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.

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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 JUSTICE OF BRITISH COLUMBIA:

THE HON. MALCOLM ARCHIBALD MACDONALD.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. MALCOLM ARCHIBALD MACDONALD.

JUSTICES:

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. ALEXANDER INGRAM FISHER.
THE HON. HAROLD BRUCE ROBERTSON.
THE HON. ALEXANDER MALCOLM MANSON.
THE HON. SIDNEY ALEXANDER SMITH.

DISTRICT JUDGE IN ADMIRALTY:

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. 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-GENERALS:

THE HON. GORDON SYLVESTER WISMER, K.C.
THE HON. NORMAN WILLIAM WHITTAKER, K.C.

MEMORANDA.

On the 23rd of November, 1934, the Honourable William Alfred Galliher, a retired Justice of Appeal, died at the City of Victoria.

On the 20th of November, 1940, Peter Secord Lampman, retired Judge of the County Court of the County of Victoria, died at the City of Victoria.

On the 30th of August, 1941, John Donald Swanson, retired Judge of the County Court of the County of Yale, died at the City of Vancouver.

On the 1st of September, 1941, the Honourable Archer Martin, retired Chief Justice of British Columbia and District Judge in Admiralty, died at the City of Victoria.

On the 13th of October, 1941, the Honourable Malcolm Archibald Macdonald, Chief Justice of British Columbia and District Judge in Admiralty, died at the City of Vancouver.

On the 2nd of January, 1942, the Honourable Sidney Alexander Smith, was appointed District Judge in Admiralty in the room and stead of the Honourable Malcolm Archibald Macdonald, deceased.

On the 5th of January, 1942, the Honourable David Alexander McDonald, a Justice of Appeal, was appointed Chief Justice of British Columbia, in the room and stead of the Honourable Malcolm Archibald Macdonald, deceased.

On the 5th of January, 1942, James Moses Coady, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Denis Murphy, resigned.

On the 5th of January, 1942, James Ross Archibald, Barrister-at-Law, was appointed a Judge of the County Court of the County of Yale and a Local Judge of the Supreme Court of British Columbia, in the room and stead of His Honour John Donald Swanson, resigned.

On the 13th of January, 1942, the Honourable Alexander Ingram Fisher, one of the Puisne Judges of the Supreme Court of British Columbia, was appointed a Justice of the Court of Appeal, in the room and stead of the Honourable David Alexander McDonald, promoted.

On the 16th of January, 1942, His Honour Joseph Nealon Ellis, a Judge of the County Court of the County of Vancouver, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Alexander Ingram Fisher, promoted to the Court of Appeal.

On the 16th of January, 1942, James Bruce Boyd, Barrister-at-Law, was appointed a Judge of the County Court of the County of Vancouver and a Local Judge of the Supreme Court of British Columbia, in the room and stead of His Honour Joseph Nealon Ellis, promoted to the Supreme Court of British. Columbia.

TABLE OF CASES REPORTED

IN THIS VOLUME.

E

F

G

H

I

J

K

L

M

N

O

P

TABLE OF CASES CITED.

A

B

C

E

F

H

Q

R

T

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

JAMES AND JAMES v. McLENNAN, McFEELY & PRIOR, LIMITED.

C. A.
1940
Oct. 16, 17, 18, 22; *Nov.* 5.

Negligence—Wholesale premises—Wire fencing put on floor of passageway—Customer trips on wire fencing—Injury—Contributory negligence—Ultimate negligence—Findings of jury.

At about 11 o'clock in the morning, Mr. and Mrs. James entered the door on the west side of the defendant's warehouse, walked along a passage at the side of the shipping-room about twenty paces, then turned on to a passage going south to an elevator, where they went up to another floor to do their business. When they were upstairs employees of the defendant laid some wire fencing along said passageway going east and west, to cut up a portion for a customer. Shortly after, Mrs. James came downstairs and proceeded along the passage, going north until she reached the east and west passage, where she tripped over the wire fencing and was severely injured. In an action for damages the jury, in answering questions, found Mrs. James and the defendant company were both guilty of negligence, and that they were both guilty of ultimate negligence. They then assessed the damages and decided that each party should contribute to the accident in equal degrees, and judgment was entered accordingly.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. (McQUARRIE, J.A. dissenting), that these answers are contradictory and cannot be reconciled nor can any legal effect be given them. The judgment below must be set aside and a new trial ordered.

C. A.
1940

JAMES
v.
MCLENNAN, MCFEELY & PRIOR, LTD.

APPEAL by plaintiffs from the decision of MORRISON, C.J.S.C. of the 24th of April, 1940, whereby judgment was entered for the plaintiffs on the verdict of the jury for one-half the damages as assessed by the said jury. On the 15th of April, 1939, Mr. and Mrs. James entered the western door of the defendant's warehouse at about 11 o'clock in the morning, and walked along a passageway kept open in the shipping-room, going east for some distance, when they turned to the right on a passageway going south a short distance to an elevator. They both went up on the elevator where Mrs. James made some purchases and Mr. James paid a bill. Just after they had gone upstairs, employees of the defendant laid wire netting along the passageway going east and west in order to cut off a portion for a customer. While it was on the floor Mrs. James came downstairs, walked along the passageway going north, and when she reached the east and west passageway she stumbled over this wire netting, and falling down was severely injured. The ground floor, including both passageways, was well lighted. On the trial the following questions were put to the jury and answered as shown below:

1. Was the defendant guilty of negligence? Yes.
2. If so, what was such negligence? By permitting customers in shipping-room without warnings of some nature.
3. Was the plaintiff guilty of negligence? Yes.
4. If so, what was such negligence? Not taking reasonable care considering the nature of the room.
5. Notwithstanding the negligence of the defendant, if any, would the plaintiff by the exercise of reasonable care have avoided the accident? Yes.
6. If so, in what way? By taking reasonable care.
7. Notwithstanding the negligence of the plaintiff, if any, would the defendant by the exercise of reasonable care have avoided the accident? Yes.
8. If so, in what way? By taking reasonable care.
9. If you find both the defendant and the plaintiff guilty of negligence contributing to the accident, in what degree did the negligence of each party contribute to the accident? Fifty per cent.
10. Damages (if any)? Male plaintiff (special) $600.
(general) nil.
Female plaintiff (general) $500.

This was estimated by the jury as the one-half that each plaintiff was entitled to.

The appeal was argued at Victoria on the 16th, 17th, 18th and 22nd of October, 1940, before MCQUARRIE, SLOAN and MCDONALD, JJ.A.

McAlpine, K.C., for appellants: The jury answered all the questions and made an extraordinary finding. We are asking for a new trial. Our appeal is based mainly on misdirection. The plaintiffs were invitees, and it is the duty of the invitor to keep the premises in a reasonably safe condition: see *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512, at pp. 549-50; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at pp. 223-4; *Norman* v. *Great Western Railway*, [1915] 1 K.B. 584; *Clark* v. *Atherton* (1939), 54 B.C. 217, at p. 222; *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 725; Salmond on Torts, 9th Ed., 516-18. The learned judge suggested it could not be called a trap: see *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74, at pp. 84 and 86; *Hudson's Bay Co.* v. *Wyrzykowski*, [1938] 3 D.L.R. 1, at p. 5. As to burden of proof see *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155, at pp. 1180-1: *Prudential Assurance Company* v. *Edmonds* (1877), 2 App. Cas. 487, at pp. 507-8; *England* v. *Colburne* (1919), 50 D.L.R. 379; *Reference re Privy Council Appeals*, [1940] 1 D.L.R. 289, at 359. By leaving out charging on a question of law is ground for a new trial: see *Guimond* v. *Fidelity Phœnix Fire Insurance Co.* (1912), 2 D.L.R. 654; *Pike* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 279, at p. 281; *McDermid* v. *Bowen* (1938), 53 B.C. 98. There was misdirection on the question of liability: see *Union Estates Ltd.* v. *Kennedy*, [1940] 3 D.L.R. 404. In respect of traps see *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219, at p. 226. Mrs. James was an invitee: see *Butts* v. *Goddard* (1887), 4 T.L.R. 193; *The Toronto Railway Company* v. *Gosnell* (1895), 24 S.C.R. 582; *Myers* v. *Toronto R.W. Co.* (1913), 18 D.L.R. 335; *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361; *Nightingale* v. *Union Colliery Co.* (1901), 8 B.C. 134; *Ball* v. *Wabash R. Co.* (1915), 26 D.L.R. 569, at pp. 571 and 573; *McLaughlin* v. *Long*, [1927] S.C.R. 303; *LeBlanc* v. *Moncton Tramway, Electricity & Gas Company Limited* (1920), 47 N.B.R. 291, at p. 299. There was misdirection on the question of damages: see *Ritchie* v. *Gale and Board of School Trustees of Vancouver* (1934), 49 B.C. 251; Mayne on Damages, 10th Ed., 577. On the question of *consortium* see

C. A. 1940

JAMES v. MCLENNAN, MCFEELY & PRIOR, LTD.

Corkill v. *Vancouver Recreation Parks Ltd.* (1933), 46 B.C. 532. The husband's claim was not put to the jury at all. We are entitled to a new trial on the question of adequacy of damages: see *Admiralty Commissioners* v. *S.S. Chekiang,* [1926] A.C. 637; *Phillips* v. *South Western Railway Co.* (1879), 4 Q.B.D. 406; *Bray* v. *Ford,* [1896] A.C. 44, at p. 49.

D. McK. Brown (*Brockelbank,* with him), for respondent: This woman was in an accident before and had brought an action for damages. She was an incurable cripple. In this case the jury could not come to any other conclusion. The learned judge properly charged the jury: see *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Winfield on Torts, 597. The learned judge chose to take the lower branch of *Indermaur* v. *Dames, supra,* on licensee and invitee: see *Power* v. *Hughes* (1938), 53 B.C. 64, at p. 71. It is the duty of an invitee to guard against what he knew or ought to have known: see *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at p. 223; *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512; *Cameron* v. *David Spencer Ltd.,* 55 B.C. 167; [1940] 2 W.W.R. 273. That the charge is correct see *Prudential Assurance Company* v. *Edmonds* (1877), 2 App. Cas. 487, at p. 507; *Bray* v. *Ford* [1896] A.C. 44, at p. 49. There was no actionable breach of duty on the part of the defendant: see *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371; *Mersey Docks and Harbour Board* v. *Procter,* [1923] A.C. 253, at p. 255. On the question of *onus* see *Field* v. *David Spencer Ltd.* (1937), 52 B.C. 447, at p. 457; *Winnipeg Electric Co.* v. *Geel,* [1932] A.C. 690, at pp. 695-6; Salmond on Torts, 9th Ed., 470. She had been in this place many times before and saw merchandise constantly shifted about in this room: see *Nevill* v. *Fine Art and General Insurance Company,* [1897] A.C. 68, at p. 76. The failure of the plaintiff to see the wire netting was in itself negligence, as the place was well lighted: see *Gregson* v. *City of Vancouver* (1939), 54 B.C. 21; 55 B.C. 40; *Stewart* v. *City of Vancouver* (1939), 55 B.C. 50; *Graham* v. *Regent Motors Ltd. and Stephens,* [1939] O.W.N. 276; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263, at p. 271; *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at p. 144. As to the finding of the jury on ultimate

negligence see *Greisman* v. *Gillingham,* [1934] S.C.R. 375. It was also dealt with in the *Whitehead* case, *supra.* The damages are in the discretion of the jury: see Mayne on Damages, 10th Ed., 1 and 450. The charge was adequate in this regard: see *McIntosh* v. *Peterson,* [1933] 1 W.W.R. 440, at p. 451; *Phillips* v. *South Western Railway Co.* (1879), 4 Q.B.D. 406, at p. 407; Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 119, sec. 150. The defendant advocated the plaintiff should go to the hospital: see *Kerry* v. *England,* [1898] A.C. 742, at p. 746. On the question of costs they should be divided in the same proportion as the finding: see section 4 of the Contributory Negligence Act; *Wegener* v. *Matoff* (1934), 49 B.C. 125, at p. 128. It comes down to the question of what is "good cause." In this case there is no ground whatever to depart from the statutory rule.

McAlpine, in reply: On the question of costs see *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214. On the inconsistency of the jury's answers to questions see *McGovern (Pauper)* v. *James Nimmo & Co.* (1938), 107 L.J.P.C. 82.

Cur. adv. vult.

5th November, 1940.

MCQUARRIE, J.A.: With due deference I am of opinion that the appeal should be dismissed. The questions submitted by the learned trial judge to the jury and the answers of the jury thereto must be considered as a whole and it seems to me that the jury could not very well have given any better or different answers on the evidence; particularly when it is common ground that there was negligence on the part of the female plaintiff and of the defendant. Clearly the jury were justified in finding, as I think they did, that there was joint negligence and apportioning that negligence at 50 per cent. It is worthy of note that the jury found that both the female plaintiff and the defendant, notwithstanding the negligence of the other, by the exercise of reasonable care, could have avoided the accident "by taking reasonable care." That, however, does not mean that either party or both had been guilty of ultimate negligence. Question 9 and the answer thereto definitely settle the conclusion arrived at by

C. A.
1940

JAMES
v.
MCLENNAN, MCFEELY & PRIOR, LTD.

McQuarrie, J.A.

the jury. They found that both the defendant and the plaintiff were guilty of negligence contributing to the accident to the extent of 50 per cent. and it was on that basis that the judgment appealed from was given. The jury answered the specific questions put to them. The judge is responsible for the questions and the jury have only those questions before them. The questions and answers may be rather confusing but if they are construed fairly and construed as a whole, as they should be, it is in my judgment clear that what the jury meant was that the fault was equally divided both as to time and extent, so that there is in fact no finding of ultimate negligence. In the above I have adopted language used in the judgment of the Lords of the Judicial Committee of the Privy Council, delivered the 24th of September, 1940, in *Canada Rice Mills* v. *Union Insurance Co.*, [1940] 4 All E.R. 169, at 174.

SLOAN, J.A.: Notwithstanding the persuasive argument of counsel for the respondent I am of the opinion that the judgment below must be set aside and a new trial ordered. In my view the answers of the jury when read together in the light of the evidence and the learned judge's charge are unintelligible in that they are contradictory and irreconcilable. In the language of MARTIN, J.A. (later C.J.B.C.) in *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361, at p. 366:

> I find a great difficulty, in fact an impossibility, in satisfying myself as to their intentions, . . .

For the sake of brevity I shall omit the particulars of negligence found by the jury and epitomize their findings as follows:

In answer to question 1 the defendant is found guilty of negligence; in answer to question 3, the plaintiff is found guilty of negligence. I construe the answer to question 5 as finding the plaintiff guilty of ultimate negligence, and the answer to question 7 as finding the defendant guilty of ultimate negligence and in answer to question 9 both defendant and plaintiff are found guilty of negligence contributing to the accident in equal degrees. Thus we have the plaintiff being held wholly responsible for the accident, in the next breath the defendant held wholly responsible and finally each found equally responsible. By no process of

C. A.
1940

JAMES
v.
MCLENNAN,
MCFEELY &
PRIOR, LTD.

reasoning, as I see it, can these answers be reconciled, nor could any legal effect be given them.

The appellant will have the costs of the appeal and the costs of the abortive trial will abide the result of the new trial.

MCDONALD, J.A.: I agree with my brother SLOAN.

Appeal allowed; new trial ordered, McQuarrie, J.A. dissenting.

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

Solicitors for respondent: *Russell, Russell, Du Moulin, Du Moulin & Brown.*

REX v. KRAWCHUK.

C. A.
1940
Dec. 3, 4, 13.

Criminal law — Murder—Manslaughter — Provocation — Evidence of—Not adequately put to jury—Criminal Code, Sec. 261.

The accused and his wife (Ukrainians) lived on a farm about one mile from Prince George. He was a section-hand on the Grand Trunk Pacific Railway and his duties took him away from home periodically. One Terachuk (also a Ukrainian) had known accused and his wife for some years and lived in their house, but after being there for some time, accused, thinking he was too intimate with his wife, drove him out on two or three occasions, then Terachuk would come back when accused was away, and when accused came home he would find him there. This caused trouble between accused and his wife, who thought that Terachuk was unfairly treated. On September 14th, 1940, Terachuk came to the house in the morning, and early in the afternoon he and Mrs. Krawchuk went to Prince George. Accused, who was home at the time, then told a farm-hand who was there that he was going to make trouble, as his wife had purchased a property in Vancouver without his knowledge. He then left his house and walked to Prince George. At about 6 o'clock in the evening Mrs. Krawchuk and Terachuk returned to the house, and Terachuk and the farm-hand went to look after the cattle. When they were returning to the house about half an hour later, they heard a shot, and looking up they saw Krawchuk and his wife close together. Then they saw Krawhchuk fire two more shots from a revolver at his wife, and she fell. About six days later accused wrote a letter to his brother which was allowed in evidence, in which he stated "She had ticket in

C. A.
1940

REX
v.
KRAWCHUK

her hands to Vancouver and I thought she was going right away to Vancouver and going to buy for herself property: that's the way I heard, and going to leave me alone." Accused was convicted on a charge of murder.

Held, on appeal (SLOAN and MCDONALD, JJ.A. dissenting), that one question only arises, *viz.*, whether or not the learned trial judge erred in omitting to instruct the jury, not on the law relating to provocation—it was accurately stated—but rather in respect to the evidence relating thereto. While section 261 of the Criminal Code was explained to the jury, the learned judge not only failed to place before them certain material evidence on the question of provocation, but also stated erroneously, that "there was no evidence fit to be submitted to them on that point." The jury, after being out for two hours, returned and asked his Lordship to repeat instructions on the law in respect to murder and manslaughter, and after pointing out that a wrongful act amounting to provocation must be of such a nature as to deprive an ordinary person of the power of self-control, he said "Now so far as you know here, I do not recollect any evidence of that sort" and previously in his charge he had said "There is no evidence so far as I know of any insult or anything of that sort." If there was such evidence an error was committed and the jury evidently desirous of considering the question of manslaughter, was deprived of the opportunity of doing so. While events long preceding the actual commission of the crime would not support a plea of provocation, they must nevertheless be kept in view as a background for their bearing on accused's state of mind on the day the crime was committed. An ordinary man, suffering a long series of wrongful acts and insults, would more readily lose self-control by further wrongful acts committed immediately before the fatal event. Terachuk was living at his home against his will while he was away working. An improper relationship existed for a long time. The jury were entitled to believe every statement in the letter written by the accused to his brother bearing on the question of provocation. While Terachuk broke up his home in one way by living there against his will, the deceased threatened to break it up in another way by leaving him. There was sufficient evidence to justify the jury if they accepted a certain view of the facts and circumstances to find a verdict of manslaughter. The appeal was allowed and a new trial ordered.

APPEAL by accused from the conviction by ROBERTSON, J. and the verdict of a jury at the Fall Assize at Prince George on the 9th of October, 1940, on a charge of murdering his wife Natallia Krawchuk at his farm near the city of Prince George on the 14th of September, 1940. Krawchuk at times was away from home. He was a section-hand on the railway and his duties took him away from time to time. One Terachuk, who had been a friend of the Krawchuks for some time, lived at their house and was there at times when Krawchuk was away.

There was evidence that Terachuk had been unduly attentive to accused's wife and the accused resented this. On the day of the crime the accused found that his wife had got a property in Vancouver and she and Terachuk were going to Vancouver. Early in the afternoon Terachuk and Mrs. Krawchuk went to town, and Krawchuk went shortly after. Terachuk and Mrs. Krawchuk came back late in the afternoon and Terachuk and a man named Stowoa went to look after the cattle. When they were returning and nearing the house they heard a shot, and looking up they saw Krawchuk with a revolver close to Mrs. Krawchuk, and they saw him fire two more shots at her and she fell. This was at about 6.30 in the afternoon, and the police arrived shortly after 7 o'clock when Krawchuk was arrested. Mrs. Krawchuk died shortly after the shooting.

The appeal was argued at Vancouver on the 3rd and 4th of December, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Hurley, for appellant: For a long time Terachuk had been on too friendly relations with the wife, and on the day of the alleged crime Krawchuk got to know that his wife had title to a property in Vancouver, and that she had $50 and a ticket to Vancouver. It was the culmination of a long series of offences to the accused. A course of conduct that worked on accused's mind. On the question of corroboration the learned judge usurped the functions of the jury. As to where the charge of murder will be reduced to manslaughter see *Reg.* v. *Rothwell* (1871), 12 Cox, C.C. 145, at p. 147.

Wilson, K.C., for the Crown: The two men Terachuk and Stowoa heard the first shot and saw the second and third shots fired at Mrs. Krawchuk. The evidence as to provocation went to the jury and it is the jury's function to pass upon it. He was properly found guilty of murder.

Hurley, replied.

Cur. adv. vult.

13th December, 1940.

MACDONALD, C.J.B.C.: The appellant was convicted by a jury of the murder of his wife Natallia Krawchuk at Prince

C. A.
1940

REX
v.
KRAWCHUK

Macdonald, C.J.B.C.

George, B.C. on the 14th of September, 1940. One question only arises, *viz.*, whether or not the learned trial judge erred in omitting to instruct the jury, not on the law relating to provocation—it was accurately stated—but rather in respect to the evidence relating thereto. While section 261 of the Criminal Code was explained to the jury the learned trial judge, with respect, not only failed to place before them certain material evidence on the question of provocation but also stated, I think erroneously, that there was no evidence fit to be submitted to them on that point. Had the jury on a question of fact found provocation; in other words, that some wrongful act or insult occurred immediately preceding the commission of the crime of such a nature as to deprive an ordinary man of the power of self-control subject to the proviso in the third subsection a verdict of manslaughter could have been returned.

The question for determination therefore is this—have we in the record evidence of provocation that ought to have been placed before the jury: it requires careful consideration. The fact that the jury, after considering their verdict for nearly two hours, returned and asked his Lordship to repeat instructions on the law in respect to murder and manslaughter is suggestive; also the further fact that their final verdict of guilty of murder was accompanied by "a strong recommendation to mercy." This indicated that the jury had under consideration the propriety of reducing the charge; I incline to the view that they would (or at least might) have done so if the evidence relating to provocation, presently referred to, had been brought to their attention. I may add that the controversy is whether or not there was such evidence within the meaning of section 261: if it existed there is no suggestion by any one, as I understand it, that the attention of the jury was directed to it.

After pointing out that the wrongful act amounting to provocation must be of such a nature as to deprive an ordinary person of the power of self-control his Lordship made this statement:

> Now so far as you know here, I do not recollect any evidence of that sort.

There is not elsewhere in the charge any qualification of this statement. This statement means, and the context bears it out, that there was no evidence for the jury to consider on this point;

it follows if there was such evidence, an error, with respect, was committed and the jury, evidently desirous of considering the question of manslaughter was deprived of an opportunity of doing so. The trial judge must of course place the evidence before them in such a way that they will appreciate it and, if necessary, segregate the evidence referable to this specific point.

Again, after referring to the fact that the deceased woman and one Tom Terachuk, her paramour, the third man in an unfortunate triangle, had gone to Prince George, a short distance away, on the day of the murder, said:

> There is no evidence so far as I know of any insult or anything of that sort; and in any case supposing there had been, wasn't there time within which his passion had time to cool?

I think, with respect, the first part of this sentence is not accurate: it is the second intimation that there was no evidence of provocation.

While events long preceding the actual commission of the crime would not support a plea of provocation they must nevertheless be kept in view as a background for their bearing on appellant's state of mind on the day the crime was committed. An ordinary man suffering a long series of wrongful acts and insults would more readily lose self-control by further wrongful acts committed immediately before the fatal event.

The jury doubtless felt that certain statements made by appellant in a letter, presently referred to (part of which, in my opinion, discloses facts from which provocation might have been found) in which he complained that one Terachuk was living in his home against his will while he was absent working as a section-man were likely substantially true. An improper relationship, if the facts stated in this letter were accepted by the jury, existed for a long time; frequently appellant tried unsuccessfully to drive Terachuk from his home: all this undoubtedly gave rise not only to deep resentment but also produced a state of mind readily influenced by additional acts likely to cause loss of self-control. It is important to remember that it is not material that these allegations of illicit relationship are denied by Terachuk. The jury were entitled to believe every statement contained in the letter written by the accused bearing on the question of provocation; that is why doubtless they wished to

C. A.
1940

REX
v.
KRAWCHUK

Macdonald,
C.J.B.C.

consider the question of manslaughter and also why they added a strong recommendation for mercy. It is with this background therefore that we must scrutinize what was said to occur immediately preceding the crime.

