address had furnished the particulars to which he was entitled. The said opening remarks indicated the Crown's case was that the prospectus was false in not what was disclosed therein but by reason of what was omitted. Then as Avory, J. said at p. 89:

> So bearing in mind those passages of the opening, and the concession which was made by the learned counsel that that supplied him with sufficient particulars of this indictment, the issue before the jury was defined, and the trial on that issue proceeded. . . .

Had Sir John Simon pressed his application I have no doubt particulars would have been furnished under the same heading as those delivered in *Rex* v. *Bishirgian* (1936), 25 Cr. App. R. 176, at p. 178, *viz.*:

> "Particulars showing how the omissions in the prospectus made it false in a material particular." . . .

That is not, as I see it, the case the Crown attempted to make out herein. I am unable to say that the principle in *Kylsant's* case can be applied to support this conviction.

In the result, for the reasons stated, and with deference, I would allow the appeal and set aside the conviction. It follows that it is unnecessary for me to make any reference to what were submitted to be alternative and inconsistent conclusions reached by the learned trial judge.

O'HALLORAN, J.A.: The appellant was president and managing director of a public company, Freehold Oil Corporation Limited. On 31st March, 1937, he obtained the sum of $40,336.46 from his associate Sidney W. Miller through the latter's secretary, Mrs. Effie Lytle (Miller being then in Eastern Canada) and deposited it to the credit of the Freehold Company. In exchange therefor and in repayment thereof he handed Mrs. Lytle six post-dated cheques of the Freehold Company aggregating $40,336.46 and dated respectively April the 8th, 9th, 10th, 12th, 13th and 14th, 1937. Three days later the Freehold Company's balance sheet was made up by the company's chartered accountants showing current assets as at 31st March, 1937, to include "cash in bank $48,789.76"; this amount included the sum of $40,336.46 obtained by the appellant as aforesaid. Four days later, on 3rd April, at a meeting of directors of the Freehold Company then held, the balance sheet was approved, and the annual general meeting of the company was called for 14th April.

A copy of the balance sheet was then directed to be forwarded the shareholders (some 1,133 in number) together with the notice calling the annual meeting. This meeting was held on 14th April, 1937, but no disclosure was made to the shareholders of the six post-dated cheques, the last of which on that very day—the 14th of April—reduced the company's cash asset position to where it was before the appellant had obtained the sum of $40,336.46 on 31st March in the manner stated. In consequence the appellant was convicted by LENNOX, Co. J. of an offence under section 414 of the Criminal Code in that he: [already set out in head-note].

This conviction resulted largely from the evidence of Mrs. Effie Lytle from whom he received the $40,336.46 in the manner stated. She gave evidence for the prosecution. The value of her testimony was vigorously attacked by counsel for the appellant. Perusal thereof convinces me at least, that her evidence is unshaken in its important features. She testified in positive

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terms that the cheque for $40,336.46 which she gave the appellant on 31st March, 1937, was a loan to the Freehold Company. There were three persons who had direct knowledge of the nature of that transaction. Mrs. Lytle was one and testified for the prosecution as stated. The other two persons who had direct knowledge, Sidney W. Miller and the appellant, did not come forward to deny her evidence that it was a loan.

The learned trial judge accepted Mrs. Lytle's evidence. In so doing he found the prosecution had discharged the *onus* of satisfying him beyond reasonable doubt that the defence explanations could not be accepted as reasonable. The record discloses no reason why he should not have accepted her evidence. It is supported by the repayment of the said sum of $40,336.46 in full within fifteen days after it had been obtained from her. In the circumstances the transaction must be regarded as a loan, as found by the learned trial judge. Once that conclusion is reached it follows that the balance sheet was falsified as charged. For the failure to disclose this loan in the balance sheet rendered the statement "cash in bank $48,789.76," such a partial and fragmentary statement of fact that it became false in itself as it made the balance sheet a document of deception in its misrepresentation to the shareholders of the true financial position of the company.

In addition to the attack on Mrs. Lytle's evidence to which I have referred, counsel for the appellant advanced four other main grounds to quash the conviction, *viz.*, (1) That the conviction is bad for duplicity in that it contains the ingredients of an offence under section 413 (making a false entry) as well as of an offence under section 414 (making a false statement); (2) the statement of the cash sheet asset position at $48,789.76 was in itself literally correct and therefore the balance sheet could not be regarded as false; (3) the particulars in the charge as well as the supplementary particulars relate to an offence under section 413 (*viz.*, false entries) and not to an offence under section 414 as charged; and (4) the accused was not given the benefit of the doubt. These four grounds are considered separately.

I. That the conviction is bad for duplicity.

It was first argued the conviction contained the ingredients of two offences; one, of making a false entry under section 413, and the other under section 414, of making a false statement, that is to say, a false balance sheet. In my view, this question of duplicity (in the form stated) is the real background of the case put forward by the appellant. For it permeated the argument on the succeeding grounds of appeal to such an extent that it is all important now to isolate it from them, if they are to be evaluated on their own merits. Instead of being pressed as originally stated, it has emerged in another form, *viz.*, that the particulars and supplementary particulars relate to an offence under section 413 and not to an offence under section 414. This of course is quite a different point and will be considered in caption III. *post.* It may be said now however it was not contended in that argument that the charge itself was bad.

Scrutiny of the conviction reveals it has scrupulously followed the language of section 414 and contains the necessary ingredients of an offence under that section. The appellant as a "director of a company" was convicted of

> concurring in making a statement which he knew to be false in a material particular [discussed in caption II. *post*] with intent to deceive the shareholders.

Reduced to popular language this means the appellant concurred in making and presenting a balance sheet which he knew would deceive the shareholders because its statement of the cash asset position did not reflect the true financial position of their company. A dominant purpose of section 414 seems to me to be the protection of shareholders from deception in the affairs of their company. The logical test of the falsity of a balance sheet under that section surely is, would the shareholders be deceived by it? The "material particular" should reasonably indicate the source of that deception. Falsity in a material particular is an element, but the nature of the section precludes it being the dominant element of the offence there brought into being. The master element is rather the deception of the shareholders which springs from the implications of the balance sheet made up as it is from entries in the company books.

These entries, once translated into the balance sheet acquire a

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new significance from the relation to each other they may be given there, and thus they may give rise to implications in the minds of the shareholders, quite distinct from the truth or falsity of these entries when regarded individually. If the shareholders were deceived as to the true financial position of their company, by the implications arising from an entry in the balance sheet, may it be said reasonably that a charge under section 414 is bad for duplicity, because it describes that entry in the balance sheet as the material particular which caused the deception of the shareholders? I do not think so. The charge contains the necessary ingredients of an offence under section 414. The fact that one of these ingredients may also be one of the several ingredients of a different kind of offence under section 413, cannot vitiate the conviction under section 414. And *vide Rex* v. *Bassey* (1931), 22 Cr. App. R. 160 regarding the distinction between intent to defraud and intent to deceive, which is closely *ad rem,* if this first ground of appeal should invite further discussion.

I leave this first ground therefore, with the conclusion that the conviction is founded upon a valid charge under section 414, and that it must be so regarded in the ensuing discussion of the remaining grounds of appeal. That is to say section 413, as well as any argument which springs from that section is eliminated from consideration.

II. Balance sheet entry "cash in bank $48,789.76."

The conviction sets forth the company statement (which was in fact the balance sheet) was false in a material particular because it stated the cash asset position at $48,789.76 "with intent to deceive the shareholders." The company admittedly had $48,789.76 in cash to its credit on 31st March, 1937. It was contended accordingly the balance sheet could not be false; it was argued section 414 relates to making a statement false in a specific particular, and not to the making of a false balance sheet with intent to deceive the shareholders.

I am unable to separate this contention from the premise which I think it necessarily implies, *viz.,* that the conviction is for making a false entry, that is for an offence under section 413, and not under section 414 for making a false balance sheet with intent to deceive the shareholders as to the true financial posi-

tion of the company. But for reasons stated in caption I. the conviction must be regarded as containing the necessary ingredients of an offence under section 414. And the point now to be decided is whether the balance sheet may be regarded as a document of deception to the shareholders under section 414, despite the fact that the material particular from which that deception arose may in itself be literally accurate as a book entry.

The literal accuracy of the item "cash in bank $48,789.76" on 31st March, 1937, was the very foundation and springboard of the charge and the case for the prosecution. The charge and conviction was directed to this, that the falsity of the balance sheet lay in its deception of the shareholders; that the "material particular" by which the shareholders were deceived was that the entry "cash in bank $48,789.76" by its literal accuracy, falsified the balance sheet as a whole, because the balance sheet then presented to the shareholders a false view—not of the company's cash in bank on 31st March, 1937—but of the true financial position of the company. The case for the prosecution as stated in the charge and borne out in the conviction may be epitomized in the language of Lord Chief Justice Hewart in *Rex* v. *Bishirgian* (1936), 25 Cr. App. R. 176, at 182 that the statement "cash in bank $48,789.76" was

> . . . such a partial and fragmentary statement of fact that the withholding of that which is not stated

(in the case at Bar the liability of $40,336.46 whether absolute or contingent—*vide* caption IV. as well as Mrs. Lytle's evidence, *supra*)

> makes that which is stated false.

There is no doubt that on 31st March, 1937, the company had $48,789.76 cash to its credit. But the statement of that material particular in the balance sheet was the foundation of the case for the prosecution. For when it was translated into the context of the balance sheet without disclosure to the shareholders of the conditions under which $40,336.46 of that amount appeared therein, it became a false statement because of what it implied, as it deceived the shareholders as to the true financial position of the company. A balance sheet may be false under section 414, because of what is implied from words and figures in it which may in themselves be literally and individually correct:

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vide Rex v. *Kylsant* (1931), 101 L.J.K.B. 97, at pp. 101 and 103-4. Mr. Justice Avory who delivered the judgment of the Court of Criminal Appeal cited Lord Macnaghten's observations in *Gluckstein* v. *Barnes,* [1900] A.C. 240, at 250-1 in regard to a prospectus of which he said "in the letter it is true" (p. 103):

" . . . , it is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes half a truth is no better than a downright falsehood."

Mr. Justice Avory also cited what Lord Halsbury said in *Aaron's Reefs* v. *Twiss,* [1896] A.C. 273, at p. 281 (p. 104):

"If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be difficulty in showing that any specific statement is untrue."

The *Kylsant* case which concerned a false prospectus was decided under the English Larceny Act from which section 414 of the Criminal Code had its origin: *vide* Middleton, J. in *Rex* v. *Harcourt* (1929), 64 O.L.R. 566, at 572. The falsity of the Freehold balance sheet in a material particular lay in the statement of the cash asset position at $48,789.76; for the contrast between this statement and what was not stated, necessarily implied to the shareholders, that the company was in a far stronger financial position than it really was. In the result the balance sheet instead of placing the true financial position of the company before the shareholders, in fact concealed it from them. Two extracts from the judgment of Lord Chief Justice Hewart in *Rex* v. *Bishirgian* (1936), 25 Cr. App. R. 177 are cited as apposite to the circumstances of this case. In the first he approves of this extract from the summing up of the learned trial judge to the jury at p. 183:

"This document [prospectus] cannot be a false document merely because something is omitted; it has to go beyond that. The omission has to make that which is stated affirmatively untrue, untrue in the sense that it creates clearly and intentionally an impression in the public, a belief in the mind of the public, which is wrong."

and proceeds at p. 184:

The contention on the part of the prosecution was that the prospectus by that which it did state with regard to the businesses of . . . , and especially by contrast with what it omitted to state, gave, and was intended to give, an utterly false description of the business.

But it is said the *Kylsant* case and other cases cited have no application. I am unable to separate that contention from an implied assumption that the conviction is for an offence under section 413, *viz.*, for making a false entry. But such an assumption is excluded for reasons stated in caption I., for the charge is that the balance sheet is false in that material particular of $48,789.76 "with intent to deceive the shareholders." But how could that material particular be in itself individually correct and yet deceive the shareholders? With respect, the answer leaves no room for uncertainty, particularly in the case of an experienced company official such as the appellant. One need but read the balance sheet to appreciate at once that when that item appeared in the context of the balance sheet it would deceive the shareholders by concealing from them the true financial position of the company. It is plain that it would induce the shareholders to believe that all of the sum of $48,789.76 was the money of the company acquired in the ordinary course of its business, and that none of it was subject to an undisclosed obligation for repayment, or subject to an undisclosed contingency, which would materially alter its cash asset position.

In the *Kylsant* case the accused was charged with circulating a written document which he knew to be false in a material particular in that it concealed the true position of the company. In the case at Bar the charge is making a balance sheet which the accused knew to be false in a material particular by stating the cash asset position of the company at $48,789.76 with intent to deceive the shareholders. The essence of the charge in the case at Bar as in the *Kylsant* case was deception of the persons for whom the statement was prepared. Concealment is a necessary incident to deception; it is a matter of degree in each case. Although concealment was not averred in the charge here in the same language as in the *Kylsant* case, yet it was stated none the less positively, by plain implication. For an averment in a charge that a cash asset position, literally correct in itself, was stated with intent to deceive the shareholders, carries with it as unmistakable an implication of concealment as if the word "concealment" itself had been used.

But there is more in this case than an unmistakable implica-

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tion of concealment. It is directly averred. For the charge must be read with the supplementary particulars set out in caption III. *post*. To say that a statement "conceals the true position" as in the *Kylsant* case, or to say as here "it does not reflect the true position" (*vide* supplementary particulars), is simply saying the same thing in different words to a person charged under section 414 with intent to deceive shareholders. If anything it is said more directly in this case, because in the *Kylsant* case specific particulars were not pressed for, and the prosecution was thus able to avoid reference to any detailed words or figures. The unmistakable implication of concealment contained in the charge before us was fixed and clarified beyond dispute, by the specific language contained in the supplementary particulars. These particulars did not attempt to add to the charge any necessary ingredient not already present therein; but they did carry out the true function of particulars (*vide* caption III. *post*), by giving the accused further information of that which it was intended to prove against him.

III. That the particulars and supplementary particulars do not relate to an offence under section 414.

Supplementary particulars were given as follows:

The false statement consists of entries in books of Freehold Oil Corporation Limited, showing sale of 203,403 shares of Hargal Oils Limited on March 31, 1937, for $40,336.43, and subsequent entries showing repurchase of 203,463 shares from Morgan Engineering Company in April, 1937, for $40,336.46, and audited balance sheet of Freehold Oil Corporation Limited made up as at March 31, 1937, showing an asset "Cash in bank $48,789.76," which did not reflect the true financial position of Freehold Oil Corporation Limited at March 31, 1937.

It was not contended that the particulars or supplementary particulars vitiated the charge under section 414. But it was contended they relate to an offence under section 413, and therefore that the evidence directed thereto was inadmissible on a charge under section 414. However, if what is said in captions I. and II. hereof concerning the ingredients of an offence under section 414 is correctly stated, then the impugned particulars must be held to relate properly to the charge and conviction, and the objection to the evidence falls accordingly.

The function of particulars is to give the accused further information of that which it is intended to prove against him,

so that he may have a fair trial. Their purpose is not to fetter the prosecution in its presentation of the case against the accused: *vide Reg.* v. *Stapylton and Others* (1857), 8 Cox, C.C. 69 and *Rex* v. *Buck et al.* (1932), 57 Can. C.C. 290, at p. 293. Paradoxically the complaint of the appellant in essence seems to be he was given too much information of what it was intended to prove against him. I have studied the evidence in the light of the charge and the particulars, and I cannot find the appellant was misled as to the offence with which he was charged and to which the particulars were directed; and *vide Rex* v. *Trainor* (1916), 27 Can. C.C. 232, at pp. 237-8. Mrs. Lytle's evidence given at the outset of the trial as to the manner in which the $40,336.46 was obtained, bore directly upon the item in the balance sheet "cash in bank $48,789.76" and the consequent deception of the shareholders as to the true financial position of the company on 31st March, 1937, and at the time of the annual meeting on 14th April, 1937.

It may be that in a purely verbal aspect, the particulars and supplementary particulars could have described in more exact language the intimate relation of the $40,336.46 book entries to the cash asset position in the balance sheet. But in view of the accountancy questions naturally to be expected in a charge relating to a false balance sheet, I am satisfied that the reference to the book entries when made in direct relation to the balance sheet, as they were, must be regarded reasonably as a statement of particulars of material evidence which the prosecution regarded necessary to present against the appellant in order to substantiate the charge under section 414. As such they carried out the true function of particulars to inform the appellant of what it was intended to prove against him: *vide Rex* v. *Buck et al., supra.* Perusal of the record convinces me that the evidence relates to the particulars and supplementary particulars, which in turn relate to the charge as laid under section 414, and that the particulars and supplementary particulars did not mislead the appellant as to the nature of the offence with which he was charged. In my view the offence under section 414 of which he was convicted was averred against him in a manner sufficiently explicit to enable him to understand precisely what he was charged with.

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IV. Benefit of the doubt.

It was argued that because the learned trial judge said "even if I am wrong" in finding the transaction a loan, yet the charge was proven even if it were a contingent sale, he failed to give the accused the benefit of the doubt. In other words, it is argued if it were a contingent sale and not a loan, then the accused was not guilty as charged. The appellant was charged in concurring in the making of a balance sheet false in "a material particular" *viz.*, in stating the cash asset position at $48,789.76 with intent to deceive the shareholders. The particulars and supplementary particulars disclosed this statement of the cash asset position rendered the balance sheet false in that respect, because of its failure to show the conditions under which $40,336.46 of that cash position appeared. The supplementary particulars do not set up the $40,336.46 as the proceeds of a loan or a contingent sale. They cite the entries concerning the transaction from the company books of account and relate these entries to the balance sheet statement "cash in bank $48,789.76."

The appellant is thereby informed that the balance sheet "did not reflect the true financial position" of the company; thus detailing further the "material particular" in which the shareholders were deceived, and making it clear that this deception rendered the balance sheet false. Whether the $40,336.46 was obtained by loan or by contingent sale therefore did not matter. In either event the charge was sustained for the balance sheet was false as it deceived the shareholders as to true financial position of the company. It was false in a material particular arising out of the statement of the cash position at $48,789.76 without disclosing the liability, absolute or contingent by which $40,336.46 thereof came into being. Reading the learned judge's remark "even if I am wrong in that" in the light of the nature of the charge, the particulars furnished, the evidence before him and the *Kylsant* decision to which he referred I am of the view the appellant was accorded in full degree that benefit of the doubt which the law demands.

In conclusion the evidence supports the conviction of the appellant under section 414. He knew the statement of the cash asset position in the balance sheet did not reflect the true position

of the company. The intent to deceive the shareholders is presumed: *vide Reg.* v. *Birt* (1899), 63 J.P. 328; *Girvin* v. *Regem* (1911), 45 S.C.R. 167, at 169 and *Rex* v. *Miller* (1940), [*ante*] 121, at 127.

With deference, I would therefore dismiss the appeal.

MCDONALD, J.A.: The appellant was convicted before LENNOX, Co. J. [His Lordship set out the charge.]
Particulars were ordered and delivered and as delivered may be briefly stated as follows: [already set out in the judgment of O'HALLORAN, J.A.]
It will be noted that the words of the charge march with those of section 414 of the Criminal Code under which section the charge was laid and under which the learned judge convicted the accused.

The particulars form part of and must be read with the charge. *Rex* v. *Harcourt* (1929), 64 O.L.R. 566. The words contained in the particulars down to and including $40,336.46 where secondly used have no application whatever to a charge laid under section 414 of the Code. They relate, and could only relate, to a charge laid under section 413 (*b*)—making or concurring in making a false entry in any book of account or other document. From this point of view the charge when read with the particulars (as it must be) is bad for duplicity, and if a charge should hereafter be laid under section 413 the appellant could not plead *autre fois* convict.

There is, however, in my view, a more serious objection to the validity of this conviction. The finding below is that while on the material date the company had cash in the bank in the amount of $48,789.76, as shown in the impeached statement, nevertheless the statement was false in that it failed to show (as the learned judge finds the fact to be) that $40,336.46 of that amount represented money borrowed by the company and still owing to its creditor.

The learned trial judge I think misdirected himself in purporting to follow the decision of the Court of Criminal Appeal in *Rex* v. *Lord Kylsant* (1931), 23 Cr. App. R. 83. In my opinion that case has no application to the present set of circum-

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stances. There the charge was laid under a section of the Larceny Act similar to section 414 of the Criminal Code and it was held, as it is argued here, that where the accused issued a statement or prospectus showing the assets and failing to show an existing liability he was guilty of making a false statement. It is to be noted, however, that in *Lord Kylsant's* case counsel for the defence instead of pressing his application for particulars, expressed his willingness to accept as sufficient particulars, a statement made by Crown counsel in opening the case. The door was thus left open and the Court held that the concealment in that case did constitute a false statement. The basis of the decision however is set out at p. 93 of the report where Avory, J. made the following observations:

> Then you have to show before you can get any further at all that it was a deliberately concocted instrument, the instrument of a definite scheme to defraud or to deceive, as the case may be, and therefore in order to prove a case of fraud of this latter type, fraud as it were by concealment, the intent of the parties must be established at the outset.

There is not throughout the whole of the present case any suggestion of fraud and *Lord Kylsant's* case I think cannot be made to apply. The conviction cannot stand and should be quashed.

Appeal allowed, Macdonald, C.J.B.C. and O'Halloran, J.A. dissenting.

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CLARIDGE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence—Interurban train—Passenger about to step on lower step of vestibule when train starts—Takes hold of grab-handle and is dragged some distance before train stops—Muscles of arm severed—Damages.

The plaintiff, who only had one arm (the right), was at the Fraser Arm Station waiting for the interurban train going to Vancouver. As the train came into the station he was at the door of the waiting-room about twelve feet from the edge of the platform. Two or three passengers entered the vestibule of the front car (a two-car train) ahead of him, and according to his story he put his foot on the lower step of the vestibule when the car started with a jerk. There were two grab-handles on the vestibule, one on each side. He grabbed the left grab-

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handle, lost his balance, and was dragged some feet before the train stopped, and he was thrown to the platform and crashed against a rail at the west end of the platform. There was conflict of evidence as to when he took hold of the left grab-handle. His evidence was corroborated by a witness sitting in the front car close to the vestibule, who said he was about to put his foot on the lower step when the car started, but the brakesman who signalled for the train to start and two men in the rear car stated the plaintiff ran from the door of the waiting-room after the car started and grabbed hold of the left grab-handle. It was held on the trial that the weight of evidence was in the plaintiff's favour, and judgment was given accordingly.

Held, on appeal, affirming the decision of MCDONALD, J., that the trial judge was convinced, after analysis, that the "weight" of evidence as distinguished from "numbers" of witnesses supported respondent's case, and unless convinced the findings of fact are "clearly wrong" the Court of Appeal will not interfere. There is no ground for so finding, and the appeal is dismissed.

APPEAL by defendant from the decision of MCDONALD, J. of the 9th of March, 1940 (reported, *ante*, p. 203), in an action for damages for personal injuries sustained by the plaintiff by reason of an accident at Fraser Arm Station on the defendant's Central Park Line, between New Westminster and Vancouver. There is a small store used as a waiting-room, the entrance being about twelve feet from the edge of the platform, the platform being practically on the level with the lower step of the vestibule of the interurban trains. The accident occurred at about 8 o'clock on the morning of July 14th, 1939. The plaintiff came to the station to catch the Vancouver bound train. On arriving there he went into the waiting-room and was at its door when the train arrived. The interurban was a two-car train, the front car only for passengers. The plaintiff, who only had one arm (the right), states that after two passengers got on the car in front of him he put his foot on the lower step, when the train suddenly started. He lost his balance, and then made a grab for the left grab-handle and got hold of it. He hung on, but was then swung around between the two cars. He managed to get one foot on the bottom step, but his other foot dragged along the platform. When in this position the emergency brake was put on and the car stopped, and as it was stopping he threw himself on the platform and crashed against a rail at its west end. The medical evidence disclosed that the biceps muscles had been severed, and

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this could only be done by a sudden jerk. The plaintiff's evidence that he reached the door of the car before it started is corroborated by a witness McAnnena, who was sitting in the front car near the vestibule, but the brakesman did not see the plaintiff when the car started, and two witnesses sitting in the back car testified that they saw the plaintiff running for the car after it started, and that is why he took hold of the left grab-handle and dragged along until the car stopped.

The appeal was argued at Victoria on the 11th of September, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

J. W. deB. Farris, K.C., (*Riddell,* with him), for appellant: The whole question was whether Claridge reached the car before it started or was some steps away when it started and then ran after it. Claridge and Connelly, the brakesman, decidedly differ as to this and there is little to choose between them as to credibility, but outside of Connelly the defendant had an overwhelming weight of evidence. Two men in the rear car saw Claridge running from the entrance to the front car after the train had started. There were two grab-handles, one on each side of the entrance to the vestibule. If the car was at a standstill when the plaintiff was about to enter, the plaintiff (having only one arm, the right) would have taken hold of the right grab-handle, but if the car was moving before he got there he would naturally take hold of the grab-handle nearest to him, which would be the left one, and in fact he did take hold of the left one. This clearly indicates the car was moving before he reached the vestibule. The brakesman would not start the car with a man standing close to the vestibule and about to get on. It would most likely be by jumping on the train already in motion that such a severe jerk would be given, sufficient to tear apart the muscles of the arm, and not merely a jolt of a car starting. As to the duty of the Court of Appeal on questions of fact see The Canadian Abridgment, Vol. 14, p. 119; *Ross* v. *Reopel,* [1938] S.C.R. 171; *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150; *Mersey Docks and Harbour Board* v. *Procter,* [1923] A.C. 253, at p. 258; *Robins* v. *National Trust Co.,* [1927] A.C. 515; *Georgia Construction*

Co. v. *Pacific Great Eastern Ry. Co.* (1928), 40 B.C. 290, at pp. 299-300; [1929] 1 D.L.R. 77, at p. 82; 11 C.B. Rev. 281-9; *Purdy* v. *Woznesensky,* [1937] 2 W.W.R. 116; *Caldeira* v. *Gray,* [1936] 1 All E.R. 540.

Nicholson (*Burton,* with him), for respondent: The learned trial judge concluded that the weight of evidence was decidedly with the plaintiff. The only independent witness corroborated that of the plaintiff. The conduct of the brakesman amounted to negligence: see *Squires* v. *Toronto R.W. Co.* (1920), 47 O.L.R. 613; *Wilson* v. *Winnipeg Electric R. Co.* (1922), 68 D.L.R. 617. The learned judge expressly found that the plaintiff was in the act of stepping on the car when the brakesman gave the signal to start, and his failure to see the plaintiff at the time was negligence. The appellate Court should not disturb his findings: see *McKay Bros.* v. *V.Y.T. Co.* (1902), 9 B.C. 37, at pp. 46-7; *Huntting Merritt Lumber Co.* v. *Coyle* (1922), 67 D.L.R. 655; *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.* (1927), 39 B.C. 241, at pp. 243-4; *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304, at p. 306; *Ross* v. *Reopel,* [1938] S.C.R. 171. In any event it cannot be said that the learned judge was clearly wrong: see *Ogawa* v. *Fujiwara,* [1938], S.C.R. 170.

Farris, replied.

Cur. adv. vult.

On the 5th of November, 1940, the judgment of the Court was delivered by

MACDONALD, C.J.B.C.: This is an appeal from findings of fact by a trial judge without a jury: our observations will apply therefore only to non-jury actions. Appellant submitted that respondent was injured while negligently attempting to board a moving tram-car: respondent submitted that the accident happened while he was mounting the steps of a stationary car; it started suddenly, he said, throwing him off balance causing the injuries aforesaid. The trial judge accepted respondent's view of the occurrence, supported by other evidence. It is common ground that unless this finding is set aside the appeal must be dismissed.

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It is our duty as an appellate Court to review the evidence, have regard to the fact that the *onus* is on the plaintiff, consider the language used by the trial judge, method of approach and so on and substitute our own opinion if convinced he was wrong. In that inquiry certain recognized rules should generally be observed. While, for example, questions of credibility are involved the trial judge is

> normally in a better position to judge . . . than the appellate tribunal can be:

Powell and Wife v. *Streatham Manor Nursing Home,* [1935] A.C. 243. We say generally, because the appellate Court, notwithstanding this element, if convinced of error, will interfere (*McCann* v. *Behnke,* [1940] 4 D.L.R. 272). In so doing we regard all factors disclosed by the record indicating that in our view the trial judge clearly reached an erroneous conclusion; these will differ in different cases: see also *Caldeira* v. *Gray,* [1936] 1 All E.R. 540.

We have in this Court frequently stated that unless convinced that the findings of fact are "clearly wrong" we will not interfere; we think that phrase is adequate; it has not, as far as we know, been questioned. It means of course a conviction formed after applying the principles referred to. The word "clearly" may not add materially to the meaning of the phrase: what is meant is a conviction of error.

Turning to this case the trial judge said [*ante,* p. 203]:

> In the conflict which we have in this case it becomes necessary to analyze the evidence carefully. This I have done and I have reached the conclusion that the weight of evidence is decidedly with the plaintiff. In my opinion the brakesman failed in his duty to see the plaintiff when the latter was in the act of stepping upon the car. Having failed in that duty, the giving of the signal to start the car, when the plaintiff was in a position of danger, was negligence which resulted in the plaintiff's injuries. So far as the law is concerned this is laid down very clearly in *Squires* v. *Toronto R.W. Co.* (1920), 47 O.L.R. 613, and *Wilson* v. *Winnipeg Electric Ry. Co.*, [1922] 2 W.W.R. 610.