I come now to the evidence on this point: it is contained in a statement made by the accused in the letter referred to written by appellant to his brother six days after the crime was committed. We decided that it was a voluntary statement; as it was placed in evidence by counsel for all parties we must treat it as part of the record. The accused is a Ukrainian; he was, as stated, a section-man; one can only judge of his literacy and mental capacity by internal evidence afforded by this letter and to some extent by his station in life. It is of some significance on this point that a defence of insanity was raised at the trial; it was not given effect to by the jury. It is to my mind a reasonable view—at all events it was undoubtedly a question for the jury—that appellant could not necessarily, and certainly might not at such a time, give a coherent statement of occurrences in proper order and sequence. It is important to bear this in mind; he tells his brother that for a couple of years he was in great distress; that he—meaning Terachuk—destroyed his family life; that he chased him out of his house a few times and told him not to return; because of Terachuk's conduct he said he had trouble in his home with his wife: that is readily understood. When he went out to work he said:

> Tom come back to my home after I had left and lived with my wife and eat my blood bread.

He tells of coming home and of finding on his table whisky and wine and in another room Terachuk in a suggestive posture. He got the impression, according to this letter, presumably from his wife, that she was going to buy property in Vancouver and the evidence discloses that she did so: he therefore had in mind that if she ever left him she would have some place to go. He tells of going away again and upon returning of "finding Tom in my home again." This is repeated. He said: "I did not say anything to anybody and I kept my teeth tight"; that is the background.

I now call attention to the following statement in the letter to which I think the attention of the jury should have been

addressed in discussing the question of provocation. It reads as follows:

> I don't remember exactly the time when was, before 12 or after. However, my wife changed her clothes and went to town with Tom; after a little while, but not so soon they came back home and brought some whisky and wine and beer; they treat me as well. I pushed it away. I don't want it. I didn't want to show up to Tytina there is between us big trouble going. She had ticket in her hands to Vancouver, and I thought she was going right away to Vancouver, and going to buy for herself property; that's the way I heard, and going to leave me alone.

One point is this—does this extract, in part at least, refer to events of the afternoon of September 14th and, if so, does it contain evidence of provocation particularly, to be more specific, the last clause wherein he says "I thought she was going to leave me alone."

Mr. *Wilson,* counsel for the Crown, urged that all references in this extract relate to events occurring some weeks at least prior to the commission of the crime; Mr. *Hurley* for the accused contested that view. There is no question that there is internal evidence in the statement to support Mr. *Wilson's* view: The "Tytina" referred to, for example, was his step-daughter and the evidence discloses that while she was in his home sometime before she was not there on the 14th of September. On the other hand, there is a reference to the fact that on the date to which he refers his wife "changed her clothes and went to town with Tom . . . before 12 or after." Mr. *Wilson* conceded that there was no other reference in the evidence to such a visit by both to Prince George. Further examination of the records confirms this: nowhere is it stated that at an earlier date they ever went into town together. It follows that the jury would be at liberty to say—and likely would say—that he referred to the admitted trip to Prince George by Terachuk and appellant's wife on September 14th; on that date undoubtedly both went into Prince George. We have therefore internal evidence that appellant, in part at least, was writing of events on that date. There is no evidence disclosing that the deceased had a ticket for Vancouver on the 14th of September: all that can be said is that no ticket was found: she did however obtain $50 from Terachuk on that date on the plea that it was to be used to make a payment on property purchased by her. It is clear that there

C. A.
1940

REX
v.
KRAWCHUK

Macdonald, C.J.B.C.

is no evidence to show that she ever went to Vancouver before under conditions that aroused his anger: her daughter testified that on an earlier occasion "mother went to Vancouver and Dad went to work" without any suggestion that there was anything unusual about it: the jury could therefore find that in this extract he was referring to events of the 14th of September. He said "she was going to leave me alone": this statement following the reference to the trip to Prince George would indicate that conduct disclosing an intention to leave him was made on September 14th at least close to, or immediately preceding the commission of the crime.

I referred to the state of mind of accused; his partial illiteracy; the strain he laboured under on September 20th when this letter was written and the probability that he would not be able to record in proper order the sequence of events; the jury might thus explain the inclusion in this statement of earlier events. It was a question fit for the jury to say whether or not any part of the events referred to, particularly the last part of it, took place on September 14th: it is neither advisable nor proper for judges to usurp their functions. As stated in *Rex* v. *Hopper*, [1915] 2 K.B. 431, at 434:

> There was sufficient evidence to justify the jury, if they accepted a certain view of the facts and circumstances, to find a verdict of manslaughter.

It is also stated—although it is obvious—that it is not material that counsel for the accused did not ask the judge to place this evidence before the jury. The trial judge could point out the internal evidence pointing, it may be, in two directions leaving it for them to find the facts: It would be for the jury to say whether or not appellant could give an accurate narrative of events in his, partially at least, disordered state of mind. I think, too, having regard to the obligation to give even on this point the benefit of the doubt to the accused, that they would in all probability, notwithstanding the inclusion of events occurring at an earlier date, find that in the main he referred to events of September 14th; at all events it was for them to decide. They would also consider whether or not the conduct that led appellant to believe that she was going to leave him alone took place immediately preceding the crime, doubly so when there is no evidence that she was going to leave him permanently at any

earlier date. I speak of conduct and acts that led him to believe she was about to desert him: not necessarily to any words spoken by her expressive of a future intention: the only reference to words is contained in the word "heard"; all the other statements relate to acts pointing to an intention to leave.

If then the jury, on a proper charge, arrived at the conclusion indicated what follows: does it disclose evidence of provocation?

She had ticket in her hands to Vancouver, and I thought she was going right away to Vancouver, and going to buy for herself property; that's the way I heard, and going to leave me alone.

As stated the important phrase is "going to leave me alone." As often happens in cases of this kind the jury might believe that whatever the conditions in his home, due to the conduct of Terachuk and his wife he was fond of the latter and did not want to lose her society: certainly he tried to drive the interloper out—unless his story is a fabrication—a point for the jury. While Terachuk broke up his home in one way by living there against his will the deceased threatened to break it up in another way, *viz.*, by leaving him. The provocation that might arise from a sudden intimation to him of this sort, after his past experience, would depend upon the degree of his attachment to home and family ties. I am wholly unable to say that it affords no evidence at all of provocation; that it amounts to no more than a scintilla and hence did not call for treatment by the trial judge. Nowhere in the charge is this—the only possible evidence bearing on provocation—isolated from the rest of the evidence and presented to the jury for their consideration. As already intimated, the evidence must be presented to the jury in such a manner that it is appreciated. Can it be said that if the facts related herein were placed before the jury and they were asked whether or not it amounted to that sudden provocation contemplated by section 261 of the Code they might not answer in the affirmative? We are not concerned with any other evidence on this point weakening the force and effect of this statement: the jury were entitled to accept it; once we accept—or rather the jury—the view that this statement did not necessarily relate to events in their proper order but at least that the conduct indicating an intention to leave, not actually did but might relate to September 14th all difficulties disappear. I might add that this

C. A.
1940

REX
v.
KRAWCHUK

Macdonald, C.J.B.C.

statement, if accepted in the sense indicated, contains the only evidence relating to events immediately prior to the commission of the crime.

In answer to the suggestion that, assuming September the 14th is referred to, the conduct outlined, *viz.*, taking steps to leave him, is not of sufficient moment to constitute a wrongful act or insult amounting to provocation, some cases might be cited. In *Rex* v. *Lynch* (1832), 5 Car. & P. 324 the provocation consisted merely in striking the prisoner and giving him a black eye: five minutes later the prisoner returned and stabbed the deceased: a verdict of manslaughter was returned. In *Rex* v. *Illerbrun*, [1940] 1 D.L.R. 145 the act of provocation was referred to in this way by Turgeon, C.J.S. at p. 146:

> There was a quarrel between Schill and the accused and Schill struck the accused on the shoulder with his fist.

This would appear to be slight provocation to justify a reduction in the charge, but a new trial was directed. At p. 147 the Chief Justice said:

> In charging the jury it is the duty of the trial judge to put the case for the accused to them as carefully and as fairly as the case for the Crown, however weak the accused's position may appear to him.

There was, therefore, with respect, an error in the charge. I felt, contrary to the usual practice when granting a new trial, that to properly expose the point it was necessary to discuss the case at some length.

The further question remains: If this evidence had been placed before the jury fairly and adequately, is it inevitable that they would still return a verdict of guilty of murder and that therefore we ought to apply section 1014, subsection 2 of the Code? I do not think so. I have already referred to the jury's action in returning to Court asking for further instructions indicating that they were giving serious consideration to the question of manslaughter: also to the recommendation for mercy. My own view is that if this evidence had been presented in the way indicated herein there is, if not a certainty, at least a probability that a verdict of manslaughter would have been returned: at all events we should not say that a conviction for murder would unquestionably follow. I think the conviction should be set aside and a new trial directed.

McQUARRIE, J.A.: I would allow the appeal and order that there be a new trial for the reasons given by the Chief Justice.

SLOAN, J.A.: The appellant, a Ukrainian, killed his wife on their farm by shooting her with a heavy calibre revolver. As he said "I gave her five shots and then she has got enough." The medical evidence discloses that only two bullets struck the woman but one which severed her wind pipe ended her life. The appellant was convicted of murder upon his trial before ROBERTSON, J. and jury at Prince George. He sought to escape the consequences of his crime by pleading insanity but failed. Nothing now turns upon that aspect of the case.

In the alternative the defence suggested that the killing, because of provocation, was not murder but manslaughter. The jury rejected this theory of the defence.

We are now asked to grant a new trial because it is alleged in the amended notice of appeal:

> The learned trial judge erred in instructing the jury that there was no evidence of provocation and took from the jury the consideration of the question of provocation.

It is conceded by my Lord the Chief Justice in his reasons (agreed to by my brother McQUARRIE), that the learned trial judge in his charge to the jury accurately directed them upon the law in relation to the issue and elements of provocation. I am happily in accord with that view and as my brother McDONALD is of the same mind it is therefore the opinion of the majority of this Court.

That leaves for consideration a narrow point: *i.e.*, whether the learned trial judge nullified his correct charge upon the law by an incorrect direction upon the facts. It is said, in effect, that the learned trial judge took the issue of provocation from the jury. With great respect I think that such a submission is unsound.

A consideration of this matter resolves itself into two enquiries: The first—Was there any evidence of provocation which, under said section 261, could reduce the crime from murder to manslaughter? The second—If so did the learned trial judge err in his charge in relation thereto?

My answer to the first enquiry is that there is no evidence in

C. A.
1940

REX
v.
KRAWCHUK

Sloan, J.A.

this case from which the jury could reasonably find the provocation contemplated by section 261 of the Code. As Hodgins, J.A. points out in *Rex* v. *Mouers* (1920), 34 Can. C.C. 287, at p. 301:

> . . . the language of the Code, . . . makes a very definite limitation upon what is provocation, and consequently upon what can be made available to prove it.

In this case, in the language of Idington, J., in *Eberts* v. *Regem* (1912), 47 S.C.R. 1, at p. 24 (a case closely paralleling this one in several aspects)

> There is nothing but mere surmise or conjecture on which to rest such a finding as is claimed to have been legally possible.

It was submitted that some wording in the statement of the accused (Exhibit 19) could be construed as evidence of provocation. With deference I think not and for several reasons. In the first place the statement of Krawchuk,—

> She had a ticket in her hands to Vancouver, and I thought she was going right away to Vancouver, and going to buy for herself property; that's the way I heard, and going to leave me alone—

had reference to a previous occasion in August when Tytina was present with her two children Rosie and Annie. That will be seen from a perusal of the next following lines in the statement.

It should also be noted that Krawchuk is there relating an occasion before Mrs. Krawchuk bought the Vancouver property. Note "She is going to buy for herself property . . ."

Following the conversation when Tytina and the children were at the farm Mrs. Krawchuk did go to Vancouver and did buy the property in question and on the 14th of September she had the certificate of title thereto. On September 14th Krawchuk was not concerned about her future intention to buy property in Vancouver but was annoyed with her for having bought it. According to Stowoa Krawchuk told him on the day of the shooting

> I am going to make a trouble, because she bought a property in Vancouver . . . .

From the internal evidence of the statement coupled with the undisputed external facts I am unable to agree that the said statement (Exhibit 19) could possibly have any relation to the events of September 14th.

However, I now propose to assume that the statement does refer to events that transpired on the 14th of September. Where, however, is the provocation in the legal sense? Krawchuk him-

self does not make the slightest suggestion that it was his wife's expression of intention to buy property in Vancouver and to leave him which so suddenly provoked him that in the heat of passion caused thereby he killed her. Neither does he say that he understood at that time she was going away with Terachuk. If anyone knows why Krawchuk killed his wife one would think it would be Krawchuk himself. If he himself does not choose to say that he thought his wife was going away with Terachuk and for that reason he killed her why should the Court say that something of that kind might have motivated his action? His only comment relating directly to the killing is:

I find out that I am in here for murder. I don't know anything about that.

I propose now, however, to assume that that which Krawchuk himself did not consider provocation the Court might, provided, of course, if the statement has any relation at all to the day of the killing. *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136. Again I ask where is the provocation sufficient to meet the requirements of section 261?

There were only two occasions on September 14th when Mrs. Krawchuk might have told her husband she was going to leave him and go to Vancouver. The first was before she left with Terachuk for Prince George. The second when she returned from Prince George. If she told him before she left then Krawchuk waited for over three hours before killing her. Can that killing reasonably be said to have resulted from "heat of passion caused by sudden provocation"? I think not. As pointed out in Roscoe's Criminal Evidence, 15th Ed., 886, the provocation to be extenuating

must be something which . . . [is resented] at the instant the fact which he would extenuate is committed.

By section 261 of the Code whether or not a wrongful act or insult amounts to provocation and whether or not the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact. Nothing is said, however, as to whether or not the time in which passion may cool is a question of fact or law. Park, J. had this to say to a jury on that question in *Regina* v. *Fisher* (1837), 8 Car. & P. 182, at 186:

The counsel for the prisoner admits, that if the blood had time to cool, it

C. A. 1940

REX v. KRAWCHUK

Sloan, J.A.

will be murder. But I say, in the hearing of two very learned persons, [Mr. Baron Parke and Mr. Recorder Law] that that is not exactly a question for you. Whether the blood had time to cool or not, is rather a question of law. If that is a question of law then we can decide it and I have no hesitation in saying that, in my opinion, if Mrs. Krawchuk had the conversation in question with her husband before leaving for Prince George there was ample time for his passion to cool before her return and his killing of her with a deadly weapon was, under all the circumstances, the premeditated act of a man actuated by a desire for revenge. If, on the other hand, that element is a question of fact the learned trial judge left it to the jury as I shall presently indicate when dealing with the charge.

I now turn to the only other relevant time when the conversation in question might have taken place, *i.e.*, on Mrs. Krawchuk's return from Prince George. It was common ground at the trial that there was no evidence of what transpired between husband and wife immediately prior to the shooting (see *e.g., Young,* counsel for accused at appeal book p. 189, line 27), but assuming that Mrs. Krawchuk said she was going to buy property in Vancouver and was going to leave him and Krawchuk thereupon got a revolver from the house and shot her would what she said, as recorded by Krawchuk, be sufficient to reduce that killing to manslaughter? I would not take the responsibility of saying that section 261 of the Code ever contemplated such a result.

The constituent elements of provocation are: (1) A wrongful act or insult; (2) sufficient to deprive an ordinary person of the power of self-control; (3) if the offender acts upon it on the sudden; and (4) before there has been time for his passion to cool.

While it is generally said that provocation is a question of fact for the jury such an observation is more misleading than instructive. The sufficiency of the evidence of provocation is for the jury. The question of whether there is any evidence at all of provocation to go to the jury is one of law for the trial judge.

In this case in my view every element of provocation within the limitations of section 261 is missing. I can recall no suggestion by defence counsel of a "wrongful act" on the part of Mrs. Krawchuk. Is there then any evidence of "insult"? In

my opinion there is not. It is clearly settled in England that if the killing is by a deadly weapon no words however provoking will be considered in law sufficient to reduce homicide to manslaughter. Archbold's Criminal Pleading and Practice, 30th Ed., 895, and see *Rex* v. *Ellor* (1920), 15 Cr. App. R. 41. Section 261 of the Code therefore changes the English common law to the extent that an insult may amount to provocation. But surely "insult" in the section must mean something in the nature of a vile epithet, something abusive or vituperative; something more than a mere statement by a wife that she is going to leave her husband. As Keating, J., put it in *Reg.* v. *Welsh* (1869), 11 Cox, C.C. 336, at p. 338 (approved by the Court of Criminal Appeal in *Rex* v. *Lesbini* (1914), 24 Cox, C.C. 516):

> The question, therefore, is—first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and, if there be any such evidence, then it is for the jury whether it was such that they can attribute the act to the violence of passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man. The law, therefore, is not, as was represented by the prisoner's counsel, that, if a man commits the crime under the influence of passion, it is mere manslaughter. The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion. When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it—the law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter.

I have thus far approached this case from several different sides and to my own satisfaction at least, all roads lead to this one conclusion: a manslaughter verdict was not possible upon the evidence.

I turn now to a consideration of the charge which is to be read as a whole in the light of the evidence. The following passages are relevant:

> Under our system of jurisprudence there are two duties that have to be performed in each case. The one in which you are supreme is that of the facts. You are the sole judges of the facts. No one has any control over you. No one has the right to restrict your power of judgment in that matter. You are restricted, however, in this way, that you must consider only the facts which have been sworn to in evidence in this Court room. . . . From those facts which you deem to be proved to the degree of proof which I shall later mention, you may draw such inferences as those facts fairly warrant. You will have noticed that every word spoken by any witness

C. A.
1940
REX
v.
KRAWCHUK
Sloan, J.A.

has been taken down by the official reporter, and if when you retire to consider your verdict you have any doubt as to what has been said by any of the witnesses, all you have to do is to ask the sheriff in whose charge you will be, to bring you back into the Court room, and I shall be happy to have read to you such parts of the evidence as you may require.

In dealing with the facts, please remember that in connection with the addresses of both counsel to distinguish between facts which have been proved by evidence, and inference or arguments—inferences from arguments based upon those facts which have been made by counsel; you will bear in mind the facts, and then if you think those facts warrant the inference or support the arguments which have been put before you by counsel, that is within your province to do so. With regard to the law, and this is the other duty to be performed in this case, it is to me—it is my duty to inform myself what the law is upon the facts in question; and you must accept my direction implicitly on the law.

. . . . .

Now it was suggested in the address of counsel for the defence that there was provocation. Now provocation does not in all cases reduce the crime from murder to manslaughter. That is the most it can be in any event. Supposing a man slapped another man six months ago, a man could not turn around today and kill him, and suggest that would reduce the crime from murder to manslaughter because he had provocation. Because someone had applied a vile epithet about six months ago to another man, he could not turn around today and murder someone and say that the crime should be reduced to manslaughter. I will read to you now from the Code which sets out the conditions under which the crime of murder may be reduced to manslaughter:

Culpable homicide which would otherwise be murder may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the powers of control by the provocation which he received, shall be questions of fact.

Now here you will see the words, he does so in the heat of passion caused by such provocation; have you any evidence that this was done in the heat of passion caused by sudden provocation? Then, any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool. Now so far as you know here, I do not recollect any evidence of that sort. But in any event, the evidence is that Krawchuk went to town somewhere about half past 3 on the afternoon in question, and returned at 6 o'clock. The woman, Mrs. Krawchuk and Tom Terachuk had gone to town half an hour before that time, and there is no evidence so far as I know of any insult or anything of that sort; and in any case supposing there had been, wasn't there

time within which his passion had time to cool? Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received shall be questions of fact; and that is a question for you.

. . . . .

Now there is one other warning I want to give you in that connection and that is this: There may be—there are alternative verdicts of murder or manslaughter, and if you should entertain a doubt as between the greater and lesser offence, that is as to whether it could be murder or manslaughter, you will give the accused the benefit of that doubt, and return a verdict of manslaughter. Where there are any inconsistencies in the evidence of any witness, or as between the evidence of that witness and another witness, you must do your best to reconcile them in coming to a conclusion. You are entitled to use your general information and your average knowledge and experience of the common affairs of life which men of ordinary intelligence possess. You may accept the whole or part of the evidence of any witness. . . .

In all I have to say to you with regard to the facts which I am now about to draw your attention, remember you are the sole judges. There are certain facts about which there may be no dispute at all. . . .

Now with regard to provocation, there is nothing there that I can see which would bring it out of that definition of provocation, or the statement with regard to provocation that I read to you; but that again is a matter for you to say; but speaking generally, there is the suggestion that—well I should not say suggestion—there is the evidence that for a long time Terachuk had been unduly attentive to the accused's wife, and the accused resented that fact. That evidence you will find first of all in the statement told by Mrs. Stephina Shilest. She relates an incident which took place on the first of July. She said she went into the house, and they were all very happy, and there was beer and whisky there, but no signs of anyone having anything to drink, except that they were all happy; that there was some dispute between husband and wife and that she slapped his face.

Now have you any other evidence of any improper relations between these two? There was one statement there made by one of the witnesses, to this effect, that Krawchuk had gone out that day, Mrs. Shilest said, that Terachuk said we have had some trouble about money this morning, and he said that I give her some money; I like her and she likes me. The trouble about that was, she said to me that she didn't tell that to the accused. So he did not know anything about it.

Now I come down to the defence upon which the defence counsel lays greatest stress; and I am going to deal with the facts in connection with that. . . . Now it is suggested by the defence that over a course of years this man had to undergo a terrible position of seeing his wife receiving improper attentions from Terachuk, and that this so worked upon his mind that at last the strain was too great, and on the day in question something snapped in his brain and he was temporarily insane. . . . Then that long letter [*i.e.*, Exhibit 19], and I want you to consider that carefully, and place such value on it as you think it merits. This letter is in exhibit,

C. A. 1940

REX v. KRAWCHUK

Sloan, J.A.

this long letter which he wrote to his brother. Of course in that connection, that was written on the 20th of September, which is days after the event.

Dealing with evidence of Dr. McArthur:

It is suggested to you that the accused was suffering from pent up emotions to an hysterical degree, or he was intoxicated, one or the other. That there are certain types of hysteria which are classified as a type of insanity. It was possible that what Krawchuk did that day would come under this head of hysteria, which would be a kind of hysteria which would be classed as insanity; that the troubles that were mentioned in this letter and so on, would indicate that. And in these hypothetical points, may bring on the type of hysteria which he mentioned. The thought that his wife was living with another man might cause something in his brain to snap; and then he quoted the authority of Dr. McNally. He said the accused was an average mental type, and that the people suffering from this kind of hysteria, that they have forgotten what has happened. He said that if the man had been normal at 4 o'clock in the afternoon he might by between 6 and 6.30 have been taken with an attack of hysteria.

Later on the jury asked for and received further direction upon the law relating to provocation. In addition to these excerpts the learned trial judge dealt exhaustively with the facts. It is true that he did not refer to the passage in the statement (Exhibit 19) which I have already quoted above, in strict relation to the defence of provocation contemplated by section 261 of the Code.

To my mind it is obvious why he did not and for these reasons: I have attempted to show, with respect, the statement has no immediate relation to the events on September 14th or alternatively if it has it discloses no provocation known to the law. An additional reason may be found in the opening address of counsel for the defence, which is as follows:

Young: [Opens his defence to the jury]. Mr. Foreman and gentlemen of the jury: It is customary for counsel for the defence at this point to outline the case for the defence. Now the defence proposes to call four witnesses. One of those witnesses will be a medical witness, Dr. McArthur. I am not going into the evidence in detail of these witnesses. They are quite short, and you will be able to follow them quite easily; and you will gather I think from the evidence given by this witness, and also from certain evidence given by the Crown already in this matter, to this effect, that if the accused did commit the offence with which he is charged, that through worry over his home life, through worry over another man trying to steal or take away his wife, coupled with the fact that he was also in ill health, and as to what the doctor has to say in regard to his mentality, that this all culminated and brought to a head on September 14th by the knowledge, or at least the assumption gained while he was out of his mind, that his wife was leaving with this other man, and was going to live in Vancouver,

and that his pent up emotions in this matter caused insanity or the temporary insanity under which this deed was committed if it was committed. That, gentlemen, in short is the defence. That is that the provocation of all these troubles worked so on his mentality that when at the last moment he thought that this was going to happen, he just burst something in his head, and this tragedy happened.

It will be seen from the excerpts from the charge I have quoted that the learned trial judge drew special attention to the statement (Exhibit 19) in relation to provocation in the sense in which that defence was opened to the jury by counsel for the accused. So much for that aspect of the matter.

It was further stated that in the passages quoted by my Lord the Chief Justice the issue of provocation was expressly taken from the jury. With deference I cannot accede to that submission. In the first place as I have said there was not, in my opinion, any evidence of provocation within section 261 to exclude from the consideration of the jury. Alternatively the worst construction that can be put upon what the learned trial judge did say in relation to his recollection of the evidence is that he was expressing his own views of the facts. As Kerwin, J., said in *Russell* v. *Regem* (1936), 67 Can. C.C. 28, at p. 29:

. . . provided he left the issue to the jury and explained that they were the sole judges thereof, it is no objection that he gave expression to his own opinion.

If further authority is needed in support of that proposition it will be found in *Rex* v. *Cohen and Bateman* (1909), 2 Cr. App. R. 197, at 208; *Rex* v. *O'Donnell* (1917), 12 Cr. App. R. 219, at 221; *Rex* v. *Picariello and Lassandro,* [1923] 1 W.W.R. 1489; *Steinberg* v. *Regem,* [1931] S.C.R. 421; *Rex* v. *Gumondson* (1933), 59 Can. C.C. 355, at 362; *Rex* v. *Duguay* (1933), *ib.* 328, at 329.

That he left the relevant issues to the jury and explained that they were the sole judges of the facts cannot be disputed by anyone who reads the charge as a whole in the light of the evidence and the defences raised.

At the close of the charge the learned judge asked this question of counsel for the accused:

Now, Mr. *Young*, I think I have covered all your defences,

and received this answer:

So far as I can recollect now you have my Lord.

In my view, with deference, the objection fails.

C. A.
1940

REX
v.
KRAWCHUK

Sloan, J.A.

As I mentioned before, the charge upon the law relating to provocation reducing murder to manslaughter was not criticized by counsel for the appellant and is conceded to be correct. It is my opinion that there was no non-direction amounting to misdirection, nor misdirection upon the facts relating to manslaughter and the defence of provocation as presented by the accused was fully and carefully put to the jury but if there was error as found by the majority of this Court then no substantial wrong or miscarriage of justice was occasioned thereby, as that part of the charge was, in my view, mere surplusage in that the statement (Exhibit 19) cannot support a defence of provocation under section 261.

If the learned judge erred at all he erred in my opinion in favour of the accused in not directing the jury that because of the absence of any objective facts upon which to find it a manslaughter verdict was not open to them—*Rex* v. *Sparkes* (1917), 29 Can. C.C. 116. For myself I apply the language of Davies, J., in *Eberts* v. *Regem, supra,* at p. 22:

> . . . . , I am not able to bring myself to the conclusion that any jury of reasonable men could fairly find that the prisoner shot the deceased while "in the heat of passion caused by sudden provocation."

In my opinion the appellant was properly convicted after a fair and legal trial. It is a case, however, in which from all its circumstances I feel that I could associate myself with the jury's "strong recommendation to mercy."

I would, however, with respect, dismiss the appeal.

O'HALLORAN, J.A.: The first ingredient of provocation under section 261, subsection 2 of the Criminal Code is:

> Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, . . .

And by subsection 3 it is a question of fact whether any particular wrongful act or insult amounts to provocation.

As I read this section the term "wrongful act" is used in a generic sense, and its comprehensive meaning should not therefore be confined, as it is in the English common law decisions, to wrongful deeds of a certain kind only. That is to say it includes any kind of a wrongful act which is "of such a nature as to be sufficient" to deprive an ordinary person of the power of self-

control. The statute further provides that it is a question of fact in each case whether the wrongful act is of that nature.

If Parliament had intended that the subject-matter of provocation should be limited in section 261 to deeds and actions of a specific character, it would hardly have chosen a term capable of the wide meaning which necessarily springs from the combination of two words of such comprehensive import as "wrongful" and "act." It is, I think, not only the more appropriate but the proper conclusion that a term of such embracing application was purposely employed in the statute to synchronize with the restrictive test therein stated to be determined as a question of fact, *viz.*, whether the subject-matter of provocation is "of such a nature as to be sufficient" to deprive an ordinary person of the power of self-control.

In this case the appellant wrote a statement which was accepted in evidence. One portion thereof cited by my Lord the Chief Justice, when read in its context, seems to me capable of the interpretation that when his wife went to Prince George with Terachuk on the afternoon of the killing, the appellant believed from what he had reason to know and from seeing a ticket in her hand, that she was then leaving him finally to live in Vancouver with Terachuk. Whether the jury would have accepted this interpretation, if the learned trial judge had directed their minds to the significance thereof as it affected provocation, is of course another question.

If this phase of the defence had been placed before the jury and the jury had accepted this interpretation then, in my view, it could not be said there was no evidence of a "wrongful act" in the sense I think that term is used in section 261. If this view is correct, it would then be for the jury to say whether in the circumstances of this case, what the wife did was "of such a nature as to be sufficient" to deprive an ordinary husband of the power of self-control.

But the jury were not instructed upon this aspect of provocation, and the material evidence was not related thereto. Emphasis was placed rather upon another element of provocation, *viz.*, the time for the cooling of passion. But as the minds of the jury were not directed to the first element I have mentioned, the

C. A. 1940

REX v. KRAWCHUK

O'Halloran, J.A.

direction upon the cooling of passion could in no sense be related to it.

If the above is correctly stated then on the record before us I am unable to say that the jury could not have properly found provocation to enable a verdict of manslaughter.

I would therefore direct a new trial.

McDONALD, J.A.: The appellant was convicted before ROBERTSON, J. of the murder of his wife Natallia Krawchuk. There was and is no dispute that the appellant shot and killed his wife. The defences raised at the trial were that the appellant was insane when the offence was committed, and in the alternative that in any event he could not on the evidence be convicted of murder but at the most, of manslaughter, for the reason (1) that by reason of drunkenness he was incapable of forming any intent to commit murder or (2) that he acted in the heat of passion caused by sudden provocation, within the meaning of section 261 of the Criminal Code. In the notice of appeal six grounds of objection were raised. On the argument before us all of these objections were abandoned and instead, counsel relies upon two other grounds which without objection from counsel for the Crown he was allowed to raise by amendment. Those grounds are:

(1) That the learned trial judge erred in instructing the jury that there was no evidence of provocation and took from the jury the consideration of the question of provocation.

(2) That the learned judge wrongly admitted the letter of the appellant (Exhibit 19) which might have influenced the jury on the issue of the sanity or insanity of the appellant.

As to the first ground, objection is taken to one sentence in the learned judge's charge, to which I shall refer in a moment. The judge in a particularly careful manner had instructed the jury as to the provisions of section 261 and had told them that the questions therein involved were matters of fact for them to decide. When he came to deal with the evidence in detail, taking witness by witness he reviewed the evidence of each. Keeping in mind the defences both of drunkenness and provocation he made the following observations:

Now with regard to the drunkenness, the suggestion you will have to consider there is whether or not the man was so drunk that he was incapable of forming a specific intent essential to constitute the crime. Well, I have already referred to the evidence upon that, the beer which was found in the house, and the drinks which he took at Prudente's beer parlour on the day in question, and the fact that Prudente said that he was normal, and the fact of the officer McKinney who saw him at about 4 o'clock that afternoon.

Now with regard to provocation, there is nothing there that I can see which would bring it out of that definition of provocation, or the statement with regard to provocation that I read to you, but that again is a matter for you to say; but speaking generally, there is the suggestion that—well I should not say suggestion—there is the evidence that for a long time Terachuk had been unduly attentive to the accused's wife, and the accused resented that fact.

It is argued that by the expression "Now with regard to provocation there is nothing *there,*" etc., the instructions previously given were nullified and that the whole question of acting in the heat of passion caused by sudden provocation was thus removed from the jury's consideration. In my opinion this clearly is not so, and the jury could not reasonably have so understood the learned judge's remarks. I have italicized the word "there" above, because it obviously has reference to what the judge had said immediately theretofore. The charge must be read as a whole and there is no authority for tearing a single phrase from its context in order to give to the charge as a whole a meaning and a colour which it does not bear. Further, it should be pointed out that at a later period when the jury came in for instructions upon the law relating to murder and manslaughter, the judge went into the matter fully again and pointed out again to the jury that the question of provocation was a question of fact for the jury to consider. Reading everything that was said in the charge I am satisfied that it was left plainly to the jury to decide as a question of fact whether this defence had been made out.

As to the second ground, what happened at the trial, when the letter in question addressed to the brother of the accused (Exhibit 19) was under discussion before the learned judge, in the absence of the jury, was this:

Wilson: [Counsel for the Crown] That is a trial within a trial.

THE COURT: You are not opposing this evidence?

Young: [Counsel for the accused] No, I am not opposing it.

C. A.
1940

REX
v.
KRAWCHUK

McDonald, J.A.

THE COURT: You want it in?

Young: Yes.

Thereupon the letter was admitted in evidence. Counsel for the accused desired the letter to go in, and indeed counsel actually used the letter to bolster his argument before us, and yet he contends the letter to be inadmissible. Such inconsistent submissions, I think, cannot be maintained; but however that may be, and aside altogether from this difficult position in which counsel finds himself in this tragic case, in my view the letter was in fact written wholly voluntarily and was admissible, after the judge had taken (as he did take) every preliminary precaution which the law, as I understand it, requires to be taken before a statement made by an accused person may be admitted in evidence.

In my opinion the appeal should be dismissed.

Appeal allowed; new trial ordered, Sloan and McDonald, JJ.A. dissenting.

C. A.
1940

Nov. 21;
Dec. 13.

FROST v. FROST.

Practice—Order for reference—Order confirming registrar's certificate and for costs of reference on solicitor and client basis—Taxation—Fees of junior counsel disallowed — Discretion of taxing officer — Said fees restored on review—Order LXV., rr. 8 and 27 (41)—Appeal.

By an order of the Chief Justice of the Supreme Court, confirming the deputy district registrar's certificate on a reference it was ordered that the costs of the reference be taxed on a solicitor and client basis. On the taxation, the taxing officer disallowed the fees of junior counsel for the petitioner on the reference. On review by the Chief Justice, these fees were restored.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that the rule that a judge should not override a registrar except on a matter of principle, has never been due to any jurisdictional restriction; it is simply a rule of policy and good sense adopted because registrars can go into details better than can judges, and the appeal should be allowed.

APPEAL by respondent Mrs. Frost from the order of MORRISON, C.J.S.C. of the 10th of September, 1940, declaring that

the deputy district registrar erred in refusing to allow the petitioner his costs of and occasioned by the employment of second counsel on the proceedings before the deputy district registrar, and that the taxation aforementioned be referred back to the said deputy district registrar for the purpose of taxing and allowing to the petitioner his proper and reasonable costs.

The appeal was argued at Vancouver on the 21st of November, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Tysoe, for appellant: This is with reference to the taxation of costs occasioned on a reference before the deputy district registrar. On the first day before the registrar there was one counsel on each side, then on the second day Mr. *Whiteside* brought in a junior counsel who acted with him on the remaining four days. On the taxation of the costs the registrar only allowed fees for one counsel on each side. On appeal from the registrar the Chief Justice held that the registrar erred in refusing to allow the petitioner his costs occasioned by the employment of second counsel, and the taxation was referred back to the registrar for the purpose of allowing counsel fees for second counsel. The costs were on a solicitor and client basis and only such costs should be allowed as fairness to the other party permits: see Seton's Judgments and Orders, 7th Ed., 244; Daniel's Chancery Practice, 8th Ed., 1078; *In re False Creek Flats Arbitration* (1912), 17 B.C. 376. The deputy district registrar exercised his discretion in ordering that costs of a junior counsel be not allowed, and it should not be interfered with except when exercised on a wrong principle: see *In re Legal Professions Act. Noble & St. John* v. *Bromiley* (1928), 39 B.C. 518.

A. M. Whiteside, K.C., for respondent: The case here is whether the Chief Justice is wrong in principle. There was a substitution for rule 983 in 1938. As to where the registrar acts on a wrong principle see *The Attorney-General* v. *The Drapers' Company* (1841), 4 Beav. 305; *Stephens* v. *Lord Newborough* (1848), 11 Beav. 403; *Sturge* v. *Dimsdale* (1845), 9 Beav. 170; *In re Maddock. But* v. *Wright,* [1899] 2 Ch. 588; *British Metal Corporation* v. *Ludlow Bros.,* [1938] 3 All E.R. 194.

C. A.
1940

FROST
v.
FROST

Tysoe, in reply: The recent change in the Rules does not affect the law that the learned Chief Justice must find the registrar acted on a wrong principle.

Cur. adv. vult.

13th December, 1940.

MACDONALD, C.J.B.C.: I would allow the appeal for the reasons given by my brother MCDONALD.

MCQUARRIE, J.A.: I agree.

SLOAN, J.A.: I agree.

O'HALLORAN, J.A.: I would allow the appeal for the reasons given by my learned brother MCDONALD.

MCDONALD, J.A.: By order of the Chief Justice of the Supreme Court the respondent was allowed as against the appellant certain costs of a reference had before the deputy district registrar at Vancouver, "to be taxed on a solicitor and client basis." The taxation came before the same official as taxing officer, when the fees of junior counsel on the reference were disallowed. On a review by the learned Chief Justice these fees were restored. From this order this appeal is taken and the point for decision is whether the learned Chief Justice erred in reversing the taxing officer on what was with him a matter of discretion, no question of any error in principle being involved. Historically the matter seems to stand thus: It was always the law in England that it was not for the Court to interfere on a review of taxation except where the taxing master had gone wrong on a matter of principle. In *Ginn* v. *Robey,* [1911] W.N. 28 this is clearly laid down by the Court of Appeal reversing Bucknill, J. who had reversed the taxing master's order allowing fees to two counsel. The Court of Appeal stated:

> It was a question which the taxing master was much better qualified than a judge to decide, and *prima facie* the Court would not interfere in such case.

This reasoning is particularly applicable in the present case for the reason that the same official who heard the reference also taxed the costs. From the decision in *In re Estate of Hugh Magee, Deceased* (1925), 36 B.C. 195 it appeared that some doubts had arisen as to whether or not costs on a solicitor and

client basis could in any case be awarded between party and party. To remove such doubts Order LXV., r. 8, was amended by a provision added in 1930.

In 1938 rules 8, 9 and 10 of Order LXV. were repealed and new rules substituted. Briefly the substituted rule 8, though none too aptly worded, distinguishes between (a) costs on solicitor and client scale between parties, which costs are never taxable except under an order and (b) costs actually between solicitor and client and other costs taxable without order. I think the present case falls under subsection (*a*) and that subsection (*b*) does not apply to costs between parties even though payable on the solicitor and client scale. In any event subsection (*b*) gives a judge express power to review, this power being given out of excess of caution to remove any doubt as to whether the general power of review given by Order LXV., r. 27 (41) extends to taxations which are not between parties. I think that the general power of review given by Order LXV., r. 27 (41) which is the same as the English rule, still applies whether the review comes under the amended rule 8(*a*) or 8 (*b*). The power given under rule 27 (41) is no wider since the amendment of 1938 than it was and the amendment was not intended to alter the general policy of the law.

The rule that a judge should not override a registrar except on a matter of principle has never been due to any jurisdictional restriction; it is simply a rule of policy and good sense, adopted because registrars can go into details better than can judges. The matter is fully discussed in *In re Legal Professions Act. Noble & St. John* v. *Bromiley* (1928), 39 B.C. 518 and cases there cited.

With respect I think the learned Chief Justice erred and that the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors for appellant: *Craig & Tysoe.*
Solicitor for respondent: *A. M. Whiteside.*

In Admiralty
1940
Sept. 3;
Nov. 13.

McKENZIE BARGE & DERRICK COMPANY LTD. v. M.S. "ALEUTIAN NATIVE."

PETROLEUM NAVIGATION COMPANY v. McKENZIE BARGE & DERRICK COMPANY LTD.

Admiralty law—Navigation—Narrow channel—Rule of road—Meeting ships—Collision—Articles 18 and 25.

The tug "Ella McKenzie" with a dump scow nearly double its length lashed to its port side with its bow extending 60 feet beyond the tug's bow, and slightly angled across its port bow, was proceeding westerly out of English Bay at about two knots, and when outside of Burrard Bridge where the channel is narrow and tortuous, was seen by the master of the "Aleutian Native" inbound at about ten knots, when about one mile away. The tug continued westerly and about 100 feet north of mid-channel or the range line. The "Aleutian Native" continued on a course easterly, slightly north of mid-channel, and when the vessels were about 100 feet apart the master of the "Ella McKenzie," concluding the "Aleutian Native" was not going to turn to starboard and that a collision was inevitable, gave two whistles, turned hard to port, and across the bow of the "Aleutian Native," not to avoid a collision, which was impossible, but in an attempt to soften the blow. In two actions, both alleging sole responsibility for the collision against the other:—

Held, that the master of the "Aleutian Native" set his final course inbound not on or near the range line but substantially north of it. The master of the tug had the right to assume, while maintaining a proper course on the starboard side of the channel, that the "Aleutian Native," bearing down on him, would turn to starboard in ample time to permit them to pass port to port. If they both maintained their respective courses a collision was inevitable. The swing to port by the master of the tug was made *in extremis*, it was not done to avoid a collision—that was impossible—but to lessen the force of the impact. The tug was proceeding in its proper channel. Its master was justified in maintaining that course until the other vessel approached a point where it became apparent that a collision was inevitable. At that stage the master of the tug was not at fault in attempting to make a swing that would, in his opinion, lessen the force of the impact. A situation of peril is not contemplated by articles 18 and 25, and they do not affect the law applicable to conduct *in periculo*, a condition not self-created by the master of the tug. He was justified up to the last moment in relying upon the "Aleutian Native" obeying the ordinary rules by which both were bound. The "Aleutian Native," having disregarded a rule imposed by competent authority and recognized by mariners, the burden was on it to show that the other by ordinary skill and care could avoid the accident: this it failed to do and it follows that the "Aleutian Native" was alone to blame for the collision.

In Admiralty

1940

McKENZIE BARGE & DERRICK CO. LTD. *v.* M.S. "ALEUTIAN NATIVE."

PETROLEUM NAVIGATION CO. *v.* McKENZIE BARGE & DERRICK CO. LTD.

TWO actions tried together, both parties alleging sole responsibility against the other for damages arising out of a collision between their vessels in False Creek, Vancouver, on the 28th of April, 1939. The facts are set out in the reasons for judgment. Tried by MACDONALD, D.J.A. at Vancouver on the 3rd of September, 1940.

Griffin, K.C., and *Sidney Smith,* for McKenzie Barge & Derrick Company, Ltd.

Ginn, and *A. Alexander,* for M.S. "Aleutian Native."

Cur. adv. vult.

13th November, 1940.

MACDONALD, D.J.A.: We are concerned with two actions tried together, each of the parties alleging sole responsibility against the other in separate actions arising out of a collision in False Creek, Vancouver Harbour, on April 28th, 1939, between the American oil tanker "Aleutian Native," 126 feet in length, tonnage gross 240, net 163, draft at the time about 10 feet, powered with two engines of six cylinders each, laden with 40,000 gallons of gasoline—about half her capacity—and the Canadian tug "Ella McKenzie," length 55 feet, beam 10 feet, draft 7 feet, powered by a 3-cylinder Diesel engine and with a dump scow 100 feet long, beam 30 feet, height 10 feet (2 feet of it above water line) lashed to its port side. The scow was nearly double the length of the tug, its bow extending 60 feet beyond the tug's bow while the stern of the tug extended 12 or 15 feet beyond the stern of the scow. The combined width of tug and scow was 40 feet. It was a cumbrous, slow-moving craft (capable only of 2 knots) and its safety and that of vessels meeting it in this narrow channel depended upon it maintaining a course in its own waters in False Creek. The scow was firmly attached to the tug by a head-line, spring-line and stern-line and was slightly angled across the port bow of the tug.

The tug and scow were outbound; the "Aleutian Native" was inbound from English Bay at, I find, a speed of approximately ten knots. It is clear that the latter had much greater manœuvreability; the tug and scow of necessity advanced slowly and

In Admiralty
1940

McKENZIE BARGE & DERRICK CO. LTD. *v.* M.S. "ALEUTIAN NATIVE."

PETROLEUM NAVIGATION CO. *v.* McKENZIE BARGE & DERRICK CO. LTD.

Macdonald, D.J.A.

turned with difficulty especially to starboard because of the scow on its port side. The tide was in the ebb, moving one-quarter of a knot and to that extent assisted the tug. The collision occurred a short distance westerly from Burrard Bridge at a point in False Creek nearly opposite Jervis Street and, as I find, about midway between the point indicated by the letter "K" marked in blue pencil by an independent witness, the captain of a fire-boat, and the point marked in red by the master of the tug indicated by the letter "J," all shown on Exhibit one. So much evidence discloses the point of collision substantially north of the range line, later referred to—and it is not explained by the final turn to port of both vessels shortly before the collision—that I have no difficulty in locating it with a reasonable degree of certainty. It is impossible, of course, to be sure of the precise spot; it was in that vicinity.

The point of collision and the course followed by both vessels is of vital importance. Mr. *Ginn* submitted that the "Aleutian Native," proceeding inbound up False Creek, set a course E.S.E. as disclosed by its log and for the last half mile at least before the collision followed the range line corresponding to mid-channel as closely as possible. He submitted that Captain Jorgensen, master of the "Ella McKenzie," by his own evidence, set his course outbound, not by compass but by object, *viz.*, his tug's stern on the north abutment of the Burrard Bridge and its bow on "English Bay buoy" shown on Exhibit one and this, he said, disclosed a course on or near the same range line and close to the geometric centre of the channel. That does not follow; the line drawn by the captain on Exhibit one, based on the objects referred to, marking his course, is substantially north of the range line.

False Creek is a narrow channel extending inland from English Bay and article 25 of the International Rules of the Road, reading as follows, would apply to it:

> In narrow channels every steam vessel shall, when it is safe and practicable keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

The actual mid-channel is not marked; if it were it would disclose a tortuous course. However a range line, already referred to, is shown on Exhibit one marked "Lts" in line 134°. This is

an extension of an imaginary line projected by taking a bearing on two leading marks placed on the Burrard and Kitsilano Bridges several hundred feet apart by a local authority, the Board of Harbour Commissioners. The entrance to the creek is irregular and because of shoals these leading marks for use by day (lights are substituted at night) outline a course which, if followed by inbound vessels, would avoid all danger. The purpose is to lead ships following it safely up the channel, free of danger from shoals or otherwise. Outgoing vessels, through knowledge of its general location and the approximate course of mid-channel, would, if navigating safely, set a course to starboard substantially north of this line; there were no shoals to prevent it.

Mid-channel, as referred to in article 25, the deepest point in the creek, is, as stated, not defined; this range line, however, as Captain Reid, Harbour Master, testified was provided with that article in mind. It does not necessarily mark mid-channel but having regard to its location, the fact that it was provided by competent local authorities, the further fact that mariners, including all parties concerned, were familiar with it, it can be treated, in so far as determining negligence is concerned, as mid-channel subject possibly to necessary allowances at certain points because of shoals. One called "the Patch" lay about 400 feet southeast of the point of collision and close on the starboard side of any inbound vessel made it necessary for inbound ships to swing to starboard of the line, if compelled to do so, only by exercising care.

An inbound vessel therefore might properly set its course, not to starboard of the line but on the range line itself in the absence of outbound vessels at or near the same point; in that event to pass properly port to port, the inbound ship, if it could not safely swing to starboard because of shoals—I think it could by proceeding slowly and exercising care—should stop where there was plenty of sea room to permit the outgoing vessel to pass. If an obstruction like "the Patch," of which much was made in evidence, made it unsafe for the "Aleutian Native" to turn to starboard when near the point of collision its duty was, as Captain Reid testified, to stop and allow the outbound tug and scow

In Admiralty

1940

MCKENZIE BARGE & DERRICK CO. LTD. v. M.S. "ALEUTIAN NATIVE."

PETROLEUM NAVIGATION CO. v. MCKENZIE BARGE & DERRICK CO. LTD.

Macdonald, D.J.A.

to pass before it entered the neck of the bottle. No rule, local or otherwise, in terms require it, but because of greater sea room outside the circumstances of this case clearly suggest it.

It was urged by counsel for the "Aleutian Native," as at least a contributing cause of the collision, that the tug with scow attached was cumbrous, uncontrollable and unseaworthy, unable to turn to starboard except with difficulty and because of its lack of manœuvreability and an alleged unavoidable tendency to drift to port, as stated by an expert witness, was a menace to navigation. Having regard to the weight of evidence, while the tug thus laden had a tendency to swing to port, it would nevertheless answer to the rudder and maintain a course, not necessarily with mathematical precision, but a course reasonably satisfactory. It was not a menace to navigation: it was carrying on essential services in a satisfactory manner. It was obligatory, especially for a tug so encumbered, presenting an obstruction 40 feet in width, to maintain a course outbound substantially on the starboard side of mid-channel or the range line. There is no question that it did so. Even the master of the "Aleutian Native" placed the tug's outbound course at least 100 feet north of the range line. He placed his own ship practically on the range line with a beam distance between them, as they approached, of 100 feet. The tug, therefore, by this evidence was in its own waters. That beam distance of 100 feet was maintained, according to Captain Wellington (master of the "Aleutian Native") until, when 700 feet apart, the tug swung to port and crossed his bow. That was his case and, if accepted, it would be formidable. His evidence discloses, contrary to the submission that the tug was bound to drift helplessly to port, that it could maintain a reasonably straight course. There is no suggestion from Captain Wellington that the tug and scow, visible to him for about a mile, did not maintain a reasonably straight course until within 700 feet; the turn at that time to port was not the result of drift but the act of its master. The fact is, as I find, that this swing was made *in extremis* to mitigate the force of an inevitable collision.