Appellant's counsel directed attention to the first five lines in the foregoing paragraph. He submitted that an analysis of the evidence—following the course adopted by the trial judge—and "the weight of evidence"—also referred to—disclosed that the finding was clearly wrong. We do not agree. The evidence of one independent witness may have greater weight than that of

many interested parties. In this case a stranger, sitting in the car observed respondent boarding it; his evidence supported respondent's version of the occurrence. Several other witnesses, at the time or at some time, appellant's employees, gave evidence the other way, thus raising a question of credibility. Their evidence consisted largely of alleged admissions by respondent that the accident was due to his own carelessness. The trial judge might properly regard this as incredible in the light, not only of probabilities but of other evidence in the case. The trial judge was convinced, after analysis, that the "weight" of evidence as distinguished from "numbers" of witnesses supported respondent's case.

We would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *V. Laursen.*
Solicitor for respondent: *J. S. Burton.*

HODGSON LUMBER CO. LIMITED v. MARSHALL *ET AL.*

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Sept. 16; *Nov.* 5.

Mechanic's lien—Enforcement—Abandonment of work—House never completed—Filing of lien—Time—Dismissal of lien action final judgment—R.S.B.C. 1936, Cap. 57, Sec. 14; Cap. 170.

The dismissal of an action to enforce a mechanic's lien finally disposes of the plaintiff's claim and is a final judgment for the purposes of appeal.

Between the 18th of April and the 25th of May, 1939, the plaintiff supplied material to the contractor engaged by the owner to build a house. The sum due for the material so supplied was payable on the 25th of May, 1939. The work on the house discontinued on the 15th of June, 1939, and it was never completed. The plaintiff filed a lien under the Mechanics' Lien Act on the 21st of February, 1940. It was held on the trial that when the work was abandoned the building shall be deemed to be completed, that the claim was filed out of time and the action for the enforcement of the lien was dismissed.

Held, on appeal, reversing the decision of LENNOX, Co. J., that "abandonment" in its usual and accepted sense conveys a meaning quite distinct from "completion." As the house has not been completed the appellant's lien is still in existence, it cannot expire until the house has been completed and thirty-one days have elapsed thereafter. The appellant is entitled to its lien.

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APPEAL by plaintiff from the decision of LENNOX, Co. J. of the 30th of April, 1940, in an action to recover $723.94, and for a declaration that the plaintiff is entitled to a mechanic's lien against the property known as lot 14, south one-half of block 38, district lot 2027, group one, New Westminster District, according to registered plan numbered 5959. The plaintiff's claim for the above amount is for the balance due and owing by the defendants for materials supplied and delivered at defendants' request in connection with the building, repairs and alterations on the above described property, set forth in the mechanic's lien filed against the said property. The plaintiff recovered personal judgment against the Modern Housing Corporation Limited, but the lien claim was dismissed.

The appeal was argued at Victoria on the 16th of September, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Carmichael, for appellant.

Lucas, for respondent, raised the preliminary objection that the notice of appeal was not filed in time. Judgment was delivered on April 30th, 1940, and notice of appeal was filed on the 20th of July, 1940. The lien actions were consolidated on the 5th of March, 1940, when an order was made that the property in question be sold for $1,100, and that this sum be paid into Court. I am acting for L. E. Wendlend, who sued and obtained judgment for a lien before they filed their lien. The judgment appealed from is an interlocutory judgment and not final. It does not finally dispose of the action: see *McAndrew* v. *Barker* (1878), 7 Ch. D. 701; *Splan* v. *Barrett-Lennard* (1931), 44 B.C. 371; *Frumento* v. *Shortt, Hill & Duncan, Ltd.* (1916), 22 B.C. 427.

Carmichael, contra: This is not an interpleader issue. It is a final order: see *Laursen* v. *McKinnon* (1913), 18 B.C. 10; *Miller* v. *Kerlin* (1923), 33 B.C. 140; *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386.

[Judgment reserved on preliminary objection.]

Carmichael, on the merits: They contend we should have filed our lien within 31 days after abandonment of the contract. Our

last delivery of material was on May 25th, 1939, and our lien was filed on February 21st, 1940. The work was never "completed." The word "completed" excludes "abandoned." The work was discontinued on June 15th, 1939, but the material does not establish when it was abandoned. It is unreasonable to pick 31 days as the time we are entitled to for filing our lien in case of abandonment. We are entitled to a reasonable time. Section 6 of the Act creates the right of lien, and section 19 states the date of expiry: see *Catlin* v. *Douglass* (1887), 33 Fed. 569; *Clarke* v. *Williams* (1939), 54 B.C. 370; *Taylor* v. *Foran* (1931), 44 B.C. 529.

Lucas: "Abandonment" is tantamount to "completion" and it leads to an absurdity to find otherwise: see *T. McAvity & Sons Ltd.* v. *Walsh*, [1927] 1 W.W.R. 242. The right is created by statute and section 19 limits the time within which the lien must be filed. If the indefinite construction contended were approved, it would result in grave injustice. The American cases decide that "abandonment" means the completion of the work: see 40 C.J. p. 192, sec. 224; *Chicago Lumber Co.* v. *Merrimack River Sav. Bank* (1893), 52 Kan. 410; 34 Pac. 1045.

Carmichael, in reply, referred to *Buscombe Securities Co.* v. *Windebank* (1919), 27 B.C. 507.

Cur. adv. vult.

On the 5th of November, 1940, the judgment of the Court was delivered by

O'HALLORAN, J.A.: I would refuse the motion to quash the appeal. The judgment appealed from disposed finally of the appellant's claim to enforce a mechanic's lien; it must be regarded therefore as a final judgment for the purposes of appeal under section 14 of the Court of Appeal Act, Cap. 57, R.S.B.C. 1936: *vide Bank of Vancouver* v. *Nordlund* (1920), 28 B.C. 342; *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386 and *Thorne* v. *Columbia Power Co. Ltd.* (1936), 50 B.C. 504.

This appeal concerns the interpretation of the Mechanics' Lien Act, Cap. 170, R.S.B.C. 1936, as it affects material men. From 18th April, 1939, to 25th May, 1939, the appellant

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Hodgson Lumber Co. Limited supplied material at a price of $723.94 to the contractor engaged by the owner to build a house. This sum was due and payable on 25th May, 1939, but the appellant has not been paid and the house has not been completed. On 8th February, 1940, the respondent Wendlend obtained judgment declaring him entitled to a mechanic's lien against the same lands and premises. Shortly thereafter on 21st February the appellant instituted proceedings to realize its lien for the price of the material supplied.

The respondent objected in the Court below that the appellant's lien had lapsed; he contended the appellant had not filed a mechanic's lien affidavit within the statutory period of "thirty-one days after the completion" of the house as required by section 19 (1) (*b*) of the Mechanics' Lien Act, *supra*. Appropriate directions having been ordered a trial took place before LENNOX, Co. J. His Honour held construction of the house had been abandoned by the owner on or about 15th June, 1939, and that it was thereby completed in the sense "completion" is used in the Mechanics' Lien Act, *supra*. As the appellant had not filed a mechanic's lien affidavit within 31 days after the abandonment, the learned judge held its lien had "absolutely ceased to exist" within the meaning of section 19 (1), *supra*.

With respect I am unable to accept this view. Neither the purpose nor the structure of the Mechanics' Lien Act requires or permits such an interpretation of "completion." "Abandonment" in its usual and accepted sense conveys a meaning quite distinct from "completion"; instead of being a form of completion, it is a negation thereof; it is in truth a failure to complete. If the Legislature had intended "completion" as a generic term to embrace termination of building construction in any manner whatever, whether by actual completion, discontinuance or abandonment, an appropriate definition of the term would appear in the statute, or the context would be widened to permit a departure from its usual and accepted meaning.

Counsel for the respondent asked us to accept the reasoning of the Supreme Court of Kansas in *Chicago Lumber Co.* v. *Merrimack River Sav. Bank* (1893), 34 Pac. 1045, which had construed "completion" to include "abandonment." The *ratio*

decidendi of that decision as I read it, was that it is inconsistent with the "spirit of the law" that a lien-claimant should be deprived of his rights solely because the work has been abandoned, for otherwise material men and labourers would be at the mercy of the dishonesty, fickleness or misfortunes of the owner or contractor. But the adoption of that reasoning here to support the interpretation favoured by counsel for the respondent would bring about the very result it was formulated to avoid; for it would defeat the appellant's rights instead of protecting them. However, no violence need be done to the language of our statute in order to preserve the appellant's lien and the right to enforce it.

By section 6 of the Mechanics' Lien Act, *supra,* when the appellant furnished the material to the contractor it became entitled "by virtue thereof" to a mechanic's lien; its right to enforce the lien arose then, without regard to the time the house might be completed by the contractor, if ever; and *vide* section 8 through 18 and also section 33. In the statute considered in the Kansas case cited *supra* on the other hand, it is made clear in *Catlin* v. *Douglass* (1887), 33 Fed. 569, at 570, that the right to enforce the lien did not arise until after the building was completed. Section 19 (1) of our statute deals solely with the expiration of the lien which section 6 has brought into being. Section 19 (1) (*b*) does not create the lien, nor does it suspend the attachment or enforcement of the lien for material supplied the contractor until after completion of the house. It enacts the conditions under which the lien shall expire. It provides that if designated steps are not taken to enforce the lien created by section 6 it shall "absolutely cease to exist" upon "the expiration of thirty-one days after the completion" of the house.

The section does not provide that the designated steps to enforce the lien for material supplied the contractor cannot be taken until after completion of the house by the contractor. To impute that meaning to the words "in the meantime" in the first line of section 19 (1) immediately following subclause (*d*) thereof would deny the effective creation and attachment of the lien under section 6. The purpose of the Mechanics' Lien Act is to protect those who supply material and do work on building

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and construction; that purpose should not be defeated by attempts to write into the statute definitions and limitations the Legislature has not thought fit to insert. As the house has not been completed the appellant's lien is still in existence; it cannot expire until the house has been completed and a period of 31 days have elapsed thereafter. On the case as presented the appellant is entitled to its lien with the consequential directions.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *J. Fred Downs.*

Solicitors for respondents: *Fleishman & MacLean.*

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Nov. 13, 14, 22.

WATT v. SHEFFIELD GOLD & SILVER MINES LIMITED N.P.L. *ET AL.*

SCHMIDT v. SHEFFIELD GOLD & SILVER MINES LIMITED N.P.L. *ET AL.*

Mechanic's lien—Lien for work upon a mine—Buildings, machinery and furnishings—Whether included in "mine," "appurtenances" or "land and premises"—Free miner's certificate—Not required by plaintiff—R.S.B.C. 1936, Cap. 170, Sec. 6; Cap. 181, Sec. 12.

The plaintiff obtained judgment in a mechanic's lien action for work done upon a mine. On appeal, the appellants contended that the respondent was not entitled to a mechanic's lien against the mine because he had not a free miner's certificate as required by section 13 of the Mineral Act.

Held, affirming the decision of SWANSON, Co. J. in part, that the distinction between a vendor's lien and a mechanic's lien is that the claimant in the former has an estate in the land before sale, whereas the claimant in the latter has not. The right acquired under a mechanic's lien is not a right of ownership but a right to enforce a claim for payment for work done, by sale of the mine, and section 13 of the Mineral Act does not apply.

Chassy v. *May* (1925), 35 B.C. 113, distinguished.

APPEAL by defendant Sheffield Gold & Silver Mines Limited from the decision of SWANSON, Co. J. of the 19th of June, 1940, in an action to enforce a mechanic's lien against 27 claims

known together as the Sheffield Mine, Yale, B.C. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 13th and 14th of November, 1940, before MACDONALD, C.J.B.C., O'HALLORAN and MCDONALD, JJ.A.

Hodgson, for appellant: There are two grounds of appeal. First, that the learned judge allowed the buildings and machinery to be included in the lien. Secondly, that the plaintiff Watt did not have a free miner's certificate as required by sections 12 and 13 of the Mineral Act. As to the first, the Act must be construed strictly and the word "appurtenances" does not include the machinery. It is necessary that the plaintiff should have a free miner's certificate under section 12 of the Mineral Act: see *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273; *Chassy* v. *May* (1925), 35 B.C. 113.

Jonathan Ross, for respondent: The word "mine" includes land and "land" under the Interpretation Act includes houses, buildings and tenements: see *Stirn* v. *Vancouver Arena Co. Ltd.* (1932), 46 B.C. 161, at p. 170; *In re Mechanics' Lien Act. McFarland* v. *Trusts and Guarantee Co.,* [1938] 3 W.W.R. 333; *McFarland* v. *Greenbank,* [1939] 2 D.L.R. 386. As to the necessity of a free miner's certificate, the case of *Chassy* v. *May* (1925), 35 B.C. 113, has nothing to do with a mechanic's lien, but see *King* v. *Alford* (1885), 9 Ont. 643, at p. 646; *Crawford* v. *Tilden* (1907), 14 O.L.R. 572; *Coldstream* v. *Bellevue* [1929] 4 D.L.R. 52.

Hodgson, replied.

Cur. adv. vult.

On the 22nd of November, 1940, the judgment of the Court was delivered by

O'HALLORAN, J.A.: By section 6 of the Mechanics' Lien Act, Cap. 170, R.S.B.C. 1936, a person "who does work or service or causes work or service to be done upon" a "mine" shall have a lien for the price thereof upon the mine and the appurtenances thereto and the lands and premises "occupied or benefited thereby or enjoyed therewith, or upon . . . which such work or service is done."

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Counsel for the appellant contended that the judgment for the mechanic's lien should be confined to the language of the statute and should not be extended to include "buildings, machinery and furnishings." We agree with that contention without deciding whether the particular "buildings, machinery and furnishings" are or are not embraced within the meaning of the terms "mine," "appurtenances" and "lands and premises" as used in the Mechanics' Lien Act.

Counsel for the appellant raised this point for the first time when he obtained leave to amend the notice of appeal during the argument. As the point did not arise below, no evidence was adduced there concerning the relation of the particular "buildings, machinery and equipment" to the "mine," "appurtenances" and "lands and premises." The judgment should conform to the language employed in the statute. Should an issue arise as to what is embraced therein that issue may still be determined in the Court of first instance, after hearing any evidence there may be which relates to the issue.

Counsel for the appellant contended next that the respondent Watt is not entitled to a mechanic's lien against the mine, because he has not a free miner's certificate. Under section 12 of the Mineral Act, Cap. 181, R.S.B.C. 1936,

> . . . no person . . . shall be recognized as having any right or interest in or to any mining property, unless he . . . has a free miner's certificate unexpired.

Watt was declared entitled to a lien for tunnelling and construction work on the mine while employed as a working foreman. It is not disclosed that he had any interest of ownership in the mine. It is asserted however that his right to a mechanic's lien invested him with a "right or interest" in the mining property; and accordingly that his right to a lien under the Mechanics' Lien Act could not arise unless he possessed a free miner's certificate under the Mineral Act.

This contention must be rejected. The purpose of the Mechanics' Lien Act is to ensure payment to persons who do work on various kinds of construction including mines. The Mineral Act sections which relate to free miners' certificates concern the ownership of mineral claims or an interest in the ownership thereof. The right acquired under a mechanic's lien

is not a right of ownership but is a right to enforce a claim for payment for work done, by sale of the mine under supervision of the Court.

Counsel for the appellant was unable to submit any authority to support his proposition, beyond certain observations in *Chassy* v. *May* (1925), 35 B.C. 113, at p. 118. The lien in that case, however, was a vendor's lien and not a mechanic's lien: *vide Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83. The reference to mechanics' liens had no relation to the subject-matter thereof; as such it is to be regarded as an *obiter dictum,* and it is our duty therefore to examine the question on the merits. In *Trottier* v. *Rajotte,* [1940] S.C.R. 203, Sir Lyman Duff, C.J. giving the judgment of the Court, said at p. 215:

> The observation of Mr. Justice Mignault, speaking on behalf of the majority of this Court in . . . appears to me to be an *obiter dictum.* It is not, so far as I can see, a part of or a step in the *ratio decidendi;* consequently, it is open to challenge in this Court and, when challenged, it would be our duty to examine the point on the merits.

In *King* v. *Alford* (1885), 9 Ont. 643, Chancellor Boyd at p. 645 and Ferguson, J. at p. 654, in discussing the distinction between a vendor's lien and a mechanic's lien observed that the claimant in the former has an estate in the land before sale, whereas the claimant in the latter has not. It cannot be said that a person who does work on a building or a mine acquires an estate therein by virtue of the Mechanics' Lien Act. All he acquires is a statutory right to enforce payment for his work by a sale under the supervision of the Court.

In the result the judgment appealed from should be varied to conform with the Mechanics' Lien Act, but otherwise the appeal should be dismissed. As the appeal is allowed in part costs will be apportioned according to the respective success of the parties. In the Watt appeal the appellant and respondent Watt will each tax their costs here and below as if successful, and be entitled to one-half the respective amount each shall so tax. In addition the respondent Watt is entitled to the costs of the appellant's motion to amend the notice of appeal. There will be a general set-off. In the Schmidt appeal, which was confined to the amendment of the judgment, raised as it was for the first time in this Court,

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the appropriate order under the circumstances herein, is that there be no costs in the appeal to either party.

The appeal is allowed in part.

Appeal allowed in part.

Solicitor for appellant: *C. W. Hodgson.*

Solicitor for respondent Watt: *Jonathan Ross.*

Solicitor for respondent Schmidt: *W. C. Parker.*

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WESSELS v. WESSELS.

Divorce—Order for payment of costs—Non-compliance with order—Contempt of Court—Further proceedings by party in contempt—Right of hearing.

After non-compliance with an order for payment of costs in an action for judicial separation, it is a matter for the discretion of the Court whether the party in contempt should be permitted to take a further proceeding in litigation, and it is material to the exercise of that discretion to consider whether the non-compliance is due to the fault or the misfortune of the party in contempt.

A district registrar ordered the appellant husband to pay into Court within a specified period certain costs taxed by his respondent wife in her petition for judicial separation. The appellant disobeyed the order. At the instance of the respondent a summons was then issued for an order that the appellant be disbarred from adducing evidence in his defence on defending his wife's petition unless he complied with the registrar's order. The summons was heard and judgment was reserved. On the opening of the trial, the trial judge, who happened to be the Chamber judge who heard the above-mentioned summons, delivered his reserved judgment and ruled that the appellant should have an opportunity of showing that his disobedience was due to inability or misfortune. The appellant was not present, but his counsel sought an adjournment of the trial on the ground that the appellant was ill and in a sanatorium and could not appear. The application was refused, and the trial judge immediately ruled that as the appellant was not present and had given no excuse in law for his absence, it was futile to give him an opportunity to show his disobedience was due to inability or misfortune.

Held, that the opportunity to show his inability or misfortune was withdrawn almost as soon as given, because the appellant was not present at the opening of the trial. The effect of what occurred is to all intents

the same as if the opportunity to show his inability or misfortune had not been granted at all. He was deprived of reasonable opportunity to purge his contempt before the trial proceeded and the appeal should be allowed.

APPEAL by respondent from the order of MANSON, J. of the 20th of June, 1940, whereby he ordered that the respondent be not permitted to appear at the trial of the cause by reason of the respondent being in contempt in that he has not paid into Court the sum of $500 and the sum of $165, pursuant to the order of the district registrar of the Court at New Westminster, made on the 18th of April, 1940.

The appeal was argued at Victoria on the 26th of September, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Soskin, for appellant: The order from which the appeal is taken debars the defendant from appearing at the trial of the action. The costs were taxed and it was ordered that the amount so taxed be paid out to the plaintiff before the money was paid into Court. There is no jurisdiction to make the order: see *Leavis* v. *Leavis* (1921), 37 T.L.R. 578, in which the defendant was debarred from initiating proceedings but not from defending in an action: see *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541. The Court has no jurisdiction to debar a litigant from making his defence. The common law is that a subject has the right to defend himself. It is an inherent right: see *Gordon* v. *Gordon,* [1904] P. 163, at pp. 168 and 171; *Freedman* v. *Freedman* (1922), 23 O.W.N. 424; *Freedman* v. *Freedman* (1923), 25 O.W.N. 3; *Manley* v. *Manley and Weeks,* [1939] 2 D.L.R. 787; *Yates* v. *Yates,* [1924] 2 W.W.R. 64; *Marsh* v. *Marsh,* [1932] 1 W.W.R. 688. The registrar had no material before him to make the order he made as to payment of these sums into Court. On contempt proceedings the validity of the first order can be questioned. There is no valid order upon which we are in contempt: see *Williams* v. *Williams,* [1929] P. 114. The respondent claimed he was domiciled in the United States and it was ordered that the question of domicil be determined at the trial: see *The*

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Bishop of Victoria v. *The City of Victoria* (1933), 47 B.C. 264, at p. 274.

C. R. J. Young, for respondent: There were two divorce actions in the United States this year. We rely on the decision in *Phelps* v. *Phelps,* a decision of this Court last year in which the case of *Leavis* v. *Leavis* (1921), 37 T.L.R. 578 was followed. On the question of personal service of the order see *In re Deakin. Ex parte Cathcart,* [1900] 2 Q.B. 478.

Soskin, replied.

Cur. adv. vult.

On the 22nd of November, 1940, the judgment of the Court was delivered by

O'HALLORAN, J.A.: On 18th April, 1940, the district registrar of the Supreme Court at New Westminster ordered the appellant husband to pay into Court within a specified time, certain costs taxed by his respondent wife in her petition for judicial separation. The appellant disobeyed that order and has not yet paid the said costs. On 11th June, 1940, the respondent's solicitor issued a summons returnable on 15th June for an order that the appellant be debarred from adducing evidence in his defence or defending his wife's petition unless he should first comply with the registrar's order of 18th April, *supra.* The summons was heard in Chambers on 15th June but judgment was reserved until 20th June, the day on which the cause was set down for trial.

When the trial opened on 20th June the learned trial judge, who happened to be the Chamber judge who had heard and reserved the summons, delivered the reserved judgment. He ruled that the appellant should have an opportunity of showing that his disobedience was due to inability or misfortune. The appellant was not present but his counsel sought an adjournment of the trial on the ground the appellant was in a sanatorium in Seattle, Washington, and could not appear on that day. The application was refused as it was not supported by affidavits which the learned trial judge considered sufficient. Immediately thereafter the learned trial judge ruled that as the appellant was not present at the opening of the trial and had given no excuse in law for his absence from the trial, it was futile to give

him the opportunity to show his disobedience was due to inability or misfortune.

To quote the learned judge during the trial:

> . . . I came to the conclusion that upon the material I could not grant the application for an adjournment. I thereupon added that it was futile to further consider the order granting leave to the respondent [appellant] to show cause why he should be permitted to take further part in the proceedings, in view of the fact that he was not here.

And again nine days later on the settlement of the order:

> As above pointed out, he [the appellant] was not present at the opening of the trial, and gave no excuse, in law, for his absence. His opportunity to explain, therefore, went by the board, and I directed that the trial do proceed.

The rational conclusion to draw from these excerpts is that the opportunity to show his inability or misfortune, in form granted the appellant at the opening of the trial, was withdrawn almost as soon as given, because the appellant was not present at the opening of the trial. The effect of what occurred is to all intents the same as if the opportunity to show his inability or misfortune had not been granted at all.

Adopting what was said in *Leavis* v. *Leavis* (1921), 37 L.T.R. 578 and *vide* also *Fitzgerald* v. *Fitzgerald* (1756), 2 Lee 263; 161 E.R. 335 and *Gower* v. *Gower*, [1938] P. 106, this Court (MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.) decided in *Phelps* v. *Phelps* on 11th December, 1939 (unreported), that the husband who had disobeyed an order for payment of his wife's taxed costs was in contempt of Court, and also that the Court had discretion in a proper case to refuse to hear him in answer to his wife's petition. But in *Leavis* v. *Leavis* it was said that before doing so it is material for the Court to consider whether the husband's disobedience of the order for payment is due to his fault or misfortune. That is to say the inherent jurisdiction of the Court to make an order of this severe character does not arise unless the husband's contempt is first found to be contumacious. In the case at Bar, with respect, it could not be found judicially that the appellant was contumacious, for the opportunity to show his inability or misfortune was not exercisable by him, as it was taken away from him almost as soon as it was granted. It was taken away because he was not present at the opening of the trial. I cannot find any-

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thing in the recited circumstances surrounding his non-attendance at the trial which justifies his non-attendance at the trial as such being interpreted as contumacious.

It may well be that counsel for the appellant failed to make out a proper case for the adjournment of the trial. But that is quite different from the question of depriving the appellant of the right to defend himself at the trial which is the issue here. In my view even if the appellant's disobedience had been properly found to be contumacious, an order of this severe character depriving him of the right to defend himself at the trial should not have been enforced, unless after the making of the debarring order he was given reasonable opportunity to purge his contempt before the trial was proceeded with. The record before us discloses the appellant had no such opportunity. The order debarring him from defending was not made until after the trial had opened and after an application by his counsel for adjournment of the trial had been refused. Even if the appellant had been properly found to be contumacious yet as he was not present at the trial, he could not have notice of the order then made debarring him from defending; accordingly he was deprived of reasonable opportunity to purge his contempt before the trial proceeded.

I would allow the appeal accordingly.

Appeal allowed.

Solicitor for appellant: *Morris Soskin.*
Solicitor for respondent: *C. R. J. Young.*

REX v. JOHNSON.

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1940
Nov. 13, 22.

Ref'd to
R. v. Cavanaugh
77 C.C.C. 79

Criminal law—Living on earnings of prostitution—Habitually in the company of a prostitute — Meaning of "habitually" — Onus of proof— Criminal Code, Sec. 216, Subsec. 2.

The accused was charged that he did between the 7th and 16th of April, 1940, unlawfully live off the earnings of a prostitute. It was admitted that accused was in the company of a prostitute for a considerable part of the period in question. The trial judge made the following finding: "There is sufficient evidence to show that the accused was at least habitually in the company of a prostitute. It has been proved that he was habitually in her company, and the accused has not satisfied me that he was not living off her earnings." The learned judge then, pursuant to subsection 2 of section 216 of the Criminal Code, placed the *onus* on the accused of proving that he was not living on the avails, and accused was convicted.

Held, on appeal, affirming the decision of HARRISON, Co. J., that the question to be decided is the meaning of the word "habitually" and in doing so it must be considered with its context and in relation to the subject-matter, and that it is sufficient if it can be shown, as it is shown, not that the accused was in the prostitute's company hour after hour or day after day, but that within the times specified he was for the most part in her company. That being so the *onus* was shifted under the above section of the Code, and the appeal was dismissed.

APPEAL by defendant from his conviction by HARRISON, Co. J. of the county of Nanaimo on a charge

that on the 7th day of April, 1940, and other days between that day and the 16th of April, 1940, in the county of Nanaimo, in the cities of Nanaimo, Port Alberni and Duncan, [he] did unlawfully live off the earnings of a prostitute, Marjorie McKellar.

The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 13th of November, 1940, before MACDONALD, C.J.B.C., O'HALLORAN and MCDONALD, JJ.A.

Murdock, for appellant: The charge is under section 216 (*l*) of the Criminal Code. There was only the evidence of Marjorie McKellar, and it is admitted her evidence was unreliable. Under section 1002 of the Criminal Code her evidence must be corroborated in some material particular. There was no corroboration: see *Hubin* v. *Regem*, [1927] S.C.R. 442; *Rex* v. *Nyshimura*, [1920] 2 W.W.R. 994.

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Carew Martin, for the Crown: This man was habitually in the company of this woman, and comes within the amendment to section 216 of the Criminal Code, namely, subsection 2 thereof: see *In re Banff Provincial Election* (1899), 19 C.L.T. Occ. N. 119, at p. 123, as to the definition of "habitual." They can be charged with the offence for one day: see *Rex* v. *Hill. Rex* v. *Churchman,* [1914] 2 K.B. 386.

Murdock, in reply, referred to *Rex* v. *Novasad* (1939), 72 Can. C.C. 21.

Cur. adv. vult.

On the 22nd of November, 1940, the judgment of the Court was delivered by

MCDONALD, J.A.: The accused was convicted by HARRISON, Co. J. of the County Court of Nanaimo for

> that [he did] on the 7th day of April, 1940, and other days between that day and the 16th of April, 1940, . . . unlawfully live off the earnings of a prostitute.

It is admitted that the witness Marjorie McKellar is a prostitute and that the accused was in her company for a considerable part of the period in question. There is some conflict of evidence and there is no doubt that the witness McKellar gave her evidence in an unsatisfactory manner and in fact contradicted herself. Nevertheless, there was ample evidence from which the learned judge could have reached the conclusion which he did reach. I am far from being able to hold that he was wrong in accepting certain parts of the evidence tendered and rejecting other parts.

The difficult point for decision, I think, is whether the learned judge, having held that there was no evidence that the accused was living with a prostitute, misdirected himself in making the following finding:

> There is sufficient evidence to show that the accused was at least habitually in the company of a prostitute. It has been proved that he was habitually in her company, and the accused has not satisfied me that he was not living off her earnings.