I find that the master of the "Aleutian Native," having observed the "Ella McKenzie" nearly a mile distant proceeding outbound in its own proper channel set his final course inbound,

not on or near the range line but substantially north of it. I cannot find, as testified by Captain Wellington and a mate acting as his deck-hand, that if his ship and the tug had maintained their respective courses they would have passed in perfect safety with a beam width of 100 feet between them according to the former or 60 feet, as stated by the latter. The captain was in the best position to observe; if his evidence should be accepted it would be difficult, although perhaps not impossible, to explain how that 100 feet beam distance was covered by a scarcely perceptible swing to starboard of the tug and scow and a swing to port of the "Aleutian Native" when, as later disclosed, they were close to each other.

The master of the tug had a right to assume, while maintaining a proper course on the starboard side of the channel, that the "Aleutian Native" bearing down upon him, as he said "just off my starboard bow about ⅛ or ¼ of a point; pretty near head on" would turn to starboard in ample time to permit them to pass port to port: even if they met on the range line he would be obliged to do so. There is no question, as I view the evidence, that if both maintained their respective courses a collision was inevitable. The master of the tug realized when, as he said, the "Aleutian Native" was within 100 feet that it was not going to turn to starboard, whereupon he put his helm hard aport and gave two blasts of the whistle. This, it was urged, gave notice of an intention on his part to pass starboard to starboard contrary to articles 18 and 25. The fact is, as stated, that this attempt to swing to port was made *in extremis*. It was not done to avoid a collision—that was impossible—but to lessen the force of the impact. This tug, so encumbered, at that stage, could not turn either way and avoid a collision; it could only attempt to soften the blow.

The sequence of events and respective positions of each when the tug first turned to port, or attempted to do so, is of course important. I have found that the course of both was such that, without a change of course, a collision would follow and the first effort to turn was made by the master of the tug. How far were they apart at that moment? Captain Wellington stated at the trial that "about a minute" elapsed between the time the tug

In Admiralty
1940

McKENZIE BARGE & DERRICK CO. LTD. *v.* M.S. "ALEUTIAN NATIVE."

PETROLEUM NAVIGATION CO. *v.* McKENZIE BARGE & DERRICK CO. LTD.

Macdonald, D.J.A.

first made a swing to port and the actual collision. Asked the same question on discovery, when events were fresher in his memory and the issues in the actions not so clearly defined, he said it was only "a matter of seconds." "A matter of seconds" is not 60 seconds nor "about a minute"; it means approximately three or four seconds or at least a limited time much less than a minute. This evidence on discovery was based on the assumption that the speed of the inbound ship was 8 knots. If, as I find, its speed was ten knots, and that of the tug two knots the "matter of seconds" would be less. With the combined speed of ten knots and two knots 1,200 feet a minute or 20 feet a second would be covered as they approached: if therefore five seconds elapsed between the times referred to both craft were within 100 feet of each other, as the captain of the tug testified, when he attempted to swing to port. I think to some extent the captain's estimate is an understatement and Captain Wellington's "about a minute" clearly an overstatement. His evidence on discovery really supports Jorgenson's evidence at the trial and more nearly corresponds with the facts. I take it therefore that Jorgenson's estimate was nearer the actual distance; in any event, with the vessels in that position, it would be impossible, as Captain Jorgenson testified, to avert a collision. Captain Wellington gave this evidence:

> Now if you had reversed both your engines at the time you stopped the first one, at the time you were 700 feet away, wouldn't you have easily have brought your vessel to a stop in the 700 feet? No sir.
>
> Why not? She won't stop in that distance.

It is clear that in the shorter distance the collision could not be avoided.

I realize it seems incredible that the captain of the "Aleutian Native," with a ship easily controlled, would maintain a course regardless of consequences but the weight of evidence and the physical facts leave no other alternative. It is of course equally incredible if we accepted the evidence of Captain Wellington that the tug, with a beam distance of 100 feet to pass safely, suddenly decided without any reason to close that gap, turn to port and whistle for the same swing by the other ship to better ensure a collision. Captain Wellington's evidence was not satisfactory; in respect to speed—his statement that it was "about

eight knots" not ten, was in conflict with records and his evidence on discovery did not agree with that given at the trial. Some obvious inconsistencies were explained by the statement that he was tired when examined. Whether or not that was the situation on the day of the collision we can merely surmise.

I do not base my conclusion as to liability on Mr. *Griffin's* submission, that by his own evidence the master of the "Aleutian Native" did not in the final moments with sufficient speed give the necessary directions to avert a collision. I base it on the broader ground that when the whistle on the tug sounded, or when an effort was made to turn to port, the vessels, having regard to speed and the fact that only "a matter of seconds" elapsed, a collision was inevitable. This was not the fault of the master of the tug; he was proceeding in his proper channel. He was justified in maintaining that course until the other vessel approached a point where it became apparent that its failure to turn to port would not avert a collision. At that stage Captain Jorgenson was not at fault in making or attempting to make a swing that would, in his opinion, lessen the force of the impact. He was justified up to that moment in assuming that the other ship would observe the rules and regardless of its wrongful position in the channel take timely steps to pass port to port. A situation of peril is not contemplated by articles 18 to 25. They do not affect the law applicable to conduct *in periculo,* a condition not self-created by the master of the tug. An error of judgment even committed *in extremis* would not support a finding of negligence.

When ships meeting collide and one failed to follow the rules, as did the "Aleutian Native" in invading waters not its own, there must be evidence of

> gross dereliction of duty or want of skill in navigation . . . to make out a case for apportionment of damages against the other:

S.S. "Cape Breton" v. *Richelieu and Ontario Navigation Co.* (1905), 36 S.C.R. 564.

No act of negligence is chargeable against Jorgenson unless inability to foresee that the other ship would not swing to starboard in time is a fault. In the same report, at p. 574, it is stated that:

> They were justified up to the last moment in relying upon the "Canada"

In Admiralty
1940

McKENZIE BARGE & DERRICK CO. LTD. v. M.S. "ALEUTIAN NATIVE."

PETROLEUM NAVIGATION CO. v. McKENZIE BARGE & DERRICK CO. LTD.

Macdonald, D.J.A.

obeying the ordinary rules, by which both were bound, instead of doggedly and recklessly persisting, as she did, in unlawfully attempting to force them to disregard those rules.

It is pointed out at the same page that a departure from a rule of the road could only be justified if adhering to it would with certainty cause a collision. In such circumstances the "Aleutian Native" having disregarded a rule imposed by competent authority and recognized by mariners, the burden was on it to show that the other by ordinary skill and care could avoid the accident: this it failed to do. It follows that the "Aleutian Native" was alone to blame for the collision. As stated by Nesbitt, J., at p. 591:

> The fault of the "Canada" being obvious and inexcusable, the evidence to establish fault on the part of the "Cape Breton" must be clear and convincing in order to make a case for apportionment.

Judgment accordingly in both actions with the usual reference as to damages.

Judgment accordingly.

In Admiralty
1940
Nov. 25.
1941
Jan. 23.

LIDDLE *ET AL.* v. M.V. "GRADAC."

Admiralty law — Salvage services — Extinguishing fire on ship — Apportionment.

The M.V. "Gradac" caught fire near Point Atkinson, and its master and crew left the ship for Vancouver and later in the day returned equipped with fire-fighting apparatus. In the meantime the master and crew of the M.V. "Sea Angel" approached the ship and at first decided it was not safe to attempt to extinguish the fire and moved away, but shortly after the fire abated and they returned before the owners arrived from Vancouver, and brought the fire under control in about fifteen minutes. With it smouldering they towed the ship to Vancouver. On the claim for salvage, the only dispute was the question of *quantum*. Eight hundred dollars was paid into Court and $1,500 was claimed. The value of the ship by plaintiff's witnesses was placed at from $4,500 to $6,000, and the average of these amounts was accepted by the Court. The repairs enhanced its value by about $500.

Held, that the amount payable to salvors by the owner should be reasonable in all the circumstances, each case to be decided by its own facts, and in this case $800 provides ample compensation, one-half to the owner and the other half to the members of the crew.

In Admiralty
1940

LIDDLE
v.
M.V.
"GRADAC"

ACTION for salvage services rendered to the M.V. "Gradac" by the master and crew of the M.V. "Sea Angel" near Point Atkinson. The facts are set out in the reasons for judgment. Tried by MACDONALD, D.J.A. at Vancouver on the 25th of November, 1940.

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

Cur. adv. vult.

23rd January, 1941.

MACDONALD, D.J.A.: This is a claim for salvage of the M.V. "Gradac" by the plaintiffs, the owner, master and deck-hands of the M.V. "Sea Angel." The only dispute is as to *quantum;* $800 was paid into Court; $1,500 is claimed.

The M.V. "Gradac" caught fire near Point Atkinson; its master and crew, after futile attempts to extinguish it left to obtain assistance, first unsuccessfully from nearby yachtsmen and fishermen. They then obtained passage to Vancouver and later in the day returned with a boat equipped with fire-fighting apparatus, not to see a wreck consumed but to save it: had they thought it would have been completely destroyed in the meantime they would not have troubled to return. Having regard to location, the extent of the fire and the comparatively short distance to sources of assistance it should not be regarded as a derelict. That is not to say that plaintiffs should not be fairly rewarded: on all the facts, as I view them however compensation should not necessarily be given upon the basis of abandonment.

In the meantime while help was sought the master and crew of the "Sea Angel," attracted by the fire approached to examine it. It was not so stated but it can be inferred from the fact that buckets were used that it carried no extra fire-fighting equipment. They first decided that it was not safe to attempt to extinguish it and hence moved away. Noticing shortly thereafter that the fire abated they returned before the arrival of the owner's boat from Vancouver, boarded the vessel and succeeded in controlling the fire in about fifteen minutes, whereupon with it still smouldering, they towed it to Vancouver. My inference is that the boat would not have been destroyed but the

In Admiralty
1941

LIDDLE
v.
M.V.
"GRADAC"

Macdonald,
D.J.A.

loss would have been greater were it not for the services rendered by the plaintiffs. With the better equipment the fire would have been controlled by the owner's servants.

The time taken to subdue the fire was, as stated, short. Approximately two hours only were consumed in controlling it and in towing it to Vancouver. The plaintiffs did not consider that there was any special danger: they returned when the fire abated with the risk correspondingly less. There was of course some degree of danger from combustion of gases that might escape. The "Sea Angel" was not compelled to deviate to any appreciable extent from her course and little additional expense was incurred.

The amount payable to salvors by the owner should be reasonable under all the circumstances; each case must be decided on its own facts. The value of the ship salved is an important element. Plaintiffs' witnesses placed it between $4,500 and $6,000. I would accept the average of these amounts. The work done in repairs enhanced its value to the extent of approximately $500. Having regard to this valuation, or to the value of the ship when repaired, less costs of repair, the fact that it was not a derelict; the slight risk involved, the limited time and labour expended and trifling expense incurred I am of opinion that the sum of $800 provides ample compensation: one half the award to the owner, the other half to the members of the crew.

Judgment accordingly.

Judgment accordingly.

IN RE TAXATION ACT AND INCOME TAX ACT AND *IN RE* ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LIMITED.

S. C.
1941
Jan. 9, 24.

Taxation—Income—Company not resident in the Province—Income alleged to be earned within the Province—Liability—R.S.B.C. 1924, Cap. 254, Sec. 4 (a)—R.S.B.C. 1936, Cap. 280, Sec. 3 (a).

The Firestone Tire & Rubber Company of Canada Limited, Hamilton, Ontario, manufacturers of pneumatic passenger and truck type casings and tubes, solid tires, tire accessories, repair materials and repair equipment, entered into a contract in 1924 with MacKenzie, White & Dunsmuir Ltd. (referred to as the distributor), an incorporated company carrying on a wholesale business in the city of Vancouver, whereby the distributor had the exclusive right to sell Firestone products in a large portion of the Province. The contract makes a distinction between accessories, repair material and repair equipment on the one hand and casings, tubes and solid tires on the other. The latter class are referred to as "inventoried goods." The first-mentioned class are paid for at once, and it is conceded that profits made by the Firestone Company from these sales are not taxable as income earned in British Columbia. As to the "inventoried goods," the distributor sends what is called a specification to the Firestone Company, setting out the inventoried goods which the distributor wishes to have shipped to it. When the goods are shipped the Firestone Company sends the distributor an invoice, but the price of the goods is not shown in it. The distributor is not obliged to pay for the specific goods covered by the invoice on a definite date from the time of shipment, but the contract states the event, the happening of which will fix the date on which they must be paid for. That event is the disappearance of the goods from the inventory. The Firestone Company fixes the price of the inventoried goods from time to time, and although there is a fixed price in force at the time when the specific goods are shipped, it is not necessarily the price which the distributor must pay for them. The distributor is under covenant to cause the happening of the event as speedily as possible in the territory assigned to it. The distributor must warehouse the goods, and as long as they remain in its warehouse such goods are at the risk of the distributor, but the right to ownership remains in the Firestone Company until sold or otherwise disposed of by the distributor. The distributor has no right to return the inventoried goods once they are received. On the 20th of each month the distributor makes an inventory of the inventoried goods warehoused under the contract and forwards it to the Firestone Company, and on the 20th of the following month it makes another inventory. A month later the distributor pays for the goods that appear in the first inventory but disappear (*i.e.*, are sold) from the second inventory at the prices fixed by the Firestone Company. The Firestone Company have no control over the conduct

S. C.

1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

of this business save as to price and adjustments made under the contract. On appeal from the decision of the Minister of Finance that the Firestone Company must pay income tax on profits from the sale of "inventoried goods" in British Columbia:—

Held, that the distributor in selling the inventoried goods in British Columbia did not do so as the Firestone Company's agent. The goods were sold to the distributor in Hamilton, in the Province of Ontario, on the basis of deferred payments involving possible price changes which did not call for any act to be done within British Columbia by the Firestone Company from which it can be said to have earned an income within the Province.

APPEAL from the decision of the Minister of Finance of British Columbia, that the Firestone Tire & Rubber Company of Canada Limited, manufacturers of pneumatic passenger and truck type casings and tubes, solid tires, tire accessories, repair materials and repair equipment, must pay income tax on all profits from October 31st, 1927, to October 31st, 1931, and from October 31st, 1932, to October 31st, 1937, inclusive, in respect of the sale of its products to MacKenzie, White & Dunsmuir Ltd., an incorporated company carrying on a wholesale business in British Columbia with head office in the city of Vancouver, under the provisions of the Taxation Act, R.S.B.C. 1924, Cap. 254, and amending Acts, and the Income Tax Act, R.S.B.C. 1936, Cap. 280, and amending Acts. The facts are set out in the reasons for judgment. Argued before MURPHY, J. at Vancouver on the 9th of January, 1941.

J. W. deB. Farris, K.C., and *McAlpine, K.C.*, for appellant.
H. Alan Maclean, for respondent, the Minister of Finance.

Cur. adv. vult.

24th January, 1941.

MURPHY, J.: The Firestone Tire & Rubber Company, hereinafter referred to as the "Firestone Company," is a company incorporated under the laws of the Dominion. It manufactures pneumatic passenger and truck type casings and tubes, solid tires, tire accessories, repair materials and repair equipment, hereinafter referred to as "Firestone products," at Hamilton, Ont. MacKenzie, White & Dunsmuir Ltd., hereinafter referred to as the "distributor," is an incorporated company carrying on

a wholesale business in the Province of British Columbia with head office in the city of Vancouver. It deals at wholesale in various lines of goods. The distributor has had since 1924 a contract with the Firestone Company whereby it has the exclusive right to sell Firestone products in a large portion of the Province of British Columbia and the reciprocal obligation not to handle any pneumatic passenger and truck type casings and tubes, cushions and regular solid tires, accessories, repair material and repair equipment other than Firestone products. The contract was reduced to writing. The copy (Exhibit 3) produced at the hearing herein is dated September 1st, 1932; but it is admitted that this document contains the terms of the contract which existed between the Firestone Company and the distributor from 1924 on. The Firestone Company has made profits from its dealings with the distributor. The Minister of Finance has decided that the Firestone Company must pay income tax on all these profits from October 31st, 1927, to October 31st, 1931, inclusive and from October 31st, 1932, to October 31st, 1937 inclusive under the provisions of the two above-mentioned Acts. From this decision the Firestone Company appealed and the appeal came on for hearing before me. There is no difference in the wording of these Acts in so far as the question involved herein is concerned. Both enact that "income earned within the Province of persons not resident in the Province" shall be liable to taxation. The contract between the Firestone Company and the distributor makes a distinction between accessories, repair material and repair equipment on the one hand and casings, tubes and solid tires on the other. This latter class will be hereafter referred to as "inventoried goods." Tire accessories, repair material and repair equipment are to be purchased outright from the company and paid for on the 20th day of the calendar month following the date of shipment. Counsel for the Minister of Finance conceded that under the decision of *Grainger & Son* v. *Gough*, [1896] A.C. 325 profits made by the Firestone Company from these sales are not taxable as income earned in British Columbia as the sales from which profits were made, resulting in income to the Firestone Company, were made wholly outside the Province. The course

S. C.
1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

Murphy, J.

of dealing with regard to inventoried goods, as carried on between the Firestone Company and the distributor, is set out in the evidence of Dunsmuir given on the appeal hearing. The distributor sends from Vancouver what is called a specification to the Firestone Company at Hamilton. Exhibit 5 is a sample. This document sets out the inventoried goods which the distributor wishes the Firestone Company to ship to it. The Firestone Company pays the freight if the goods are shipped in carload lots. Less than carload lots and express shipments are forwarded freight charges "collect" but the company refunds to the distributor in respect to such shipments an amount equal to the carload freight. When the goods are shipped the Firestone Company sends to the distributor what is called a memorandum invoice. Exhibit 6 is a sample. Inspection will show that the price of the goods forwarded is not set out in this memorandum invoice. The reason is, as paragraph 6 of the contract and Dunsmuir's evidence show, that the distributor is not obligated to pay for the specific goods covered by such invoice on a definite date at the time they are shipped. The contract, however, does state the event, the happening of which will fix the date on which they must be paid for. That event is the disappearance of the goods from the inventory hereinafter discussed. Similarly as to price. The Firestone Company fixes the price of inventoried goods from time to time. Though there is accordingly a fixed price in force at the time when specific goods are shipped that is not necessarily the price which the distributor must pay for them as will be shown later on in this judgment. But again the contract states the event the happening of which will set the price. It is the same event, *i.e.*, the disappearance of the goods from inventory. So far as the happening of this event depends on the act of distributor it is under covenant to cause such happening as speedily as possible by pushing sales of the goods in the exclusive territory assigned to it. The distributor is bound to receive and warehouse the goods set out in the memorandum invoice and so long as they remain in its warehouse or in its possession such goods are at the risk of the distributor but the right, title, ownership and property therein remain in the Firestone Company so long as they remain in the warehoused stock

and have not been sold or otherwise disposed of by the distributor. The distributor has no right to return inventoried goods once they are received before it has sold them. The "returned goods" referred to in paragraph 6 of the contract are, as I construe the contract, inventoried goods which have been sold by the distributor and taken back where an adjustment under the Firestone Company's guarantee of its goods has been made. The distributor under the contract must return such goods to the Firestone Company. On the 20th of each month the distributor makes an inventory of the quantity of casings, tubes and solid tires, *i.e.*, of the inventoried goods warehoused by it under the contract. On the 20th day of the following month it takes another inventory. It then sends on the 23rd a document called "Monthly Inventory and Sales Report" to the Firestone Company at Hamilton. For the sake of clarity I will deal with a specific sample of this monthly inventory and sales report filed on the appeal as Exhibit 7. Taking, as an example, the third item on the first page this document shows that according to the inventory taken on September 20th, 1937, 52 casings of a particular type were in the distributor's warehouse at Vancouver. Between September 20th and October 20th twenty additional casings of this type were received by the distributor from the Firestone Company. The document shows that on October 20th, 1937, there were 62 casings of this type in the distributor's warehouse. Ten casings of this type had therefore disappeared from the inventory during the month that elapsed between the taking of the inventories. The distributor was obligated to pay for these ten casings and for them only in casings of this type. The due date for such payment was November 20th, 1937. The casings so withdrawn are shown in Exhibit 7 under the heading "Net Sales." The monthly inventory and sales report is forwarded by the distributor to the Firestone Company in duplicate. When forwarded from Vancouver it does not contain the two columns of figures set out on the right hand side of Exhibit 7. These are inserted by the Firestone Company in Hamilton. They are the prices per unit of the goods that have disappeared from inventory and the total amount payable on each type of goods by the distributor for the goods that have so disappeared.

S. C.
1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

Murphy, J.

One copy of the document is then sent back by the Firestone Company to the distributor in Vancouver. The Firestone Company then invoices the distributor for the goods that the monthly inventory and sales report shows to have disappeared from inventory. Exhibit 8 is a sample. This is a regular trade invoice except that the goods which have disappeared from inventory are not set out in detail but are referred to as "sales," the debit figures being obtained from those placed on the monthly inventory and sales report by the Firestone Company at Hamilton. Payment is to be made on the 20th of the following month. The price to be paid by the distributor for the goods which have disappeared from inventory is fixed by the Firestone Company from time to time and may be changed by it at any moment. If during the currency of any month between the taking of inventories a change of price is so made by the Firestone Company the distributor is notified by wire. It then immediately takes an inventory. For all inventoried goods which have disappeared up to the date of receipt of the wire it pays at the old price. For all goods which have so disappeared after such receipt it pays at the new price. Any inventoried goods sold by the distributor in the exclusive territory assigned to it under the contract must be sold at prices fixed by the Firestone Company. The distributor takes all the profits and bears all the losses resulting from these sales made by it. The Firestone Company has no control over the conduct of this business save as to price and adjustments made under the contract.

On these facts counsel for the Finance Minister contends that the Firestone Company must pay income tax on the profits it makes on inventoried goods on the ground that the distributor is an agent for making sales of such goods on behalf of the Firestone Company in British Columbia. He argues that the first sale of the inventoried goods is the sale made by the distributor to its customers in British Columbia. The question to be decided under the above Acts is whether or not the Firestone Company has earned an income within British Columbia on the inventoried goods sent by it to the distributor. It is evident I think that the Firestone Company can only earn an income in British Columbia upon the inventoried goods by selling them at a profit within

the Province. I cannot agree that the distributor in selling the inventoried goods in British Columbia is doing so as the Firestone Company's agent. If it were its obligation to pay money to the Firestone Company could arise only because of such sales or at any rate in connection with such sales. But this is not the case, as I view the facts. The evidence of Dunsmuir and paragraph 6 of the contract show that the distributor's liability to pay for inventoried goods on a definite date arises as soon as and to the extent that such goods disappear from inventory. That disappearance may not be the result of any act done by distributor. Fire, theft or other occurrences may bring it about. Again the act of distributor which creates an obligation to pay on a definite date may not be a sale or connected with a sale. If it drops goods from inventory its obligation to pay for goods so dropped on a definite date arises whether or not a sale is involved. Further paragraph 14 of the schedule of covenants and conditions stipulates that the inventoried goods in distributor's warehouse or possession shall be at the sole risk of distributor. The stipulations in the contract relied upon by counsel for the Minister of Finance as to retention of title and property in the inventoried goods by the Firestone Company, obligation on the distributor to insure them in the Firestone Company's name and compulsion to sell them at a price fixed by the Firestone Company were all present in the contract considered in the case of *John Deere Plow Co.* v. *Agnew* (1913), 48 S.C.R. 208, at 212 yet it was held not to be an agency contract. His contention that paragraph 2 of the schedule of covenants and conditions stipulates that inventoried goods are to be paid for on the 20th day of the month following shipment from distributor's warehouse is I think untenable. This paragraph applies to purchase of all Firestone products and "shipment," in my opinion clearly refers to shipment from Hamilton, Ont. Further the contract must be read as a whole. Paragraph 6 of the contract must be considered in connection with paragraph 2 of the schedule. Payment, in my opinion, can only be demanded by the Firestone Company from the distributor for such amounts as can be charged to the distributor and paragraph 6 of the contract shows that only the amount arrived at by computing the price of the inventoried goods that

S. C.
1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

Murphy, J.

have disappeared from inventory can be so charged, not the amount that represents the price of all inventoried goods shipped from Hamilton previous to the date when the inventory was made up. Distributor is bound to deliver inventoried goods to the Ford Motor Company and to the Dominion Government which the Firestone Company has sold to these parties by contracts made outside British Columbia and counsel for the Minister of Finance adduces this as further proof of agency. Here again, in my opinion, the distributor is not acting as agent for the Firestone Company but is selling such goods to the Firestone Company for under its contract it debits to the Firestone Company inventoried goods so delivered at the price fixed under its contract by the Firestone Company payable by distributor for goods which have disappeared from inventory plus an agreed profit as shown by Exhibit 10. The fact that the Firestone Company does not pay for such goods in cash but by a merchandise credit does not alter the real nature of the transaction. Distributor's obligation to make such deliveries arises I think from its covenant to do so and affects the conduct of its own business just as the covenant to sell goods at prices fixed by the vendor was held to operate in *John Deere Plow Co.* v. *Agnew, supra.* In my view the inventoried goods were sold to the distributor in Hamilton, Ont. on the basis of deferred payments involving possible price changes which did not call for any act to be done within British Columbia by the Firestone Company from which it can be said to have earned an income within the Province. The Firestone Company had the right not to ship the full amount of inventoried goods requested by the distributor at any one time as shown by Dunsmuir's evidence. The reason for this stipulation was I think to provide against the deferred payments arrangement operating to the financial detriment of the Firestone Company. Because of such stipulation it could exercise its judgment as to what amount of inventoried goods the market in the distributor's exclusive territory would absorb at a given time, thereby obviating loss to it through large stocks of inventoried goods remaining in distributor's warehouse which had been sold to distributor but payment for which could not be insisted upon under the terms of the contract until they had disappeared from inventory.

The appeal is allowed. *Appeal allowed.*

EDWARDS AND EDWARDS v. SMITH.

C. A.
1940
Nov. 5, 6.
1941
Jan. 14.

Negligence—Parent—Dangerous weapon—Spring-gun left in unlocked cupboard—Child warned not to use gun in parents' absence—Child shoots at and injures plaintiff—Damages.

The defendant purchased a spring-gun for the amusement of his two boys, ten and eleven years of age. The gun contained a magazine that carried many small pellets of lead. To prepare the gun for firing, a lever is pulled and this places one pellet in the barrel in front of the spring. A target could be hit with the gun at a distance of 40 feet. The defendant gave the boys specific instructions not to use the gun except in the presence of himself or his wife. Shortly after the noon hour on the 24th of August, 1939, the defendant and his wife went to town and left the two boys and a small girl in charge of the plaintiff, a girl twenty years of age who was employed as a domestic servant. Before leaving, the defendant put the gun in an unlocked cupboard in the kitchen. The gun was not loaded, but it contained pellets in the magazine. Shortly after, the older boy took the gun from the cupboard and he and his brother were shooting at a target. At this time the plaintiff with the little girl was going out at the back of the house when the boy called to her, and as she turned her head the gun went off and the pellet hit her on the left eye. She lost the sight of her eye. She recovered judgment in an action for damages.

Held, on appeal, affirming the decision of McDonald, J. (Macdonald, C.J.B.C. dissenting), that the appellant must be found liable for the girl's injuries, as he permitted a dangerous thing to come into the hands of an immature boy without control under circumstances in which he should have anticipated that harm might be done to the girl or other third party. The boy's negligent use of the gun in his absence was within the risk the father should have anticipated, and he did not take reasonable precautions to avoid that risk.

APPEAL by defendant from the decision of McDonald, J. of the 7th of June, 1940, holding the defendant liable in respect of injuries sustained by the plaintiff, and awarding damages in the sum of $3,000 to the plaintiffs. The defendant is a school-teacher residing with his wife and their children in West Vancouver. The infant plaintiff, 20 years of age, was engaged by defendant's wife to help with housework and to look after her children when she was away from the house. There were two sons, ten and eleven years old, and a younger daughter. The family were in California in 1939, where the defendant purchased a spring-gun, the use of which was permitted by the two

C. A.
1940

EDWARDS
v.
SMITH

boys when either of the parents was present. When the parents were away from their house the gun was kept in a cupboard in the kitchen and specific instructions were given the boys that the use of the gun by them was permitted only in the presence of one of the parents. The pellets to be fired from the gun are kept in the magazine, and it is necessary to pull a lever to place a pellet in the shooting-barrel. The appellant admitted that if the boys had the gun when he was not there it might cause trouble to somebody because it was dangerous. On August 24th, 1939, the parents left the family home for Vancouver, just after the noon hour, leaving the children in charge of the plaintiff. The gun was left in the cupboard and some pellets were in the magazine. After the parents left Jimmy, the older boy, took the gun from the cupboard and with his brother and two other boys did some shooting in the defendant's yard. As the plaintiff was going through the back of the premises to her home for a bathing-suit, Jimmy called her, she looked around, and as she did so the gun in Jimmy's hands went off and a pellet struck her in the left eye. She saw Jimmy pointing the gun at her. She was confined to her bed for four weeks and she lost the sight of her eye.

The appeal was argued at Vancouver on the 5th and 6th of November, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Locke, K.C., for appellant: The evidence showed that the defendant did everything and took all precautions which a reasonable man would reasonably be expected to do in the circumstances. The gun belonged to the defendant and the sons were specifically instructed that the use of the gun by them was permitted only in the presence of one of the parents. The gun was put away in a cupboard before the parents left the house, and all reasonable precautions were taken. The evidence adduced at the trial did not disclose any negligence on the part of the defendant, and the defendant was under no duty to the plaintiff which he did not discharge. The learned judge based his judgment on *Williams* v. *Eady* (1893), 10 T.L.R. 41, at p. 42. This is distinguishable, as are the other cases cited by the learned judge, namely, *Dixon* v. *Bell* (1816), 1 Stark. 287; *Sullivan* v. *Creed*, [1904] 2 I.R. 317 and *Bebee* v. *Sales* (1916), 32 T.L.R.

413. There is no evidence that the spring-gun is dangerous *per se* and it was not so in fact. Assuming it is dangerous *per se,* his duty is to take due precaution to prevent it causing injury to persons who will necessarily or may reasonably be expected to come within its proximity: see *Dominion Natural Gas Company, Limited* v. *Collins and Perkins,* [1909] A.C. 640, at p. 646.

J. A. MacInnes, for respondents: The act of giving an infant eleven years of age an air-gun and permitting the infant to use it, is not only gross negligence but it is a criminal offence under section 126 of the Criminal Code. He who delivers to or negligently allows to come into the possession of a child a dangerous instrument must accept responsibility for any resulting mischief: see *Dixon* v. *Bell* (1816), 5 M. & S. 198; *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; *Williams* v. *Eady* (1893), 10 T.L.R. 41; *Englehart* v. *Farrant & Co.,* [1897] 1 Q.B. 240; *Sullivan* v. *Creed,* [1904] 2 I.R. 317; *Cooke* v. *Midland Great Western Railway of Ireland,* [1909] A.C. 229; *Fowell* v. *Grafton* (1910), 20 O.L.R. 639; *Bebee* v. *Sales* (1916), 32 T.L.R. 413; *Green* v. *B.C. Electric Ry. Co.* (1916), 10 W.W.R. 614, at p. 617; Salmond on Torts, 9th Ed., pp. 69 and 553. The defendant failed in his duty to the infant plaintiff as a member of the general public, and also failed in his special duty as an employer. The defendant knew and should have known of the risk: see *Grizzle* v. *Frost and Another* (1863), 3 F. & F. 622; *Mansfield* v. *Baddeley* (1876), 34 L.T. 696. The plaintiff had no responsibility whatever as to the gun and did not know where it was kept. Breach of a statutory duty by an employer is not a risk which a servant can be assumed to have undertaken: see *Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423; *Jones* v. *Canadian Pacific Railway* (1913), 83 L.J.P.C. 13; *Davies* v. *Thomas Owen & Co.,* [1919] 2 K.B. 39; *Wheeler* v. *New Merton Board Mills, Ld.,* [1933] 2 K.B. 669. There was a total absence of any knowledge of the risk by the plaintiff: see *Smith* v. *Baker & Sons,* [1891] A.C. 325; *McPhee* v. *E. & N. Railway* (1913), 49 S.C.R. 43, at p. 49.

Locke, replied.

Cur. adv. vult.

C. A.
1941

EDWARDS
v.
SMITH

14th January, 1941.

MACDONALD, C.J.B.C.: Appeal from a judgment for $3,075 damages awarded to respondent, a domestic servant aged twenty, against appellant, a school-teacher living in the district municipality of West Vancouver. Respondent was engaged to do housework in appellant's home and to care for the children. She lost the sight of an eye through the discharge of a pellet from a spring-gun in the hands of appellant's eleven year old son James.

While in California shortly before this occurrence, appellant bought a spring-gun for the use of his boys: we are not concerned about the ownership; it was for the child's use under restrictions. It was not an air-gun: the distinction is important. An air-gun is a dangerous weapon: at all events it is so regarded by Parliament as indicated by the provisions of section 126 of the Criminal Code. There is no legislation against the use of spring-guns: they are designed for the use of minors and freely manufactured and sold without restrictions of any kind. Their power is limited; spring-guns will not carry small pellets more than 40 feet before giving way to the force of gravity. Serious injury would, of course, arise if, as unfortunately happened in this case, a pellet came into contact with the eye.

Parents are liable for loss or damage caused to others by the acts of their children under certain conditions, if having regard to the ordinary laws of negligence, not necessary to elaborate, it can reasonably be found that injuries ensued by reason of acts of omission or of commission on their part in relation to their children. The degree of care will vary with the nature of the instrument. The circumstance that a spring-gun is less dangerous than an air-gun not only in the view of Parliament but in fact is material. I do not think, with respect, that the trial judge regarded, or in any event sufficiently regarded, this distinction: while stating at the outset of his reasons for judgment that a spring-gun was used later he outlined evidence wherein it was erroneously referred to as an air-gun: the correction was made subsequently but it is not included in the extract quoted upon which the trial judge apparently relied. I am the more inclined to this view as he then proceeded to refer to it as a dangerous instrument, either through having an air-gun in mind,

overlooking the distinction between the two or wrongly of the opinion that no distinction existed.

Liability was based upon the principles laid down in *Williams* v. *Eady* (1893), 10 T.L.R. 41, at p. 42, where the facts were so different that, with deference, it is of little assistance. Lord Esher, M.R. said in reference to a schoolmaster that:

> . . . he was bound to take notice of the ordinary nature of young boys, their tendency to mischievous acts, and their propensity to meddle with anything that came in their way.

This is an accurate statement as far as it goes: the facts however are all-important. The error in the judgment under review consists in failing to consider, at least sufficiently, that appellant was aware of this propensity and, as will be observed when referring to the evidence, guarded against it by careful training and oversight and by imposing restrictions on the use of the spring-gun. The trial judge proceeded to say:

> . . . in each case the real ground of liability was the leaving of a dangerous instrument in a place where it was available to a young and irresponsible person who might reasonably be expected to use it to the injury of another.

This is applied as an accurate statement of the law applicable to the facts; I suggest it falls short of a complete statement unless by the word "irresponsible" is meant a child left without proper training in the use of a spring-gun. Of course if a spring-gun is so inherently dangerous that no training in its use would justify leaving it where a boy of eleven could secure it other considerations would apply.

I think, with deference, the trial judge proceeded upon wrong principles, or at least upon inadequate statements of the law as applied to the facts of this case, later referred to. The cases cited would, with deference, mislead rather than direct. They differ widely on the facts. In *Williams* v. *Eady* (1893), 10 T.L.R. 41, where a bottle of phosphorous was left in a place of ready access to pupils there was no warning: no instructions were given; in *Dixon* v. *Bell* (1816), 1 Stark. 287, a fowling piece loaded with powder and a quantity of printing types, not a spring-gun, was entrusted to a child, again without implanting the need of care; in *Sullivan* v. *Creed,* [1904] 2 I.R. 317 a gun fully loaded was left in the way of a fifteen year old boy ignorant of that fact: no care whatever was exercised; in *Bebee*

C.A. 1941

EDWARDS v. SMITH

Macdonald, C.J.B.C.

v. *Sales* (1916), 32 T.L.R. 413 an air-gun, regarded, as stated, by Parliament as dangerous was given by a father to his fifteen year old son, again without actual instructions or admonition. The boy, in fact, broke a window with it whereupon the boy's father promised to break it but did not do so: later damage ensued: again no attempt to instruct in the art of care. All were concerned with dangerous instruments. I think the reference to these cases in the reasons is evidence that the trial judge regarded a spring-gun as an equally dangerous weapon.

We are not precluded from interfering with this judgment because of findings of fact: the facts are not in dispute. Wherever appellant's evidence is referred to it is accepted; no one contested it nor that of the boy's mother in respect to care taken to avoid danger. The reasons for judgment do not indicate that their evidence was not believed: it is confirmed too by the infant respondent in several respects. It follows that the trial judge merely expressed the opinion that negligence was disclosed on the state of facts found in the record; we are in an equally good position to agree or to disagree with that view.

Referring now to the facts from which negligence, if any, must be found, may I first say it was not suggested that an eleven year old boy should not be permitted to use a spring-gun: or as the plaintiff calls it a "BB" gun; I venture to suggest they are familiar objects in homes with boys of teen age. Special precautions, of course, must be taken to guard against danger: the only question is were sufficient precautions taken in this case having regard to reasonable standards of care, assuming of course that it is not negligence *per se* to permit a boy of this age to use one? Appellant, as soon as he bought it, instructed his son carefully in its use: he taught him how to hold it, impressed upon him the need for care and trained him in shooting at targets. He spent time for several days doing so. He gave this course of instruction although aware that his son already had experience with weapons: an uncle, a sportsman and an expert shot, trained him in the use of a 22 rifle. This is important: we have to decide, not with wisdom acquired after the event, when there is danger judgment may be deflected, whether or not appellant had a right reasonably to believe, as a result of his training,

that his son could be entrusted not with a shot-gun but with a spring-gun. Appellant would be justified in assuming from his knowledge that the boy had training in handling a 22 rifle under the guidance of an expert that he, at least, made some progress in assuming responsibility.

All the foregoing is evidence of care; not of lack of care. I cannot agree that no reliance ought to be placed by a parent upon such training, that it is of no substantial value or that the only course to follow is to lock a spring-gun up and to have it taken out for use only in the presence of the boy's father. If it should only be used in the father's presence there would be little point to prior training; if it must always be placed under lock and key when the parents are away no progress would be made in implanting in the child's mind lessons in responsibility. Training in the proper use of the spring-gun and in acquiring a sense of responsibility took place in California shortly before the return of the boy's parents to West Vancouver: it continued after their return.

I have suggested in view of all the facts that it would be reasonable to permit the boy to use a spring-gun when his parents were absent: appellant, however, did not go that far; he imposed restrictions on its use. He told James that it could only be used when he (or his mother) was present. Asked if he so instructed the boy because he considered it dangerous he said "No, I did not want to take any risk with the gun." This is used against him, why I do not know: it was evidence of care, not of neglect: it was an added precaution. Was it reasonable to believe that the boy would obey this injunction? The answer is that appellant knew he had a good record for obedience at home and at school, and in any event he would know, that if he failed to obey, the training already received in its proper use would in all likelihood prevent mischief.

The boy continued to use the gun around the house in the father's presence "practically every day." I do not think there is any evidence in reference to open spaces, apart from what may be inferred; the accident did not occur in the city of Vancouver where the population is congested: it occurred in the district municipality of West Vancouver. Appellant watched his

C. A.
1941

EDWARDS
v.
SMITH

Macdonald, C.J.B.C.

son shooting at a target and at the end of practice made it a rule to place it in a cupboard. I think it must be conceded that thus far there is no evidence of negligence: all our references are to acts of caution. The only act of omission that can possibly be assigned—I do not think reasonably—is this: appellant either should have hidden the spring-gun or should have locked it up securely in his absence.

I venture to think a Court would obtain more light on this point from modern writers of repute on the training and rearing of children than from decisions of the Courts originating more than a century ago, although in truth I am not aware of any decision holding that in respect to spring-guns or objects comparable to them more care should be taken than was exhibited in this case. A necessary sense of gradually increasing responsibility cannot be developed by hiding out of sight objects attractive to boys or by placing them surreptitiously under lock and key. Even in the case of children of tender years with a propensity to grasp at objects, the parent who understands the best methods of training does not move them out of reach: time and care is given to teaching obedience: it is not proof that the method is wrong because of occasional failures. Where of course the instrument is inherently dangerous other considerations apply. Certainly the need of locking up a boy's spring-gun would at least depend on age and the training received.

Time spent in training and general observation would determine whether or not more drastic measures were necessary. In view of the facts known to him, appellant was justified in thinking it was not necessary to lock it up. I think he went further than necessary in view of the instructions given, the lessons received from an uncle, the days spent in training all for the purpose of developing self-reliance. He would be justified in trusting the boy to use it at all times. As intimated he went further than this in taking precautions.

It is important to observe that the children, including James, were never left without oversight. When appellant had to be absent at work the children's mother would be at home: whenever she left home she did not display lack of care: the children were left in charge of the respondent. Reasonably can it be said

either parent should anticipate danger under these conditions? I think not.

We are not obliged to shut our eyes to the way spring-guns or "BB" guns are used by boys of this age without interference beyond preliminary training. The careful parent teaches the child or ought to teach him to put his possessions away himself: it is a retrograde step to surreptitiously hide them or to lock them up. Results more dangerous might well ensue from the acts of a boy prevented from developing responsibility: it is far better that the child should be carefully taught and after instructions made the object of his parents' trust to a reasonable degree.

I do not propose to impose standards of care upon my neighbour that I do not impose upon myself unless convinced of my own negligence: there is a tendency, when occasionally an accident occurs, to be unreasonable in stipulating high standards of care. In this class of case, insisting upon these so-called high standards would in the end do more harm than good. The case is unfortunate to the parties concerned: the respondent lost the use of an eye and should succeed if by fairly applying principles of law she is entitled to compensation: we should be equally sure before imposing a serious liability on one, doubtless of limited means, that we are acting in accordance with law. I would allow the appeal.

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

O'HALLORAN, J.A.: While the respondent's twenty year old daughter was in charge of three young children of the appellant at his home in the municipality of West Vancouver, she was hit in the eye by a pellet fired from a spring-gun playfully pointed at her by the eldest child a boy of eleven. The parents were absent from home at the time. This appeal is from a judgment awarding $3,000 damages to the girl and $75 special damages to her father.

We have to determine if the appellant committed a breach of any duty he owed the girl injured while she was employed by him to look after his home and children. In *Shacklock* v.

C. A.
1941

EDWARDS
v.
SMITH

O'Halloran, J.A.

Ethorpe, Ltd., [1939] 3 All E.R. 372, Lord Macmillan (with whom Lord Atkin and Lord Wright agreed) said 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 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 governing elements of relationship in this case emerge as follows: (1) The girl was injured by the appellant's son in the course of and at the place of her employment, without negligence on her part; (2) the appellant's son was eleven years of age. He was of tender years; and he could not be expected to possess that ability for prudent independent action which comes with the training and experience of more mature years. The parents recognized this by leaving him and the two younger children in charge of the girl; (3) the father realized the spring-gun was a dangerous thing in the hands of this young boy, for he had forbidden him to use it except in the presence of his parents; (4) the spring-gun was kept in the kitchen; it was in a place of known and ready access to the boy; (5) the appellant left the girl in charge of his home and children for the afternoon but did not tell her the boy was not permitted to use the gun during his absence.

In order to ascertain whether the appellant committed a breach of duty which renders him liable we must consider his duty towards the girl as an employee to safeguard her from injury, as well as his duty to keep a dangerous and attractive spring-gun out of the hands of an immature boy. Lord Wright said in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152, at pp. 175-6 cited by Sir Lyman Duff, C.J. in *The King* v. *Hochelaga Shipping & Towing Co. Ltd.*, [1940] S.C.R. 153, at 156:

> Negligence is the breach of that duty to take care, which the law requires, . . . in regard to another's person or his property, . . . The degree of want of care which constitutes negligence must vary with the circumstances. . . . It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man.

The appellant's want of care must be measured therefore by the special circumstances of this case.

There is no doubt the boy was negligent in injuring the girl as he did. There is no doubt either that the appellant would have been negligent if he had done what the boy did; *vide* for example *Whalen* v. *Bowers* (1925), 35 B.C. 128 and cases there cited. It is clear the girl did not assume the risk of this injury. For she had no responsibility for the gun, she did not know where it was kept, and although acting *in loco parentis* was neither informed of the restrictions imposed on the boy in its use, nor instructed to prevent him using it. The appellant's responsibility for what the boy did depends upon whether he took reasonable precautions to prevent the boy using the gun. We were not informed of any municipal regulation affecting the ownership or use of this type of gun.

It is important to note we are not concerned with parental responsibility for the negligence of a youth of years of discretion and admitted ability for prudent independent action such as the seventeen year old girl in *North* v. *Wood* (1914), 83 L.J.K.B. 587 (Ridley and Bankes, JJ.) or the eighteen year old boy in *Hook* v. *Davies* (1939), 53 B.C. 437 (MORRISON, C.J.S.C.). Nor are we concerned with such a case as *Corby* v. *Foster* (1913), 13 D.L.R. 664, at 670-1. Nor is it contended that the appellant is liable simply because he is the father of the boy. In *Black* v. *Hunter,* [1925] 3 W.W.R. 393, Martin, J.A. of the Saskatchewan Court of Appeal applied this statement of the law at p. 395 as taken from 29 Cyc. 1666-7:

> While a parent may be liable for an injury which is directly caused by the child, where his negligence has made it possible for the child to cause the injury complained of and probable that the child would do so, this liability is based upon the rules of negligence rather than the relation of parent and child.

In that decision Martin, J.A. in my view stated the principle by which the appellant's conduct should be measured in this case when he said at p. 396:

> There can be no question but that the law requires a very high degree of care on the part of anyone who leaves anything potentially dangerous in a place where it is possible that children may meddle with it; everyone must be presumed to know that children will meddle with that which comes within their reach.

And *vide* also *Lynch* v. *Nurdin* (1841), 1 Q.B. 30; 113 E.R. 1041, Lord Denman, C.J. at p. 1044; *Heaven* v. *Pender* (1883),

C. A. 1941

EDWARDS v. SMITH

O'Halloran, J.A.

52 L.J.Q.B. 702, at 705-7-9; *Williams* v. *Eady* (1893), 10 T.L.R. 41; and *Sullivan* v. *Creed,* [1904] 2 I.R. 317.

We have to decide whether or not in the circumstances of this case the appellant father failed to take sufficient care to prevent the boy obtaining possession of and using an admittedly dangerous spring-gun, while he and the mother were away from home and the girl was in charge *in loco parentis.* As already stated the father's conduct in prohibiting the use of the gun by the boy except in the presence of his father or mother must be regarded as an admission that the boy was not sufficiently mature to use the gun with safety to others, and that the gun itself was a dangerous thing or at least was a dangerous thing when it was in the hands of the boy. That is to say the appellant had reason to anticipate danger to others if the boy were permitted to have control of the gun in the absence of his parents. In cross-examination the appellant admitted he had restricted the boy in the use of the gun because he thought that if the boy had the gun when he was not present it might cause trouble to someone because it was dangerous.

The gun was kept in the kitchen, and both sons had been instructed by the father that use of the gun was permitted only in the presence of one of the parents. On the day in question the appellant put the gun in a cupboard in the kitchen before leaving the house. That was the only precaution he then took. The cupboard was not locked. The boy knew where it was and it was easily reached. The girl who was to be in charge during his absence was not warned that the boy was not permitted to use the gun. The learned trial judge found, and it is supported by the evidence, that the girl had no responsibility whatever as to the gun, and did no know where it was kept. I see no escape from the conclusion that the appellant did not take proper care to prevent the boy obtaining possession and use of a dangerous thing, which from his own evidence he had reason to anticipate would occasion harm to others, if it got into the boy's possession while the parents were away.

The appellant relied on his general prohibition (not as a matter of fact repeated that day) that the boy should not use the gun except in the presence of his father or mother. But he

knew the boy was fond of playing with the gun. It is common knowledge boys like to play with any kind of gun, real or make believe, and that pointing and pretended shooting at each other occurs in the course of such play. He had reason to antipicate there was every probability that while the boy was playing with his brother and sister and other small friends, the attraction for the gun would prove superior to any general prohibition against its use. The girl was *in loco parentis* but he did not warn her not to let the boy have the gun. The appellant should have known that leaving the gun in a place of ready access with pellets to fire it available made its attraction all the greater. He should have reasonably anticipated it would prove an attraction the boy could not resist. The ordinary nature of boys cannot be ignored: *vide Williams* v. *Eady, supra,* Lord Esher, M.R. at p. 42.