In so finding the learned judge pursuant to the 1939 amendment to section 216 of the Criminal Code, placed the *onus* on the accused of proving that he was not living on the avails. If he was wrong in this the conviction could not stand. The contention is that he was wrong for the reason that he misconstrued the

word "habitually." The evidence shows that from some time toward the end of March, 1940, until 16th April, 1940, the accused was from day to day in McKellar's company. They met by arrangement and lived at the same hotel in Nanaimo, though in separate rooms, for several days; they went to Port Alberni together and lived at the hotel there for two days as man and wife; they returned to Nanaimo and a day or so later were in the same hotel in Duncan though in separate rooms.

The point to decide is the meaning of the word "habitually" as used in the amendment. In my opinion the word is not used in the broad sense given to it in the dictionaries as meaning "usually," "continually," "customarily," etc. I think it must be considered with its context and in relation to the subject-matter, and that it is sufficient if it can be shown as it is shown, not that the accused was in McKellar's company hour after hour and day after day, but that within the times specified he was for the most part in her company. This opinion is supportetd by the decision of Rouleau, J., in *In re Banff Provincial Election* (1899), 19 C.L.T. Occ. N. 119 where, dealing with the question of the residence of a voter, the learned judge held that the word "habitual" must not be given too restricted a sense. Reliance was placed on a statement of Dicey in his "Conflict of Laws" now appearing in the 5th edition at p. 66 where the learned writer says:

> The word "habitual," in the definition of residence, does not mean presence in a place either for a long or a short time, but presence there for the greater part of the period, whatever that period may be (whether ten years or ten days), referred to in each particular case.

I think the same reasoning applies to the case at Bar and that what is meant is, as counsel contends, that if it can be shown that during the period in question the parties were for the most part in each other's company, then the *onus* is shifted under the terms of the amendment to the statute. In my opinon the appeal should be dismissed and the conviction affirmed.

Appeal dismissed.

1940

C. A.

Nov. 12, 19.

REX v. MARSH.

Criminal law—Indecent assault—Jury retires to consider verdict—Returns and requests for view of locus in quo—Granted—Evidence as to locus in quo taken on view—Criminal Code, Sec. 958.

The accused was charged with indecent assault on a girl fifteen years old, in his automobile on 65th Avenue in the outskirts of Vancouver, where there was a narrow gravel road with trees and bush on each side. On the trial the jury retired to consider their verdict, and after about two hours they returned and the foreman stated the jury would like to have a view. This was acceded to, and the learned judge, with the parties concerned first being guided by the complainant and later by her companion at the time of the alleged offence, a girl of eight years, was led to the spot on 65th Avenue where their evidence was taken as to the *locus in quo*. The jury then returned to Court, where a verdict of guilty was returned and accused was convicted.

Held, on appeal, reversing the decision of MANSON, J., that the additional evidence did not relate to something which had arisen *ex improviso* in the course of the trial, but was evidence the necessity for which should have been obvious from the outset, and should not have been admitted at that stage of the trial.

Held, further, that evidence was admitted of the complainant of a complaint made to her mother some 24 hours after the alleged offence, although she had spent the previous night in the same house with her mother and had seen her mother in the morning after the alleged offence before leaving home. This evidence is clearly inadmissible and must necessarily have been prejudicial to the accused. The appeal is allowed and a new trial ordered.

APPEAL from the conviction by MANSON, J. and the verdict of a jury at the Vancouver Fall Assize on the 23rd of September, 1940, on a charge of indecent assault on one Dorothy Williams, a girl fifteen years of age. At about 7 o'clock in the evening of the 23rd of April, 1940, the accused took Dorothy Williams and another girl, Helen Varpaarvouri, who was eight years of age, for a ride in his car. He bought them ice-cream and cigarettes and took them on a circuitous route past the Fraser Golf Course on to 65th Avenue, and on reaching a narrow part of the dirt road with bushes on each side he stopped. The girls got out and after picking some flowers Dorothy got into the front seat with the accused. Accused then told Helen to go back and watch for other cars coming. Dorothy said he then

pulled her on his knee, pulled down her pants and put his finger into her privates. Helen then got into the car and they went home. Dorothy told the facts to her mother on the following afternoon.

The appeal was argued at Vancouver on the 12th of November, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and MCDONALD, JJ.A.

Jeremy, for appellant: The trial started at 10 o'clock in the morning. The usual hour is 10.30, and the jury were empanelled before I arrived at 10.30. My submission is that this is unjust. I did not have notice of the change of time. My next point is that after the jury had retired to consider their verdict they re-entered and the foreman stated that the jury would like to have a view of the *locus in quo.* A view was granted and further evidence was taken in the course of the view. The view could have been taken at the proper time. There is no reason for the delay, and it is manifestly unfair to the accused: see *Rex* v. *Day* (1940), 27 Cr. App. R. 168.

W. H. Campbell, for the Crown: There is no excuse for counsel being late when the trial started. On Friday, the 20th of September the Court was adjourned until 10 o'clock on Monday morning the 23rd of September, and counsel for the defence was in Court at the time and heard or ought to have heard this pronouncement. No unfair advantage was taken during his one-half hour's absence on Monday morning. On the next point, with relation to the evidence taken during the view, there was no change or contradiction in the evidence so taken, and did not affect the defendant's case at all. The learned judge rightly complied with the jury's request for a view: see *The Queen* v. *Whalley* (1847), 2 Cox, C.C. 231; *Rex* v. *Kaplansky, Sachuk and Seniloff* (1922), 69 D.L.R. 625.

Cur. adv. vult.

On the 19th of November, 1940, the judgment of the Court was delivered by

MCDONALD, J.A.: The accused was convicted before MANSON, J. and a jury of having on 22nd April, 1940, indecently assaulted one Dorothy Williams.

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On the appeal before us, counsel for the accused raised two grounds. In the first place, he objected that the trial opened at 10 o'clock in the morning, whereas he expected the practice to be followed which is usual in Vancouver, *viz.*, that the Assize Court opens at 10.30 o'clock. However it appears that when Court adjourned on the previous Friday evening the learned judge adjourned until 10 o'clock on Monday morning, and while it was unfortunate that the trial should have opened and proceeded for half an hour in the absence of counsel for the accused, I think we have no right to interfere with the judge's discretion in that regard.

The second point raised is more serious. It arises out of the fact that after the jury had been addressed by counsel, charged by the judge and had been considering their verdict for some two or three hours they returned to Court and asked that they might have a view of the locality where the offence was alleged to have been committed. The learned judge acceded to that request and attended with the various parties concerned, first being guided by the complainant, Dorothy Williams, a girl of fifteen years, and later by her companion at the time of the alleged offence, Helen Varpaarvouri, a girl of eight years. Meanwhile these witnesses had gone home and had had the opportunity to discuss the matter with others. Each of the girls separately and in the presence of the accused and the judge and jury took the parties to an isolated spot on 65th Avenue, where there are bushes on each side of the road. Sixty-fifth Avenue is merely a trail and not a well-travelled road. At the trial the girl, Dorothy Williams, had fixed the offence as having taken place on 61st Avenue, on which street is her own home. This is a well-travelled road. The other witness had not fixed the place. Upon returning to Court no opportunity was offered to counsel to further address the jury and, within a few minutes, a verdict of guilty was returned.

While there are cases where the trial judge may even on a criminal charge allow new evidence to be introduced after the case has been closed, such cases are very rare indeed and can only arise where something has come up *ex improviso*—something which may not have been foreseen. No such situation

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arose here. In this case, assuming (and this is a very violent assumption) that the learned judge had power to reopen the case as he did, yet I think that the dangers of grave injustice to the accused are obvious. See *Rex* v. *Day* (1940), 27 Cr. App. R. 168.

There is a further serious objection, which was not taken before us but which was raised at the trial, *viz.*, that the learned judge over counsel's objection admitted evidence of the complainant of a complaint made to her mother some 24 hours after the alleged offence, although she spent the previous night in the same house with her mother and had seen her mother in the morning after the alleged offence before leaving home. In my opinion this evidence is clearly inadmissible and must necessarily have been prejudicial to the accused. The authorities are collected in the 4th edition of Tremeear at 1600 *et seq.* The law is clearly laid down by Hodgins, J.A. in *Rex* v. *Elliott,* [1928] 2 D.L.R. 244, at p. 250, where he said:

> A complaint therefore is admissible only where it is made immediately after the offence or at the first convenient or reasonable opportunity thereafter.

I think the appeal must be allowed and a new trial ordered.

Appeal allowed; new trial ordered.

HEEP v. THIMSEN.

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1940
Nov. 7, 22.

Contract—Right to cut timber—Covenants as to cutting and removing timber—Breach of covenant—Notice to terminate agreement—Sufficiency of notice.

The plaintiff and the defendant entered into a written contract on August 16th, 1939, whereby the defendant was granted the right to cut and remove timber from certain lands, the property of the plaintiff. Clause 10 of the agreement provided that in case of default by the defendant in the observance or performance of any of the covenants therein contained, and if such default shall continue for ten days after notice thereof by the plaintiff specifying such default and the intention to cancel the agreement, then at the expiration of ten days the agreement, at the option of the plaintiff, may be terminated. Dispute arose as to the defendant's operations, and on the 7th of November, 1939, the

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plaintiff served the defendant with notice that as the defendant made default in the observance and performance of the covenants contained in the contract "more particularly in respect of clause 2 of said agreement" and if such default continued for ten days, he would terminate the agreement. (Clause 2 of the agreement sets out fifteen various covenants to be observed and performed by the defendant.) On the 20th of November, 1939, the plaintiff served the defendant with final notice of cancellation of the agreement. In an action for rescission of the agreement and damages, it was held by the trial judge that the cancellation proceedings were effectively taken, and he made the declaration sought and awarded damages.

Held, on appeal, reversing the decision of MANSON, J., that as several of the fifteen covenants contained in clause 2 were incapable of immediate performance the notice of November 7th, 1939, was defective in that it did not, as required by clause 10 of the contract, "specify" the default complained of. The purpose of this requirement obviously is to give the appellant, upon receiving notice of default as to any particular covenant, an opportunity to remedy that default. The notice given was in terms quite too general and was insufficient to found a final notice of cancellation.

APPEAL by defendant from the decision of MANSON, J. of the 8th of April, 1940, in an action for rescission of a contract between the plaintiff and the defendant made on the 10th of August, 1939, whereby the defendant contracted to cut and remove from the property of the plaintiff, being timber lots on Hollyburn Ridge, north of Burrard Inlet, in accordance with the covenants and terms of said agreement. On the 7th of November, 1939, the plaintiff notified the defendant in writing that he had made default in the observance and performance of the covenants contained in said contract, more particularly in respect of clause 2 of said agreement, and if the default continued for ten days he would terminate the agreement. On the 20th of November, 1939, the plaintiff notified the defendant of the cancellation of the contract.

The appeal was argued at Vancouver on the 7th of November, 1940, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Gillespie (*David McKenzie*, with him), for appellant: Three months after the contract was entered into the plaintiff gave notice of its cancellation. We rely on the deficiency of the notice of cancellation. A proper notice of cancellation is a condition precedent to the action. The owner in giving notice must say

precisely in what particular the operator is in default. In his first notice he refers particularly to clause 2 of the agreement, but clause 2 contains fifteen separate covenants. The contract is determinable by either party on breach: see Halsbury's Laws of England, 2nd Ed., Vol. 7, pp. 183-4, secs. 259 and 260; *The Town of Richmond* v. *Lafontaine* (1899), 30 S.C.R. 155.

McLelan, for respondent: The evidence shows there was no attempt whatever to carry out the contract. The plaintiff gave every assistance to the defendant that he reasonably could, but owing to lack of equipment and finances he was unable to come anywhere near fulfilling the contract. We submit that the notice given was sufficient: see *Prudential Trust Co.* v. *Leduc,* [1931] 3 D.L.R. 616, at p. 618.

Gillespie, replied.

Cur. adv. vult.

On the 22nd of November, 1940, the judgment of the Court was delivered by

McDONALD, J.A.: Appellant and respondent entered into a written contract, dated 16th August, 1939, whereby appellant was granted the right to go upon and remove merchantable timber from certain lands, the property of respondent.

Clause 2 of the agreement sets out fifteen various covenants on the part of appellant to be observed and performed, some of which required performance immediately upon his entering upon the operation, some required performance at a later date and some ran through the whole term of the agreement which by its terms came to an end on 31st December, 1941.

By clause 10 of the agreement it was provided that:

> If default shall be made on the part of the [appellant] in the observance or performance of any of the covenants, provisions, terms or conditions or stipulations on his part herein contained and if such default shall continue for ten days after notice thereof by the [respondent] specifying such default and the [respondent's] intention to cancel this agreement, then at the expiration of this ten days, this agreement at the option of the [respondent] shall be terminated.

Appellant began operations under the contract late in September, 1939, not on or about the 1st of September, 1939, as required by the contract, and felled some 250,000 feet of timber. Thereupon disputes arose and delays occurred and on the 7th of

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November, 1939, respondent served upon appellant a notice to the following effect:

TAKE NOTICE that under and by virtue of clause ten (10), of the contract . . . I HEREBY give you notice that you have made default in the observance and performance of the covenants, provisions, terms, conditions, and stipulations contained in said contract. More particularly, you have made default in respect of clause two (2) of said agreement, and if such default shall continue for ten days from the date hereof, I shall then terminate said agreement in accordance with the terms of said agreement.

Appellant demanded particulars as to his default but respondent chose to rely upon the notice already given and on 20th November, 1939, a final notice of cancellation was delivered to the following effect:

TAKE NOTICE that whereas on the 7th day of November, A.D. 1939 I gave you notice that you had made default in respect of your covenants contained in the logging agreement . . . and whereas you have permitted the default to continue since the said 7th day of November, 1939 in spite of my warning in said notice of cancellation, I HEREBY cancel said logging agreement as and of this 20th day of November, A.D. 1939.

For the purposes of this appeal it is conceded by appellant that he must accept the finding of the learned trial judge, MANSON, J., that he was in default, and it is conceded on behalf of the respondent that, as a condition precedent to his right of action for a declaration that the contract has been duly cancelled he must prove that a notice of cancellation appropriate to the requirements of the contract had been duly given. The neat point for decision therefore is whether or not the notice of 7th November, 1939, was in compliance with clause 10 of the contract. The learned trial judge stated that in his view "the cancellation proceedings were effectively taken" and he made the declaration sought and awarded damages. With great respect I cannot agree. Having regard to the fact that several of the fifteen covenants contained in clause 2 were incapable of immediate performance I am of opinion that the notice of November 7th, 1939, was defective in that it did not, as required by clause 10 of the contract, "specify" the default complained of. The purpose of this requirement obviously was to give the appellant upon receiving notice of default, as to any particular covenant, an opportunity to remedy that default. The notice given was I think in terms quite too general and was insufficient to found a final notice of cancellation. This conclusion I think

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is in line with the decision in *The Town of Richmond* v. *Lafontaine* (1899), 30 S.C.R. 155, though that case is meagrely reported. See also the decision of North, J. in *Fletcher* v. *Nokes*, [1897] 1 Ch. 271 where it was held that the notice to be served by a lessor on his lessee, under section 14, subsection (1) of the Conveyancing and Law of Property Act, 1881, "specifying the particular breach of covenant complained of" must be given in such detail as will enable the lessee to understand what is complained of, so that he may have an opportunity of remedying the breach before action brought. This decision was approved by the House of Lords in *Fox* v. *Jolly*, [1916] 1 A.C. 1, at p. 13. *Digby* v. *Penny* (1932), 101 L.J.K.B. 615 is plainly distinguishable. There the notice in question was held to be sufficient but the statute which was under discussion did not require that the notice should specify the particular breach of which the landlord complained.

The appeal is allowed and the action dismissed with costs here and below.

Appeal allowed.

Solicitor for appellant: *David McKenzie.*
Solicitor for respondent: *T. G. McLelan.*

Appld Re Battaglia 22 D.L.R. (2d) 446

Consd Rex ex rel Lee v. W.C.B.Bd. 57 B.C.R. 412

REX *EX REL.* MORAN AND McLAREN v. LENNOX.

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Oct. 15;
Nov. 5.

Criminal law—Charge—Election for trial under section 827 of the Criminal Code—Accused not ready to elect—Taken as election to be tried by the Court having criminal jurisdiction—Mandamus—Appeal.

Two men, accused persons, named Moran and McLaren, were brought before a county court judge to elect for trial under section 827 of the Criminal Code. In answer, Moran said "I am not ready to elect now" and McLaren answered "I am not ready to elect." The learned judge treated these answers as an election to be tried in the ordinary way by the Court having criminal jurisdiction. One week later, represented by counsel, the accused appeared before the same county court judge and sought to elect for trial. The learned judge refused the application on the ground that they had already elected in the manner stated. An application for a peremptory writ of *mandamus* directed to the county

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judge, commanding him to cause Moran and McLaren to be brought before him for the purpose of being given the option to be tried forthwith before a judge without a jury or to be tried in the ordinary way by the Court having criminal jurisdiction, was refused.

Held, on appeal, reversing the decision of FISHER, J., that when accused said they were not ready to elect it should have been interpreted reasonably in the circumstances as a request for time to make up their minds how they should elect, the more so as they then had no counsel. By so acting the accused were deprived of the option to elect as preserved to them by section 827 (*b*) of the Criminal Code. What occurred constituted a "violation of an essential of justice." Accordingly *mandamus* will lie.

APPEAL by the prosecutors Jack Moran and John McLaren from the order of FISHER, J. of the 9th of October, 1940, dismissing their application on the return of an order *nisi* of the 3rd of October, 1940, whereby His Honour Judge LENNOX of Vancouver was ordered to show cause why a peremptory writ of *mandamus* should not issue directed to him, commanding him forthwith to cause the said prosecutors Jack Moran and John McLaren to be brought before him for the purpose of being given the option to be tried forthwith before a judge without the intervention of a jury or to be tried in the ordinary way by the Court having criminal jurisdiction.

The appeal was argued at Victoria on the 15th of October, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Paul Murphy, for appellant: The two accused were brought before the county court judge to elect how they were to be tried and they both said they were not ready to elect. The learned judge forthwith remanded them into custody to be tried in the ordinary way by the Court having criminal jurisdiction. They have the right to elect and a *mandamus* should issue: see *Re Rex* v. *Daly et al.* (1924), 55 O.L.R. 156; *Giroux* v. *Regem* (1917), 56 S.C.R. 63; *Reg.* v. *Ballard* (1897), 1 Can. C.C. 96, at p. 101; *Attorney-General for Ontario* v. *Daly*, [1924] A.C. 1011; *Rex* v. *Lee Sow* (1922), 31 B.C. 161.

W. S. Owen, for the Crown: *Mandamus* does not lie because the learned judge below functioned. "Forthwith" has its literal effect. Section 828 of the Code provides that he can elect: see *Rex* v. *Wong Chuen Ben* (1930), 43 B.C. 188, at p. 192. There

are only two methods open to an accused. He comes before the county court judge under section 825: see *Rex* v. *Lewis* (1909), 78 L.J.K.B. 722. If it is a question of discretion it does not go to the jurisdiction. He is given the right of election and if he does not exercise it he is tried in the regular way. A Supreme Court judge can *mandamus* a county court judge, but in this case the county court judge functioned.

Murphy, in reply, referred to *Rex* v. *Wong Sack Joe* (1929), 41 B.C. 254.

Cur. adv. vult.

5th November, 1940.

MACDONALD, C.J.B.C.: I would allow the appeal for the reasons given by my brother O'HALLORAN.

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

SLOAN, J.A.: I agree with my brother O'HALLORAN.

O'HALLORAN, J.A.: When Jack Moran and John McLaren were brought before LENNOX, Co. J. as accused persons on 23rd September, 1940, to elect for trial under section 827 of the Criminal Code, the accused Moran answered "I am not ready to elect now," and the accused McLaren answered "I am not ready to elect." Without more the learned judge treated these answers as an election despite the fact the accused were not then represented by counsel although they had been at the preliminary hearing. One week later represented by counsel the accused appeared before LENNOX, Co. J. and sought to elect for trial. The learned judge refused to entertin the application on the ground they had already elected in the manner stated. FISHER, J. refused a *mandamus;* this appeal lies from that refusal.

With respect as I view it the accused could not elect by saying "I am not ready to elect," the more so when one of them said "I am not ready to elect now." They did not elect or refuse to elect. It is apparent from these answers (supported as they are by the application of the accused a week later when represented by counsel), that they were unable, at that particular time, to exercise their "option" as to their mode of trial. When accused

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said they were not ready to elect it should have been interpreted reasonably in the circumstances as a request for time to make up their minds how they would elect, the more so as they were then without counsel. By acting as he did the learned judge deprived the accused of the option to elect preserved to them in section 827 (*b*), *supra*. In doing so he exceeded his jurisdiction or at least declined or failed to act judicially—*vide Reg.* v. *Evans and others* (1890), 62 L.T. 570, Lord Esher, M.R. at pp. 571-2, and *Rex* v. *Board of Education*, [1910] 2 K.B. 165, Farwell, L.J. at pp. 179-82; affirmed in the House of Lords, [1911] A.C. 179.

What occurred constituted a "violation of an essential of justice" in the sense that term has been used by this Court in *In re Low Hong Hing* (1926), 37 B.C. 295, and *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541. Accordingly *mandamus* will lie. *Vide* also *In re Chinese Immigration Act and Chin Sack* (1931), 45 B.C. 3, at pp. 5-7, and cases there cited. Where an inferior Court, in the words of Lord Ellenborough, C.J. in *The King* v. *The Archbishop of Canterbury* (1812), 15 East 117, at p. 145; 104 E.R. 789, at 799, has refused or eluded the performance of its express duty, the superior Court will interfere by *mandamus* to compel it to do what appertains to its duty. And *vide* also *The Queen* v. *The Archbishop of Canterbury* (1859), 1 El. & El. 545; 120 E.R. 1014 referred to by Gillanders, J.A. in the Ontario Court of Appeal in *Re Imperial Tobacco Co.*, [1939] 4 D.L.R. 99, at 110.

The accused did not act perversely, nor did they refuse to elect or do or say anything from which it could be inferred judicially that they had exercised their option to elect. As the accused on their arraignment were not permitted to exercise their undoubted right to select the alternative modes of trial open to them as contemplated by section 827, *supra*, the learned judge below failed in his duty in that regard and in consequence the *mandamus* should issue.

Counsel for the respondent also contended that *mandamus* did not lie alleging there was an alternative remedy, *viz.*, that the objection could be taken by the accused on their arraignment in due course at the Vancouver Assize. I should not regard

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that course as equally convenient or effective. Yet even if it were, this Court has held in *Dumont* v. *Commissioner of Provincial Police*, [*ante*, 298, at p. 303], [1940] 3 W.W.R. 39, at p. 41, in the judgment delivered by my learned brother SLOAN that the existence of another remedy does not oust the jurisdiction to grant *mandamus*, but is at best an element to be considered in exercising that jurisdiction. FISHER, J. did not refuse the *mandamus* on this ground.

I would therefore allow the appeal and direct the *mandamus* to issue.

McDONALD, J.A.: I have had the privilege of reading the judgment of my brother O'HALLORAN. I agree therewith and have nothing to add.

Appeal allowed.

THE CHILDREN'S AID SOCIETY OF THE CATHOLIC ARCHDIOCESE OF VANCOUVER v. THE MUNICIPALITY OF THE CITY OF SALMON ARM.

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Oct. 15, 16;
Nov. 5.

Infants Act—Juvenile court—Neglected child—Order for care and custody of—Maintenance of child—Charge against municipality—R.S.B.C. 1936, Cap. 128, Secs. 56 (j), 82, 93 and 95.

Dist'd
R. v. Cornick
91 C.C.C. 56

Dist'd
R. v. Bains Singh (No 2)
93 C.C.C. 196.

Ref'd to
Re Otis Elevator Co.
Int'l Union of Elevator Constructors
22 D.L.R. (3d) 709
(N.S.S.C.)

By order of the juvenile court for the city of Vancouver, it was found that Evelyn Sherban is a neglected child within the meaning of the Infants Act, that she has no parent capable and willing to exercise proper parental care over her, that she is of the Roman Catholic religion, and it was ordered that she be delivered into the care and custody of The Children's Aid Society of the Catholic Archdiocese of Vancouver and that the municipality of the city of Salmon Arm do pay The children's Aid Society of the Catholic Archdiocese of Vancouver $4 per week for the expense of supporting the child until she is eighteen years old. On motion on behalf of the municipality of the city of Salmon Arm for a writ of *certiorari*, it was ordered that the order of the juvenile court be quashed in so far as it was ordered that the municipality of the city of Salmon Arm do pay to The Children's Aid Society the sum of $4 per week for the expense of supporting the child.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that there are two municipal corporations of Salmon Arm, namely, the city and the district, and there is no evidence

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adduced to show whether it is the city or the district municipality which was sought to be charged for the care and maintenance of the neglected infant. There are no objective facts from which an inference may be drawn. The record fails to disclose any evidence at all to enable a Court to decide judicially that the city of Salmon Arm is or is not chargeable, and *certiorari* lies accordingly and the appeal is dismissed.

Rex v. *Nat Bell Liquors, Lim.*, 91 L.J.P.C. 146; [1922] 2 A.C. 128, distinguished.

Held, further, that section 82 of the Infants Act is not *ultra vires* of the Provincial Legislature.

APPEAL by The Children's Aid Society from the decision of MORRISON, C.J.S.C. of the 17th of June, 1940. Evelyn Sherban, a neglected child of the Roman Catholic faith, was born in Vancouver on the 17th of May, 1939. The child's mother, Leona Sherban is an infant and unmarried. Leona's parents live at Salmon Arm where they have resided for over seven years. Leona lived with her parents until she came to Vancouver about five months before the child was born. Both mother and child have been cared for by Our Lady of Mercy Home in Vancouver since the child was born up to the present. On the information and complaint of Muriel Shaw, agent of the Catholic Children's Aid Society, that Evelyn Sherban, a neglected child of the Roman Catholic faith, under the age of eighteen years, apprehended under section 56 of the Infants Act of British Columbia by reason of subsection (*j*), "Who has no parent capable and willing to exercise proper parental control over" the child. Taken before Helen G. MacGill, judge of the juvenile court in Vancouver, it was ordered that Evelyn Sherban be delivered into the care and custody of The Children's Aid Society of the Catholic Archdiocese of Vancouver, and that the municipality of the city of Salmon Arm shall pay to The Children's Aid Society of the Catholic Archdiocese of Vancouver the sum of $4 weekly for the expense of supporting the said child until she reaches the age of eighteen years. On motion for a writ of *certiorari* by the municipality of the city of Salmon Arm, it was ordered by MORRISON, C.J.S.C. that the order of Mrs. MacGill be quashed in so far as it was thereby ordered that the municipality of the city of Salmon Arm shall pay to The Children's Aid Society the sum of $4 per week for supporting the said child until she reaches the age of eighteen years.

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The appeal was argued at Victoria on the 15th and 16th of October, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

A. deB. McPhillips, for appellant: This is an appeal from the order of MORRISON, C.J.S.C., quashing the order of the juvenile court judge. The proceedings were properly started on information and complaint under the Infants Act. *Certiorari* was applied for to quash the first order but not the second order. The learned judge having held the matter to have been properly laid before the judge of the juvenile court and within her jurisdiction, erred in not dismissing the application for *certiorari.* The jurisdiction of the juvenile court is established and you cannot go into the evidence: see *Rex* v. *Nat Bell Liquors, Ld.,* [1922] 2 A.C. 128, at p. 156; *Rex* v. *Brandilini* (1926), 38 B.C. 87. He erred in not holding that the applicant was precluded from *certiorari* by reason of the remedy provided in subsection (3) of section 82 of the Infants Act. The matter having been properly submitted to the juvenile court and an order being properly made according to the statute, the learned judge should not have dealt with the charge on the municipality.

Maitland, K.C., for respondent: In this Act we are not concerned with the *Nat Bell* case. Salmon Arm was not mentioned in the whole proceedings: see *Rex* v. *Cruickshanks* (1940), 73 Can. C.C. 213; *Rex* v. *Henderson* (1929), 41 B.C. 242; *Rex* v. *Gustafson* (1929), 42 B.C. 58; *Rex* v. *Colpe* (1937), 52 B.C. 280; *Rex v. Chin Yow Hing* (1929), 41 B.C. 214; *Volhoffer* v. *Volhoffer,* [1925] 2 W.W.R. 304; *Rex* v. *Oakes* (1923), 39 Can. C.C. 329; *Rex* v. *Page* (1923), 53 O.L.R. 70. You can look at the proceedings in the Court below in this case. Section 82 of this Act is *ultra vires.* It is indirect taxation: see *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.,* [1933] A.C. 168, at pp. 189-90 and 193-4; *Cotton* v. *Regem,* [1914] A.C. 176; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357; *City of Windsor* v. *McLeod,* [1926] 2 D.L.R. 97, at p. 101.

H. Alan Maclean, for the Province of British Columbia: The sum ordered here is not a tax at all, and if it is a tax it is a direct

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tax. Section 82 of the Act has been enforced since 1901. It is for the maintenance of a particular person. The great characteristic of an indirect tax is that you do not know who is going to pay it: see *Brandon* v. *Municipal Commissioner,* [1931] 4 D.L.R. 830, at p. 838.