As stated previously the degree of care depends upon the circumstances of each case; it is not a uniform standard. Here the father regarded it as dangerous that the boy should have the use of the gun when his parents were away. That in itself fixes a measure of care which the father set for himself in this case. It was said also that hitting the girl in the eye was an unusual danger. But the danger to be anticipated from the gun was being hit with a pellet fired from it. Whether the resulting injury is serious or of a minor nature does not affect the principle if the injury has arisen in a way that should have been anticipated; that is to say from firing the gun. That antipicated danger applied to the boy's brother and sister and other little playmates as well as to the girl actually hurt.

The appellant must be found liable for the girl's injuries, as he permitted a dangerous thing to come into the hands of an immature boy without control under circumstances in which he should have anticipated, as the event unfortunately proved, that harm might be done to the girl or other third party. I say "might" because it is not necessary that he should have foreseen exactly what happened. One is responsible not only for the necessary but for the reasonably probable consequences of his acts: *vide Sullivan* v. *Creed, supra,* Palles, C.B. at p. 328. The boy's negligent use of the gun in his absence was within the risk the father should have anticipated. The evidence discloses he did not take reasonable precautions to avoid that risk.

C. A.
1941

EDWARDS
v.
SMITH

In my view the learned trial judge determined the case in accordance with correct principles and the appeal should be dismissed.

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

Solicitor for appellant: *A. M. Whiteside.*
Solicitors for respondents: *MacInnes & Arnold.*

C. A.
1941
Jan. 16;
Feb. 3.

REX v. HAMM.

Criminal law—Invitation for subscribers for book including guessing competition—Ten branches of army, navy and air force services—Popularity race as to—Awards in money—"Contest"—Interpretation—Criminal Code, Sec. 235, Subsec. 1 (h).

Section 235, subsection 1 (*h*) of the Criminal Code makes a person liable for an offence who "advertises, . . . any offer, invitation or inducement to bet on, to guess or to foretell the result of any contest, or any result or contingency of or relating to any contest."

Accused appointed agents for the purpose of obtaining subscriptions for a book called "The War of 1940." Persons subscribing paid one dollar and filled out an order form and were given a receipt. The order form contained ten blank squares and read in part: "Please forward me the Souvenir Book 'The War of 1940.' I have filled out the Popularity Race Blank and agree to accept your decisions as final." The receipt stated that there would be awards estimated at $40,000, divided 60 per cent. to the winner, and so on. It contained a list of ten branches of the army, navy and air forces, each marked with one number from one to ten, followed by instructions: "Place these TEN services in the order of their popularity—to indicate your preferences simply put the numbers 1 to 10 in the above squares. Fill out in full using each number only once." On the back of the receipt are rules governing the awards. The accused was convicted on a charge that he did unlawfully aid and assist in giving notice of an invitation to guess or to foretell the result or contingency of or relating to a contest, contrary to the Criminal Code.

Held, on appeal, reversing the decision of police magistrate Hall (MCQUARRIE, J.A. dissenting), that there is no contest, or any contingency relating thereto upon the result of which the subscribers are invited to bet. What we have here is an invitation to join with other subscribers in a guessing competition among themselves. Section 235, subsection 1 (*h*) of the Criminal Code under which the charge is laid does not prohibit any such competition.

C. A.
1941

REX
v.
HAMM

APPEAL by accused from his conviction by police magistrate H. C. Hall, Victoria, on a charge

that on or about the 14th day of October, 1940, at the city of Victoria, in the Province of British Columbia, [he] did unlawfully aid or assist in giving notice of an invitation to guess or to foretell the result or contingency of or relating to a contest, contrary to the Criminal Code.

The accused appointed agents for the purpose of obtaining subscriptions for a book called "The War of 1940." Persons subscribing paid a dollar and filled out an order form and were given a receipt. The order form contained ten blank squares and read in part as follows:

Order Blank and Free Race Entry. . . . To Associated Societies of War Services: Enclosed please find One Dollar for which please forward me the Souvenir Book "The War of 1940." I have filled out the Popularity Race Blank and agree to accept your decisions as final. . . . Closing date December 27, 1940.

The agent's receipt stated that there would be

awards estimated at $40,000, divided 60% to winner, 20% to 2nd, 10% to 3rd and 10% to the next 37—1% of first award to selling agent.

The agent's receipt contained ten blank squares to correspond with those on the order form, and under the heading "Entries for Popularity Race" were listed ten branches of the army, navy and air force, such as infantry, navy, tanks, etc. There followed an invitation to the subscriber in these terms:

Place these ten services in the order of their popularity—to indicate your preferences simply put the numbers 1 to 10 in the above squares—Fill out in full using each number only once.

On the back of the agent's receipt there were rules governing payment of awards, reading in part as follow:

A Solution having the first (3) three placed correctly will be adjudged better than one having the first (2) two correct, or an entry showing the first (4) four placed correctly will be adjudged better than one having the first (3) three correct. This notwithstanding the accuracy of subsequent choices. . . . Winners will be notified as soon as results are known. . . . All entries to the Popularity Race are accepted subject to the regulations and restrictions governing each State or Province and each contestant agrees to accept our judge's decision as final. . . . Closing date December 27th, 1940. Results January 1st, 1941.

There was no evidence that the ten military services referred to had entered into any contest.

The appeal was argued at Victoria on the 16th of January, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

C.A.
1941

REX
v.
HAMM

Whittaker, K.C., for appellant: The charge is under section 235, subsection 1 (*h*) and (*j*) of the Criminal Code. The learned magistrate was wrong in finding that this was a contest. The popularity race is not a contest. There must be an event on which the wager is made to bring it within the above section of the Code: see *Rex* v. *Proverbs,* [1923] 2 W.W.R. 622; *Rex* v. *Lutes* (1923), 41 Can. C.C. 181; *Rex* v. *Mulholland* (1923), 33 B.C. 10.

Davey, for respondent: This is a contest within the meaning of section 235, subsection 1 (*h*). It comes within the words "any result or contingency of or relating to any contest": see *Rex* v. *Lutes* (1923), 41 Can. C.C. 181, at p. 183. The "contest" is in the offer itself. There is a contingency involved in the contest.

Whittaker, replied.

Cur. adv. vult.

3rd February, 1941.

MACDONALD, C.J.B.C.: I agree on the facts that the charge as laid cannot be sustained.

MCQUARRIE, J.A.: With due deference I cannot agree with the judgment of the majority of the Court herein. After careful consideration of the facts and the authorities discussed before us by counsel I have come to the conclusion that on the facts this case comes within section 235, subsection 1 (*h*) of the Criminal Code for the reasons stated by the learned trial magistrate whose findings I think are important. The majority held that

> We have here no contest nor any contingency relating thereto upon the result of which the subscribers are invited to bet. What we have is an invitation to join with other subscribers in a guessing competition among themselves.

It is clear therefore that there was an "invitation" to enter some kind of a competition. As I see it there is no difference between a competition and a contest. The Code so far as I have been able to discover does not contain a definition of the word "contest" but the Oxford Dictionary, 1893, appears to bear out my statement as just mentioned. At page 901, Vol. II., I find this definition of "contest":

> Amicable conflict, as between competitors for a prize or distinction; competition.

The only question which is involved here is whether the contest

was unlawful or not under the Code. Clause (*h*) of subsection 1 of section 235 of the Code under which the charge is laid reads as follows:

(*h*) advertises, prints, publishes, exhibits, posts up, or otherwise gives notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of any contest, or any result or contingency of or relating to any contest;

In my opinion this was not merely "a guessing competition among themselves" like guessing the number of beans in a jar, for instance, where possibly some skill is exercised. Applying the findings of fact made by His Worship as aforesaid with which I agree, I am forced to the conclusion that what was attempted to be inflicted on the gullible portion of the public was not even a fairly decent and respectable contest or competition in which the promoters would share a portion of the receipts with the lucky ones among the subscribers, but was what is commonly known as a "skin game," "racket" or confidence trick of the worst order, where really the contest was between the subscribers and the promoters as to whether the subscribers or any of them would get any money in the way of a prize or not. What usually happens in a fraudulent game of this kind might happen again here and after getting all they could the organizers would fold their tents and silently fade away. That Parliament could have intended that such a thing should be allowed to be carried on without adequate punishment is beyond my comprehension. Details of the scheme are given in Exhibit 1. In the first place there was to be a "Souvenir Book" described as "The War of 1940" at the price of $1 per copy and it was also stated that "Profits are for War Charities and Services." At the hearing it was not even suggested that it was ever intended that such a book should be issued or that any war charities or services would receive any part of the profits of the scheme which was described as a "Popularity Race." Then there was an "Order Blank and Free Race Entry." It was also stated under the heading of

Awards Estimated at $40,000, Divided 60% to winner, 20% to 2nd, 10% to the next 37—1% of 1st award to selling agent.

It is to be noted that the originators of the scheme were apparently not to receive any profits whatever. Under the heading of "Entries for Popularity Race" we find the following:

C. A.
1941

REX
v.
HAMM

McQuarrie, J.A.

1. Infantry. 2. Army Service.
3. Ambulance. 4. Artillery.
5. Navy. 6. Signal Corps.
7. Mine Layer. 8. Air Pilot.
9. Tanks. 10. Submarine.

Place these TEN services in the order of their popularity—to indicate your preferences simply put the numbers 1 to 10 in the above squares—Fill out in full using each number only once.

Apparently the contest was to guess which of the services mentioned was the most popular. The result did not depend on the number of votes cast by subscribers for the different services respectively but upon the decision of a "judge" to be appointed by the mythical "Associated Societies of War Services," and the decision of that judge (not necessarily a member of the judiciary) should be final. The basis on which the "judge" should arrive at his decision is not stated and that is where the contest apparently comes in. There was also, of course, to be the contest between the subscribers for the prize money.

It was also shown by the evidence that there were actually a number of subscribers to the scheme which no doubt would have been quite profitable for the promoters had it not been for the intervention of the police which I think was entirely justifiable.

I would therefore dismiss the appeal.

SLOAN, J.A.: In my view the evidence in this case does not bring the accused within section 235, subsection 1 (*h*) of the Code and in consequence I would allow the appeal and set aside the conviction.

O'HALLORAN, J.A.: I would allow the appeal for the reasons given by my learned brother MCDONALD.

MCDONALD, J.A.: The appellant was convicted before magistrate H. C. Hall, under section 235, subsection 1 (*h*) of the Criminal Code for that he did aid or assist in giving notice of an invitation to guess or to foretell the result or contingency of or relating to a contest. The facts are that the appellant and his partner one Hague invited subscribers each to contribute $1 for the privilege of competing with one another in guessing the winner in what was called a "Popularity Race" among ten different arms of the services. Each subscriber had the privilege of

marking his ticket to indicate by number the order in which the services stand in popularity. The idea was that the judge to be selected by the operators of the scheme would decide who among the subscribers made the most popular selection, and so on, and the money in the fund was to be distributed accordingly. There is no evidence that the services have anything whatever to do with any such scheme. One would be surprised if it were suggested that any such evidence existed. Hence there was in fact no "Popularity Race" as the tickets would indicate. What we really have is a guessing contest among the subscribers themselves, there being no other contest or contingency on which their money was to be staked. The point for decision is whether such a contest falls within the apposite section of the Code.

The history of the legislation involved, that is to say legislation against betting, begins in 1853 with the Imperial statute 16 & 17 Vict., Cap. 119, whereby the keeper of any house or place was forbidden to receive any money for the consideration of any promise to pay thereafter any money on any event or contingency of or relating to any race, fight, game, sport or exercise. By statute of 1874, 33 Vict., Cap. 15, the prohibition was extended to include any advertisement or the like

inviting any person to make or take any share in or in connection with any such bet or wager.

The statute of 1853 was in effect carried into our Criminal Code in 1892, it being made unlawful by section 204 (*d*) to record or register any wager upon the result

(i.) of any political or municipal election;

(ii.) of any race;

(iii.) of any contest or trial of skill or endurance of man or beast.

Thus the matter stood until 1910 when the section was repealed and a new section numbered 235 was enacted. Now for the first time in Canada it was by section 235, subsection 1 (*g*) and (*h*) forbidden to advertise or make any offer or invitation to bet, or to convey any information relating to betting or wagering. I should say it is reasonably clear that the betting or wagering referred to in subsection 1 (*g*) and (*h*) is that mentioned in subsection 1 (*d*), just as such bet or wager in the English statute of 1874 refers to the bet or wager mentioned in the statute of 1853.

In 1922 by Cap. 16, Sec. 13 of the statutes of that year sub-

C. A.
1941

REX
v.
HAMM

McDonald, J.A.

section 1 (*g*) was repealed and a new subsection passed whereby the prohibition was extended to the advertising of any offer, invitation or inducement to bet on, to guess or to foretell the result of any contest. Again I should say it is fairly clear that what was aimed at was a contest of one of the sorts mentioned in subsection 1 (*d*).

On June 7th, 1923, the Appellate Division in Alberta rendered a decision in *Rex* v. *Proverbs,* [1923] 2 W.W.R. 622, wherein it was held that a guess or foretelling by subscribers as to the number of goals to be scored by certain opposing football teams as compared with the goals scored by the same respective opposing teams in the previous year was not a guess or foretelling as to the result of any contest, the real contest not being the score as compared to that of the previous year, but being the actual winning of the game. In their decision their Lordships relied upon the well-established rule that in a penal statute words must not be supplied by implication. It will be noted of course that in the *Proverbs* case there was no contest at all, as there is here, among the subscribers themselves. Up to that stage no one had suggested that any such competition came within the laws relating to betting.

On June 30th, 1923, the statute was again amended by Cap. 41, Sec. 5, whereby there were added to subsection 1 (*g*) after the word "contest," the words "or any result or contingency of or relating to any contest." It is obvious, I think, that this amendment was intended to cover the point raised in the *Proverbs* case. It is now contained in subsection 1 (*h*) of section 235.

Then came the decision of this Court in *Rex* v. *Mulholland,* 33 B.C. 10, decided October 2nd, 1923. Unfortunately the decision is not very helpful. CAYLEY, Co. J., had convicted the appellant, on facts precisely similar to those in the *Proverbs* case, on two counts, one under sections 227 (*b*) (i) and 228, and one under 235, subsection 1 (*g*). On appeal MACDONALD, C.J.A. upheld the conviction under section 235, subsection 1 (*g*); MARTIN, J.A. (as he then was) took exactly the contrary view, while EBERTS, J.A. affirmed the conviction on both counts. In his judgment MARTIN, J.A. declined to follow the Alberta decision holding that the "contest" in question was really, as

here, among the subscribers themselves, and that such "contest" was prohibited by the statute, which we are presently considering. While the opinion of MARTIN, J.A. would support the Crown's contention in the present case it should be noted that there was there in fact an actual contest between opposing football teams and the subscribers were betting upon a contingency relating to that contest. The opinion of the learned judge must be taken to have been expressed in relation to the facts of the case before him.

On October 8th, 1923, the Court of Appeal for Saskatchewan rendered a decision in *Rex* v. *Lutes,* 41 Can. C.C. 181 wherein they held that following the 1923 amendment, betting on the scores to be made in certain baseball games came within the prohibition of the subsection now under consideration as being covered by the expression "or any result." Here again there was an actual contest between third parties upon the result (in some sense or other) of which contest the subscribers were betting. It is important to note that this decision is based upon the assumption (see p. 183) that the word "contest" in subsection (*g*) now (*h*), is used in a sense similar to the meaning assigned to it in section 235 (*d*) (iii).

In my view the present case differs from any of the cases cited and the offence charged does not come within the purview of section 235, subsection 1 (*h*) under which the charge is laid. We have here no contest nor any contingency relating thereto upon the result of which the subscribers are invited to bet. What we have is an invitation to join with other subscribers in a guessing competition among themselves. In my opinion the subsection in question has not prohibited any such competition. Had Parliament so intended apt words should not have been difficult to find.

I would allow the appeal and quash the conviction.

Appeal allowed; conviction quashed, McQuarrie, J.A. dissenting.

Solicitors for appellant: *Whittaker, Harvey, McIllree & Twining.*

Solicitor for respondent: *H. Alan Maclean.*

S. C.
1940
Oct. 28;
Nov. 1.

C. A.
1941
Jan. 21;
Feb. 3.

DIXIE v. ROYAL COLUMBIAN HOSPITAL.

Statute, construction of—Limitation of actions—Shortening time for bringing action—Hospital Act, R.S.B.C. 1936, Cap. 121, Sec. 31.

The plaintiff was born in the defendant hospital on the 28th of September, 1917. On the next day she suffered injury, her right side, right breast and right arm being severely burned and causing permanent scars owing to the alleged negligence of a nurse employed in the hospital. She brought this action for damages on the 17th of August, 1939, being within one year after she came of age. The defendant pleaded, *inter alia*, that the action was barred by section 31 of the Hospital Act. On the point of law being heard, it was held that said section 31 of the Hospital Act was retrospective and barred the plaintiff's claim.

Held, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.B.C. dissenting), that unless the language used plainly manifests in express terms or by clear implication a contrary intention—(a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective. Said section 31 falls within either (a) or (c) but is not within (b). The language in which it is couched does not plainly manifest an intention that the section is to be applied retrospectively.

APPEAL by plaintiff from the decision of MURPHY, J. in an action tried by him at New Westminster on the 28th of October, 1940, for damages resulting from injuries received in the defendant hospital. The plaintiff was born on the 28th of September, 1917. At the time of her birth her mother was a patient in the hospital, but the plaintiff was a normal child and remained in the hospital to await the discharge of the mother from the hospital. The plaintiff claims that on the 29th of September, 1917, she was painfully injured and permanently disfigured and disabled by the negligence of a nurse, a servant of the defendant, in that she carelessly and negligently placed an ice-cap composed of rubber and metal and containing extremely hot water against the right side, right breast and right arm of the plaintiff and thereby seriously and permanently burned, disfigured and injured her. The action was brought within one year after the plaintiff had attained the age of twenty-one years. The defendant claims the action is barred by section 31 of the Hospital Act (set out in

the judgment of MURPHY, J.). This section came into force in 1934 and this action was brought five years later.

Sullivan, K.C., and *C. D. McQuarrie*, for plaintiff
Reid, K.C., and *Cassady*, for defendant.

Cur. adv. vult.

1st November, 1940.

MURPHY, J.: It is my opinion plaintiff's claim is barred by section 31 of the Hospital Act, R.S.B.C. 1936, Cap. 121. This section reads as follows:

> All actions against the owner or the board of management of a hospital receiving aid under this Act for indemnity for any damages, whether continuous or not, sustained by any person by reason or in consequence of any act of negligence on the part of the owner or the board of management or any of his or its officers, servants, or employees shall be commenced within one year after the cause of action arose; and every action within the scope of this section which is not commenced within the period so limited shall be absolutely barred.

Admittedly the Legislature can take away a right of action if it sees fit. I agree that the intention of the Legislature must be shown by clear language and that such construction is placed on a particular piece of legislation only if the Legislature has shown its intention by clear language. The language of said section 31 in my opinion, meets such requirement, particularly the words

> and every action within the scope of this section which is not commenced within the period so limited shall be absolutely barred.

There can be no question that the cause of action set up in this case is within the scope of the section. It has not been commenced within the period limited by the section. The Legislature has said that in consequence it shall be absolutely barred. I cannot conceive of language that could more clearly indicate the intention of the Legislature to bar such action.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 21st of January, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Sullivan, K.C., for appellant: The plaintiff was born on the 28th of September, 1917, and owing to treatment at the hospital on the following day her right arm, right side and right breast

C. A.
1941

DIXIE
v.
ROYAL
COLUMBIAN
HOSPITAL

were injured. The action for damages was brought within one year after she was twenty-one years of age. It was held that section 31 of the Hospital Act was a bar to the action. The section came into force in 1934. The action arose in 1917. We submit that this section has no retrospective effect: see *The Ydun,* [1899] P. 236, at p. 245. If a right of action is taken away it must be done in clear words: see Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 513, secs. 670 and 671; Maxwell on Statutes, 8th Ed., 5 and 189-90; *Wright* v. *Hale* (1860), 6 H. & N. 226; *Upper Canada College* v. *Smith* (1920), 61 S.C.R. 413, at pp. 416, 442-3 and 445; *Steeves* v. *Dufferin Rural Municipality* (1934), 42 Man. L.R. 489; *Kearley* v. *Wiley* (1931), 66 O.L.R. 490; *Stephenson* v. *Parkdale Motors Ltd.* (1924), 56 O.L.R. 180. This is not a matter of procedure only: see *Hemphill* v. *McKinney* (1915), 21 B.C. 561.

Locke, K.C., for respondent: The case is confined to section 31 of the Hospital Act and its retrospective effect. *Upper Canada College* v. *Smith* (1920), 61 S.C.R. 413 is not on a statute of limitations at all. The case of *McGrath* v. *Scriven,* [1921] 1 W.W.R. 1075, is decisive of this case and was a judgment delivered by the Supreme Court one month prior to the *Upper Canada College* case and it was not cited on the argument of the *Upper Canada College* case. The judgment should be upheld on the grounds stated by the learned trial judge. Section 31 is clear and this action was brought five years after the Act was passed: see *Board Trustees Acme Village School Dist.* v. *Steele-Smith,* [1933] 1 D.L.R. 545, at p. 551. The parents could have brought an action at any time after 1917. The Act applies to existing rights and there is no presumption that they are not intended to interfere with existing rights: see *West* v. *Gwynne,* [1911] 2 Ch. 1, at pp. 4-6. This amendment applies to occurrences both before and after it was enacted: see *Rex* v. *Chandra Dharma,* [1905] 2 K.B. 335. It related to procedure only and it is retrospective. Statutes of limitation are always matters of procedure: see Maxwell on Statutes, 8th Ed., 198; Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 517; Vol. 20, p. 596; *Spears* v. *Hartly* (1800), 3 Esp. 81; *Beattie* v. *Dorosz and Dorosz,* [1932]

2 W.W.R. 289; *Jacobs* v. *London County Council* (1934), 104 L.J.K.B. 84.

Sullivan, in reply, referred to *Singer* v. *The King,* [1932] S.C.R. 70.

Cur. adv. vult.

3rd February, 1941.

MACDONALD, C.J.B.C.: Appeal from the judgment of MURPHY, J. I am of the same opinion as the trial judge in respect to the construction of section 31, R.S.B.C. 1936, Cap. 121. Assuming for this purpose that the principles outlined by my brother SLOAN are sound I still think the language employed clearly applies to this case. Certainly the draftsman would be disappointed upon finding—if such is the fact—that it does not cover an action in respect to alleged injuries received many years ago; doubtless it will be difficult dealing with a period so remote to procure evidence or to ascertain the true facts. "All actions" without any exception, in the circumstances outlined in the section, are barred. It refers to cases where damages are "sustained" in distinction to an action for damages arising in the future: a verb in the past tense is inserted. I do not think, with deference, that the use of the word "shall" militates against this view. The phrase "shall be commenced" may appropriately be applied to all actions past or future: it would in fact be impossible to select any other words to cover the point.

I think, therefore, the section should be given a retrospective interpretation.

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

SLOAN, J.A.: On the 29th day of September, 1917, the plaintiff, then an infant, suffered injury as the result of the alleged negligence of a nurse employed by the defendant hospital. On the 17th of August, 1939, she commenced this action claiming damages for such injury.

The defendant pleaded *(inter alia)* that the action was barred by section 31 of the Hospital Act, R.S.B.C. 1936, Cap. 121.

This point of law having been set down for hearing it came on before MURPHY, J., who held that said section 31 was retroactive

C. A.
1941

DIXIE
v.
ROYAL
COLUMBIAN
HOSPITAL

Sloan, J.A.

and barred the plaintiff's claim. The plaintiff appeals from that determination.

With great respect I think the learned judge below fell into error.

Section 31, which was originally passed in 1934 (B.C. Stats. 1934, Cap. 28, Sec. 2) reads as follows: [already set out in the judgment of MURPHY, J.]

The law relating to the construction of statutes as prospective or retrospective in their application has been the subject of many weighty opinions; some of them irreconcilable. However, from my reading of the English and Canadian cases, including *Upper Canada College* v. *Smith* (1920), 61 S.C.R. 413, and *McGrath* v. *Scriven,* [1921] 1 W.W.R. 1075 (and others founded thereupon) in my view, the following relevant principles emerge as established by the weight of authority: unless the language used plainly manifests in express terms or by clear implication a contrary intention:

(a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

In my opinion said section 31 falls within either (a) or (c) but is not within (b). The language in which it is couched does not plainly manifest an intention that the section is to be applied retrospectively. Attention is drawn to the use of the word "shall" which is expressive of futurity—*Smithies* v. *National Association of Operative Plasterers,* [1909] 1 K.B. 310, at p. 319.