McPhillips, in reply: In section 51 of the Act "officer" is defined, and every other person authorized by the superintendent may carry out its functions.

Cur. adv. vult.

5th November, 1940.

MACDONALD, C.J.B.C.: If there was no evidence before the juvenile court judge disclosing that Salmon Arm might be charged with the care and maintenance of this infant the appeal should be dismissed. I think, with deference, there is such evidence. The words "Salmon Arm" were used repeatedly by witnesses; no one could be misled or was in fact misled, by this designation; it meant the city of Salmon Arm, a well known urban municipality and, with respect, could not reasonably be taken to refer to any other geographical area.

We are now told on this appeal, through an affidavit sworn to by the clerk of the city of Salmon Arm, or, as he describes it, "The Municipality of the City of Salmon Arm," that there is in this Province a rural area known as "The Municipality of The District of Salmon Arm" and based upon this evidence it is urged that the words "Salmon Arm," as used by the witnesses in the juvenile court, is equally referable to this district municipality. I cannot agree. When the single word "Vancouver" is used by witnesses who would suggest that possibly the "County of Vancouver" was meant? All cities in Canada from Halifax to Victoria are constantly referred to in common speech by a single word. When in this Province we speak of Cranbrook, Revelstoke, Salmon Arm or Kamloops all know that cities are referred to; we may take judicial notice of that fact. One says he lives in "Vancouver"; not in the "corporation of the city of Vancouver." This is more particularly true where the city and an adjoining rural district municipality bear the same name. When one speaks of residing in "New Westminster" one does not conclude that the county of Westminster is meant; it is not at all

referable to it. A rural district municipality in comparison with the urban is in a junior position; hence when both bear the same name the single word, in the popular mind, is appropriated by the city: in that event additional words, such as "township" or "municipality," are necessary to describe the rural area. If I said I lived for a time in Goderich, a town in Ontario, no one in that Province would be misled: If however I lived in the "township of Goderich" I could not use the single word "Goderich" to describe it.

All parties were aware that one important aspect of this inquiry related to whether or not the city of Salmon Arm was chargeable; it was not suggested by anyone that the obligations, if any, of the district municipality were considered. Mr. *Maitland* appeared on behalf of the city of Salmon Arm; no other area was represented or referred to. He does not urge that a serious error was committed: he merely takes the technical ground that there is no evidence that the urban municipality he openly represented at the hearing was indicated in the proceedings. This, for the reasons given and with deference to other views, is I think fallacious.

We are concerned therefore only with a question of construction: the Courts constantly construe words used by witnesses, whether grammatical, precise or otherwise: I find no difficulty in saying that the words "Salmon Arm" are referable only to the city of that name and that it is not a proper designation for the junior district municipality: to hold otherwise, as in this case, leads to a denial of justice.

I would refer to *Ex parte Macdonald* (1896), 3 Can. C.C. 10; *Rex* v. *Canadian Pacific Railway Co.* (1908), 14 Can. C.C. 1, and *Reg.* v. *McGregor* (1895), 2 Can. C.C. 410.

I agree that the section of the Act attacked is not *ultra vires*. I would allow the appeal.

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

SLOAN, J.A.: I agree with my brother O'HALLORAN.

O'HALLORAN, J.A.: The record before us includes the evidence and proceedings before the judge of the juvenile court in

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and for the city of Vancouver. There are two municipal corporations of Salmon Arm, *viz.*, the city and the district; but there is no evidence adduced to show whether it is the city or the district municipality which was sought to be charged for the care and maintenance of the neglected infant. Nor can I find in the record any objective facts from which this inference may be drawn. As Lord Wright said in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*, [1940] A.C. 152, at 169, inference must be carefully distinguished from conjecture or speculation. Without objective facts there can be no inference, for then there is nothing to support inference and what is left is mere speculation or conjecture. The "municipality of Salmon Arm," the "corporation of Salmon Arm," or "Salmon Arm" which were the only descriptions appearing in the evidence and proceedings, may refer to the district as well as to the city municipality.

I see no escape from the conclusion that the record fails to disclose any evidence at all to enable a Court to decide judicially that the city of Salmon Arm is or is not chargeable. *Certiorari* lies accordingly. In my opinion *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, particularly at p. 158, does not apply. In the first place for the reasons given by FISHER, J. in distinguishing that decision in *In re Bland and Children's Aid Society* (1933), 48 B.C. 45, at pp. 48-51, which with respect I think was rightly decided. I refer in the second place to an important phase which does not seem to have emerged in the *Nat Bell* case (and *vide* the decision of the Appellate Division of Alberta in *Rex* v. *McMicken*, [1923] 3 W.W.R. 879), *viz.*, a decision by a Court, as here, without any evidence to support its decision is not an exercise of the judicial function at all. The Court has declined or failed to exercise its judicial function: it is in effect a refusal to decide according to the evidence. As such it is a "violation of an essential of justice" in the sense that term has been used by this Court in such reported decisions as *In re Low Hong Hing* (1926), 37 B.C. 295, at p. 302, and *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, at pp. 549, 551, and 555. *Vide* also *Rex* v. *Housing Appeal Tribunal*, [1920] 3 K.B. 334.

Reference may be made also to the observations of Cockburn,

C.J. and Field, J. in *The Queen* v. *Adamson* (1875), 45 L.J.M.C. 46 on the necessity of magistrates deciding only on the "evidence before them." *Vide* also *Reg.* v. *Evans and others* (1890), 62 L.T. 570, at 571-2 and *Rex* v. *Board of Education*, [1910] 2 K.B. 165, with the authoritative exposition of Farwell, L.J. at pp. 179-182; the decision of the Court of Appeal was affirmed in the House of Lords, [1911] A.C. 179. In this aspect the same principle applies as in *mandamus*. *Vide* also the decision of GREGORY, J. in *In re Chinese Immigration Act and Chin Sack* (1931), 45 B.C. 3, at pp. 5-6 and cases there cited. This conclusion is not affected by sections 82 (3) or 93 of the Infants Act, Cap. 128, R.S.B.C. 1936.

Counsel for the respondent sought to uphold the judgment below by submitting that section 82 of the said Infants Act is *ultra vires* in that, the section when authorizing the judge of the juvenile court to make an order fixing a municipality with the responsibility for the upkeep of the neglected child thereby authorized the imposition of an indirect tax. In my view neither the said order of the judge of the juvenile court nor the section of the Infants Act by virtue of which jurisdiction is conferred to make that order, impose a levy or charge upon the municipality in the nature of a tax within the meaning thereof as defined in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at p. 363, and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, [1933] A.C. 168, at p. 175.

In the circumstances the quashing order should be sustained and the appeal dismissed.

MCDONALD, J.A.: I concur in the judgment of my brother O'HALLORAN.

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

Solicitors for appellant: *McPhillips & McPhillips.*

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

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1940
May 28;
June 4.
C. A.
1940
Sept. 13;
Nov. 5.

CRUMP v. SMITH.

Evidence — Corroboration — Action against administrator for breach of contract with deceased person—Bequest in an invalid will—Plaintiff only stranger in blood benefiting under invalid will—R.S.B.C. 1936, Cap. 90, Sec. 11.

The plaintiff and Annie Smith, deceased, were employees in the Hudson's Bay Company in Vancouver and were friends for many years. The plaintiff owning a lot in Vancouver, built a residence on it, and the deceased lent him $2,500 to assist in payment for the construction of the residence. He then gave deceased a mortgage on the premises for $2,500. Further advances to the plaintiff brought the loan up to $3,000. In October, 1939, plaintiff and deceased agreed verbally that the plaintiff would convey and quit claim to deceased the property in question, and deceased would release the mortgage debt to the plaintiff and the plaintiff would be allowed to occupy the said premises at $35 per month, and the deceased would bequeath to the plaintiff the sum of $3,000 in her will. The plaintiff then conveyed the property to deceased. Annie Smith died on the 4th of January, 1940, intestate. The deceased executed an invalid will which contained a bequest to the plaintiff of $3,000. In an action against the administrator of deceased's estate for breach of contract, it was held that the corroboration required by section 11 of the Evidence Act must be of something essential to be shown before the plaintiff can, upon his own evidence, obtain a decision in his favour upon the cause of action he is setting up. The corroborating evidence must be of some fact essential to the success of the plaintiff, though it is not required that all such facts be corroborated. The fact essential to the success of the plaintiff is that he must show a binding contract on the part of the deceased to bequeath him $3,000 as part of the consideration for his execution of a quit-claim deed to her of the property. The bequest in the invalid will is consistent with two views. It might be that she was making a gift to him of $3,000, and the fact that he was the only stranger in blood benefiting under the invalid will does not advance the matter so far as furnishing corroboration, and the action should be dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that the learned trial judge reached the right conclusion and the Court is in agreement with the reasons given in support of his judgment.

APPEAL from the decision of MURPHY, J. in an action against the administrator of the estate of Annie K. Smith and personal representative of said Annie K. Smith, deceased, for damages caused by said Annie K. Smith to the plaintiff by reason of her breach of contract, tried at Vancouver on the 28th of May, 1940. The plaintiff and Miss Smith were friends for many years, both

having been employees of the Hudson's Bay Company. In 1924 the plaintiff purchased a property in Vancouver and Miss Smith lent him $2,500, repayment of which was secured by his giving her a mortgage on the property. Further advances increased this sum to $3,000. By arrangement between them in October, 1939, the plaintiff quit claimed all his interest in the property to Miss Smith. Miss Smith would permit plaintiff to live in the house on payment of $35 per month, she would release the mortgage on the property, and in her will she would bequeath him $3,000. The property was transferred to Miss Smith and she made a will bequeathing him $3,000. Miss Smith died in January, 1940, but her will was not properly executed and was not admitted to probate. Letters of administration of her estate were granted to the defendant. On February 15th, 1940, the quit-claim deed was registered, it having remained in Miss Smith's possession until her death.

Bray, for plaintiff.
P. A. White, and *Bruce Robertson,* for defendant.

Cur. adv. vult.

4th June, 1940.

MURPHY, J.: If this action fell to be decided on the evidence adduced by plaintiff I would hesitate to hold that it had been affirmatively made out to the extent necessary to entitle plaintiff to judgment. Since, however, I have come to the conclusion that the corroboration required by section 11 of the Evidence Act, R.S.B.C. 1936, Cap. 90 has not been adduced I need not deal further with this feature.

The corroboration required by said section must be of something essential to be shown before the plaintiff can upon his own evidence obtain a decision in his favour upon the cause of action he is setting up. Evidence which is consistent with two views corroborates neither. The corroborating evidence must be of some fact essential to the success of the plaintiff though it is not required that all such facts be corroborated. *Elgin* v. *Stubbs* (1928), 62 O.L.R. 128. The facts relied upon here as corroboration are that the deceased executed an invalid will which con-

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Murphy, J.

tains a bequest to plaintiff of $3,000 and that the plaintiff is the only stranger in blood who takes any benefit under said invalid will. The fact essential to the success of the plaintiff in this case is that he must show a binding contract on the part of the deceased to bequeath him $3,000 as part of the consideration for his execution of a quit-claim deed to her of the Broughton Street property. The bequest in the invalid will is consistent with the view that testator was making a gift of $3,000 to the plaintiff. The fact that he is the only stranger in blood benefiting under the invalid will does not, so far as I can see, advance the matter so far as furnishing the required corroboration is concerned. Neither of these facts taken alone, nor both together considered in themselves, tend, in my opinion, to indicate the existence of a contract such as the one plaintiff sets up.

The action is dismissed with costs. By consent of defendant's counsel I direct that the expense of obtaining a transcript of the evidence, which I requested, and of which I made a careful study, should be paid in the first instance out of deceased's estate. I direct, however, that the costs thereof be included in the costs to be recovered by the defendant from the plaintiff.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 13th of September, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Bray, for appellant: The sole defence urged by the defendant is that the requirements of section 11 of the Evidence Act had not been fulfilled. The learned judge's judgment dismissing the action is based on *Elgin* v. *Stubbs* (1928), 62 O.L.R. 128, but that case discloses many points of difference from the case at Bar. The distinction is shown in *In re Hodgson. Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, at p. 183. The statement of the plaintiff need not be corroborated in every particular: see *Radford* v. *Macdonald* (1891), 18 A.R. 167, at p. 171; *Green* v. *McLeod* (1896), 23 A.R. 676; *McDonald* v. *McKinnon* (1878), 26 Gr. 12; *Rawlinson* v. *Scholes and another* (1898), 79 L.T. 350; *Minister of Stamps* v. *Townend,* [1909] A.C. 633; *McDonald* v. *McDonald* (1903), 33 S.C.R. 145, at p. 152; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, at p. 263; *Thornley* v. *Royal Trust Co. and Mowbray* (1932), 41 O.W.N. 470,

at p. 472. The *Stubbs* case was based on *In re Finch*. *Finch* v. *Finch* (1883), 23 Ch. D. 267, which is not a proper exposition of the law and has not been followed.

Bruce Robertson, for respondent: There are two issues: (1) Should the plaintiff be believed; (2) was there corroboration. He relies on the purported will as corroboration, but that document says nothing about an obligation to leave $3,000. It is no more consistent with an obligation than it is with a gift. Evidence which is consistent with two views is not corroboration: see *Thompson* v. *Coulter* (1903), 34 S.C.R. 261; *Elgin* v. *Stubbs* (1928), 62 O.L.R. 128; *Holliday* v. *Turner* (1930), 65 O.L.R. 206. He must satisfy the Court that the plaintiff's evidence is true: see *Pieper* v. *Zinkann* (1927), 60 O.L.R. 443, at 446. On the meaning of "material" see *Orr* v. *Orr* (1874), 21 Gr. 397, at p. 409; *Bligh* v. *Gallagher* (1921), 29 B.C. 241. This Court will not on a question of credibility readily reverse the trial judge: see *Nemetz* v. *Telford* (1930), 43 B.C. 281; *Gray* v. *Caldeira,* [1936] 1 W.W.R. 615.

Bray, in reply, referred to *Thornley* v. *Royal Trust Co. and Mowbray* (1932), 41 O.W.N. 470.

Cur. adv. vult.

5th November, 1940.

MACDONALD, C.J.B.C.: I would dismiss the appeal.

SLOAN, J.A.: After a careful consideration of the evidence and the authorities I am confirmed in the opinion I formed during the hearing of this appeal that the learned trial judge below reached the right conclusion and the appellant must fail. I am in agreement with the reasons given to support his judgment and can add nothing of value thereto.

O'HALLORAN, J.A.: I would dismiss the appeal for the reasons given by the learned trial judge, Mr. Justice MURPHY.

Appeal dismissed.

Solicitor for appellant: *H. R. Bray.*
Solicitor for respondent: *Bruce Robertson.*

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Dec. 5.

THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA EX REL. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN AND NEWS PUBLISHING COMPANY LIMITED.

Affmd [1941] S.C.R. 321

Injunction—Professions—Foreign dentist—Advertising in British Columbia—Holding out "as being qualified or entitled" to practise—Restraining advertising — Section 63 (2) of Dentistry Act — Validity — R.S.B.C. 1936, Cap. 72, Sec. 63 (2)—B.C. Stats. 1939, Cap. 11, Sec. 3.

The defendant Cowen, a citizen of the United States residing in Spokane, Washington, where he practises dentistry, inserted advertisements in a newspaper in British Columbia with a view to inducing residents of that Province to go to him for dental treatment. He was not licensed under the Dentistry Act and did not do any work in British Columbia. Section 3 of the Dentistry Act Amendment Act, 1939, provides that "No person not registered under this Act shall, within the Province, directly or indirectly offer to practise, or hold himself out as being qualified or entitled to practise, the profession of dentistry either within the Province or elsewhere, and no person shall, within the Province, directly or indirectly hold out or represent any other person not registered under this Act as practising or as qualified or entitled or willing to practise the profession of dentistry in the Province or elsewhere, or circulate or make public anything designed or tending to induce the public to engage or employ as a dentist any person not registered under this Act." At the suit of the Attorney-General on relation of the College of Dental Surgeons of the Province, the trial judge held that the above section falls within the provisions of section 92 of the British North America Act, and he granted an injunction restraining the News Publishing Company Limited from holding out or representing the defendant Cowen as qualified or entitled to practise dentistry in British Columbia or elsewhere.

Held, on appeal, affirming the decision of MURPHY, J., that the pith and substance of the Dentistry Act is to prevent the possibility of impairment of the health of residents of British Columbia through the practise of dentistry by persons not qualified under the provisions of the Dentistry Act. It follows that the Province can utilize its power of controlling advertisements appearing within its territorial limits to lessen the likelihood of the occurrence to residents in the Province of the local evil aimed at. As the Province can utilize its power to prevent unregistered dentists resident within the Province from holding themselves out as dental practitioners, so likewise it can prevent unregistered dentists resident outside the Province from doing anything within the territorial limits of the Province intended to make more probable the occurrence of what in the view of the Legislature is an evil calling for legislative action.

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APPEAL by defendants from the decision of MURPHY, J. of the 11th of September, 1940 (reported, *ante,* p. 370), in an action for an injunction to prevent further publication of advertisements in the daily paper of the defendant the News Publishing Company at Nelson, B.C., on behalf of and by the authority of the defendant Cowen, holding him out as a dentist practising in the city of Spokane in the State of Washington, U.S.A. The defendant Cowen is not a member of the College of Dental Surgeons of British Columbia. The College had brought a previous action for an injunction against Dr. Cowen to restrain him advertising in the Province his practice in Spokane. The Court of Appeal and Supreme Court of Canada decided that the Dentistry Act, as it then was, did not apply to dentists not practising in the Province.

The appeal was argued at Vancouver on the 8th and 12th of November, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.

J. W. deB. Farris, K.C., for appellant: The 1939 amendment to the Dentistry Act, so far as it affects extraprovincial dentists, is not in relation to a matter of a merely local nature in the Province under section 92 (16) of the B.N.A. Act: (a) The evil is not local because it has an immediate external cause. (b) remedy is not local because it is directed and operates against the external cause. We agree that the legislation so far as valid comes within section 92 (16): see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, at pp. 130-1; *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* [1896] A.C. 348, at p. 365. It is also agreed that the original Dentistry Act comes within section 92 (16). The controversy is as to the power to stop outside dentists advertising in the Province and to stop newspapers in the Province advertising dental treatment outside. The word "elsewhere" in the 1939 amendment raises the controversy in this case. The learned judge below said the evil aimed at by the Act remains local, though its occurrence is caused by dental work outside. The cause of the evil would be extraprovincial dentistry but the evil resulting would have its *situs* within the Province, and he relies on *Rex* v. *Western Canada Liquor Co.* (1921), 29

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B.C. 499, at pp. 507-8. This case is in part distinguishable and it has been in effect overruled by subsequent decisions. An evil which has its foundation and cause outside the Province cannot be said to be a matter of a purely local or private nature, and a regulation in the Province designed to and having the effect of limiting the operations of an external cause cannot be said to be a purely local matter in the Province. The case of *Gallagher* v. *Lynn* (1937), 106 L.J.P.C. 161, has essential differences from this case. See also *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708. The case of *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357, at p. 365, is a complete refutation of the suggestion that external affairs may be regulated in the Province provided the regulation is applied within the Province. See also *Attorney-General for Ontario* v. *Reciprocal Insurers,* [1924] A.C. 328, at p. 345; *In re Grain Marketing Act, 1931,* [1931] 2 W.W.R. 146, at p. 156; *Reference re Alberta Statutes,* [1938] S.C.R. 100, at p. 122. It is submitted that the 1939 amendment to the Dentistry Act is in relation to the regulation of trade and commerce (*i.e.,* section 91 (2)): see *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia,* [1898] A.C. 700, at p. 715. Dentures made by dentists are goods within the meaning of the Sale of Goods Act: see *Lee* v. *Griffin* (1861), 30 L.J.Q.B. 252; *Robinson* v. *Graves* (1935), 104 L.J.K.B. 441, at p. 445. As to the scope of the expression "trade and commerce" see *James* v. *Cowan* (1930), 43 C.L.R. 386, at p. 418; *W. & A. McArthur Ltd.* v. *State of Queensland* (1920), 28 C.L.R. 530, at pp. 546-7; *Roughley* v. *New South Wales* (1928), 42 C.L.R. 162, at p. 179. The power to regulate embraces all the instruments by which commerce may be conducted: see *Walton* v. *State of Missouri* (1875), 91 U.S. 275; *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* [1896] A.C. 348, at p. 363. As to interprovincial trade see *In re The Natural Products Marketing Act, 1934,* [1936] S.C.R. 398, at p. 410; *Proprietary Articles Trade Association* v. *Attorney-General of Canada* (1931), 100 L.J.P.C. 84, at p. 91. Because the pith and substance of the Dentistry Act as a whole is within the Province's jurisdiction,

it does not follow that it can incidentally legislate so as to directly affect matters outside its competence: see *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada,* [1894] A.C. 189; *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* [1896] A.C. 350; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia,* [1898] A.C. 700; *Grand Trunk Railway of Canada* v. *Attorney-General of Canada,* [1907] A.C. 65; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association,* [1902] A.C. 73, at pp. 79-80; *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708, does not apply as both the regulation and its effect were confined within the Province. See also *Attorney-General for British Columbia* v. *Macdonald Murphy Lumber Co.,* [1930] A.C. 357, at p. 364; *Rex* v. *Nat Bell Liquors, Ld.,* [1922] 2 A.C. 128; *Union Colliery Company of British Columbia* v. *Bryden,* [1899] A.C. 580, at p. 583; *Cunningham* v. *Tomey Homma,* [1903] A.C. 151, at p. 157. It is the civil right of newspapers in Canada to advertise with reference to transactions of an interprovincial nature. Such a civil right is not a purely local one: see *Royal Bank of Canada* v. *Regem,* [1913] A.C. 283; *In re Grain Marketing Act, 1931,* [1931] 2 W.W.R. 146, at pp. 155 and 182.

Maitland, K.C., for respondent: The whole issue is whether section 63 (2) is *ultra vires* of the Legislature. By advertising Cowen as a dentist, the paper is circulating and making public something designed or tending to induce the public to engage or employ as a dentist a person not registered under the Dentistry Act. That the regulation of professions is within the power of the Provincial Legislature see *Lafferty* v. *Lincoln* (1907), 38 S.C.R. 620. In *Bennett* v. *The Pharmaceutical Association of the Province of Quebec* (1881), 4 L.N. 125; 1 D.C.A. 336, it was held that the Pharmacy Act was *intra vires.* The legislation in question is confined to transactions taking place within the Province, that is, "holding out within the Province": see *Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708, at p. 718. The only act restrained by the judgment below is the publishing within the Province of an advertisement by a

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person not registered under the Dentistry Act. The pith and substance of the Act is to prevent the possibility of impairment of the health of residents of British Columbia by persons who may not measure up to the standards required by the Dentistry Act: see *Attorney-General for Alberta ex rel. Rooney* v. *Lees and Courtney*, [1932] 3 W.W.R. 533, at p. 541. Even if it may incidentally affect trade with Spokane, it is not passed "in respect of" trade and is not subject to attack on that ground: see *Bennett* v. *The Pharmaceutical Association of the Province of Quebec* [*supra*]. The section is aimed at the removal of a local evil caused or shown to exist by the advertising referred to. Advertising is no exception to the acts which the Legislature of the Province has power to prohibit being done within the Province: see *Rex* v. *Western Canada Liquor Co.* (1921), 29 B.C. 499, at pp. 506-7. In the interest of health, only persons of whose qualifications it is satisfied under the tests provided by the Act should, by means of advertising, "hold themselves out within the Province." If Cowen desires to "hold himself out" within the Province, he simply has to do what everyone else has to do—register in this Province under the Act. The respondent adopts the reasons of the learned trial judge as to the validity of the section in question.

Farris, replied.

Cur. adv. vult

5th December, 1940.

MACDONALD, C.J.B.C.: We are asked to hold that an amendment to the Dentistry Act, R.S.B.C. 1936, Cap. 72, enacted in 1939 by Cap. 11, Sec. 3, adding to section 63 of the original Act a new subsection (2), is *ultra vires* of the Provincial Legislature: it reads as follows: [already set out in head-note.] If the words "either," "elsewhere" and "or elsewhere," as I understand it, had not been included in this section no question could be raised respecting its validity.

There can be no question that the original Act and the amendment, less the words referred to, is *intra vires* of the Provincial Legislature. The main Act was passed to regulate and control the practice of dentistry for the purpose, as the trial judge found, of preserving

alth of the residents of the Province in so far as it may be affected e practice of dentistry.

as also designed in the public interest to improve the *status* hat profession; if one is not satisfied with these statements policy it will be found impossible to substitute another not of ocal or private nature.

It is in the public interest, in the view of the Legislature, from ne standpoint of health and ethics to provide for citizens within he Province a body of qualified dentists possessing known standards and qualifications. Unprofessional conduct, as displayed in flamboyant advertising, is controlled by a council; it keeps a register of the members of the College of Dental Surgeons in the Province and in that way may exercise control. Whether or not one might urge, contrary to the view just expressed, that legislation of this character limits competition or creates a monopoly—if indeed that would make any difference—it would be at best incidental to its main purpose.

With the foregoing the pith and substance of the Act can we hold that the presence of the words referred to, *viz.*, "or elsewhere," create such a departure from its original purpose that it is no longer legislation of a "merely local or private nature"? Rightly or wrongly, with respect to counsel's submissions, I do not think the question is open to serious debate.

Appellant's counsel, through the discussion of many well-known constitutional cases, took us on a journey into a far country—I think a foreign land—but I found no sustenance there: the problem is strictly local—close at hand. Many implications were suggested from the inclusion of these words: it was said to relate, as presently framed, not exclusively to a local matter at all and to no longer have for its only object the preservation of health and the improvement of *status* in the dental profession: the submission appeared to be that, because the alleged condition arose from practising dentistry in another country, no local evils ensued properly subject to Provincial legislation. The Act does not interfere with the practice of dentistry elsewhere; it merely interferes with the "activities" of such dentists if in any way they project themselves into this Province.

There is much legislation of a purely local nature which, if

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repealed, would be beneficial to residents of neighbouring Provinces and States: that is merely an incident. If it is conceded that no one, within the Province, not registered under the Dentistry Act "shall hold himself out" as being qualified or entitled to practise the profession of dentistry either personally or through the medium of advertising it would be a curious limitation on legislative powers to hold that one outside the Province could within it enjoy greater rights. The appellant Cowen engages in "activities" both in this Province and in the State of Washington: legislation in each area in respect to his acts, whether it relates to driving a car or to advertising, may be validly enacted by the appropriate Legislature.

It follows that if the council may, as indicated, prevent a certain type of advertising as unprofessional it can also prevent one, not registered under the Act, from advertising at all within the Province: in other words prevent him from "holding himself out" if the Legislature gives it authority to do so or if, as in this case, it legislates directly on this point. Section 63 (2) contains that prohibition; it is purely a matter of a local or private nature. To hold otherwise is to say that the Province, to advance a local policy cannot legislate in respect to the acts of one within the Province wherever he may reside: non-residents in respect to what they may or may not do within the Province are subject to much Provincial legislation. It may impose a condition as a *sine qua non* to any local activities: the condition in this case is this—if an outsider "hold himself out" as a dentist here he must register under the Dentistry Act: he will then be subject to that control the Legislature deems essential. It is directed only to "activities"; its basic feature is "holding himself out," not in Washington but in British Columbia. Provincial legislation is not confined to persons: its subject-matter may be acts and conduct.

It may legislate, too, in respect to the civil rights of individuals or companies, *e.g.*, the appellant News Publishing Company Limited. If civil rights within the Province are invaded it is not without authority. If, too, it is legislating in respect to a local or private matter we are not concerned with repercussions here or elsewhere. If also it is the policy of the Government, as

indicated, to provide, or at least to make available for local residents, in the interest of public health, registered dentists with certain standards it can advance that policy still further by removing, as far as possible, inducements to go elsewhere. If in so doing trade and commerce is affected it is incidental to the real purpose of the legislation; it interferes at best only to the extent necsssary for the proper exercise of Provincial powers in relation to this local matter.

The Act, doubtless prompted by the recent decision in *Attorney-General for British Columbia* v. *Cowen,* [1939] S.C.R. 20 is not directed at this appellant alone. This Province is contiguous to the State of Washington: if it should become a general practice in the adjoining city of Seattle and at other points near the border to indulge in this practice the evil would be greater and the *status* of dentists in this Province more injuriously affected. To promote their welfare is a local object: legislation too is often validly enacted locally to protect people from following their own inclinations.

I would further suggest that even if we view it from what might be considered a lower plane and hold—contrary I think to the facts—that the real purpose of this legislation is to add to the revenue of local dentists by inducing residents to have their dental work done within this Province it would not be objectionable. The Legislature might regard it as of importance from a local standpoint to have within our own Province a strong dental profession obtained by a greater measure of public support; in addition local spending has a local value.

It is only necessary to add that this legislation was enacted in relation to matters hereinbefore referred to not to subject-matters on the outskirts said to be of Federal concern. If it impinges upon any field of Federal legislation it does so to no greater extent than necessary and incidental to the exercise of Provincial powers.