It follows then that said section 31 does not have a retrospective effect and therefore does not bar the plaintiff's claim. With deference I would allow the appeal.

O'HALLORAN, J.A.: I concur in the judgment of my learned brother SLOAN allowing the appeal.

MCDONALD, J.A.: I concur in the judgment of my brother SLOAN. I think, however, that in deference to counsel who made the decision in *McGrath* v. *Scriven,* [1921] 1 W.W.R. 1075, his

sheet anchor, I should make some further reference to that case which was decided by the Supreme Court of Canada very shortly before *Upper Canada College* v. *Smith* (1920), 61 S.C.R. 413. It is strenuously contended that these decisions are in conflict. Examination has satisfied me, however, that there is no real conflict even though the *McGrath* case contains *dicta* that cannot easily be reconciled with the reasoning in the *Upper Canada* case.

In the *McGrath* case the material ruling was that an action by the owner of liquor against a constable for first seizing and later destroying the liquor was barred by an amendment to a statute which imposed a time limitation of three months on actions against constables. Prior to the amendment the statutory limitation was six months. The material dates were as follow: Seizure by the constable on 29th March, 1918, amendment of the statute 26th April, 1918, destruction by the constable 1st May, 1918, action begun 31st July, 1918. There could, therefore, be no doubt of the amendment's applying to the claim for destruction of the liquor, for it was not destroyed until after the amendment, so that no question of retrospectivity could arise. The original seizure took place 28 days before the amendment, so even if the amendment did operate retrospectively, still the plaintiff had more than two months thereafter wherein to bring his action for the seizure, before the statute, literally applied, would bar him. He did not have the full three months given; but still his remedy was not arbitrarily abolished without there being preserved to him any chance to assert it.

The *Upper Canada* case dealt with a statutory provision similar to section 4 of the Statute of Frauds which required any agreement for paying a real-estate agent's commission to be in writing. The Supreme Court of Canada held that such enactment ought not to be construed as retrospective, so as to apply to an agreement made before the statute; for it was pointed out that such a construction would totally deprive the plaintiff of a vested right of action without giving him any chance of complying with the statutory requirement. The judgments dealt elaborately with all phases of the question when an enactment barring or restraining legal remedies should be deemed to operate retrospectively. Duff, J. (as he then was), in particular reviewed the

C. A.
1941

DIXIE
v.
ROYAL
COLUMBIAN
HOSPITAL

McDonald,
J.A.

decisions on statutes of limitations and distinguished several decisions that held such statutes to bar particular causes of action which arose before the statute, on the ground that those decisions did not totally bar intending plaintiffs as from their enactment, but left them still a limited opportunity to sue, inasmuch as the statutes by their terms did not come into effect for a number of weeks after enactment. On this basis I think the two cases can be reconciled and the decision in the *McGrath* case does not stand in the appellant's way on this appeal.

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

Solicitors for appellant: *Sullivan & McQuarrie.*
Solicitors for respondent: *Cassady & Lewis.*

LEVI AND LEVI v. MACDOUGALL, TRITES AND PACIFIC COAST DISTILLERS LIMITED.

C. A.
1940
Nov. 18, 19.
1941
Jan. 14.

Company law—Action by shareholders—Request for company to bring action—Refusal—Sufficiency—Point of law—Rules 281, 282 and 283.

The plaintiffs Sam and Dora Levi sued on behalf of themselves and all other shareholders of Pacific Coast Distillers Limited, save the defendants *MacDougall* and Trites, alleging that the defendant *MacDougall*, acting in his capacities as president, director and solicitor of the company, in breach of his fiduciary duty, connived with defendant Trites with the result that Trites, through the failure of the company to defend an action brought by Trites to foreclose a mortgage held by him upon the assets of the company, obtained a final order for foreclosure, and having obtained title to such assets sold them at a large personal profit. The plaintiffs allege in their statement of claim that prior to the issue of the writ herein they applied in writing to the defendant company for permission to bring this action in the name of the said company. Permission was refused in writing and the said company was then added as a defendant herein. On the trial objection was taken by the defence *in limine* that the statement of claim disclosed no cause of action. The two letters above mentioned were allowed in evidence without objection and the learned judge also considered as evidence an admitted statement of fact that of 190,000 issued shares of capital stock of the company, the defendant *MacDougall* was the registered holder of only 70,001 shares. Upon hearing argument on the point of law the learned judge acting under the powers contained in rules 281, 282 and 283, held that the statement of claim disclosed no cause of action, and the action was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (MACDONALD, C.J.B.C. and MCQUARRIE, J.A. dissenting), that it is an essential element or ingredient of this particular type of class action that it be alleged that there has been a refusal to sue by the shareholders of the company in meeting assembled or that the holding of such a meeting would be futile by reason of the defendants being majority shareholders. The demand in the plaintiffs' letter to the defendant company above referred to was obviously not such a demand as the law requires, the evidence further discloses that the defendants were not majority shareholders, and the appeal should be dismissed.

APPEAL by plaintiffs from the decision of MURPHY, J. of the 10th of June, 1940, dismissing an action brought by Sam Levi and Dora Levi on behalf of themselves and all other shareholders of the Pacific Coast Distillers Limited, except *Albert Reginald MacDougall* and Amos Bliss Trites. The plaintiffs ask for damages against the defendants, for an order directing the return

C. A.
1940

LEVI
v.
MAC-
DOUGALL,
TRITES AND
PACIFIC
COAST
DISTILLERS
LTD.

of certain books and records of the defendant company, and for rectification of a certain mortgage executed by the company on the 25th of November, 1936, whereby certain assets of the company were mortgaged to the defendant Trites. The defendant *MacDougall* is a solicitor and was also president and a director of the defendant company at the time the mortgage was given and foreclosed. The plaintiffs allege that *MacDougall* and Trites conspired to deprive and did deprive the company, by a series of tortious acts, of all its undertakings and assets by means of foreclosure proceedings. They also claim damages from *MacDougall* for negligence in the performance of his duties as solicitor of the company. It was not alleged by the plaintiffs that any attempt was made before the action was commenced to obtain proper authority from the company in public meeting assembled to sue in its name, nor that *MacDougall* and Trites were in control of the company, and such attempt would be futile. They allege, however, that the plaintiffs prior to the action applied in writing to the company for permission to bring the action, and this was refused, and the company was then added as a defendant. The defendants alleged the statement of claim was bad in law and that it disclosed no cause of action. Effect was given to the defendants' objection and that the plaintiffs could not maintain the action as framed.

The appeal was argued at Vancouver on the 18th and 19th of November, 1940, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

J. A. MacInnes, for appellant: The procedure adopted here is unauthorized by rules 282 and 283. No point of law was properly raised in the defence pleadings. A general plea such as is relied upon by the defendants is no plea without specific grounds: see Bullen & Leake's Precedents of Pleadings, 7th Ed., 122; *Page* v. *Page* (1915), 22 B.C. 185; *Merchants' Bank of Canada* v. *Bush* (1917), 24 B.C. 521; *Stokes* v. *Grant* (1878), 4 C.P.D. 25. There was no consent by the plaintiffs nor was any order made by the Court permitting the defendants to set down or present the motion. The above are prerequisites under rule 282. The pleading attacked must be accepted for the purpose of the motion: see *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816, at 821. The

dismissal here was a mistrial: see *Republic of Peru* v. *Peruvian Guano Company* (1887), 36 Ch. D. 489, at p. 495; *Steeds* v. *Steeds* (1889), 22 Q.B.D. 537, at p. 542. Instead of dismissing the action he should have directed the calling and holding of a meeting of members to ascertain their wishes: see *Pender* v. *Lushington* (1877), 6 Ch. D. 70, at p. 78; *Silber Light Company* v. *Silber* (1879), 12 Ch. D. 717, at p. 722. The application was too late: see *Cross* v. *Earl Howe* (1892), 62 L.J. Ch. 342; *Mitchell* v. *Campbell*, [1937] 2 W.W.R. 497. The material fact was the refusal by the company to take action: see *Williams* v. *Wilcox* (1838), 8 A. & E. 314, at p. 331; *F.* v. *Koyl Securities Ltd.*, [1940] 1 W.W.R. 669; *Steuart* v. *Gladstone* (1879), 10 Ch. D. 626, at p. 644. The matters complained of here are not within the rule in *Foss* v. *Harbottle* (1843), 2 Hare 461: see *Madden* v. *Diamond* (1906), 12 B.C. 80; *Alexander* v. *Automatic Telephone Company*, [1900] 2 Ch. 56, at p. 69; *Clark* v. *Workman*, [1920] 1 I.R. 107, at pp. 116-17; *Baillie* v. *Oriental Telephone and Electric Company, Limited*, [1915] 1 Ch. 503; *Burland* v. *Earle*, [1902] A.C. 83; *Theatre Amusement Co.* v. *Stone* (1914), 50 S.C.R. 32, at pp. 35 and 37. Where the wrong-doers are in control see *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350; *Cook* v. *Deeks*, [1916] 1 A.C. 554; *Lumbers* v. *Fretz* (1928), 62 O.L.R. 635, at pp. 650-1; *Ferguson* v. *Wallbridge*, [1935] 1 W.W.R. 673, at p. 691. If the company refuses to permit litigation of the questions raised the proper course is to allow the action to proceed: see *International Wrecking Co.* v. *Murphy* (1888), 12 Pr. 423, at pp. 424-5. The wrong-doers should not escape on the pretence that the matter falls within internal management of the company: see *Alexander* v. *Automatic Telephone Company*, [1900] 2 Ch. 56. If the transaction impeached is open to objection on its merits it should be heard: see *Normandy* v. *Ind, Coope & Co., Limited*, [1908] 1 Ch. 84, at p. 109; *Cook* v. *Deeks*, [1916] 1 A.C. 554, at p. 564; *Allen* v. *Gold Reefs of West Africa, Limited*, [1900] 1 Ch. 656, at p. 671; *Brown* v. *British Abrasive Wheel Co.*, [1919] 1 Ch. 290, at p. 295; *Roxborough Gardens of Hamilton Limited* v. *Davis* (1920), 46 O.L.R. 615, at pp. 629-30; *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy.

C. A. 1940

LEVI v. MACDOUGALL, TRITES AND PACIFIC COAST DISTILLERS LTD.

App. 350; *British America Nickel Corporation* v. *M. J. O'Brien*, [1927] A.C. 369.

Locke, K.C., for respondents: The action if maintainable should be brought by the company itself: see Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 408, sec. 675; *Burland* v. *Earle*, [1902] A.C. 83, at p. 93. This is clearly laid down in *Foss* v. *Harbottle* (1843), 2 Hare 461, and *Mozley* v. *Alston* (1847), 1 Ph. 790. See also *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215; *Gray* v. *Lewis*. *Parker* v. *Lewis* (1873), 8 Chy. App. 1035. The only exception is where the persons against whom relief is sought control the company themselves and will not permit the action to be brought in the name of the company. There is no allegation in the statement of claim that *MacDougall* and Trites hold such a preponderance of shares. Such an allegation is necessary to take the case out of the general rule: see *Johnston v. Carlin* (1914), 20 B.C. 520, at p. 525; *Ferguson* v. *Wallbridge*, [1935] 3 D.L.R. 66, at p. 83. The reasons and findings of the learned trial judge are correct and supported by the cases referred to. See also the cases referred to by MARTIN, J.A. in *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215. The learned judge did not allow a demurrer but simply gave effect to a point of law raised in the statement of defence that the amended statement of claim disclosed no cause of action. This point of law having been raised in the defence the trial judge under rules 282 and 283 of the Supreme Court Rules, and the inherent jurisdiction of the Court heard the defendants' objection and dismissed the action. The Court will at the trial of an action involving questions of both law and fact decide the question of law first if it appears that the decision of such question may render it unnecessary to try the questions of fact: see *Pooley* v. *Driver* (1876), 5 Ch. D. 458; *Dadswell* v. *Jacobs* (1887), 34 Ch. D. 278, at p. 284. Rules 2, 3 and 4 of Order XXV. give an alternative method of procedure: see *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86, at pp. 90-1. The consent of the plaintiff to the hearing of the objection raised is required, and no notice is required beyond such notice as was given in the statement of defence. The plaintiffs were not prevented from adducing evidence in opposi-

tion to the defendants' objection and no application was made to amend the statement of claim. The learned trial judge properly dismissed the action.

MacInnes, replied.

Cur. adv. vult.

14th January, 1941.

MACDONALD, C.J.B.C.: Appeal from the judgment of MURPHY, J. dismissing without trial an action by two shareholders of Pacific Coast Distillers Limited brought on behalf of themselves and all other shareholders against *MacDougall,* the president and a director of the company, and Trites, a shareholder. The company was added as a party defendant upon its refusal, as alleged, to permit its name to be used as plaintiff. Counsel for defendants at the opening of the trial, without notice of intention so to do, applied to the trial judge for dismissal on the ground that the statement of claim disclosed no cause of action in the plaintiffs. This application was acceded to and the action dismissed; hence this appeal.

It was alleged in the statement of claim that the defendant Trites, with the aid and connivance of the defendant *MacDougall,* unlawfully obtained by foreclosure of a mortgage title to the company's property and sold it to another brewery. *MacDougall,* it is alleged, occupied a dual position; he was not only president and a director of the company but also agent for Trites, whose interests as mortgagee were adverse to the company's interests.

The statement of claim alleged (and we must assume truly) that the company obtained a loan of $20,000 from the bank and the defendant Trites guaranteed payment: it thereupon executed a mortgage in his favour on all its property and assets. It contained a condition that a 60-day request in writing should be given by the mortgagee, or his representative before calling upon the mortgagor to retire this indebtedness to the bank; this notice, it is alleged, was not given. It is further alleged that the company was not in default for interest or taxes, but notwithstanding absence of default and demand for payment by the bank or by Trites foreclosure proceedings were instituted. It is alleged that while *MacDougall* was president of the company he instructed a solicitor to start a foreclosure action on behalf of Trites wherein

C. A.
1941

LEVI
v.
MAC-
DOUGALL,
TRITES AND
PACIFIC
COAST
DISTILLERS
LTD.

Macdonald,
C.J.B.C.

it was falsely alleged to the knowledge of both defendants that the company was in default. It is further alleged that the defendant *MacDougall* in connivance with Trites, after securing a solicitor to act for Trites, entered an appearance for the company and thereafter purported to act as solicitor for the defendant company. I should add that Trites was the owner of a block of the company's shares: they were held by *MacDougall* in trust for Trites.

It is further alleged that *MacDougall,* in collusion with Trites, convened a general meeting of shareholders and at said meeting made certain representations outlined in the statement of claim to induce them to believe, contrary to the facts, that the foreclosure proceedings should be permitted to culminate in a final judgment for foreclosure to debar the claims of a creditor with an execution in the hands of the sheriff. It is also alleged that he advised the shareholders that the defendant Trites while prosecuting the action as aforesaid, would hold it in abeyance to enable the company to effect a sale of its undertaking as a going concern or until some other financial arrangements could be made. In the meantime it is alleged the defendants prior to the shareholders' meeting referred to, and unknown to the shareholders, opened negotiations with one Albert Loftus McLennan, a director and officer of United Distillers Limited, a brewery in competition with the defendant company, for the sale to McLennan, or his nominee of the business, assets, effects and undertaking of the defendant company, as soon as the defendant Trites could obtain a final decree of foreclosure. It is also alleged that the distillery licence of the defendant company had a value of $150,000 and that foreclosure involved its loss and surrender.

It is further alleged that *MacDougall,* although aware that the defendant company was not in default and that no demand for payment had been made did not file any defence and let it appear to the Court that the company was in fact in default with respect to interest and taxes thereby aiding his co-defendant Trites to obtain by Court motion instead of by trial, a foreclosure decree. Throughout the relationship as aforesaid prevailed between the two defendants. It is further alleged that no evi-

dence was offered to warrant the limitation of the usual period of three months for redemption nor any material put forward to justify the request on behalf of Trites for acceleration of foreclosure proceedings.

The agreement with the said McLennan was executed on the 25th of June, 1938; it provided that Trites should convey to him or to his nominee the whole of the mortgaged premises if and when the said defendant obtained a final order of foreclosure. The defendant *MacDougall,* it is alleged, in collusion with the defendant Trites, aided and assisted in, and had knowledge of the terms of said agreement preparing a written memorandum thereof or in the alternative settling and agreeing to the terms of said agreement.

It is further alleged that upon the taking of the mortgage accounts pursuant to a decree *nisi* it was falsely claimed on behalf of Trites that the defendant company was in default in respect to interest in the sum of $1,486.09 and the defendant *MacDougall* failed to controvert this claim. He also knew, it is alleged, that there was no default in respect to taxes for the year 1938 yet permitted $310.87 for taxes to be included in the amount certified as part of the price of redemption. He also, it is alleged, failed to report to the defendant company, its director or shareholders the results certified by the district registrar.

It is further alleged that on the 14th of October, 1938, the defendant Trites assisted by *MacDougall* sold to Fraser's Distillery Limited, the grantee named in that behalf by said McLennan, pursuant to the agreement referred to, all of the said mortgaged premises, permitting the distillery licence of the defendant company to be surrendered, cancelled, transferred or otherwise made available to the said Fraser's Distillery Limited, this being a term of the agreement with the said McLennan and the said Fraser's Distillery Limited. It is further alleged that the expressed consideration in the agreement referred to, *viz.,* $25,500 was inadequate, as said property so transferred, exclusive of the distillery licence, had a value of upwards of $50,000.

It is further alleged in paragraph 42 of the statement of claim that prior to the issue of the writ the plaintiffs applied in writing to the company for permission to bring action in its name and

C. A.
1941

LEVI
v.
MAC-
DOUGALL,
TRITES AND
PACIFIC
COAST
DISTILLERS
LTD.

Macdonald,
C.J.B.C.

this was refused in writing whereupon the company was added as a defendant.

I have outlined the allegations to disclose the nature of the action with which we are concerned; it is based upon fraud. Briefly, it is alleged that were it not for the connivance and collusion of the two defendants the company would not and should not have lost its property; it would not (together with its licence) have fallen into the hands of a competitor willing to pay more than the amount of the indebtedness.

It is, of course, unnecessary to say, as the action was not tried, that the allegations in the statement of claim may or may not be true. I hasten to say so in justice to the defendants: for aught we know there may have been no loan or mortgage, or if so such grave default that legally and equitably foreclosure proceedings might properly be instituted. It may be that *MacDougall* was not acting in a dual capacity; or, if so, performed his full duty to the company. I am bound to say, however, with at least equal haste, having regard as I conceive it, to the fair and equal administration of justice that I would have been better pleased if the defendants had shown a desire to obtain the trial of this action enabling them to establish, if such is the case, that these allegations are without foundation. Obviously, unless there are insurmountable difficulties in the way an action of this sort ought to proceed to trial, if not in its present form then after being properly constituted with all necessary amendments, if any made. The same counsel appeared for the company and the defendant *MacDougall*. I would like to have been satisfied that he, as president of the company, with the assistance of Trites, was unable to induce it to sue.

First, as to the law applicable: the general rule is that for any wrong done to a company it alone may maintain an action. I do not deem it necessary to enter upon a lengthy discussion of the law. Relevant cases, including *Foss* v. *Harbottle* (1843), 2 Hare 461; *Mozley* v. *Alston* (1847), 1 Ph. 790; *Burland* v. *Earle*, [1902] A.C. 83 and many others were considered by this Court in *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215. MACDONALD, C.J.A., at pp. 219-20, said, referring, of course, to the facts in that case:

> If the transaction were one which could be ratified by the shareholders, then it is quite clear that under no circumstances could these appellants [the plaintiffs in the action] succeed; if, on the other hand, the transaction was fraudulent or *ultra vires*, the appellants were entitled to bring this form of action only after the company had refused to take one, or where it appeared that it would be idle to apply to the company to take action.

This means that if it is established to the satisfaction of the Court or a jury by relevant evidence that "it would be idle to apply to the company to take action" shareholders may maintain it. The Chief Justice discussed exceptions to the general rule, *viz.*, that to redress a wrong to the company or to recover money or damages for the company *prima facie* it must launch the action. One exception arises where the defendant controls a majority of the shares; another where the impugned transaction is fraudulent, as alleged in this case; in that event shareholders may sue "where it appeared that it would be idle to apply to the company to take action." This is a statement of a well-known principle: one is not called upon to do a futile thing.

If, by way of one illustration only, it could be established that by permitting one brewery to pass into the control of a competitor the majority shareholders in the old company by secret arrangement or otherwise profited thereby or accomplished some sinister purpose of their own a judge or jury might conclude that it would be futile to ask such a majority for the use of the company's name. Would it be asserted that under such or similar circumstances minority shareholders could not obtain redress? I know of no case that excludes from consideration this, to my mind, reasonable proposition. MARTIN, J.A., at p. 227 in *Rose* v. *B.C. Refining Co.*, based on the assumption that the transaction complained of was fraudulent or void, held that shareholders could not maintain an action in their own name on behalf of all other shareholders without first making an attempt to obtain authority from the company in public meeting assembled; his Lordship then added:

> There is nothing in the record before us to show that such an attempt would have proved futile, . . .

indicating, of course, that if that had been shown there would have been no need of applying for such authority.

The observations of these learned judges were made with the full record of the case before them; the action was tried, not

C. A.
1941

LEVI
v.
MAC-
DOUGALL,
TRITES AND
PACIFIC
COAST
DISTILLERS
LTD.

Macdonald,
C.J.B.C.

dismissed, as in this case without trial; the Court therefore was in a position to decide whether or not any facts were disclosed to establish futility: we are not in that position; it does not follow therefore that we too must say, as stated by MARTIN, J.A., that

> there is nothing in the record before us to show that such an attempt would have proved futile, . . .

We are at liberty, unless precluded from considerations later referred to, to permit the plaintiffs to amend and to make that allegation: I think we ought to do so. *McMurray* v. *Northern R.W. Co. and Cumberland* (1875), 22 Gr. 476 was in principle precisely similar to this case. The point was raised on demurrer that the pleadings as here, did not disclose a cause of action. Chancellor Spragge (p. 491) said:

> There can be no question, that if the charges made by this bill are true, they are proper subjects for the cognizance of a Court of Equity. I must take them to be true for the purposes of this demurrer; but, of course, for the purposes of this demurrer only.

I think the learned judge in this extract expressed the view that oppresses me, that where serious allegations are made they should not be brushed aside if it is possible to procure a judicial investigation. The Chancellor, at p. 499, quoted, with approval, the judgment of Chancellor Blake in a former action, pointing out that where shareholders might sue in their individual capacity they would have to disclose upon the record, that is to say, in the pleadings the circumstances which compelled them to depart from the ordinary mode of suing in the name of the company. Chancellor Spragge, as intimated, upheld the plea on demurrer, *viz.*, that the issue was not properly framed; that the plaintiff upon the allegations put forward was not entitled to complain of the matters therein referred to but he did not dismiss the action; leave to amend was given. That is this case unless, as stated, it can be shown that by the course followed on the hearing of the application really a partial trial of the action the plaintiffs are not entitled to this indulgence. As stated by the Vice-Chancellor in *Foss* v. *Harbottle* (1843), 2 Hare 461, at 492:

> The claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

The "claims of justice" in this instance require that these allega-

tions should not be left on the record without any enquiry into their truth or falsity. I am not impressed with the submission that it would be a hardship on the defendants, particularly Trites who doubtless would bear the burden to be exposed to the costs of a trial.

Majority shareholders cannot arbitrarily prevent minority shareholders from obtaining redress or so direct proceedings that no judicial inquiry can be held to enable the Court, not them, to decide whether or not they were acting honestly or dishonestly. A defendant too, armed with a full answer to allegations of this character ought, as intimated, to insist that the action, if possible, should be brought to trial. I repeat that I have no opinion either way as to whether or not this action is meritorious: I have a pronounced opinion that the trial should be permitted if at all possible.

In my opinion, therefore, as in *McMurray* v. *Northern R.W. Co. and Cumberland,* a case frequently referred to with approval, an opportunity should be given to the plaintiffs to amend their statement of claim. Mr. *MacInnes* urged that the action, as presently framed, is maintainable; that paragraph 42 of the statement of claim, alleging a request for the use of the company's name and an alleged refusal is sufficient, he is entitled to maintain that position if so advised; I do not agree with that contention; in the alternative he asked for leave to amend: I would grant it.