I would dismiss the appeal.

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

McDONALD, J.A.: I have examined at length and with care the judgment of the learned trial judge and the arguments care-

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fully and fully presented before us by counsel, in relation to that judgment. In my opinion the learned judge has met and correctly dealt with, every substantial argument which the appellants raise. I think he reached the right conclusion and I am unable, after much careful consideration—and I say it with great respect—to add much if anything useful to what the learned judge has said.

Though it is not mentioned in the reasons of the trial judge, counsel for appellants before us relied upon the decision in *Gallagher* v. *Lynn* (1937), 106 L.J.P.C. 161. There Lord Atkin held that the milk legislation of Northern Ireland was in respect of "trade" (a prohibited subject) but was, in its pith and substance an Act to protect the health of the inhabitants of Northern Ireland, though it might incidentally affect trade with County Donegal.

With great respect I am quite unable to understand what comfort appellants' counsel can extract from this decision. My own view would be that it might equally well be used in support of respondent's contention that the Act now in question, considered in its pith and substance, relates to the health of the inhabitants of British Columbia and is hence a matter of a merely local or private nature in the Province even though it may incidentally reduce the chances of an unqualified dentist from selling his wares in this Province.

The thing the legislation now in question strikes at is the "holding out" within the Province. Such legislation I think is valid even though it may incidentally affect the operations of some individual who happens to carry on his business in Spokane. The argument that the Dentistry Act has for its real purpose the creation and protection of a monopoly in the fortunate group who happen to be registered upon the rolls of the profession is at first blush persuasive, but I think it is unsound. Admittedly the regulation and control of each of the learned professions lie within the ambit of Provincial jurisdiction, and yet one cannot believe that any Legislature in Canada has ever introduced such legislation having for its primary purpose the protection of any favoured group from competition, whether such competition came from without the Province or from within. It is true that

as an incident to this type of legislation the qualified practitioner is protected from competition from the unqualified—in this case the unregistered—but that is merely an incident. The object of such legislation is to protect the people of the Province, so far as is humanly possible, from the consequences of their own folly in seeking the services whether medical, legal or dental of the quack, the shyster and the charlatan. It is not the saving of a favoured group which is sought after, but the saving of the people as a whole or at least that section of the people who lack the necessary wisdom to save themselves.

In my view of the appellants' argument, quite too much stress was placed upon the presence of the words "or elsewhere" in the amendment. If one keeps in mind the real purpose of the statute as a whole, it seems plain that these words are inserted merely for clarity and not with the intent of assuming extra-territorial jurisdiction.

In addition to the above I am of opinion that the legislation in question could well be supported under head (16) of section 92 of the B.N.A. Act, but it is unnecessary to elaborate this aspect. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

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

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June 11, 12, 13, 14, 17, 18; *Sept.* 25; *Nov.* 5.

NATIONAL TRUST COMPANY LIMITED v. THE CHRISTIAN COMMUNITY OF UNIVERSAL BROTHERHOOD LIMITED AND THE BOARD OF REVIEW FOR THE PROVINCE OF BRITISH COLUMBIA.

Farmers' Creditors Arrangement Act, 1934, The—Board of Review—Application of defendant community for relief—Whether applicant a "farmer" within the Act—Appeal—Costs—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, 1925, made between the plaintiff and the community, to secure first-mortgage bonds, there being a balance due of about $170,000. On the 3rd 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 that the Board of Review endeavour to formulate an acceptable proposal with the result that on the 14th of September, 1939, the board 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, 1939, 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. On the trial it was held that the community was not a "farmer" within the meaning of the Act.

Held, on appeal, reversing the decision of ROBERTSON, J., that the appeal should be allowed.

Per MACDONALD, C.J.B.C. and MCQUARRIE, J.A.: That jurisdiction to determine whether the appellant is a "farmer" within the meaning of the Act resides exclusively in the county and district courts in the area affected. The point was in fact decided by county court judges on the application of the official receiver. Orders were made by the county court judges for Yale and for West Kootenay permitting the appellant The Christian Community to proceed with its application and declaring that it was entitled to take advantage of the Act. This involves a decision that the applicant was a "farmer": that is the only basis upon which the orders could be made. It was further held that if wrong in this view, and an action for a declaration as to whether or not the appellant Christian Community is a "farmer" may be maintained in the Supreme Court, the said community is in fact a "farmer" which is the substantial question to be decided.

Barickman Hutterian Mutual Corpn. v. *Nault et al.*, [1939] S.C.R. 223, followed.

Per O'HALLORAN, J.A.: That said Act has vested exclusive jurisdiction in the county court to adjudicate upon questions concerning the *status* of the appellant company as a farmer, and has provided an appeal from the county court to the Court of Appeal. Further, the jurisdiction of the Supreme Court as a Court of first instance is ousted thereby, and therefore the Supreme Court had no jurisdiction to entertain this declaratory action.

APPEAL by defendant The Christian Community of Universal Brotherhood Limited from the decision of ROBERTSON, J. of the 15th of December, 1939 (reported, 54 B.C. 386) in an action wherein the plaintiff sought a declaration that the defendant community is not a farmer within the meaning of The Farmers' Creditors Arrangement Act, 1934. On May 18th, 1938, the plaintiff commenced an action against the defendant community to have carried into execution the trusts of a deed of trust and mortgage of December 3rd, 1925, made between the plaintiff and defendant community to secure first-mortgage bonds in the sum of $350,000. The amount due at the time of the action was $170,000. On June 3rd, 1939, the defendant 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 a consolidation and reduction of principal and interest "according to the ability of The Christian Community of Universal Brotherhood Limited to meet." On August 1st, 1939, the defendant community purported to request the defendant, the Board of Review, to formulate a proposal. On September 14th, 1939, the board sent out a notice to the community's creditors, including the plaintiff, that the community's request for a proposal would be heard at Nelson, B.C., on the 26th of September, 1939. On the 16th of September, 1939, the plaintiff commenced this action seeking, *inter alia,* a declaration that the defendant community was not a farmer within the meaning of The Farmers' Creditors Arrangement Act, 1934, and an injunction restraining the defendants from proceeding with the above application. An *interim* injunction granted on the 16th of September, 1939, was dissolved by FISHER, J. on the 20th of October, 1939. The learned trial judge held that he was bound by the said decision in so far as the injunction was concerned, but declared that the defendant community was not a farmer within the meaning of the Act.

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The appeal was argued at Vancouver on the 11th to the 14th and the 17th and 18th of June, and at Victoria on the 25th of September, 1940, before MACDONALD, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.

McAlpine, K.C. (*C. F. R. Pincott,* with him), for appellant: This action is for a declaration that the defendant board has no jurisdiction to formulate a proposal, for a declaration that the defendant community is not a farmer, and for an injunction to restrain the defendants from taking steps under The Farmers' Creditors Arrangement Act, 1934. It is submitted the action will not lie. The Courts may exercise supervisory authority over a tribunal such as the board, but that authority cannot be exercised in an action so framed. It is exercised, if at all, by writs of prohibition, *mandamus* and *certiorari*: see *Credit Foncier* v. *Board of Review,* [1940] 1 D.L.R. 182; *In re The Farmers' Creditors Arrangement Act, 1934. In re Hudson's Bay Co. and Peters (No. 2),* [1938] 2 W.W.R. 412. The learned judge should have held the present action is not maintainable. Assuming the Court has jurisdiction to decide whether the community is a farmer, it should not intervene at this stage in the proceedings before the board. The board has jurisdiction to decide the issues raised: see *In re The Farmers' Creditors Arrangement Act, 1934. In re Proposal of Marshall Brothers Limited,* [1935] 1 W.W.R. 80; *In re Farmers' Creditors Arrangement Act, 1934. In re Boers,* [1936] 2 W.W.R. 47; *In re Farmers' Creditors Arrangement Act, 1934. In re Hockley, ib.* 268. There is no justification for the plaintiff at this stage to ask the Court to intervene. For this reason FISHER, J. dissolved the injunction: see *National Trust Company Ltd.* v. *The Christian Community of Universal Brotherhood Ltd.* (1939), 54 B.C. 386. The Court should not interfere by injunction and draw within its jurisdiction matters in issue in an inferior Court: see *Belrose* v. *Chilliwhack* (1893), 3 B.C. 115, at p. 120. The defendant community is a farmer within the meaning of the Act. A farmer is defined as "a person whose principal occupation consists in farming or in tilling of the soil" and a corporation may be a farmer: see *Barickman Hutterian Mutual Corpn.* v. *Nault et al.,* [1939] S.C.R. 223. By the

letters patent of the defendant community the first object is "to carry on agricultural pursuits." The evidence discloses the principal occupation of the community is farming and tilling of the soil. The stores and factories and saw mills are merely incidental.

W. S. Owen, for the Board of Review, adopted the argument for The Christian Community. There is error in granting the plaintiff liberty to apply for an injunction against this defendant. The Court cannot make a declaration involving future rights unless a present right depends on the decision or unless there are some other special circumstances to satisfy the Court that it is desirable once and for all to decide on the future rights: see *Curtis* v. *Sheffield* (1882), 21 Ch. D. 1, at p. 3; *In re Staples. Owen* v. *Owen,* [1916] 1 Ch. 322. In an action commenced by writ of summons judgment can be granted only in respect to such causes of action as had arisen at the date of issue of the writ: see *Hoffman* v. *McCloy* (1917), 38 O.L.R. 446; *Stewart* v. *Henderson* (1914), 30 O.L.R. 447; *Poisson and Woods* v. *Robertson and Turvey* (1902), 86 L.T. 302, at p. 324; *Kevan* v. *Crawford* (1877), 6 Ch. D. 29, at pp. 41-2. This appellant is entitled to its costs of the trial, as the main claim against this defendant was for an injunction and this was refused.

Hossie, K.C. (*Ghent Davis,* with him), for respondent: The main point is whether or not the appellant is a farmer within the meaning of The Farmers' Creditors Arrangement Act, 1934. The definition of farmer is in The Farmers' Creditors Arrangement Act, 1934, Can. Stats. 1934, Cap. 53, Sec. 2 (*f*). Appellant is not a farmer. It has long been held that a limited company is a separate entity: see *Salmon* v. *Salmon & Co.,* [1897] A.C. 22; *Macaura* v. *Northern Assurance Co.,* [1925] A.C. 619; *Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue,* [1939] 3 W.W.R. 567, at p. 573. The question is whether the appellant is a farmer and not the members of the Doukhobor sect or the shareholders. The appellant owned farm lands but never worked the lands itself. It rented them out. It paid no wages for working the lands. A landlord whose farm is worked by another is not a farmer: see *In re Farmers' Creditors Arrangement Act, 1934. In re Lantzius,* [1936] 1

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W.W.R. 373. They rely on the case of *Barickman Hutterian Mutual Corpn.* v. *Nault et al.*, [1939] S.C.R. 223, but that is clearly distinguishable. The trial judge had jurisdiction to make the declaration contained in the judgment. The Board of Review is not a Court: see *Dodier* v. *Lindsay Company Limited* (1937), 19 C.B.R. 137; *Board* v. *Board*, [1919] A.C. 956, at p. 963; *Kettenbach Farms Ltd.* v. *Henke* (1937), 19 C.B.R. 92, at p. 93. The board gave notice of its intention to consider the request of the community and an action for a declaration was commenced. On the question of jurisdiction see *National Trust Company* v. *Powers et al.*, [1935] O.R. 490; *In re Hudson's Bay Co. and Peters* (1938), 19 C.B.R. 258; *Hedley* v. *Bates* (1880), 13 Ch. D. 498, at p. 503; *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario*, [1919] A.C. 687; *Rex* v. *Electricity Commissioners. Ex parte London Electricity Joint Committee Co. (1920)*, [1924] 1 K.B. 171. The action was not premature. The board would have proceeded to formulate a proposal and we would have been bound by it. The trial judge did not usurp the functions of the board. The board has no power to determine the facts upon which its own jurisdiction is founded: see the *Hedley* case and *Dodier* case, *supra*. The *onus* is on the community to establish its right to the protection of the Act: see *In re Beck*, [1940] 1 W.W.R. 609, at pp. 618-19; *Dodier* v. *Lindsay Company Limited* (1937), 19 C.B.R. 137. The appellant is not within the statute because it did not file a proposal within the meaning of the Act. The proposal as filed merely expresses a hope for consolidation and reduction of principal and interest, and does not contain an expression of desire to pay: see *Corrigan* v. *Canadian Bank of Commerce* (1938), 20 C.B.R. 169, at p. 170. To be effective the proposal must comply with the statute and rules. The Board of Review espoused the cause of the community, and having adopted this position judgment could properly be given against it to prevent further proceedings in a matter in which the learned judge held it had no jurisdiction.

McAlpine, replied.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: Appeal from the judgment of ROBERTSON, J. declaring appellant, The Christian Community of Universal Brotherhood Limited, is not a "farmer" within the meaning of The Farmers' Creditors Arrangement Act, 1934; liberty was given respondent to apply for an injunction should appellant, The Board of Review, proceed with a request for review following a report from the official receiver (section 12 (4)) that a "farmer" had made a proposal unacceptable to creditors.

Guided presumably by the decision in *Kettenbach Farms Ltd.* v. *Henke,* [1937] 3 W.W.R. 703 the action was launched on the assumption that the Board of Review had asserted authority to determine whether or not respondent was a "farmer" and that the Act did not confer jurisdiction on any particular tribunal to decide that question. The pleadings were framed on that basis; there were no allegations based on a recognition of the fact, as we now find, that jurisdiction to determine the point referred to resides exclusively in the county and district courts in the area affected.

Doubtless since the Act was passed boards of review have assumed jurisdiction to decide this point. When the request comes from the official receiver however he reports, not that one claiming to be a "farmer" but an actual "farmer" has made a proposal.

The appeal also was argued before us on the basis that this jurisdiction was vested in the Board of Review. After reserving judgment we reached a conclusion, tentatively at all events, adverse to this view and requested further argument. Subsequently the report of a decision by the Court of Appeal of Saskatchewan (*In re The Farmers' Creditors Arrangement Act, 1934. Great West Life Assurance Co.* v. *Beck,* [1940] 2 W.W.R. 522) appeared: that Court held that the district court judge had jurisdiction to determine whether or not a debtor, who made a proposal to the official receiver, was a farmer, Martin, J.A.—and I agree with him—stated at p. 527, that the question

> . . . whether or not a debtor who has made a proposal is a farmer should be determined before the official receiver reports to the Board of Review. If

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the official receiver is in doubt as to the *status* of the debtor he may apply to the Court for directions under Rule 42 of the Rules and Regulations made by the Governor in Council under sec. 15 of the Act.

Turgeon, C.J.S. also held that the district court judge had jurisdiction—I think exclusive jurisdiction—to decide this question. Reading the Act with the Bankruptcy Act this I think is clear. The Board of Review has not concurrent jurisdiction to decide the same point. It would be anomalous if, after the official receiver secured a finding from a county court judge, the board could reopen the question *a fortiori* when parties dissatisfied by the decision of the county court judge might appeal to the Court of Appeal and to the Supreme Court of Canada. This took place in *Barickman Hutterian Mutual Corpn.* v. *Nault et al.*, [1939] S.C.R. 223. While the point was not argued—it was assumed that the proper procedure was followed—it is significant that the action proceeded on this basis without anyone questioning the jurisdiction of the county court judge to decide the point.

The Court of Appeal in Saskatchewan in the case referred to and my brother O'HALLORAN in this one reviewed the pertinent sections of the Act: I do not propose to repeat the inquiry and simply say that, in my opinion, the county court judge alone has jurisdiction to determine this question. That is the scheme of the Act and it is a workable scheme. A preliminary question of this nature can suitably be determined before it reaches a board consisting possibly of at least two laymen.

Jurisdiction conferred on an inferior tribunal like the board must be found in express words. In their absence it was submitted that the board had inherent jurisdiction to decide it. I do not think so. Where too the Act specifically provides a method of determining it by another forum that in itself excludes any question of inherent jurisdiction.

The point was in fact decided by county court judges on the application of the official receiver. Orders were made by His Honour Judge KELLEY, county court judge for the district of Yale and by His Honour Judge NESBIT in the County Court of West Kootenay, permitting the appellant, The Christian Community, to proceed with its application and declaring that it was entitled to take advantage of the Act. The orders were obtained

in two jurisdictions for greater certainty because the property affected was located in both districts. Where, as here, orders were made permitting the applicant to take advantage of the Act it involves a decision that the applicant was a "farmer"; that is the only basis upon which the orders could be made. It was submitted that the parties affected by the order, including the respondent, had no notice of these applications. There is no evidence on the point although the absence of recitals in the orders would appear to indicate that only the official receiver was represented. This, however, would not establish that notices to appear were not given; they might have received them and failed to appear. In any event it is immaterial: The orders, in any event, are not things of naught whatever may be said of the right to vacate them by appropriate proceedings.

However, if I am wrong in this view and an action for a declaration, as to whether or not the appellant The Christian Community is a "farmer," may be maintained in the Supreme Court I would say, with the greatest respect for any contrary views, on the authority of *Barickman Hutterian Mutual Corpn.* v. *Nault et al.*, [1939] S.C.R. 223 that it is a "farmer." This, of course, is the substantial question to be decided. I shall state my reasons briefly and in a general way.

The learned trial judge was of the opinion the *Barickman* case is distinguishable on the facts: that, speaking generally, that corporation owned the land, conducted the farming operations and owned all the produce, whereas in this case, while the appellant owned the land it did not in fact farm it: rather were the members of the community, who actually performed the physical labour on the soil in the position of tenants to the appellant. This assumes that because the *modus operandi* differs in the two cases the same principle does not run through them. It is doubtless true that with all religious organizations of this character operating farm lands, their religious opinions are reflected in method and management: that would not affect the question whether or not the principal occupation was farming. As I view it the relationship of appellant company to members of the community is not that of landlord and tenant however much they make use of terms associated with that relationship:

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that view fails to take into consideration, as one should, the scheme as a whole.

There is, of course, no further question, in view of the decision referred to, that the appellant company may be a farmer. While the Chief Justice of Canada sets out the *modus operandi* his Lordship's reasons do not indicate that unless one had similar facts to match it the decision would not be applicable: it is not in that way decisions are applied. Here, as there, we are concerned with a religious community "pursuing a way of life broadly conforming, as they conceive it" economically as well as spiritually, to certain principles. If methods differ the basic principle is the same. The principal business of a corporation may be farming whatever its *modus operandi*: we are concerned in deciding that question with physical facts. One might visualize many ways of vesting title, holding shares, distributing profits, carrying on operations or disposing of produce but there would be no doubt what business the company followed whatever might be said of its methods or internal management. If, indeed, the principal occupation of appellant company is not farming it would be difficult to define what it is doing. The purpose of the Act, as pointed out by their Lordships, *viz.*, to maintain farmers on the land as efficient producers, has a bearing on this question. As stated too by Kerwin, J. at p. 231—and it is equally applicable here:

> The evidence is uncontradicted that not only the principal occupation but the sole occupation of all its members is farming.

I might mention that other activities, such as lumbering operations, etc., the outgrowth of farming operations, are incidental to the main purpose and in no way destroys the "principal" character of the occupation. I think, therefore, in principle, the decision applies. I would allow the appeal.

McQUARRIE, J.A.: I agree that the appeal should be allowed for the reasons stated by the Chief Justice.

O'HALLORAN, J.A.: The declaratory judgment appealed from is challenged on the main ground it is not within the jurisdiction of the Supreme Court of this Province. To succeed the appellants must show the jurisdiction of the Supreme Court as

a Court of first instance has been ousted. To do so jurisdiction must be shown in another Court or tribunal: *vide* Lord Hardwicke in *Derby (Earl of)* v. *Athol (Duke of)* (1749), 1 Ves. Sen. 202; 27 E.R. 982. Decision of the appeal really resolves itself into a determination of what Court or tribunal has jurisdiction to decide if a person is a "farmer" within the meaning of The Farmers' Creditors Arrangement Act, 1934, and amending Acts up to and including the 1938 amendment (referred to hereafter as the F.C.A. Act). Its decision raises questions of great importance—as does any sustained attack upon the jurisdiction of a superior Court.

I. Preliminary review of the case.

Under section 6 (1) of the F.C.A. Act, "A farmer who is unable to meet his liabilities as they become due" . . . may file a "proposal" for a composition extension of time or scheme of arrangement with his creditors. The procedure is set by rules passed under section 15. On 23rd June, 1939, the appellant The Christian Community of Universal Brotherhood Limited (hereafter referred to as the "appellant company"), filed a "proposal" with an official receiver under the F.C.A. Act. Among the creditors disclosed in its statement of affairs accompanying the proposal was the National Trust Company Limited (hereafter referred to as the respondent), as trustee of a deed of trust and mortgage to secure a bond issue for $350,000 held as security by The Canadian Bank of Commerce; there was then due $168,283.12 with interest. The official receiver convened a meeting of the creditors to consider the proposal. It is not disputed that the respondent received notice of the meeting with copies of the proposal and statement of affairs accompanied by a voting letter form in accordance with section 6 (2) and rules 8 through 17.

It does not appear from the record that the respondent attended the meeting or utilized its voting letter, or that it communicated with the official receiver in any way. It would seem that it did not advise him of the objection it saw fit to raise later by this action, *viz.*, that the appellant company was not a "farmer" within the meaning of the F.C.A. Act. If the respondent had notified the official receiver of its objection at that time, it would

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have been his duty to apply to the proper county court for directions under rule 42, to enable the issue to be tried and disposed of before that Court under the exclusive jurisdiction vested in it by sections 2 and 5 of the F.C.A. Act. The Court of Appeal for Saskatchewan so decided recently when the jurisdiction of the county or district court was attacked in *In re Farmers' Creditors Arrangement Act, 1934. Great West Life Assurance Co.* v. *Beck,* [1940] 2 W.W.R. 522; with that decision and its supporting reasons I respectfully agree. It is noted in passing that the issue as to whether the applicant was a farmer in *Barickman Hutterian Mutual Corpn.* v. *Nault et al.,* [1939] S.C.R. 223 was decided in an appeal from the judgment of a county court judge made on an application to him under rule 42. The difficulty here is that the respondent delayed until the matter had reached the Board of Review, and then commenced this action in the Supreme Court to decide what should have been decided by the county court in the ordinary course if the respondent had not refrained from making its objection known. The precise point does not seem to have been decided.

The scheme of the F.C.A. Act is clear that if the creditors accept the proposal filed with the official receiver he has complete authority subject to approval of the proposal by the county court. (*Vide* sections 7 to 11 and rules 11 and 13 through 16). But if as happened here the official receiver is unable to secure the concurrence of the creditors, and the farmer or the creditors wish to proceed further, then it is the duty of the official receiver to make a report under section 12 (4) to another official body named in the Act, *viz.,* the Provincial Board of Review. Counsel for the respondent did not question that he did so in this case accompanied by the written request of the appellant company to the Board of Review to formulate an acceptable proposal (*vide* section 12 (4) and rule 17). After receipt thereof the Board of Review fixed 26th September, 1939, as the date it would "deal with" the request, and on 14th September, 1939, so notified the respondent and others concerned. On the 16th of September, 1939, the respondent commenced this action against the appellant company and the appellant Board of Review for a declaration that the appellant company was not a "farmer" within the

meaning of the F.C.A. Act, and for an injunction restraining both defendants from proceeding further under that Act.

The claim in the action was thus interpreted by ROBERTSON, J. the learned trial judge, *vide* pp. 388, 392 and 398 of the report thereof in 54 B.C. The action went to trial on that premise and the appeal was argued on that premise. In the meantime on the 20th of October, 1939, FISHER, J. dissolved the *ex parte* injunction granted when the writ issued; the learned judge held the Board of Review had jurisdiction to decide if the appellant company was a farmer: *vide* (1939), 54 B.C. 321. The motion to dissolve the injunction was not turned into the trial of the action; but later the action was set down for trial before ROBERTSON, J. who on 15th December, 1939, delivered the judgment from which this appeal lies. The learned trial judge declared the appellant company was not a "farmer" within the meaning of the F.C.A. Act, and gave liberty to the respondent to apply to restrain the appellant Board of Review if it attempted to proceed with the above-mentioned request to formulate an acceptable proposal. At this Bar both appellants contended there was no jurisdiction in the Supreme Court to render the judgment appealed from. Counsel for the appellant Board of Review contended further that the board had jurisdiction to determine if the appellant company is a farmer.

In my opinion neither the Board of Review nor the Supreme Court has jurisdiction to decide whether the appellant company is a farmer within the meaning of the F.C.A. Act. The F.C.A. Act does not confer that jurisdiction on the Board of Review. It will be shown that sections 2 and 5 thereof have divested the Supreme Court of all jurisdiction as a court of first instance which it possessed formerly in matters to which the F.C.A. Act now applies, and have vested that jurisdiction in the county and district courts. This is not to say the Supreme Court may not exercise supervisory jurisdiction by *mandamus* prohibition or *certiorari* in a proper case. These high prerogative and expeditious remedies are available to prevent inferior tribunals acting without jurisdiction, in excess or in abuse of their jurisdiction or in violation of the essentials of justice; *vide The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417, at pp.

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442-3 and 450; *The King (Martin)* v. *Mahony*, [1910] 2 I.R. 695; *Rex* v. *Commanding Officer of Morn Hill Camp* (1916), 86 L.J.K.B. 410; *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, at p. 153; and *In re Low Hong Hing* (1926), 37 B.C. 295, MARTIN, J.A. (as he then was) at p. 302; *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, at pp. 549, 551 and 555; and a valuable article contributed by Mr. *D. M. Gordon* in (1926), 42 L.Q.R. 521.

II. The structure of the F.C.A. Act reveals that the jurisdiction to determine the *status* of the appellant company as a farmer lies not in the Board of Review, but in the county court.

The Board of Review is a statutory creature of inferior jurisdiction. Its jurisdiction cannot be presumed as in the case of a superior Court—*vide In re Robert Evan Sproule* (1886), 12 S.C.R. 140, at pp. 193-4. Its jurisdiction must be warranted by the F.C.A. Act: *vide Taylor* v. *Clemson* (1842), 2 Q.B. 978; 114 E.R. 378, at p. 401 in the Court of Exchequer Chamber; affirmed in the House of Lords (1844), 11 Cl. & F. 610; 8 E.R. 1233; and also the decision of MACDONALD, J. in *In re Nowell and Carlson* (1919), 26 B.C. 459 and cases there cited. In *Samejima* v. *Regem*, [1932] S.C.R. 640, Lamont, J. (with whom Duff and Cannon, JJ. agreed), said at p. 646:

> It is established law that jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised.

And *vide* also *Gregoire Kossekechatko* v. *Attorney-General of Trinidad* (1931), 101 L.J.P.C. 17. By section 12 (1) of the F.C.A. Act the Board of Review is given the "jurisdiction hereinafter provided"; but nowhere in the Act is it given power to determine if the applicant is a farmer. Its jurisdiction is limited expressly to "formulating an acceptable proposal," if "it can do so in fairness and justice to the debtor or the creditors" —*vide* section 12 (4) through 12 (9).

It is in truth a farmer's debt adjustor invested with wide equitable powers "to retain the farmers on the land as efficient producers" (*vide* F.C.A. Act preamble). But the board is given no power to decide whether the debtor is a farmer, or whether the claimants are creditors. In a recent decision of the Sas-

katchewan Court of Appeal, *Lefebvre* v. *Lefebvre,* [1940] 2 W.W.R. 578, a person named as a creditor by the farmer, applied to the district court while the matter was before the official receiver, for leave to commence an action against the farmer to cancel or rectify an agreement under which the farmer's alleged indebtedness to him arose. The district court gave leave. The Court of Appeal refused to interfere. Martin, J.A. in giving the judgment of the Court, having said that if the plaintiff could establish his allegations there might well be no debt in existence at all to be affected by any proposal which the Board of Review might formulate if the matter should reach it, observed at p. 582:

> A Board of Review would not attempt to decide what the agreement between the parties was and once it was apparent there was a dispute would no doubt refuse to make a proposal until the matters in dispute were settled by the parties themselves or by an appropriate tribunal.

The Board of Review is not a Court with an appeal from the proposals it formulates: *vide In re Farmers' Creditors Arrangement Act, 1934. Kerr* v. *Wiens,* [1937] 1 W.W.R. 535, a decision of the Manitoba Court of Appeal followed by the Alberta Appellate Division in *In re Farmers' Creditors Arrangement Act, 1934. In re Peters, Hudson's Bay Co. and Peters, ib.,* 787. The F.C.A. Act provides no appeal from the proposals the board is given jurisdiction to formulate—even when as in section 12 (5) its proposal may be unacceptable to both the farmer and the creditors. Although not a Court the board performs important judicial functions as was said by the Saskatchewan Court of Appeal in *In re The Farmers' Creditors Arrangement Act, 1934. In re Drewry,* [1940] 2 W.W.R. 389. It has to decide on evidence between a proposal and an opposition, *vide Rex* v. *London County Council* (1931), 100 L.J.K.B. 760, Scrutton, L.J. at p. 770. It has legal authority to determine questions affecting the rights of subjects and must act judicially, *vide Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72 (H.L.). It is a special tribunal invested with extraordinary powers of taking away rights which existed before the F.C.A. Act was passed and of altering the effect of written instruments without any appeal as expressed by Martin, J.A. of the Saskatchewan Court of Appeal in *Prudential Insurance Co. of America* v. *Berg,* [1940] 2 W.W.R. 381, at pp. 387-8.

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Within principle and authority such far-reaching powers which affect personal rights as well as property, are to be exercised judicially and not ministerially, *vide Rex* v. *Electricity Commissioners* (1923), 93 L.J.K.B. 390; even if it were contended the Board of Review should act solely under executive powers and in no sense as a Court, as was the case in *Eshugbayi* v. *Nigeria Government (Officer Administering)* (1931), 100 L.J.P.C. 152, at p. 157. Its jurisdiction arises under the F.C.A. Act when the official receiver reports to it that a farmer has made a proposal, but that no proposal has been accepted by his creditors (*vide* section 12 (4)). When a statute says a tribunal shall have jurisdiction if certain facts exist it is conceded that tribunal has jurisdiction to enquire into the existence of those facts: *vide Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, at p. 162, and *Eshugbayi* v. *Nigeria Government (Officer Administering), supra,* at pp. 156-8. But that is excluded here by the structure of the F.C.A. Act to which I shall refer. It will be seen that the jurisdiction of the Board of Review to formulate a proposal does not arise from a finding by it that certain preliminary facts exist. On the other hand its jurisdiction is conditioned upon the pre-existence of those preliminary facts, necessarily so found or accepted as pre-existing facts before the matter could reach the Board of Review; and *vide* what was said by Lamont, J. (with whom Duff, Newcombe, and Rinfret, JJ. agreed), in *Segal* v. *City of Montreal,* [1931] S.C.R. 460, at 472-3.

The F.C.A. Act provides first for an official receiver; but if he is unsuccessful in formulating a proposal the aid of the Provincial Board of Review may be invoked. In any case the proposal is the starting point; it must be filed with the official receiver. If the creditors accept it, and the county court approves it, the matter is finished. If the proposal is accepted the official receiver has sole jurisdiction subject to approval of the county court. The Board of Review cannot then have anything to do with it. The board has no control over the official receiver. He is not an officer, servant, or agent of the board. The Board of Review cannot function unless first, the farmer and his creditors fail to agree upon a proposal, and secondly either

of them makes a written request to the board that it "endeavour to formulate an acceptable proposal," *vide* section 12 (4) and Form F. It should be noted that although Form F describes itself as a "request for review," it is not a request to review what the official receiver has done. The request to the board is to "endeavour to formulate an acceptable proposal," that is to start with the proposal and statement of affairs as filed with the official receiver, and attempt anew to formulate a proposal acceptable to all concerned.

However, this request does not in itself confer jurisdiction on the board; it is a condition of jurisdiction, but only one of the conditions. Before the board's jurisdiction can come into being, it must have a report from the official receiver that a farmer has made a proposal but that no proposal has been approved by his creditors. Section 12 (4) reads:

> 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.

Once he has made this statutory report the official receiver becomes *functus*. The Board of Review takes over at this point as a new and entirely independent tribunal. The scheme of the Act is clear that the Board of Review has then no more control over the official receiver than it had before its jurisdiction arose. He is not its officer servant or agent.

From this review of the F.C.A. Act it appears the *status* of the applicant as a farmer must be determined or accepted at some point before the official receiver has become *functus,* and therefore before the jurisdiction of the board can arise. The source of the board's jurisdiction is the "report" by the official receiver that a "farmer" has made a proposal which his creditors will not accept. But the official receiver has no jurisdiction to make a report to the board in any case where the applicant is not a "farmer," *vide Samejima* v. *Regem, supra.* If any question arises as to the *status* of the applicant as a farmer it is the duty of the official receiver to apply to the county court to have that question decided, for that court is given "exclusive jurisdiction" under sections 2 (2) and 5. By plain implication of the F.C.A.

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Act it is a condition of jurisdiction in the Board of Review that the *status* of the applicant shall have been accepted or determined before the matter reaches it. The judgment of Martin, J.A. (concurred in by Gordon, J.A.) in *In re The Farmers' Creditors Arrangement Act, 1934. Great West Life Assurance Co.* v. *Beck, supra,* supports this in clear terms for the learned judge said at p. 527:

> The language [of section 12 (4)] implies that the question of whether or not a debtor who has made a proposal is a farmer should be determined before the official receiver reports to the Board of Review.

It follows that there is only one tribunal to which the F.C.A. Act has given jurisdiction to determine the applicant's *status, viz.,* the county court. But that jurisdiction does not cease because it was not invoked when it should have been. If the matter reaches the Board of Review, and because of delay or misunderstanding the farmer's *status* is questioned there for the first time, that does not take away the county court's jurisdiction, or confer jurisdiction on the Board of Review. Although the jurisdictional point with which we are concerned was not raised in *In re The Farmers' Creditors Arrangement Act, 1934. Kruse* v. *Wright,* [1938] 2 W.W.R. 181, I refer to it because of the comparable facts. It was an appeal to the Saskatchewan Court of Appeal from a district court judge to whom a creditor had applied to set aside the proposal filed with the official receiver some four months after the farmer had requested the Board of Review to formulate an acceptable proposal. The board had not yet dealt with the request (p. 182); it had not yet been able to sit in the district and consider the matter (p. 187); it does not appear whether the board as here had fixed a date for hearing during the four-month interval. No mention was made of the official receiver's report.

But it may be urged that if the jurisdictional question is raised for the first time after the matter reaches the Board of Review, there is no provision in the F.C.A. Act to enable the board to refer it to the county court, and further that the board cannot refer it back to the official receiver for he became *functus* when he made his report to the board. The answer thereto is that the official receiver does not become *functus* until he has done his duty according to law. If he should report a person as a farmer

who is not a farmer, he has not done his duty according to law, for he has exceeded his jurisdiction in making such a report: *vide Samejima* v. *Regem, supra.* The Board of Review, however, cannot declare his report to be a nullity or set it aside as voidable, because the board has no power to review or to quash what has been done by the official receiver. Without that power, which is denied it by the F.C.A. Act, it may not inquire into the existence of the facts in his report which would give it jurisdiction, and thus enable it to decide as an inferior tribunal may (subject to *certiorari*), whether it has jurisdiction to proceed. It cannot question the official receiver's report in its statutory essentials. The scheme of the F.C.A. Act could have been different. In the case of an unaccepted proposal it could have given the official receiver the power to formulate what he might consider to be a fair and just proposal, but with an appeal from him to the board. Then the board in truth would be a board of review, reviewing his decisions on appeal. But that is not the case now.

III. The jurisdiction of the Supreme Court to determine if the appellant company is a farmer is expressly excluded by the F.C.A. Act vesting in the county court, all the jurisdiction the Supreme Court possesses in bankruptcy matters to which the F.C.A. Act applies.

The above reasons lead to the conclusion that the Board of Review has not jurisdiction to decide if the appellant company is a farmer; the F.C.A. Act has given that jurisdiction to the county court. This conclusion excludes the jurisdiction of the Supreme Court as it is sought to be exercised in this action. This is an action for a declaration that the appellant company is not a "farmer" within the meaning of the F.C.A. Act. In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1937), 106 L.J.P.C. 67, the Judicial Committee held the F.C.A. Act was genuine legislation relating to bankruptcy and insolvency. In the light thereof the Court of Appeal for Saskatchewan in *In re The Farmers' Creditors Arrangement Act, 1934. Great West Life Assurance Co.* v. *Beck, supra,* held in effect that the F.C.A. Act was an addendum to the Bankruptcy Act confined to farmers unable to meet their liabilities as they become due (*vide* F.C.A. Act preamble and section 6). *Vide*

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the judgment of the Chief Justice of Saskatchewan at p. 524. The provisions of the F.C.A. Act might well have been enacted as additional sections to the Bankruptcy Act. The subject-matter of the F.C.A. Act must be regarded therefore as part of the bankruptcy law.

The jurisdiction of the Supreme Court in bankruptcy matters is defined in section 152 of the Bankruptcy Act, Cap. 11, R.S.C. 1927, where it was

> . . . invested with such jurisdiction at law and in equity as will enable them [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act. . . .

But Parliament expressly devested the Supreme Court of that original, auxiliary and ancillary jurisdiction by enacting in section 5 (1) of the F.C.A. Act that in matters to which that statute relates the county or district court of the district in which the farmer lives

> . . . shall have exclusive jurisdiction in bankruptcy subject to appeal. . . .

And by enacting in section 2 (2) of the F.C.A. Act:

> . . . and this Act shall be read and construed as one with the Bankruptcy Act, . . . , and the provisions of the Bankruptcy Act and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

In the circumstances it seems clear the county court has been invested with all the jurisdiction in the premises formerly possessed by the Supreme Court. To hold otherwise, in the language of Lord Watson in *Barraclough* v. *Brown* (1897), 66 L.J.Q.B. 672, at 676, would be to authorize

> an interference by a Court having no jurisdiction in the matter with the plenary and exclusive jurisdiction conferred by the Legislature upon another tribunal.

Giving section 5 the construction and application which I think the F.C.A. Act demands, and which was given it in *In re The Farmers' Creditors Arrangement Act, 1934. Great West Life Assurance Co.* v. *Beck, supra,* it follows that Parliament has committed to the county court exclusive jurisdiction to determine if the applicant is a farmer; and *vide* what was said by Lord Watson at p. 676, in *Barraclough* v. *Brown, supra.* As Lord Watson observed further at p. 676 thereof:

> . . . [Parliament] has therefore by plain implication enacted that no other Court has any authority to entertain or decide these matters.

This is a restatement of what Lord Tenterden said in *Doe dem. The Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. 847, at 859; 109 E.R. 1001, at 1006:

> Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

This proposition was cited with approval by the House of Lords in *Pasmore* v. *Oswaldtwistle Urban Council* (1898), 67 L.J.Q.B. 635, where the Earl of Halsbury, L.C. said at p. 637:

> The principle upon which the question arises that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law.

In *Barraclough* v. *Brown, supra,* the statute provided the undertakers might recover certain expenses from the shipowners "in a Court of summary jurisdiction," but did not expressly exclude recourse to a superior Court. The undertakers did not proceed in a "Court of summary jurisdiction" but instead sued in the High Court. The four members of the House of Lords agreed that the statute had ousted the jurisdiction of the High Court. In *Bull* v. *Attorney-General of New South Wales* (1916), 85 L.J.P.C. 217, the statute designated a local land board to determine if leases of a certain description were voidable. The Attorney-General did not pursue that course, but commenced an action for a declaration that the leases were void. As I read the decision the Judicial Committee found that the declaratory action failed because the jurisdiction of the local land board had not been invoked. The present case is stronger than *Barraclough* v. *Brown,* or *Bull* v. *Attorney-General of New South Wales.* For in neither case was the superior Court devested of its jurisdiction in that express language; and in neither case did the statute give the inferior tribunal "exclusive jurisdiction" in that express language.

The judgment appealed from did not consider sections 2 and 5 of the F.C.A. Act. It purports to follow a decision of the Appellate Division of Alberta in *Kettenbach Farms Ltd.* v. *Henke,* [1937] 3 W.W.R. 703, which rested specifically on the premise there stated that (p. 704)

> no special provision is made in the Act for the disposition of a contest on the point.

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Obviously the effect of sections 2 and 5 of the F.C.A. Act was not considered in the *Kettenbach* decision. In the circumstances for reasons which have been stated fully, *supra,* I am unable, with great respect, to follow that decision. Counsel for the respondent relied strongly also on a decision of Jessel, M.R. in *Hedley* v. *Bates* (1880), 49 L.J. Ch. 170. In that case A sued his neighbour B for trespass in respect to land drainage and sought to restrain B from proceeding further under a form of a notice which B had served on him in the belief it complied with the Land Drainage Act. A attacked the validity of the notice. By that statute if A failed to agree to the work proposed in the notice and if A and B did not settle their dispute by arbitration, jurisdiction was conferred upon an inferior tribunal named in the statute, to decide if the proposed work would cause injury to A, and if so whether it could be fully compensated for by money. The Master of the Rolls appears to have held that the inferior tribunal could not have jurisdiction to determine the validity of the notice if as and when the matter should come before it; he then held the notice was bad as it did not comply with all the statutory requirements, and granted an injunction restraining B from proceeding further under the invalid notice.

Hedley v. *Bates* gave rise to much uncertainty as to what it did decide. From two explanations subsequently given by the Master of the Rolls—*vide Stannard* v. *Vestry of St. Giles, Camberwell* (1882), 51 L.J. Ch. 629, at 632-3, it would seem that if it may be applied at all to this case it tends to support the conclusion that the respondent's remedy here was by prohibition and not by declaratory action. *Vide* also *North London Rail. Co.* v. *The Great Northern Rail. Co.* (1883), 52 L.J.Q.B. 380, Brett, L.J. at 383. In any event if *Hedley* v. *Bates* may be read to lend any support to the respondent's contention, it is displaced by *Barraclough* v. *Brown, supra,* and *Rex* v. *Nat Bell Liquors, Lim., supra,* for the reasons given when these decisions are referred to. But *Hedley* v. *Bates* is clearly distinguishable in any event. The dispute between A and B had not progressed to a point where the jurisdiction of the inferior tribunal could be invoked. It was an action for trespass and the Court was therefore seized of the matter *aliunde, vide Stannard* v. *Vestry of St.*

Giles, Camberwell, supra. The injunction motion seems to have been turned into the trial with the defendant disclaiming any intention or right to trespass if the notice were held invalid. If the notice was valid, there could be no trespass; a decision as to the validity of the notice was essential to determine the action. With respect, *Hedley* v. *Bates* presents no analogy to the case at Bar.

IV. The jurisdiction of the Supreme Court is ousted, even if the Board of Review should possess the jurisdiction here found to be lodged exclusively in the county court.

It should be observed furthermore that the jurisdiction of the Supreme Court is ousted even if the Board of Review should possess the jurisdiction which I find is lodged exclusively in the county court. For if it is conceded the board has jurisdiction, the F.C.A. Act then flows in the same channel as the statute considered in *Barraclough* v. *Brown, supra;* then in the language of Lord Watson already cited we should conclude Parliament had enacted by plain implication that no tribunal other than the Board of Review has authority to entertain or decide the *status* of the applicant as a farmer. To enable the board to entertain the matter it is a condition precedent that the applicant should be a farmer. If contrary to the view I hold, that condition precedent is not required to be decided by the county court before the matter comes to the Board of Review then the latter must have jurisdiction to decide it in order to determine if it has jurisdiction to proceed; that is clearly settled in *Rex* v. *Nat Bell Liquors, Lim. supra,* where Lord Sumner said for the Judicial Committee at p. 162:

> If a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard, but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior Court.

And *vide* also *Eshugbayi* v. *Nigeria Government (Officer Administering), supra.*

V. Concurrent jurisdiction does not exist in the Supreme Court. But even if it did, this is not a case in which it should be exercised.

Brief reference is made in this paragraph to an alternative

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contention advanced that there is concurrent jurisdiction in the Supreme Court. For reasons previously given it cannot exist; in any event the judgment appealed from is necessarily premised upon the existence of exclusive jurisdiction in the Supreme Court. This is made doubly clear by granting what was virtually an injunction restraining the Board of Review from exercising the statutory duties it was created by Parliament to perform. But even if concurrent jurisdiction should lie in the Supreme Court this is not a case in which it should be exercised: *vide In re Connolly Brothers, Lim.* (1911), 80 L.J. Ch. 409, at p. 416. Where an expeditious procedure has been provided by the Bankruptcy Rules for determination of questions relating to bankruptcy, it has been held that procedure should be followed in the public interest in preference to an action in the Supreme Court involving greater delay and expense: *vide Bartley's Trustee* v. *Hill* (1921), 61 D.L.R. 473, at p. 475; *Stillwater Lumber & Shingle Co.* v. *Canada Lumber & Timber Co.* (1923), 32 B.C. 81, at p. 85, and *Re Viscount Grain Growers' Co-operative Ass'n Ltd. Trustee* v. *Brumwell and Royal Bank of Canada*, [1924] 3 D.L.R. 803, Lamont, J.A. (with whom McKay and Martin, JJ.A. agreed) at p. 807. In my view this has equal application to the F.C.A. Act, for as stated previously it is in effect an addendum to the Bankruptcy Act. The applicant, in need of an early and inexpensive adjustment of his financial troubles should not be deprived of the summary procedure provided in the F.C.A. Act and rules; for the purpose of the Act is to retain him on the land as an efficient producer.

VI. The county court orders enabling the appellant company to take advantage of the F.C.A. Act must be regarded as binding the respondent, unless set aside or quashed according to law.

As intimated previously if a creditor has failed to raise jurisdictional objections until the matter has reached the Board of Review one would expect him to seek the aid of the Supreme Court by prohibition if the board has not already formulated the proposal, or by *certiorari*, if it has. If he should succeed there is nothing before the board to give it jurisdiction and the matter would revert perforce to the official receiver, whose duty it would then be to invoke the jurisdiction of the county court: *vide*

In re The Farmers' Creditors Arrangement Act, 1934. Great West Life Assurance Co. v. *Beck, supra.* It is noted that proposals formulated by a board of review were quashed on *certiorari* by the Manitoba Court of Appeal in *In re The Farmers' Creditors Arrangement Act, 1934. In re Ratz,* [1939] 3 W.W.R. 612, and by the Saskatchewan Court of Appeal in *In re The Farmers' Creditors Arrangement Act, 1934. In re Drewry, supra;* and *vide* also *Credit Foncier* v. *Board of Review,* [1940] 1 D.L.R. 182. This view carries additional significance in the facts of this case. For when he received the proposal of the appellant company dated 23rd June, 1939, the official receiver appeared before the county courts alleged to have jurisdiction, *viz.,* the County Court of Yale at Penticton on the 26th of June, 1939, and the County Court of West Kootenay at Nelson on the 28th of June, 1939, and obtained orders that the appellant company

> . . . is hereby permitted to make application under and is entitled to take advantage of the said Farmers' Creditors Arrangement Act. . . .

Since no one but a farmer may apply under the F.C.A. Act counsel for the appellant contended this was a declaration by at least one Court of competent jurisdiction that the appellant company was a "farmer" within the meaning of the F.C.A. Act. In paragraph 12 (a) of its statement of defence the appellant company pleaded these orders were "final and conclusive." In its reply and joinder of issue the respondent pleaded, *inter alia,* it did not have notice of the applications to the county courts. Of course there can be no proper hearing if an interested party has not had an opportunity to be heard; such an occurrence is a violation of an essential of justice. However, this Court has no evidence before it as to what occurred before the county court. For aught we know there may have been notice, or lack of notice may have been waived. In the absence of any evidence at all as to what occurred, neither the Court below nor this Court can presume to say that if any defect existed in the orders, it was not cured by the respondent's acquiescence or delay.

For reasons already stated the proper county court had jurisdiction to make the order. If in the course of doing so something occurred which amounted to an abuse of that jurisdiction or a violation of an essential of justice, the order would be void-

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able on that ground but it would not be wholly void and a nullity as an usurpation of jurisdiction such as would be the case if the county court had been wholly without jurisdiction to entertain the matter. In *The Queen* v. *Justices of Antrim*, [1895] 2 I.R. 603 (cited with approval by the Court of Appeal in *Rex* v. *Simpson* (1913), 83 L.J.K.B. 233), O'Brien, L.C.J. said at p. 636:

> If the case were one where the tribunal was *ex facie* wholly unauthorized, and the accusation and accused plainly *coram non judice*, the matter would be entirely different. In such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity—not merely voidable, but void.

If the respondent did not receive notice of the applications one would think that when the orders came to its knowledge it would have moved the county courts to set them aside for irregularity or lack of notice; or in any event would have moved to quash them on *certiorari*. But that was not done. Apparently the respondent regarded the county court as an usurping tribunal wholly without jurisdiction *ab initio*. The reasoning upon which this judgment is based must exclude that as a mistaken view.

VII. Concluding observations concerning the jurisdiction of the Supreme Court as sought to be exercised in the judgment appealed from.

Respondent's argument in support of the declaratory judgment under review divides itself into three aspects of the Supreme Court's jurisdiction. Two of these, *viz.*, exclusive jurisdiction and concurrent jurisdiction have been considered and rejected for reasons stated in Captions II. through VI. hereof. However, counsel for the respondent advanced a third jurisdictional aspect which may be stated in this general form, that where prohibition or *certiorari* lies there also is found jurisdiction to bring a declaratory action. So stated it may reflect also a tendency discernible in some decisions to regard prohibition and *certiorari* as alternative remedies. This aspect of the respondent's argument identified itself with the decision of the majority in *Cooper* v. *Wilson* (1937), 106 L.J.K.B. 728 (discussed later) and particularly with an observation of Greer, L.J. therein at p. 734, that the power to quash a dismissal order upon *certiorari* in that case did not prevent the bringing of a declaratory action to declare the dismissal order invalid.

Analysis of this third jurisdictional aspect demands a clear apprehension of the nature of the judgment under review and also of the scope of the jurisdiction which may be exercised in prohibition and *certiorari*. What then is the nature of the judgment under review? It is a judgment in a Supreme Court action declaring the appellant company is not a farmer within the F.C.A. Act coupled with what in legal effect is an order restraining the Board of Review from performing its statutory duties. It is an adjudication upon the merits of the dispute between the parties; for the real issue between them is whether the appellant company is a farmer within the meaning of the F.C.A. Act. Could that judgment have been given if the proceedings of the Board of Review had been attacked on prohibition or *certiorari*? The answer must be no, for such proceedings are not an appeal, and they are not a hearing *de novo;* they cannot go into the merits of the dispute between the parties. The only remedy the applicant may obtain, for (apart from any extension or abridgment of *certiorari* in a particular statute), the only jurisdiction the Supreme Court has in such proceedings, is a review of the proceedings in the inferior Court or tribunal, to ascertain if the inferior Court or tribunal has acted without jurisdiction, in excess or in abuse of its jurisdiction or in violation of the essentials of justice.

In prohibition or *certiorari* proceedings, if the jurisdictional objections thereby taken are acceded to, what has been done by the inferior tribunal may be quashed; but if they are not acceded to the motion to quash stands dismissed. That is to say, if instead of the present declaratory action the respondent had initiated prohibition proceedings, the Supreme Court would have had no jurisdiction to declare the appellant company a farmer. The most it could have done would be to prohibit the Board of Review from proceeding further or to quash what it had done, on the ground (if it so decided) that the board had no jurisdiction to entertain the request of the appellant company to formulate a proposal. Proceedings by way of prohibition or *certiorari* necessarily presume that the supervisory jurisdiction of the Supreme Court is limited to jurisdictional objections to the proceedings of the inferior tribunal, and that it does not extend

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to the correctness of any decision upon the merits of the dispute which the inferior tribunal would have power to make if it were conceded jurisdiction. Of course if the jurisdictional objection succeeds, the decision on the merits is swept away; not because it is in itself a wrong decision, but because it is found the inferior Court had no jurisdiction to make that decision or any decision on the merits.

Macdonald, J. of the Saskatchewan Court of King's Bench had this question before him in *Credit Foncier* v. *Board of Review, supra,* and I think what he said there at p. 188, bears repetition:

> It is also clear that on *certiorari* proceedings a Court considers only the question of jurisdiction and does not consider the merits.
>
> To hold therefore that an action of this nature lies against the Board of Review would be in effect to give the plaintiff an appeal to this Court, for I never heard of an action in which the trial Court was not free to try the merits.

And refer also to the authorities cited at the end of Caption I. hereof. Lord Reading pointed out in the *Morn Hill Camp* case, *supra,* that the same principles apply in *certiorari* as in *habeas corpus;* and in *Rex* v. *Electricity Commissioners, supra,* Atkin, L.J. said there was no difference in principle between *certiorari* and prohibition, except that the latter may be invoked at an earlier stage. It follows from what has been said: (1) The bringing of a declaratory action is an exercise by the Supreme Court of its jurisdiction as a Court of first instance. (2) The Supreme Court cannot act as a Court of first instance unless it has exclusive or concurrent jurisdiction. (3) If the Supreme Court has not exclusive or concurrent jurisdiction it cannot entertain a declaratory action, by borrowing the jurisdiction which it has in prohibition and *certiorari.* For its jurisdiction in prohibition and *certiorari* is restricted to a review of jurisdictional objections to proceedings of inferior tribunals, and does not extend to an adjudication upon the merits, which can only be done by a Court of first instance possessing exclusive or concurrent jurisdiction.

For reasons already fully stated in Captions II. through VI. hereof, the Supreme Court had not exclusive or concurrent jurisdiction. Therefore the present declaratory action was not maintainable. Decisions have been referred to in which actions have

been brought when prohibition or *certiorari* proceedings could have been taken also. But on examination it will be found that in such cases the Court had exclusive or concurrent jurisdiction, or at least that if exclusive or concurrent jurisdiction did not exist by necessary implication, the reasoning employed could not support the conclusion reached. For such authorities as *Heard* v. *Pickthorne* (1913), 82 L.J.K.B. 1264 to apply, it must first be found that there is no special tribunal under the F.C.A. Act which has exclusive jurisdiction to decide that an applicant is or is not a farmer; in other words it must first be found that the Supreme Court had exclusive or concurrent jurisdiction to do so. It is to be noted that in *Andrews* v. *Mitchell* (1904), 74 L.J.K.B. 333 relied on in *Cooper* v. *Wilson, post,* as well as in *Heard* v. *Pickthorne, supra,* the Earl of Halsbury, L.C. said at p. 335, that the action for damages for wrongful expulsion could be brought in the county court because the arbitration committee of the friendly society had no jurisdiction to entertain the question. But as pointed out previously the county court is given exclusive jurisdiction here by the F.C.A. Act. The validity of the F.C.A. Act itself is not in dispute. The most that can be said is that the construction of the F.C.A. Act is in dispute; but the county court has been given jurisdiction to determine that question with an appeal to the Court of Appeal. If the contention of the respondent were acceded to, then after an unsuccessful appeal to the Court of Appeal from the county court, a party might bring an action in the Supreme Court for the same relief and appeal from its decision as of right to the Court of Appeal, and this Court would then be asked to pass a second time upon the same question between the same parties.

Counsel for the respondent relied on *Cooper* v. *Wilson* (1937), 106 L.J.K.B. 728, a decision of a Court of Appeal in England (Lords Justices Greer and Scott and Macnaghten, J., the latter dissenting.). In that case on 27th July, 1933, a police sergeant filed a statutory notice of resignation which became effective 24th August. On 8th August the police preferred certain disciplinary charges against him; after an inquiry the chief constable purported to dismiss him on 14th August. His appeal to the watch committee was dismissed on 29th August. His

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complaint was that under the relevant statutes the chief constable had no power to dismiss, and that any power of dismissal which he had was provisional until confirmed by the watch committee which alone had power to dismiss; consequently if he were right the decision of the watch committee on 29th August was beyond its jurisdiction, as his resignation had become effective five days previously and it could not dismiss a man who had already resigned. Instead of taking proceedings by *certiorari* to quash the order of dismissal, he brought an action to declare it invalid. Greer, L.J. at p. 734, held the action was maintainable as an exercise of the power to grant declaratory orders under rule 285.

That rule no doubt applies to cases where a statute has not set up a special tribunal with plenary jurisdiction; but where as here the statute has done so I am unable with great respect for reasons stated when discussing *Barraclough* v. *Brown, supra,* to see that rule 285 has any bearing. At best rule 285 is procedural and a rule cannot create jurisdiction, *per* Lord Davey in *Barraclough* v. *Brown, supra,* at p. 677. In *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1915), 84 L.J.K.B. 1465, which was much relied on in *Cooper* v. *Wilson, supra,* every member of the Court of Appeal in discussing *Barraclough* v. *Brown* stressed the very point emphasized here, that the power to decide the dispute was taken away by statute from the Supreme Court as a Court of first instance and given to another tribunal. The dissenting judgment of Macnaghten, J. in *Cooper* v. *Wilson* with respect seems to be in accord with principle and authority when he said at pp. 751-2:

> The declaration prayed for in this action is a declaration that the resolution of the watch committee confirming the decision of the chief constable was invalid and ought therefore to be quashed, and though I fully accept the view that the power of the Court under Order XXV. [r. 285] to make declarations as to the rights of parties is almost unlimited, the limit is, in my opinion, reached when it is sought to obtain a declaration that a decision of a tribunal exercising judicial or *quasi*-judicial functions ought to be quashed. . . . The question at issue in this case was not as to the rights of the appellant under his contract of service but as to the validity of the resolution of the watch committee confirming his dismissal from the police force. With very great respect, I venture to think that in such a case an application for a writ of *certiorari* was the proper and only remedy available to the plaintiff.

So as not to be misunderstood it is not said that the action in *Cooper* v. *Wilson* may not have been maintainable on other grounds which have no application in the case at Bar. That case may be referred to as an example of the delay and expense which may be incurred if the expeditious remedy of *certiorari* is ignored. If *certiorari* proceedings had been taken there the lengthy and expensive proceedings which arose out of the declaratory action would have been avoided. It appears that on the sixth day of the trial before a judge and special jury, one of the watch committee announced she agreed with the plaintiff and repudiated the defence. The trial being treated as abortive a new trial was ordered and came on for hearing several months later, lasting from 29th January to 5th February, 1936; in the appeal it is noted the appellant was permitted to proceed *in forma pauperis*.

Finally prohibition and *certiorari* do not interfere with the jurisdiction conferred by Parliament on special tribunals, but enable the Courts in an expeditious and comparatively inexpensive manner to supervise the conduct and decisions of such tribunals should they act without jurisdiction, in excess of or in abuse of their jurisdiction, or in violation of the essentials of justice.

VIII. Brief summary of the conclusions reached in this judgment.

(1) The F.C.A. Act has vested exclusive jurisdiction in the county court to adjudicate upon questions concerning the *status* of the appellant company as a farmer and has provided an appeal from the county court to the Court of Appeal. (2) The jurisdiction of the Supreme Court as a Court of first instance is ousted thereby, and therefore the Supreme Court had no jurisdiction to entertain this declaratory action. (3) These conclusions do not affect the jurisdiction of the Supreme Court to intervene by way of prohibition or *certiorari,* when it is alleged the Board of Review has acted without jurisdiction, in excess or in abuse of its jurisdiction or in violation of the essentials of justice. (4) The order of the judge of the proper county court discussed in Caption VI. hereof is an order of a Court of competent jurisdiction under the F.C.A. Act, and the Supreme Court

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NATIONAL TRUST COMPANY, LTD. v. THE CHRISTIAN COMMUNITY OF UNIVERSAL BROTHERHOOD LTD.

O'Halloran, J.A.

has no jurisdiction to ignore it to set it aside or quash it in a declaratory action. This does not debar the respondent apart from delay or acquiescence from recourse to its lawful remedies should it have good grounds to attack the order.

With respect therefore the judgment appealed from was given without jurisdiction. It is "a thing of naught which could not be disobeyed": *vide McLeod* v. *Noble* (1897), 28 Ont. 528; Boyd, C. at p. 548. The judgment should be quashed accordingly and the respondent's action stand dismissed. As the Court below had no jurisdiction to entertain the declaratory action, it follows that this Court has no jurisdiction on this appeal to decide whether the appellant company is or is not a farmer; for that was the subject-matter of the declaratory action.

I would allow the appeals of both appellants.

Appeals allowed.

Solicitor for appellant The Christian Community of Universal Brotherhood Limited: *C. F. R. Pincott.*

Solicitor for appellant The Board of Review for the Province of British Columbia: *W. S. Owen.*

Solicitors for respondent: *Davis & Co.*

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Nov. 22, 27, 29; Dec. 17.

IN RE MUNICIPAL ACT AND DIXON.

Taxation—Assessment—"Actual value"—Improvements—History of section 223 of the Municipal Act, R.S.B.C. 1936, Cap. 199.

The net revenue of a business property over a period of years is not a conclusive test in determining the price which a purchaser would pay for it, and an assessor would not have to enquire from year to year into the business of the various owners of land and assess accordingly, but the revenue-producing qualities of the property under present conditions should be considered as one of the elements affecting the actual value of the property, as such would undoubtedly be taken into consideration by a prospective purchaser in estimating the price he would be willing to pay for it.

On the contention of the appellant that the sole guide as to "actual value" is the price that the property should bring in the present market:—

Held, that the selling value must be taken into consideration along with such other relevant facts as have been proved relating to the original cost of construction, the replacement cost, the depreciation of the building, the trend of business or traffic from one adjoining street to another, and the nature and the assessments of other properties on the same street in the neighbourhood.

Held, further, that the land assessment of the property in question at $24,790 be affirmed, but that the value of the improvements was assessed at too high an amount and should be reduced from $62,500 to $40,000.

APPEAL from the assessment of the westerly ten feet of lot 13 and the easterly 40 feet of lot 14, official map of the city of Victoria in the city of Victoria. The facts are set out in the reasons for judgment. Argued before FISHER, J. at Victoria on the 22nd, 27th and 29th of November, 1940.

Whittaker, K.C., for Ambrose Dixon.
F. L. Shaw, for the city of Victoria.

Cur. adv. vult.

17th December, 1940.

FISHER, J.: The section of the Municipal Act governing the assessment in question herein is section 223 (1), R.S.B.C. 1936, Cap. 199, reading as follows:

For the purposes of taxation, land, except as hereinafter provided, shall be assessed at its actual value, and improvements shall be assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements: Provided, however, that land and improvements shall be assessed separately.

The history of section 223 has been referred to in the argument. The section was first enacted by section 30 of the Municipal Act Amendment Act, 1915, Cap. 46, B.C. Stats. 1915, which repealed section 199 of the consolidated Municipal Act passed in 1914, being Cap. 52, B.C. Stats. 1914, and which was first enacted in 1899 by section 7 of the Municipal Clauses Act Amendment Act, 1899, Cap. 53, B.C. Stats. 1899, and reading as follows:

For the purpose of taxation land and improvements shall be estimated at their value, the measure of which as to land shall be the actual cash value, as to improvements shall be the cost of placing at the time of assessment such improvements on the land, having regard to their then condition, but land and improvements shall be assessed separately.

The 1899 enactment above mentioned replaced section 113 of Cap. 144, R.S.B.C. 1897, which reads as follows:

For the purposes of taxation, land and improvements within a municipality

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shall be estimated at their value, the measure of which value shall be their actual cash value as they would be appraised in payment of a just debt from a solvent debtor; but land and improvements shall be assessed separately.

In *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264, MACDONALD, C.J.B.C., referring to an exactly similar section of the Municipal Act, as it then stood, *viz.*, section 212 (1) of Cap. 179, R.S.B.C. 1924, said at p. 267:

> There is no definition of "actual value" beyond what the words themselves import.

In *The Bishop of Victoria* v. *The City of Victoria* case, *supra*, and other cases hereinafter referred to, however, the Courts have stated the principles to be followed and the elements or circumstances to be taken into consideration according to a proper interpretation of the section or similar sections. In giving my decision on the appeal herein therefore I propose to, and hope I shall, follow such principles and take into consideration all the elements or circumstances that the Courts have so said should be considered. In *The Bishop of Victoria* case MACDONALD, C.J.B.C. says at pp. 267-8, in part, as follows:

> I think there is a question of law involved in this case. The selling value is no more the actual value of the property than is the cost of construction and, in my opinion, the learned judge ought to have taken into consideration, although he might not have founded his judgment upon it, the cost of construction and all other circumstances affecting the actual value of the property, for instance, the depression which now exists, the cost of construction, the deterioration of the building, if any, and any relevant local circumstances were appropriate subjects for consideration. All facts which might affect what the judge might consider the value ought to have been canvassed by him and by excluding these the learned judge was in error in his law.

Speaking of the assessor for the defendant in such case the learned Chief Justice said at p. 269:

> He ought not to accept the selling value at a forced sale or the selling value at an open sale as the basis of assessment to the exclusion of all other relevant facts any more than he should accept the cost of construction as the actual value to the exclusion of all other circumstances. The value would depend upon his own judgment after having taken all circumstances into consideration. . . .

In the same case MARTIN, J.A. (as he then was) said, in part, as follows at pp. 271-3:

> The manner in which the defendant's assessor regarded the matter and the principle or test that he applied are, fortunately, beyond speculation or dispute, and his evidence shows clearly he made the initial and primary error of construing "actual value" as meaning the cost of construction alone in the case of buildings erected for scholastic purposes, . . .

Furthermore, it is to be borne in mind that the assessment in question is one for a year only and subject to annual change to meet improved conditions, which we all hope are not far off, and if happily the result of them should be that a revenue is derived from the use and operation of this "improvement" institution, that would be an element in the future consideration of its actual value just as is the loss suffered today in the severe struggle of carrying out its purpose in the face of unprecedented adverse conditions; in short, as my brother had indicated as aforesaid, due regard must be had to all the "features" of the particular case.

In the same case MACDONALD, J.A. (now C.J.B.C.), after setting out the history of said section 212 said at pp. 279-80 as follows:

All we can say from this history is that in ascertaining "actual value," where we have not the benefit of additional phrases the old aids, *viz.*, "payment of a just debt from a solvent debtor" and "replacement value," while they may possibly be considered as factors in taking a general view of the whole problem no longer form the true basis for assessment purposes.

In *Gates' Case*, [1918] 2 W.W.R. 930, THOMPSON, Co. J. dealing with the present section, considered the passing of the British Columbia Prohibition Act as an element affecting the value of a hotel. I think he was right in doing so. So too, although it does not necessarily follow from the case referred to, a school or college engaged, not in commercial pursuits but in academic work, carried on, to some extent at least, on a charitable basis should be viewed from the standpoint of the "use" to which the building is devoted. It does not follow that its assessment should be unreasonably low because it is non-productive in a commercial sense: it does mean that a proper valuation cannot be reached without due regard to that feature.

There are two kinds of value known to economists, *viz.*, value in use and value in exchange. An article may have great value in use because of special properties or characteristics not susceptible to measurement by commercial standards and have comparatively little value in exchange. It is the latter measure of valuation, properly understood however, that should be applied. In doing so we have a guide in the judgment of the late Mr. Justice Idington in *Pearce* v. *Calgary* (1915), 9 W.W.R. 668 at 672-3. In interpreting the words "fair actual value" (and the word "fair" adds little to the phrase) as applied to land, at the time unsaleable, and likely to remain so for many years, he said:

"In the course of liquidation which always follows and has to be faced by those concerned in disposing of such properties under such circumstances, there are generally some prudent persons possessed of means or credit who will attempt to measure the forces at work making for a present shrinkage in values for a time and again likely to arise making for an increase of value.

"Such men are few in number and of these only a very small percentage perhaps are able to make a rational estimate of these reversible currents, and a still smaller percentage willing to venture the chances of their investment on the strength of their best judgment. They know that the shrewdest and most far seeing may be mistaken.

"I take it that the 'fair actual value' meant by the statute quoted above is, when no present market is in sight and no such ordinary means available

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of determining thereby the value, what some such man would be likely to pay or agree to pay in way of investment for such lands."

In the case of *In re Charleson Assessment* (1915), 21 B.C. 281 the Court dealt with an assessment of property under section 38 of the Vancouver Incorporation Act, 1900, which was as follows:

All rateable property shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements, if any, being estimated separately from the value of the land on which they are situate.

It will be noted that the section is different but at pp. 285-6 MACDONALD, C.J.A. lays down some general propositions:

By section 38 the Legislature endeavoured to fix a basis upon which assessments should be made. What the land would fetch at the moment at a forced sale is not the test. I think the assessor should look to the past, the present, and into the future. His view-point should not be different to that of a solvent owner not anxious to sell, but yet not holding for a fictitious or merely speculative rise in price.

In the present case it is or must be common ground between the parties that the property in question herein was sold in December, 1939, by the then owner Prudence Limited to Edwin G. Smith for the sum of $11,500 and a few days later was sold by Smith to the appellant for the sum of $14,000. Upon the evidence before me, however, I cannot look upon the latter sum as the real selling value of the property at present as even the witnesses for the appellant say in effect that it should sell under present market conditions for from $35,000 to $40,000 and it is quite apparent that the appellant bought the whole property for $1,000 less than the land if unimproved would be worth in the present market according to the evidence given by his own witnesses. Some explanation of the small amount received by Prudence Limited may be found in the evidence of *H. J. Davis,* formerly its secretary, who had been trying for five years to sell the property and finally sold it for the company and testified that some prospective purchasers who were interviewed refused to buy when they were shown a statement of the annual receipts and expenditures in connection with the property. I have had considerable evidence as to what the receipts and disbursements in connection with the property have been during the past six years and also evidence as to what they should have been. I pause here to say that I do not think that what has been the net revenue over a period of years is a conclusive test in determining the

price which a purchaser would pay for a business property or that an assessor would have to enquire from year to year into the business of the various owners of land and assess accordingly. (See *Gates' Case, supra,* at p. 933) but I think after a perusal of the cases hereinbefore referred to that the revenue-producing qualities of the property under present conditions should be considered as one of the elements affecting the actual value of the property as such would undoubtedly be taken into consideration by a prospective purchaser in estimating the price he would be willing to pay for the property.

It is or may be argued on behalf of the appellant that the sole guide as to actual value is the price that the property should bring in the present market but having in mind what has been said in the passages above set out I refuse to consider the selling value as the basis of assessment to the exclusion of all other relevant facts. I take into consideration the selling value along with such other relevant facts as have been proved relating to the following matters, *inter alia, viz.*: the original cost of construction, the replacement cost, the depreciation of the building, the trend of business or of traffic away from Government Street to Douglas Street and the nature and the assessments of other properties on Yates Street in the same neighbourhood. Having said this and adding also that I appreciate the fact that the position of an assessor assessing lands and improvements in the city of Victoria, British Columbia, and perhaps in the whole of Western Canada, for many years has been a most difficult one, I still have to say with all respect for Mr. O'kell, the Victoria City assessor, and the expert witnesses called on behalf of the city on the hearing before me, that in estimating the actual value of the whole property for the purposes of assessment and taxation they, in my view, have given too little weight to the real selling value of the property and too much weight to the replacement cost and to potential or speculative values.

Applying the principles and propositions of law laid down in the passages from the judgments of our Courts, as hereinbefore set out, I have to say that my conclusions are as follow: While I feel that much may be said in favour of a reduction of the land assessment nevertheless, looking at the assessment of other lands

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on Yates Street between Douglas and Blanshard Streets, I hesitate to interfere and have finally come to the conclusion that upon the evidence before me I should affirm, as I do, the land assessment at $24,790. Assuming such amount then to be the actual value of the land, if there were no improvements thereon, I think that the improvements upon the land have not been assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements as required by section 223 as aforesaid and I have no hesitation in interfering with such assessment upon looking at the assessment of the improvements upon the adjoining 50 feet with respect to which I have had evidence, *viz.*, the west 20 feet of lot 14 and the east 30 feet of lot 15 according to Exhibits 18 and 19. After taking into consideration all the relevant facts, as I have said, I have come to the conclusion that the improvements upon the lands in question herein, *viz.*, the westerly 10 feet of lot 13 and the easterly 40 feet of lot 14, have been valued and assessed at too high an amount and that the assessment of such improvements should be reduced from $62,500 to $40,000, the actual value of the whole property being in my view $64,790. Order accordingly with costs to the appellant fixed at $35 and disbursements.

Order accordingly.

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1940
Oct. 1;
Nov. 5.

REX v. DAVIS.

Criminal law—Charge—Retaining stolen goods knowing the same to have been stolen—Stolen goods—Proof of—Criminal Code, Sec. 400.

The accused was convicted for retaining stolen property knowing the same to have been stolen. Five hundred and ninety pounds of one million gauge copper cable, belonging to the British Columbia Electric Ry. Co. Ltd. was taken from the bridge at Marpole shortly prior to the 2nd of January, 1940. On June 19th following an employee of the British Columbia Electric Ry. Co. Ltd. and a detective entered the junk shop of the defendant, and in the basement they found 590 pounds of cable boarded up.

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Held, on appeal, reversing the decision of the deputy police magistrate for Vancouver, that the conviction could not be supported having regard to the evidence. Presumptions arising out of recent possession do not flow from mere possession of goods but from possession of stolen goods. The first obligation of the Crown is to prove the goods to be stolen goods. Before a person can be convicted of the crime of retaining stolen goods knowing them to have been stolen, it is incumbent upon the Crown to show that the goods received were, in fact, stolen, and this is where the Crown has failed.

Rex v. *Fitzpatrick* (1923), 32 B.C. 289, followed.

APPEAL by accused from his conviction by deputy police magistrate Matheson in Vancouver on the 18th of July, 1940, on a charge

that at the city of Vancouver, between the 1st day of January, 1940, and the 22nd day of June, 1940, [he] unlawfully did retain in [his] possession stolen goods knowing the same to have been stolen, to wit, 590 pounds of one million gauge copper cable of the value of over twenty-five dollars, the property of the British Columbia Electric Railway Company.

The appeal was argued at Victoria on the 1st of October, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Branca, for appellant: He was charged with having 400 feet of copper wire, knowing that it was stolen. First, there is no evidence that the goods were stolen. Secondly, there was no evidence that what he had belonged to the British Columbia Electric Ry. Co., and thirdly, there was reasonable doubt upon which he should have been discharged. The police found copper wire on his place but it was not identified as the wire that disappeared from the British Columbia Electric Ry. Co.: see *Ivey* v. *Smith* (1929), 40 B.C. 475; *Royal Bank of Canada* v. *Pound* (1917), 24 B.C. 23, at p. 25; *Rex* v. *Fitzpatrick* (1923), 32 B.C. 289, at pp. 292-3. The wire was identified by a splice, but it is a standard splice and may apply to any wire. On the question of identity see *Rex* v. *Scheer* (1921), 57 D.L.R. 614; *Rex* v. *Carswell* (1916), 29 D.L.R. 589. On the question of reasonable doubt see *Richler* v. *Regem*, [1939] 4 D.L.R. 281. The case of *Rex* v. *Pomeroy* (1936), 51 B.C. 161, at 163 and 166, does not apply, as the facts are different. The identity of the goods was accepted on very meagre evidence. There is no evidence that the wire was stolen: see *Rex* v. *Sanders*, [1919]

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1 K.B. 550; *Rex* v. *Powell* (1919), 27 B.C. 252; *Rex* v. *Brooks* (1906), 11 O.L.R. 525; *Rex* v. *Tong Wah* (1931), 44 B.C. 260. An explanation was given by the accused that might reasonably be accepted as true.

Carew Martin, for the Crown: There were two witnesses who gave evidence of the theft. In any case it is sufficient if the goods are found elsewhere: see *Rex* v. *Sbarra* (1918), 13 Cr. App. R. 118; *Rex* v. *Fuschillo,* [1940] 2 All E.R. 489; *Rex* v. *Wilson* (1924), 35 B.C. 64, at p. 66; *Rex* v. *Searle* (1929), 51 Can. C.C. 128. As to the magistrate finding that accused's explanation might not reasonably be true see *Rex* v. *Murphy, Kitchen and Sleen* (1931), 4 M.P.R. 158.

Branca, in reply, referred to *Rex* v. *Sbarra* (1918), 87 L.J.K.B. 1003.

Cur. adv. vult.

On the 5th of November, 1940, the judgment of the Court was delivered by

SLOAN, J.A.: The appellant was convicted by the deputy police magistrate of the city of Vancouver for unlawfully retaining stolen property, knowing the same to have been stolen, and from that conviction appeals, alleging *(inter alia)* that there was no proof that the goods found in his possession were, in fact, stolen.

Counsel for the Crown conceded before us that there was no direct proof that the goods in question were stolen but he relied upon the consequential effect of certain presumptions to sustain the conviction.

If I understand his submission it amounted to this: Recent possession, and the circumstances surrounding the retention of these goods, raised a presumption that the accused knew that he was in possession of stolen goods. He did not give a reasonable explanation of such possession and in consequence the magistrate would be justified in finding that the accused knew the goods were stolen. He contended then that if it is found that the accused was in possession of goods which he knew to be stolen it follows that the goods were in fact stolen. Thus, he argues, the essential elements of the crime are established. In support of this process of reasoning *Rex* v. *Sbarra* (1918), 13 Cr. App. R.

118 and *Rex* v. *Fuschillo* (1940), 27 Cr. App. R. 193 are relied upon.

With respect I cannot agree with that submission. It is not, in my opinion, the proper approach to the problem. In my view the presumptions arising out of recent possession do not flow from mere possession of goods but from possession of stolen goods. The first obligation of the Crown is to prove the goods to be stolen goods. Failing this, to use the language of Charles, J. in *Rex* v. *Hemmings* (1939), 27 Cr. App. R. 46, at p. 48, "the prosecution had not set the case on its feet at all." Lack of proof of that essential ingredient of the crime cannot be cured by a presumption based upon a presumption. A presumption would have to be regarded as a fact instead of a rule by virtue of which a fact may be inferred, by an act of reasoning, from another known fact. It seems to me that, generally speaking, the first inference must exhaust the presumption and that inferences ought not to be drawn from inferences.

In my opinion this appeal falls within the language of (the late) MACDONALD, C.J.A. in *Rex v. Fitzpatrick* (1923), 32 B.C. 289, at p. 292 wherein he said:

> The prisoner thought he was buying stolen furs. . . . But before a person can be convicted of the crime of receiving stolen goods knowing them to have been stolen, it is incumbent upon the Crown to shew that the goods received were, in fact, stolen, and this is where, in my opinion, the Crown has failed.

And see *Reg.* v. *Dredge* (1845), 1 Cox, C.C. 235.

There are many circumstances in the *Sbarra* and *Fuschillo* cases, *supra,* which are absent here and these authorities, in my view, afford no assistance to the Crown in the circumstances of this case. It is not without interest to note that MACDONALD, C.J.A. in *Fitzpatrick's* case, *supra,* at p. 293, said of *Sbarra's* case:

> *Rex* v. *Sbarra* (1918), 87 L.J.K.B. 1003, is relied on as shewing that there was sufficient evidence of theft here, but if the true meaning of that judgment is that mere conjecture is sufficient, then I do not agree with it. I think however, that the Court there must have attached some importance to the fact that the three persons indicted with the prisoner had pleaded guilty of the theft, and therefore the failure to prove the theft formally did no substantial wrong to the prisoner.

While I am of the opinion under the circumstances of this case the Crown cannot succeed in the absence of positive proof

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that the goods in question were stolen yet I do not wish it understood that, in my opinion, such a rigid requirement is an invariable rule to which there are no exceptions. See, *e.g., Reg.* v. *Burton* (1854), 6 Cox, C.C. 293 and *Reg.* v. *Mockford* (1868), 17 L.T. 582 and Wills on Circumstantial Evidence, 7th Ed., 240, but, as I have said, this is within the class of case in which the rule and not the exception is to be applied.

Before leaving this case there is another aspect to which I would direct attention. The following observation appears in the learned deputy magistrate's report to us " . . . I did not believe his [the accused's] explanation."

In the language of Harvey, C.J.A., in delivering the judgment of the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Searle* (1929), 51 Can. C.C. 128, at 131:

> . . if the magistrate thought it was sufficient that he should disbelieve the story told [by the accused] he was wrong in his law.

That statement is based upon the well-known observation of Lord Reading, C.J. in *Rex* v. *Schama and Abramovitch* (1914), 11 Cr. App. R. 45, at 49; that "perplexing case," as Lord Sankey, L.C. described it in *Woolmington* v. *Director of Public Prosecutions* (1935), 30 Cox, C.C. 234, at 243 "the real result" of which (he says at p. 243) lays down in "somewhat involved language" that

> while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

Lord Hewart, C.J. was of the opinion in *Rex* v. *Currell* (1935), 25 Cr. App. R. 116, at 118 that *Schama's* case

> really decides no more than this, that the burden of proof is on the prosecution, . . .

Fortunately the Supreme Court of Canada has recently interpreted *Schama's* case in *Richler* v. *Regem,* [1939] 4 D.L.R. 281. Sir Lyman Duff, C.J.C., in delivering his judgment in which Rinfret, Kerwin and Hudson, JJ. concurred, said (at p. 282):

> The proper direction on the trial of an accused charged under s. 399 of the Cr. Code with receiving or retaining in his possession stolen goods, knowing them to be stolen, is explained in three judgments to which our attention was called by Mr. Gendron.

The learned Chief Justice then reproduces the "somewhat involved language" of Lord Reading in *Schama's* case *(supra)*

notes that it was applied in Alberta in *Rex* v. *Searle (supra)*, quotes the observations of Avory, J. in *Rex* v. *Ketteringham, Senr.* (1926), 19 Cr. App. R. 159, at 160 and then sums up the effect of these judgments in the following passage:

> The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the *onus* of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

It is, I think, clear that the learned deputy magistrate did not apply the test deemed proper by the quoted Canadian authorities. To find the explanatory testimony of the accused in this class of case unworthy of belief apparently is not enough to convict. But as I am of the opinion the conviction should be quashed on the first ground no consequential results flow from (with respect) his erroneous conception of the law on this aspect of the case.

The appeal is allowed and the conviction set aside.

Appeal allowed; conviction set aside.

BOYDEN AND BOYDEN v. BELSHAW.

C. A.
1940
Nov. 20, 21;
Dec. 13.

Negligence—Collision between motor-truck and bicycle—Motor-truck about to enter lane—Boy on bicycle coming out of lane—Fails to stop at stop-sign—Liability

E., an employee, was driving the defendant's motor-truck north on Voght Street in the city of Merritt in the afternoon, intending to turn into a lane on his right which was about fifteen feet wide. When the front of the truck had reached the sidewalk in front of the lane, he saw two boys racing on bicycles in the lane coming toward him, one on the north side of the lane and the other on the south side. To avoid the boy on the south side he turned to the left and stopped the truck, when its front was close to the north corner of the lane. The boy on the north side, who failed to stop at a stop-sign close to the entrance in the lane, ran into the front of his truck and was severely injured. In an action for damages it was held on the trial that the boy was solely responsible for the accident.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the boy failed to stop in approaching the outlet, passed a stop-sign and ran

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v.
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into the motor-truck. There was evidence of negligence on his part. It was found by the trial judge that the driver of the motor-truck was not negligent, and this Court cannot say that he was clearly wrong in doing so, and the appeal is dismissed.

APPEAL by plaintiffs from the decision of MORRISON, C.J.S.C. of the 6th of June, 1940, in an action for damages arising out of a collision between the plaintiff infant who was riding on a bicycle, and a motor-truck of the defendant driven by an employee named Russell Eagles. At about 4 o'clock on the afternoon of the 3rd of September, 1938, Eagles, who drove a motor-truck for the Belshaw meat market, was driving north on Voght Street in the city of Merritt and made a right turn, intending to go into a lane which was about fifteen feet wide. When his front wheels were about to go across the sidewalk just outside the lane, two boys on bicycles were about to come out of the lane. One boy (the plaintiff) was on the north side of the lane and the other on the south side. Eagles then being afraid of running into the boy on the south side, turned his truck to the left and went across the entrance of the lane to its north side before he stopped. As he stopped the plaintiff, who did not stop at a stop-sign in the lane and close to the entrance, ran into the front of his truck and was severely injured.

The appeal was argued at Vancouver on the 20th and 21st of November, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Castillou, for appellants: One Brownridge was a witness who saw the accident, and the learned judge would not let me ask Eagles what he said to Brownridge shortly after the accident. The evidence shows Eagles was going at an excessive speed, as he was about to turn into the lane and his attention was diverted by his waving to a girl on the opposite side of Voght Street. This Court can assess damages. Assuming the boy was negligent in not stopping at the stop-sign, by the exercise of reasonable care Eagles could have avoided the accident: see *McGinitie* v. *Goudreau*, [1921] 3 W.W.R. 250. As to a lane being a highway see *Robertson* v. *Wilson*, [1912] S.C. 1276, at p. 1279; *Chaplin* v. *Hawes* (1828), 3 Car. & P. 554; *Wales* v. *Harper* (1911), 17 W.L.R. 623; *Newell* v. *Acme Farmers Dairy Ltd.*, [1939] 1 D.L.R. 51.

J. G. A. Hutcheson, for respondent: The evidence justifies the finding of fact by the trial judge and this Court should not interfere: see *Chong* v. *Gin Wing Sig,* [1917] 2 W.W.R. 183; *The Canadian Pacific Ry. Co.* v. *Bryce* (1909), 15 B.C. 510 (n.), at p. 513. There was no evidence of speed when Eagles turned into the lane. A bicycle is a "vehicle": see *Regina* v. *Justin* (1893), 24 Ont. 327; *Regina* v. *Plummer* (1870), 30 U.C.Q.B. 41; *Cannon* v. *Abingdon (Earl of),* [1900] 2 Q.B. 66; *Zelowski* v. *Orben,* [1927] 1 W.W.R. 955. No act of Eagles' after he was forced by the other boy on the bicycle amounted to negligence. There was no room for getting between the two boys. They were racing down the lane at some speed. There was ample evidence to support the finding of the trial judge. No admission by Eagles would be evidence against the defendant: see *Jarvis* v. *London Street R.W. Co.* (1919), 45 O.L.R. 167. On the question of emergency see *Harding* v. *Edwards and Tatisich* (1929), 64 O.L.R. 98, and on appeal [1931] S.C.R. 167.

Castillou, replied.

Cur. adv. vult.

13th December, 1940.

MACDONALD, C.J.B.C.: Appeal by the plaintiffs in an action for damages tried by MORRISON, C.J.S.C. It arose out of a collision in the city of Merritt between the infant plaintiff (appellant) riding a bicycle and the defendant, respondent's driver, in a motor-truck. The boy on his bicycle was emerging from an alley to a main thoroughfare: the driver of respondent's truck was in the act of turning to the right to enter the alley. Appellant, although on his proper side of the travelled part of the road in the alley, failed to stop at a stop-sign and ran into respondent's truck.

The accident would probably not have occurred were it not that another boy on a bicycle also approached the main street from the alley opposite the appellant on the wrong side of the road. Hence, the driver of respondent's truck, as he turned into the alley, was compelled to swerve a little to the left to avoid the boy last mentioned. For doing so negligence cannot be imputed to him although it is clear that if he had not been compelled to do so the accident would not have happened. The

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trial judge, in short reasons, found that the negligence of the boy was the sole cause of the accident. That he was negligent there is no doubt. He failed to stop in approaching the outlet: he passed a stop-sign and ran into the truck as it was about to turn as aforesaid in the narrow intervening space between the two boys: at all events we cannot say that there was no evidence of negligence on his part. The trial judge, too, necessarily found that the driver of the motor-truck was not negligent and again we cannot say that he was clearly wrong in doing so.

It was submitted that respondent was negligent on two grounds. First, that when making the turn into the alley he waved to a lady on the opposite side of the street; this, it is said, distracted his attention and contributed to the accident: second, that he turned into the alley at an excessive speed. As to the first point the incident referred to occurred some appreciable time before the turn commenced and could not therefore be a factor; nor can it be said that we ought to reverse the findings of fact and say that he turned into the alley at an excessive speed. In the result therefore, with no negligence on defendant's part, it follows the appeal must be dismissed.

I would add that there was not such material interference with the cross-examination of witnesses by counsel that a new trial should be granted on that ground.

MCQUARRIE, J.A.: I agree.

SLOAN, J.A.: I agree.

O'HALLORAN, J.A.: Perusal of the evidence as presented has led me to the conclusion reached by the learned trial judge. I would therefore dismiss the appeal.

MCDONALD, J.A.: I have considered carefully the arguments presented on this appeal and have reached the conclusion that we ought not to interfere with the learned Chief Justice's finding of fact, there being evidence on which to base such finding.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *H. Castillou.*

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

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

KENNEDY v. UNION ESTATES LIMITED. MCLEOD v. UNION ESTATES LIMITED. BROOKS v. UNION ESTATES LIMITED (p. 1).—Affirmed by Supreme Court of Canada, 29th June, 1940. See [1940] S.C.R. 625; [1940] 3 D.L.R. 404; 10 F.L.J. 227.

REX v. MCLEOD (p. 439).—Reversed by Supreme Court of Canada, 21st February, 1941. See [1941] 1 D.L.R. 773.

SKELDING v. DALY *et al.* (p. 427).—Affirmed by Supreme Court of Canada, 18th November, 1940. See [1941] S.C.R. 184; [1941] 1 D.L.R. 305.

Cases reported in 54 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

CAMERON v. CARR *et al.* (p. 85).—Decision of Court of Appeal (unreported) affirming decision of ROBERTSON, J., affirmed by Supreme Court of Canada, 1st October, 1940. See [1940] 4 D.L.R. 216.

CHESWORTH v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY (p. 529).—Reversed by Supreme Court of Canada, 3rd October, 1940. See [1940] 4 D.L.R. 577; [1941] S.C.R. 201.

DON INGRAM LIMITED v. GENERAL SECURITIES LIMITED (p. 414).—Affirmed by Supreme Court of Canada, 29th June, 1940. See [1940] S.C.R. 670; [1940] 3 D.L.R. 641; 10 F.L.J. 211.

WINSBY v. TAIT AND TAIT & MARCHANT (p. 335).—Reversed by Supreme Court of Canada, 20th December, 1940. See [1941] 2 D.L.R. 81.

Case reported in 53 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

CANADA RICE MILLS LIMITED v. THE UNION MARINE AND GENERAL INSURANCE COMPANY LIMITED (p. 440).—Reversed by the Judicial Committee of the Privy Council, 24th September, 1940. See 110 L.J.P.C. 1; 57 T.L.R. 41; 10 F.L.J. 131; [1940] 4 All E.R. 169; [1940] W.N. 328; [1941] 1 D.L.R. 1.

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CONTRACT—*Right to cut timber—Covenants as to cutting and removing timber—Breach of covenant — Notice to terminate agreement — Sufficiency of notice.*] The plaintiff and the defendant entered into a written contract on August 16th, 1939, whereby the defendant was granted the right to cut and remove timber from certain lands, the property of the plaintiff. Clause 10 of the agreement provided that in case of default by the defendant in the observance or performance of any of the covenants therein contained, and if such default shall continue for ten days after notice thereof by the plaintiff specifying such default and the intention to cancel the agreement, then at the expiration of ten days the agreement, at the option of the plaintiff, may be terminated. Dispute arose as to the defendant's operations, and on the 7th of November, 1939, the plaintiff served the defendant with notice that as the defendant made default in the observance and performance of the covenants contained in the contract "more particularly in respect of clause 2 of said agreement" and if such default continued for ten days, he would terminate the agreement. (Clause 2 of the agreement sets out fifteen various covenants to be observed and performed by the defendant.) On the 20th of November, 1939, the plaintiff served the defendant with final notice of cancellation of the agreement. In an action for rescission of the agreement and damages, it was held by the trial judge that the cancellation proceedings were effectively taken, and he made the declaration sought and awarded damages. *Held*, on appeal, reversing the decision of MANSON, J., that as several of the fifteen covenants contained in clause 2 were incapable of immediate performance the notice of November 7th, 1939, was defective in that it did not, as required by clause 10 of the contract, "specify" the default complained of. The purpose of this requirement obviously is to give the appellant, upon receiving notice of default as to any particular covenant, an opportunity to remedy that default. The notice given was in terms quite too general and was insufficient to found a final notice of cancellation. HEEP v. THIMSEN. - - **487**

CONTRACT—*Continued.*

2.——*Sale of goods for ten years—Mutual covenants—Breaches of covenants by both parties—Buyers' breach result of seller's deceit — Damages.*] By an agreement in writing dated December 18th, 1929, it was agreed that Cummins and his wife would buy from Silver not less than 2,000 mandolin-guitars annually for a period of ten years. They had agreed previously to purchase all their requirements from Silver during the ten-year term and not to purchase any other class of musical instruments without his consent. Silver agreed not to sell any of these instruments in New Zealand, South Africa, Australia, Canada, Great Britain and the United States except to the Cummins and that he would not divulge to or educate any person in the principles of salesmanship therefor practised by him in New Zealand in the course of said business. Both parties committed breaches of their respective covenants. Silver committed the first breach in June, 1932, when he began selling instruments in South Africa in a deceitful manner successfully designed to keep the Cummins ignorant of what he was doing. The Cummins purchased more than their annual quota of 2,000 instruments for the first two years but after that they failed to reach it. Neither party attempted to repudiate the contract upon becoming aware of the other's breach but kept the contract alive and continued to buy and sell instruments thereunder. The Cummins had operated in New Zealand and Australia and were operating in Canada where they had arrived in October, 1937. Silver issued a writ against them in June, 1938, and they counterclaimed for damages for breach of contract. On the trial Silver was awarded damages in the sum of $6,536.29 for loss of royalties on the deficiency in purchases without costs and the Cummins were awarded $5,322.50 with costs on their counterclaim. *Held*, on appeal, affirming the decision of FISHER, J., that Silver's appeal should be dismissed but reversing his decision as to the Cummins' cross-appeal and that it should be allowed. The breach of contract ascribed to the Cummins resulted naturally from the plan evolved by Silver which induced Cummins not to go to South Africa so that Silver might go there himself without Cummins' knowledge and caused Cummins to go to Australia both knowing it was a less profitable field. Cummins suffered from Silver's deceit and the maxim *omnia præsumuntur contra spoliatorem* applied. Silver's loss of royalties from Cummins' deficient purchases

not ready to elect now" and McLaren answered "I am not ready to elect." The learned judge treated these answers as an election to be tried in the ordinary way by the Court having criminal jurisdiction. One week later, represented by counsel, the accused appeared before the same county court judge and sought to elect for trial. The learned judge refused the application on the ground that they had already elected in the manner stated. An application for a peremptory writ of *mandamus* directed to the county judge, commanding him to cause Moran and McLaren to be brought before him for the purpose of being given the option to be tried forthwith before a judge without a jury or to be tried in the ordinary way by the Court having criminal jurisdiction, was refused. *Held*, on appeal, reversing the decision of FISHER, J., that when accused said they were not ready to elect it should have been interpreted reasonably in the circumstances as a request for time to make up their minds how they should elect, the more so as they then had no counsel. By so acting the accused were deprived of the option to elect as preserved to them by section 827 (*b*) of the Criminal Code. What accurred constituted a "violation of an essential of justice." Accordingly *mandamus* will lie. REX *ex rel.* MORAN AND MCLAREN v. LENNOX. - - - - - **491**

3.——*Charge — Retaining stolen goods knowing the same to have been stolen—Stolen goods—Proof of—Criminal Code, Sec. 400.*] The accused was convicted for retaining stolen property knowing the same to have been stolen. Five hundred and ninety pounds of one million gauge copper cable, belonging to the British Columbia Electric Ry. Co. Ltd. was taken from the bridge at Marpole shortly prior to the 2nd of January, 1940. On June 19th following an employee of the British Columbia Electric Ry. Co. Ltd. and a detective entered the junk shop of the defendant, and in the basement they found 590 pounds of cable boarded up. *Held*, on appeal, reversing the decision of the deputy police magistrate for Vancouver, that the conviction could not be supported having regard to the evidence. Presumptions arising out of recent possession do not flow from mere possession of goods but from possession of stolen goods. The first obligation of the Crown is to prove the goods to be stolen goods. Before a person can be convicted of the crime of retaining stolen goods knowing them to have been stolen, it is incumbent upon the Crown to show that the goods received were, in fact, stolen, and

this is where the Crown has failed. *Rex* v. *Fitzpatrick* (1923), 32 B.C. 289, followed. REX v. DAVIS. - - - - **552**

4.——*Charge of being in possession of opium—Accused sits in room while another finishes his smoke — "Knowledge and consent" — Interpretation — Can. Stats. 1929, Cap. 49, Sec. 17—Criminal Code, Sec. 5, Subsec. 2.*] The accused called upon another Chinaman to sell him lottery tickets. When he entered the other's room he found him smoking opium. The other would not do business until he had finished his smoke. The accused sat down to wait until he had finished. While waiting the police entered the room. A charge of being in possession of opium was dismissed. On appeal by the Crown:—*Held*, affirming the decision of police magistrate Wood, that the facts herein do not disclose such "consent" on accused's part that would bring him within the meaning of section 5, subsection 2 of the Criminal Code. REX *v.* CHO CHUNG. - **234**

5.——*Charge of being in possession of opium—Sale of opium by one Chinaman to another—Purchase price paid—Opium not delivered to purchaser—Application of section 5, subsection 2 of Criminal Code.*] Section 5, subsection 2 of the Criminal Code reads: "2. If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them." The accused (a Chinaman) met an opium-runner (a Chinaman) in a doorway for the purpose of purchasing a deck of opium from him. He paid the opium-runner $2 but before the deck of opium was handed to him the police appeared and they were both arrested. The opium-runner threw away the deck of opium as the policeman was about to seize him. A charge of having opium in his possession was dismissed. *Held*, on appeal, reversing the decision of police magistrate Wood (MCQUARRIE, J.A. dissenting), that the above section of the Criminal Code applies. Custody or possession in the hands of the runner "with the knowledge and consent" of the accused is by virtue of this section the latter's custody and possession. The basic feature calling for the application of the section was the "previous arrangement" and the "purpose of" the meeting. REX v. LEE CHEW. - **385**

6.——*Conspiracy — Evidence — Unlawful common design — Rule as to evidence con-*

CRIMINAL LAW—*Continued.*

view of locus in quo—Granted—Evidence as to locus in quo taken on view — Criminal Code, Sec. 958.] The accused was charged with indecent assault on a girl fifteen years old, in his automobile on 65th Avenue in the outskirts of Vancouver, where there was a narrow gravel road with trees and bush on each side. On the trial the jury retired to consider their verdict, and after about two hours they returned and the foreman stated the jury would like to have a view. This was acceded to, and the learned judge, with the parties concerned first being guided by the complainant and later by her companion at the time of the alleged offence, a girl of eight years, was led to the spot on 65th Avenue where their evidence was taken as to the *locus in quo*. The jury then returned to Court, where a verdict of guilty was returned and accused was convicted. *Held*, on appeal, reversing the decision of MANSON, J., that the additional evidence did not relate to something which had arisen *ex improviso* in the course of the trial, but was evidence the necessity for which should have been obvious from the outset, and should not have been admitted at that stage of the trial. *Held*, further, that evidence was admitted of the complainant of a complaint made to her mother some 24 hours after the alleged offence, although she had spent the previous night in the same house with her mother and had seen her mother in the morning after the alleged offence before leaving home. This evidence is clearly inadmissible and must necessarily have been prejudicial to the accused. The appeal is allowed and a new trial ordered. REX v. MARSH. - - - - - **484**

10.——*Interdicted person — Interdiction order set aside—Accused later arrested when in possession of liquor—Setting aside order not filed with board—Conviction—R.S.B.C. 1936, Cap. 160, Secs. 70 and 73 (1).*] An order of interdiction was made against the accused on the 29th of June, 1937. On the 21st of July, 1939, said order was set aside by the county court judge for the county of Yale. On August 9th, 1939, accused was convicted by a stipendiary magistrate on a charge that on the 26th of July, 1939, he unlawfully did as an interdicted person have in his possession liquor. Section 73 (1) of the Government Liquor Act, under which the county court judge has power to set aside an order of interdiction, provides, *inter alia*, that "upon the order of the Judge so setting aside the order of interdiction being filed with the Board, the interdicted person shall be restored to all his rights under this Act." The order of the county court judge was not filed with the "board" until five days after accused was arrested on the 26th of July, 1939. On appeal to the Supreme Court by way of case stated the conviction was affirmed. *Held*, on appeal, reversing the decision of MANSON, J., that on the 21st day of July, 1939, by the order of KELLEY, Co. J. the order of interdiction had been set aside and in the absence of an existing interdiction order a person cannot be said to be an "interdicted person" as defined by the Act. The accused was not an "interdicted person" within the meaning of the Act at the time of his arrest, and the conviction should be set aside. REX v. CARMICHAEL. (No. 2.) - - - **237**

11.——*Living on earnings of prostitution —Habitually in the company of a prostitute —Meaning of "habitually"—Onus of proof—Criminal Code, Sec. 216, Subsec. 2.*] The accused was charged that he did between the 7th and 16th of April, 1940, unlawfully live off the earnings of a prostitute. It was admitted that accused was in the company of a prostitute for a considerable part of the period in question. The trial judge made the following finding: "There is sufficient evidence to show that the accused was at least habitually in the company of a prostitute. It has been proved that he was habitually in her company, and the accused has not satisfied me that he was not living off her earnings." The learned judge then, pursuant to subsection 2 of section 216 of the Criminal Code, placed the *onus* on the accused of proving that he was not living on the avails and accused was convicted. *Held*, on appeal, affirming the decision of HARRISON, Co. J., that the question to be decided is the meaning of the word "habitually" and in doing so it must be considered with its context and in relation to the subject-matter, and that it is sufficient if it can be shown, as it is shown, not that the accused was in the prostitute's company hour after hour or day after day, but that within the times specified he was for the most part in her company. That being so the *onus* was shifted under the above section of the Code, and the appeal was dismissed. REX v. JOHNSON. - **481**

12.——*Manufacturer—Bill rendered for services to customer including sales tax—Bill paid by customer—Amount of sales tax not paid to Crown — Charge of "false pretences"—R.S.C. 1927, Cap. 179, and amendments — Criminal Code, Sec. 404.*] The accused operated a cannery near Vancouver

CRIMINAL LAW—*Continued.*

in which he canned mushrooms for customers, including W. T. Money & Company Limited. On the 8th of May, 1936, he billed W. T. Money & Company Limited for the sum of $386.02 for his services, and added thereto the sum of $30.88 for Federal sales tax. On the 15th of May, 1936, he sent a further account to W. T. Money & Company Limited for $285.71 for canning services, to which account was added $22.86 for Federal sales tax. W. T. Money & Company Limited paid the two accounts in full to the accused, but the two sums amounting to $53.74 were never turned in to the proper Crown officials. The accused was charged that "between the 7th and 16th days of May, A.D. 1936, [he] unlawfully with intent to defraud did obtain by false pretences the sum of $53.74 from W. T. Money & Company Limited." He was convicted. *Held*, on appeal, reversing the decision of police magistrate Wood (MACDONALD, J.A. dissenting), that there were no representations made by the appellant to the Money Company other than what appears on the face of the accounts rendered. It is clear from the evidence that the appellant did not make any representation known to him to be false. One cannot be guilty of a false pretence when the representation he makes is at best a mixed question of law and fact, and he has valid and reasonable grounds for believing it to be true. A representation or a promise that something will be done in the future is not within the contemplation of section 404 of the Criminal Code, which is limited to representations of fact either "present or past." The appeal is allowed and the conviction is set aside. REX v. THIMSEN. - - - **103**

13.——*Murder—Evidence of accomplices—Corroboration — Summing-up — Criminal Code, Sec. 1014 (2).*] The accused was charged with the murder of one William Ingram who ran a lunch-counter at Fernie, B.C. He was struck on the head with an iron pipe which was covered with a split rubber hose, in an attempted hold-up, and died four days later. The accused, who was alleged to have struck the blow, was aided in the commission of the crime by two youths—Morgan and Haile—who performed part of the tasks assigned to them, but quitted the scene almost immediately before Ingram was struck down. The accused was convicted. In the charge the learned judge said in part as follows: "[Haile] admits he went with the accused—as you will see when I go into the evidence more minutely when I am dealing with the main question—until the accused had raised his hand to strike

CRIMINAL LAW—*Continued.*

Ingram, and then Haile says he ran away. Now if that means that Haile abandoned the common intent; made up his mind that he would have nothing more to do with it then he would not be an accomplice because he would not have united in the commission of the crime. The crime up to that time had not taken place. . . . The same with regard to Morgan. Morgan says that the accused invited him to assist in this crime and whilst he does not say in words that he agreed to it, again according to his own testimony he did go with the accused; played a portion of the part that was assigned to him, but before the crime was committed—if it were a crime—before Ingram was struck he left, and again the question is for you to consider whether you believe that and whether you draw from that act the inference that he had abandoned the common intention and left because he didn't want to have anything more to do with it." *Held*, that by this instruction the learned judge advised the jury that as a matter of law, Morgan and Haile would not be accomplices if the jury found that they had abandoned the common unlawful object of violently robbing him before the fatal blow was struck. He in effect instructed the jury that they must consider only two elements in order to find abandonment: (a) a change of mental intention, and (2) quitting the scene before the crime was finally consummated by the blow. Before a prior abandonment of a common enterprise may be found by a jury, there must be something more than a mere mental change of intention and physical change of place by those associates who wish to disassociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of the crime. There must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts in each case, but where possible it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause, that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. There has been misdirection prejudicial to the accused, the appeal is allowed and a new trial ordered. *Held*, further, with respect to section 1014, subsection 2 of the Criminal Code, that there is not that "corroborative evidence . . . of

FOREIGN JUDGMENT—*Continued.*

1911. This marriage was dissolved by Act of Parliament in June, 1923. The defendant Marie Pope was his second wife whom he married in May, 1924. Pope was a soldier in the Great War, and on returning to Canada in 1919 he no longer lived with his first wife. On August 27th, 1919, they entered into a separation agreement, one of the terms being that the wife should have the custody of their children and he was to pay her $125 per month for six months, and after that one-half of his pay and allowances. Payments fell in arrears and in May, 1923, a further agreement was entered into between the first wife, the husband and the second wife, whereby the second wife agreed to transfer certain property both real and personal to The Royal Trust Company as trustee, the trustee to pay from the rents and profits to the plaintiff an annual sum of $1,000, payable in consecutive monthly instalments of $150, as an alimentary allowance, the husband guaranteeing that the annual allowance be $1,800. The second wife continued to make payment of the greater part of the amounts specified until the 1st of April, 1938, when of the amount due there remained unpaid the sum of $1,658. The plaintiff then sued the defendants in Ontario for that sum under the agreement of May, 1923, and obtained judgment. Pursuant to an *ex parte* order, obtained under the Reciprocal Enforcement of Judgments Act, the Ontario judgment was registered in British Columbia. On an application by the defendants to set aside the registration of the Ontario judgment on grounds based on section 4 (*a*) and (*f*) of said Act, namely, that the original Court acted without jurisdiction and that the judgment was in respect to a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering Court:—*Held*, that upon the defendant voluntarily entering an unconditional appearance he thereby submits to the jurisdiction, and accordingly that Court has jursidiction and there is nothing in the agreement in question in this action that would render it invalid as being against public policy. [Affirmed by Court of Appeal.] POPE v. POPE. - - - - - **27, 277**

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INDECENT ASSAULT. - - **484**
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INFANTS ACT—*Juvenile court—Neglected child—Order for care and custody of—Maintenance of child—Charge against municipality—R.S.B.C. 1936, Cap. 128, Secs. 56 (j), 82, 93 and 95.*] By order of the juvenile court for the city of Vancouver, it was found that Evelyn Sherban is a neglected child within the meaning of the Infants Act, that she has no parent capable and willing to exercise proper parental care over her, that she is of the Roman Catholic religion, and it was ordered that she be delivered into the care and custody of The Children's Aid Society of the Catholic Archdiocese of Vancouver and that the municipality of the city of Salmon Arm do pay The Children's Aid Society of the Catholic Archdiocese of Vancouver $4 per week for the expense of supporting the child until she is eighteen years old. On motion on behalf of the municipality of the city of Salmon Arm for a writ of *certiorari*, it was ordered that the order of the juvenile court be quashed in so far as it was ordered that the municipality of the city of Salmon Arm do pay to The Children's Aid Society the sum of $4 per week for the expense of supporting the child.

NEGLIGENCE—*Continued.*

a boat on the river. He did not see the woman before he struck her. She left no dependants and in an action by the administrator for damages for loss of expectation of life it was held that the defendant was guilty of negligence but the deceased woman was equally guilty of negligence causing the accident for had she looked before stepping on to the road she must have seen the defendant's car coming. *Held*, on appeal, reversing the decision of MCDONALD, J. (MACDONALD, C.J.B.C. dissenting), that notwithstanding the failure of the deceased woman to look to the east before entering the road, the defendant by the exercise of reasonable care could have avoided running into her and by failing to do so was wholly responsible for the accident. LAUDER v. ROBSON. - - - - - **375**

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5.——*Damages — Defect in sidewalk—Injury to pedestrian—Extent of disrepair.* - - - - - - - - **40**
See MUNICIPAL CORPORATION. 1.

6.——*Dangerous goods—Sale of—Duty to give adequate warning—Insufficiency of—Liability of manufacturer and wholesaler—Sale of Goods Act—Quantum of damages—R.S.B.C. 1936, Cap. 250, Sec. 21.*] The defendant Inecto Rapid (Canada) Limited manufactured a hair dye and the defendant W. T. Pember Stores Limited was a wholesale distributor of the product which was retailed by the defendant Pacific Drug Stores Limited from its store in Vancouver. The plaintiff sent her son to the Vancouver store to purchase a hair dye known as Inecto Rapid. The store manager made the sale of the two bottles ordered and gave the messenger a copy of instructions in the form of a pamphlet. The plaintiff denied that she received the pamphlet. The use of the dye by the plaintiff caused a rash and blistering which required the services of a physician and rendered her unfit for work for five months. In an action for damages it was held that while this dye has a harmful effect in the case of a very few persons its toxic qualities are such that it is very harmful to a limited number of persons who have healthy skins. The law requires that a dye containing toxic ingredients must be sold only with the clearest warning to the user of the danger involved. The warning should be on the container as a pamphlet may easily not come to the attention of the user and although the plaintiff knew that

NEGLIGENCE—*Continued.*

Inecto Rapid was harmful in some degree had there been a proper warning on the container such as the law requires she probably would not have used it and judgment was given against the manufacturer and wholesaler. *Held*, on appeal, affirming the decision of MANSON, J., that there was evidence to support the view of the learned trial judge that harmful effects other than a rash might (and did actually) follow the use of this hair dye which could have been avoided by more detailed instructions. O'FALLON v. INECTO RAPID (CANADA) LIMITED, W. T. PEMBER STORES LIMITED AND PACIFIC DRUG STORES LIMITED. - **341**

7.——*Escalator in departmental store—Customer ascends from first to second floor—Her heel catches in slot on landing plate—Shoved violently from behind—Back injured — Damages—Appeal.*] The plaintiff entered the defendant's store as a customer and used the escalator running from the first to the second floor. When she reached the top the heel of her shoe caught in one of the slots in the metal landing plate into which the moving cleats enter and disappear downward. The plaintiff being held fast, she was pushed violently forward by those behind her. Her heel broke away from the aperture and falling, her back was severely injured. She was awarded $3,000 damages on the trial. *Held*, on appeal, affirming the decision of MCDONALD, J., that the slot in which her heel was caught must be regarded as a concealed danger to the respondent, in the sense that the danger of catching her heel cannot be said to have been obvious to her. There is no evidence of negligence on her part. In these circumstances the appellant must be held to be responsible for her injuries arising from catching her heel as she did. CAMERON v. DAVID SPENCER, LIMITED. - - - - - **167**

8.——*Liability — Hole in sidewalk—Injury to pedestrian.* - - - **50**
See MUNICIPAL CORPORATION. 2.

9.——*Pedestrian crossing street not at intersection — Run down by motor-cycle—Excessive speed—Contributory negligence—Damages—Percentage of liability.*] At 11 o'clock in the morning of the 15th of September, 1939, Jung Yam Wing was walking on the south side of Pender Street between Main and Columbia Streets in Vancouver when he stepped off the sidewalk between two parked cars to cross the street. When he emerged from between the cars he was confronted with a car going east. He hesitated and the car stopped. He then sud-

denly started to run across the street and when about half way across the northerly half of the street he was run into by a motor-cycle with side-car attached which was going west at about 30 miles an hour and driven by the defendant Jones who was in the employ of the defendant company. Wing died from a fractured skull shortly after the accident. In an action for damages by the administrator of the Wing estate it was held that Wing was 40 per cent. responsible for the accident and the defendant Jones 60 per cent. *Held*, on appeal, affirming the decision of FISHER, J. (SLOAN, J.A. dissenting as to the percentage of liability), that both deceased and Jones were guilty of negligence and the percentage of liability found by the learned trial judge was reasonable in the circumstances and should not be disturbed. JUNG HON MANN v. NORTHWESTERN MESSENGER & TRANSFER LTD. AND JONES. - **404**

10.——*Portion of defendant's amusement park reserved for picnic—Accident in park outside of the reserved portion—Collapse of bench on which plaintiffs were seated—Licensees with an interest—Liability.*] The plaintiffs were employees of the International Harvester Company of Canada Limited, and on the 14th of April, 1938, an employee of said company applied to the Union Steamships Limited to reserve a picnic ground on Bowen Island for July 3rd, 1938, for a company's picnic. The steamship company reserved No. 1 picnic grounds for the Harvester Company and so advised them, at the same time reporting the reservation to the defendant company. The Steamship Company and the defendant company (the same shareholders in each) had a common interest in the Bowen Island resort, which included a number of picnic grounds for reservation and other attractions for the amusement of the public visiting the island. A lump sum was paid the Steamship Company, which included transportation and the reservation of the picnic grounds. A place for concerts known as the "Shell Bowl" was built by the defendant company that was not on No. 1 picnic ground but close to it. Permission was given by the defendant to one Scott to conduct concerts at "The Bowl" and the public could attend the concerts without any charge, but a collection was taken up for the benefit of the performers at each concert. After being on picnic ground No. 1 the three plaintiffs, with two husbands, went to "The Bowl" and they all sat on one bench

facing the platform. About ten minutes after sitting down the bench swayed sideways, collapsed and fell over backwards. The plaintiffs were injured. Examination of the bench showed that its supports were in a decayed condition. It was held on the trial that the plaintiffs were invitees, that it was the duty of the defendant to make the bench reasonably safe, and the defendant was negligent in not doing so. *Held*, on appeal, affirming the decision of FISHER, J. (MARTIN, C.J.B.C. and SLOAN, J.A. dissenting), that although the "Shell Bowl" where the accident occurred is not within picnic ground No. 1, that was specially reserved for the Harvester Company, the entertainment offered by the defendant must be looked on as a whole including all the different attractions. The relationship of the plaintiffs to the occupier should be defined as at least licensees with an interest. A higher obligation should be placed on the occupier in respect to a licensee with an interest, and actual knowledge of the condition of the bench is not necessary, it is enough that it ought to have known it was unsafe, and there is liability. *Per* MARTIN, C.J.B.C. and SLOAN, J.A.: That no matter what the relationship between the plaintiffs and the defendant might have been in their user of the reserved public grounds (the determination of which is not necessary in this appeal) when at the "Shell Bowl" ground, under the circumstances of this case, they were bare licensees of the defendant and no more. The obligation of a licensor extends only to those hidden dangers, the existence of which were actually and in fact known to him and unknown to the licensee. Failing proof of such knowledge the defendant as licensee cannot be held responsible for the damages suffered by the plaintiffs. KENNEDY AND KENNEDY v. UNION ESTATES LIMITED. MCLEOD AND MCLEOD v. UNION ESTATES LIMITED. BROOKS v. UNION ESTATES LIMITED. - - - - - - **1**

11.——*Street-railway—Injury to person attempting to get on car—Duty to passenger boarding car—Inability to practise profession — Refusal to undergo operation—Damages.*] The plaintiff had lost his left arm from below the elbow in his youth. In attempting to board one of the defendant's cars the car had started and he was thrown to the ground and severely injured. He was a doctor by profession and 55 years of age. His medical advisers would not guarantee a satisfactory result and he refused to undergo an operation which would involve the