It remains to consider whether or not anything that took place before the learned trial judge when this application was made precludes this Court from setting aside the judgment under review. It is clear that the question of futility was not considered. I will assume, without deciding it, that under the rules the trial judge might entertain this application and dismiss the action if satisfied that it was not maintainable. With great respect, I do not think this course ought to have been followed. Where one or more courses may be followed, each authorized by rules of Court, a judge has the right to insist that the rule appropriate to the facts and circumstances should be invoked. It is a "golden principle that procedure with its rules is the handmaid and not the mistress of justice." A point of law, such

C. A.
1941

LEVI
v.
MACDOUGALL, TRITES AND PACIFIC COAST DISTILLERS LTD.

Macdonald, C.J.B.C.

as this could, under the rules, be set down for determination with notice to all parties; in that event plaintiffs' counsel would not be compelled as in this case, where intricate questions of law were involved and substantial property rights affected, to meet unprepared an application launched by an opponent fully prepared. I am not precluded from so viewing it because plaintiffs' counsel, doubtless convinced that the point would not be given effect to, did not ask for an adjournment. Under such circumstances when it is now declared, for example, that Mr. *MacInnes*, if he did not agree at least did not object to the wrongful admission of certain evidence presently referred to, I would have to be satisfied that this was perfectly clear construing questions of doubt in his favour. As intimated, on this application, based as it could only be upon the pleadings, evidence was given in the form of letters exchanged between the plaintiffs and the company. Was this admitted with the consent of all parties? I think not: I refer to the record:

THE COURT: [to Mr. *Locke*] The first thing you would have to do would be to put those things in on which you base your objection.

Locke: Yes.

THE COURT: It must come before me in some way as evidence.

Locke: Quite so.

THE COURT: Therefore, to solve the matter of his doing it, you should do it. Is that not so Mr. *Locke?*

Locke: I will put it in.

Whereupon the letters referred to were placed in evidence. Based upon this evidence and the pleadings the argument then proceeded. Later, further evidence was adduced said to show that the defendants did not own a majority of the shares of the company and could not therefore exercise control: I am not concerned with its effect, only with the fact that it was inadmissible on this application.

THE COURT: [to Mr. *MacInnes*] Do you admit, Mr. *MacInnes*, that Trites and *MacDougall* have not a majority of shares in this company?

MacInnes: I do not admit they do not control a majority, my Lord. The control of the majority is what counts.

THE COURT: They cannot control unless they are on the register.

MacInnes: They can have associates with them who are on the register.

Mr. *MacInnes* took part in further discussion on this question and concluded by saying this:

I do not want to take any factitious objection, but neither do I want to concede anything.

In view of this statement and the fact that the enquiry in respect to shares was not initiated by him I would not say that he agreed to this excursion into a forbidden field. Later the Court stated that it could

> take it for granted as far as this question is concerned the total issue of shares is 190,000 and the only shares in *MacDougall's* name are 70,001, and there is none in Trite's name, although he is interested in the 70,001.

To this observation it was Mr. *Locke,* not Mr. *MacInnes,* who answered: "Yes, that is correct." Mr. *MacInnes's* position was, as I would construe it, that he did not "want to concede anything"; he did not change it.

I refer also to the question of amending the pleadings with such allegations as would enable the plaintiffs to sue as shareholders; it was urged that when the Court stated to Mr. *MacInnes* that

> there is no application to amend before me. In this case, I have to take the pleadings,

he said:

> No, I am not suggesting an amendment.

It does not follow from this statement made in the course of an argument, wherein he maintained that in his opinion no amendment was necessary that he should be later precluded from requesting it, *a fortiori* when, as the record shows, almost immediately thereafter he said:

> Those defects in the proceedings, I say, may be covered by amendment, and the Privy Council so held. . . .

The application at the conclusion of the argument was adjourned for a few days to enable the trial judge to consider the authorities. On the resumption of the hearing, without further preliminary discussion written reasons for judgment were given sustaining the objection and holding that the plaintiffs could not maintain the action as framed. After delivering judgment Mr. *MacInnes* was advised by the learned trial judge that he would hear anything he wanted to say about amendments. The Court said this:

> If you want to make an application to amend before I dismiss the action, I will of course hear what you have to say and what has to be said on the other side.

In reply Mr. *MacInnes* stated that without having received notice (meaning notice of the original application) he was taken by surprise and did not get the effect of his learned friend's argu-

C. A.
1941

LEVI
v.
MAC-
DOUGALL,
TRITES AND
PACIFIC
COAST
DISTILLERS
LTD.

Macdonald,
C.J.B.C.

ment or of his Lordship's finding "in time to consider what amendments could be made," he then added:

> I would ask your Lordship to give me a short period of time to consider it in view of your Lordship's written reasons, whether it can be amended or not. I do not know whether an amendment could be made.

He thereupon asked for "two days to consider it." This under the circumstances narrated was a request so reasonable in its nature, involving no suggestion of hardship to the other side, that it should have been granted; I can with the greatest respect conceive of no good grounds for not acceding to it. I think the fact is that in the subsequent discussion it was overlooked inadvertently by a trial judge who always displays the greatest care in deciding cases brought before him. Mr. *Locke,* on being asked to state his position on this request, said:

> I am going to oppose any amendment at this time.

He added that no truthful amendment could be made. I would say that this was not a point for defendants' counsel to decide. Mr. *Locke* added that he was opposing any amendment. Mr. *MacInnes,* in addition to asking for two days to consider amending also pointed out that the action was partly heard on evidence tendered by the other side without any opportunity being given to him to tender his evidence. His Lordship thereupon said:

> I will dismiss the action with costs and let it go to the Court of Appeal.

I respectfully suggest that the request for an adjournment of two days to consider the question of amending was reasonable and, with deference, in the interests of justice ought to have been acceded to. I also think in view of the fact that the pleadings were departed from and evidence adduced to enable the judge to better determine, as he thought, whether or not this action ought to be dismissed error justifying interference is disclosed.

Further, apart altogether from the foregoing considerations this Court has independent powers to permit an amendment of pleadings if the interests of justice require it.

I would allow the appeal, set aside the judgment dismissing the action and permit the plaintiffs to amend their pleadings as in *McMurray* v. *Northern R.W. Co. and Cumberland, supra.* The action may then proceed in the ordinary way with the facts determined by the trial judge or jury. The question of futility is a question of fact. It is for the judge or jury to say on all relevant

evidence, if any adduced, whether or not it would be futile to request this company to convene a meeting of shareholders to decide that point. The company is before the Court as defendant; with proper allegations there could be no legal difficulties in the way of proceeding with the trial of the action: certainly no such conclusion would be arrived at if the evidence discloses that there is no merit in the plaintiffs' case and, as stated, I have no opinion on that point; on the other hand if merit is disclosed a judge or jury with that fact established and other evidence might reach a different conclusion.

McQUARRIE, J.A.: I agree with the Chief Justice that this appeal should be allowed. The plaintiffs should be allowed to amend and the action proceed.

SLOAN, J.A.: I would dismiss the appeal for the reasons given by my brother McDONALD.

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

McDONALD, J.A.: The plaintiffs are minority shareholders in Pacific Coast Distillers Limited, a company with an issued share capital of 190,000 shares. Defendant *MacDougall* is the president and a director of the company and the holder of 70,001 shares, which shares, as it is alleged, he holds in trust for defendant Trites. In the statement of claim it is alleged, to put the matter briefly, that the defendant *MacDougall* acting in his capacities of president and director and as the solicitor of the company, and in breach of his fiduciary duty, connived with defendant Trites in such manner and with the result that Trites, through the deliberate failure of the company to defend an action brought by Trites to foreclose a mortgage held by him upon the assets of the company, obtained a final order for foreclosure and having obtained title to such assets, sold the same at a large personal profit. For the purposes of this appeal—and for such purposes only—it must be taken that these and all other allegations in the statement of claim are true.

The plaintiffs Dora Levi and Sam Levi sue on behalf of them-

C. A.
1941

LEVI
v.
MAC-
DOUGALL,
TRITES AND
PACIFIC
COAST
DISTILLERS
LTD.

McDonald, J.A.

selves and all other shareholders of the company, save defendants *MacDougall* and Trites, for damages amounting to some $200,000.

Paragraph 42 of the statement of claim contains the following allegation:

> The plaintiffs did, prior to the issue of the writ herein and on or about the 24th day of June, 1939, apply in writing to the said defendant company for permission to bring this action in the name of the said company and permission was, on the 27th day of June, 1939, refused in writing, and the said company was added as a defendant herein.

In each of the statements of defence it is alleged that the statement of claim is bad in law and discloses no cause of action.

On the opening of the trial before MURPHY, J. (and it is of prime importance that we should consider with care what took place before him) counsel for defence took the objection *in limine* that the statement of claim disclosed no cause of action and that the action could not possibly succeed as laid. It is conceded that he ought properly upon the question of law raised by him, to have confined himself to the pleadings as they stood and he did I think make a mis-step by specifically referring to the letter of 24th June mentioned in paragraph 42 of the statement of claim as above set out. However, this mis-step, if it was such, was concurred in by the demand of counsel for the plaintiffs that the letter go in as evidence. Thereupon the letter was marked as Exhibit 1 and the company's letter in reply was then put in as Exhibit 2, without any objection from plaintiffs' counsel. It will be convenient at this stage to set out these letters in full:

Exhibit 1: June 24th, 1939.

Pacific Coast Distillers Limited,
C/o A. Reg. MacDougall,
Solicitor, Marine Building,
Vancouver, B.C.

Dear Sirs:—

I have been consulted by Miss Dora Levi and other shareholders of record in your company relative to the liability of the company's president and director, *A. Reg. MacDougall*, in the matter of the mortgage proceedings which resulted in the loss of the company's property assets and undertaking.

The question of that officer's duty to the company as the company's solicitor has also been considered in connection with the above mentioned mortgage and I have been instructed to enquire whether your directors will authorize the bringing of the appropriate action in the Courts without delay.

I must ask you to let me have your reply to this enquiry not later than

Tuesday next the 27th inst., so that my clients may take such further steps in the matter as they may be advised.

Yours truly,
Stewart S. Tufts.

Exhibit 2:

Vancouver, B.C.,
June 27th, 1939.

Stewart S. Tufts, Esq.,
475, Howe Street,
Vancouver, B.C.

Dear Sir:

I have been instructed to advise you that the directors of Pacific Coast Distillers Limited at a meeting held this day passed the following resolution:

"Resolved that in the absence of any knowledge as to the reasons for the action mentioned in the letter of *Stewart S. Tufts* dated June 24, 1939, and being unaware of any justification for such action, the authority requested by the said *Stewart S. Tufts* be hereby refused."

I am, yours truly,
W. H. Burgess,
Secretary.

Exhibit 1 speaks for itself. It is obviously not such a demand as the law requires, and makes no mention whatever of defendant Trites.

In addition to these letters the learned judge also considered as evidence an admitted statement of fact, *viz.*: that of 190,000 issued shares of the capital stock of the company, defendant *MacDougall* was the registered holder of only 70,001 shares. It is not necessary, I think, here to set out in detail everything that was said by judge and counsel in this regard, but to my mind it is clear beyond peradventure that the learned judge was led to believe (as is no doubt true) that the facts are as stated and that on the question of what evidence was available to prove a demand upon the company for leave to sue in the company's name and a refusal to comply with such demand, there was no evidence other than such as is contained in the letters, Exhibits 1 and 2. The learned judge stated in open Court when reading his reasons for the conclusions which he had reached:

Admittedly I take it from what occurred at the hearing the only evidence that can be adduced to substantiate said paragraph [42] consists of Exhibits 1 and 2.

Surely plaintiffs' counsel having failed to challenge that statement or the judge's statement made at an earlier stage of the proceedings that

the total issue of shares is 190,000 and the only shares in *MacDougall's* name are 70,001, and there are none in Trites' name,

C. A.
1941

LEVI
v.
MAC-
DOUGALL,
TRITES AND
PACIFIC
COAST
DISTILLERS
LTD.

McDonald, J.A.

must be taken to have admitted the correctness of these statements. To hold otherwise would be to allow counsel to play fast and loose with the Court, and I think he ought not to be heard to suggest before us that he might have been able had the trial proceeded to its conclusion, to controvert these facts by other evidence, and this in face of the fact that nothing is pleaded to support the admission of other evidence. He makes not the slightest suggestion before us as to what such other evidence might be. The situation is not identical with, but bears some similarity to that which arose in *Spencer* v. *Field,* [1939] S.C.R. 36, where the well-known case of *Scott* v. *Fernie* (1904), 11 B.C. 91 was approved.

Upon the above state of the matter, the learned judge heard lengthy argument during which plaintiffs' counsel was given the opportunity to ask for an amendment to his pleading. He asked for no amendment and elected to rest upon his pleading as it stands. During the argument many of the well-known authorities were discussed and on a Thursday evening the learned judge stated that the point of law in question being of great importance he would consider the matter and give his opinion on the following Monday, whereupon counsel might consider their respective positions. On the following Monday judgment was pronounced to the effect, putting the matter briefly, that the statement of claim was bad in law and disclosed no cause of action in these plaintiffs. The learned judge went on to say that even if he should be wrong in so holding, nevertheless the action could not possibly succeed because defendant *MacDougall* was not the holder of a majority of the issued shares of the company. Argument then ensued at some length but as pointed out above, plaintiffs' counsel took no exception to the learned judge's statement of the facts. In the result the learned judge, acting under the powers contained in marginal rules 281, 282 and 283, dismissed the action.

The rules in question are to the following effect:

1. No demurrer shall be allowed.

2. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial; provided that . . . by order of the Court or

Judge . . . , the same may be set down for hearing and disposed of at any time before the trial.

3. If, . . . , the decision of such point . . . substantially disposes of the whole action, . . . , the Court or Judge may thereupon dismiss the action. . . .

Objection is taken before us that plaintiffs' counsel was taken by surprise on the trial, that the learned judge had no authority under the above rules to do what he did, but that he was obliged on the demand which was made by plaintiffs' counsel, to have proceeded to hear the whole of the evidence no matter at what expense to the parties, and no matter how protracted the trial might be. In my opinion the learned judge adopted a course not only within his authority but pursuant to his duty.

So far as any question of surprise is concerned, for my part, having regard to what took place at the trial and after the adjournment, I am unable to take this complaint seriously. As to the trial judge's powers, I think the rules above cited were enacted for the very purpose for which they were used in this case and that there is no substance in the argument that, since demurrers have been abolished, the only way to raise a point of law is by substantive motion on formal notice. It is true, of course, that pursuant to the proviso in rule 282 such a motion may be made (in fact such motions frequently are made) but there is nothing in the proviso to prevent the trial judge, in the absence of any such motion, from adjudicating as he did.

If I am right so far, it only remains to consider whether the learned trial judge reached the right conclusion upon the apposite law. The neat point at issue is as to just what in this form of action, the plaintiff must allege. Briefly stated, it is an essential element or ingredient of this particular type of class action, that it be alleged that there has been a refusal to sue, by the shareholders of the company in meeting assembled or that the holding of such a meeting would be futile, by reason of the defendants being majority shareholders. I can see no good purpose to be gained by reviewing at length the authorities which have been so often canvassed since the decision in *Foss* v. *Harbottle* (1843), 2 Hare 461. As early as 1875 Chancellor Spragge considered the matter very fully in *McMurray* v. *Northern R.W. Co. and Cumberland* (1875), 22 Gr. 476, and it must be par-

C. A. 1941

LEVI v. MACDOUGALL, TRITES AND PACIFIC COAST DISTILLERS LTD.

McDonald, J.A.

ticularly noted that the learned Chancellor's judgment was delivered on a demurrer. Having reviewed the authorities which had followed the decision in *Foss* v. *Harbottle* his Lordship expressly said at p. 503:

> My opinion, therefore, is, that the allegations in the bill, as they stand, do not show sufficient reason for this suit being instituted by a shareholder.

It has throughout all the years been held that the plaintiff in this particular sort of action must allege and prove as was said by the late Chief Justice MACDONALD in *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215, at 219-20:

> If the transaction were one which could be ratified by the shareholders, then it is quite clear that under no circumstances could these appellants [the plaintiffs] succeed; if, on the other hand, the transaction was fraudulent or *ultra vires*, the appellants were entitled to bring this form of action only after the company had refused to take one, or where it appeared that it would be idle to apply to the company to take action.

The learned Chief Justice obviously here referred to the very common case such as *Cook* v. *Deeks* (1916), 85 L.J.P.C. 161, where the defendants held three-fourths of the issued shares of the company. Having regard to the authorities cited to the Court it is equally clear that the learned Chief Justice in speaking of the company meant the shareholders of the company in open meeting duly assembled. At this point one might again refer to the judgment in *McMurray* v. *Northern R.W. Co. and Cumberland, supra,* where the learned Chancellor at p. 502 said:

> I must be able to see from the allegations in the bill that it would be futile to ask. . . .

It is objected on behalf of plaintiffs that paragraph 42 of the statement of defence of defendant *MacDougall* is not sufficient in its terms to raise the point of law relied upon by defendants. A simple answer to this of course is that it is not necessary to plead points of law at all. In any event the pleading in paragraph 42 of the statement of claim in my opinion is wide enough to include any point of law upon which defendants propose to rely.

It is further said that the making of the request was a condition precedent to the plaintiffs' right to sue and that the defendants therefore if intending to rely upon the want of such request were bound under rule 210 to so distinctly specify their intention in their pleading. It is clear, I think, that the making

of such request is not a condition precedent. The making of a proper request is, as stated above, an essential element in the constitution of a cause of action. The matter is fully dealt with in the Annual Practice, 1940, at p. 365.

As to the alternative application of appellants' counsel for leave to amend his pleadings, I think this ought not to be allowed. There are only two amendments which I can conceive to be possible under the circumstances. If plaintiffs seek to allege that the respondents *MacDougall* and Trites are majority shareholders in the defendant company they are met by the difficulty that any such statement is contrary to the known facts. If they seek, on the other hand, to set up an allegation to the effect that other shareholders in the company are dominated by the defendants *MacDougall* and Trites, then counsel for the appellants is met with the difficulties arising from what took place on the hearing. To wit:

THE COURT: Mr. *MacInnes*, you know it was stated in argument, although I have not this proved before me, but it was stated that these defendants have only 70,000 of the 190,000 shares: unless you can suggest some other shareholders are being dominated by them you cannot amend this at all.

MacInnes: On that point of law, rightly or wrongly I am convinced that this action stands irrespective of the shareholders so far as that is concerned, because of the finding in *Cook* v. *Deeks* that shareholders couldn't ratify the taking of company property.

Not having asked for an amendment below I think it is not open to counsel to ask it from us on this appeal.

Upon the whole case I am of opinion that the learned trial judge reached the right conclusion and that the appeal should be dismissed with costs here and below.

Appeal dismissed, Macdonald, C.J.B.C. and McQuarrie, J.A. dissenting.

Solicitor for appellants: *Stewart S. Tufts.*

Solicitor for respondent *MacDougall*: *C. H. Locke.*

Solicitor for respondent Trites: *J. R. Nicholson.*

Solicitor for respondent Pacific Coast Distillers Limited: *W. S. Lane.*

C. A.
1940
Dec. 13.

NATIONAL TRUST COMPANY LIMITED v. THE CHRISTIAN COMMUNITY OF UNIVERSAL BROTHERHOOD LIMITED AND THE BOARD OF REVIEW FOR THE PROVINCE OF BRITISH COLUMBIA. (No. 2).

Costs—Taxation—Appeal—Appendix N—Difficult points of law involved—Column 3.

On an application that the costs of appeal and of the Court below be taxed on a higher scale than otherwise applicable:—

Held, that on a general view of this case and more particularly because of conflicting decisions and a somewhat unsettled state of the law, it ought to be regarded as one "where difficult points of law are involved" and it was directed that the costs be taxed under Column 3 of Appendix N.

MOTION by appellant The Christian Community of Universal Brotherhood Limited for an order that the costs of the two appeals on appeal (reported, 55 B.C. 516) and in the Court below, be taxed under Column 3 of Appendix N of the Rules of Court. Heard by MACDONALD, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A. at Vancouver on the 13th of December, 1940.

McAlpine, K.C., for appellant.
W. S. Owen, for the Board of Review.
Hossie, K.C., for respondent.

Cur. adv. vult.

13th December, 1940.

MACDONALD, C.J.B.C. (*per curiam*): We are not precluded from the decision in *Canada Rice Mills Ltd.* v. *The Union Marine and General Insurance Co. Ltd.* (1939), 54 B.C. 10 from acceding to this motion for an order that the costs of the two appeals on appeal and in the Court below should be taxed on a higher scale than otherwise applicable. We think on a general view of the case and more particularly because of conflicting decisions and a somewhat unsettled state of the law that it ought to be regarded as one where difficult points of law were involved. We would, therefore, direct that the costs be taxed under Column 3.

Motion granted.

TURNER'S DAIRY LIMITED *ET AL.* v. LOWER MAINLAND DAIRY PRODUCTS BOARD *ET AL.*

C. A.
1940
Nov. 27, 28, 29; *Dec.* 2, 3,
1941
Jan. 28.

Natural Products Marketing (British Columbia) Act—Order in council—"Scheme" to regulate marketing of milk—Constitution of Lower Mainland Dairy Products Board—Orders of board—Providing for equalization of return to milk producers—Validity of orders—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" through which the milk produced is to be marketed. The board passed by-laws or orders which are compulsory upon the Clearing House, the producers, the dealers and manufacturers within the area. In an action by certain producers against the said board, the Milk Clearing House Limited and *Williams*, Barrow and Kilby, they set out 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 on 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 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, the effect of said orders being 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 board are *ultra vires* of the board. It was held on the trial that the board by the orders in question sought to accomplish indirectly what the law had disclosed they could not do directly, and that the declarations and injunctions as sought in the prayer of the statement of claim should be granted.

Held, on appeal, affirming the decision of McDonald, J. (Macdonald, C.J.B.C. dissenting), that under cover of a broad scheme to regulate the milk industry the appellant board embarked upon a plan which in its reality results in an indirect tax. The impugned orders sought to conceal their true scope and effect and were a colourable use of the board's powers. The board attempted to do an illegal act under colour of a lawful authority.

C. A.
1940

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

APPEAL by defendants from the decision of MCDONALD, J. in an action for a declaration that orders 11 to 15 inclusive, of the Lower Mainland Dairy Products Board are *ultra vires* and not binding on the plaintiffs, who are milk producers; for an injunction restraining the board from taking steps to compel the plaintiff to comply with the provisions of said orders; for an injunction restraining the Milk Clearing House Limited from acting as the designated agency pursuant to said orders; for a declaration that the Milk Marketing Scheme of the Lower Mainland of British Columbia, established by order of the Lieutenant-Governor in Council, and in particular clause 10 (*d*) thereof, is *ultra vires,* and for an injunction restraining the Lower Mainland Dairy Products Board from exercising any of the powers purporting to have been invested in it by said scheme. By the Natural Products Marketing (British Columbia) Act the Lieutenant-Governor in Council is empowered to establish marketing boards and to inaugurate schemes for the regulation of marketing of natural products in the Province. The defendant board was so constituted with extensive powers as set out in the scheme. Under the powers so conferred, the board enacted the orders attacked in this action in August, 1939. On the trial it was held that the orders complained of were *ultra vires* the marketing board and plaintiffs were granted the relief sought.

The appeal was argued at Vancouver on the 27th, 28th and 29th of November and the 2nd and 3rd of December, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Locke, K.C., for appellants: The Natural Products Marketing (British Columbia) Act was held *intra vires* the Legislature by *Shannon* v. *Lower Mainland Dairy Products Board* (1938), 107 L.J.P.C. 115. The scheme is authorized by the Act and was upheld by the trial judge. The orders attacked are within the power vested in the marketing board by the scheme. This in itself ends the matter. The fact that some producers of milk receive less for their product and others more cannot affect the matter, nor can motives of individual members of the board in doing what is expressly authorized by statute, invalidate the orders. Two Acts were passed, first the Milk Act designed to

insure a supply of clean milk, and then the Natural Products Marketing (British Columbia) Act designed to control and regulate the manner in which milk shall be marketed and insure a fair return to producers of milk. The judgment appealed from declares orders 11 to 15 inclusive to be *ultra vires* the board. This is incorrect, as shown by examination of the legislation, scheme and orders. Order 11 provides for the licensing of producers and dealers and the agency designated by the board to purchase the milk produced. This is authorized by the Act and is settled by the decision in *Rex* v. *Hoy's Crescent Dairy, Ltd.* (1938), 53 B.C. 321. Order 12 designates the Milk Clearing House Limited as the agency to market the regulated product and is authorized by the Act and the scheme. Order 12 is the penalty order and provides that any person guilty of a breach of any order shall incur penalties imposed by the statute or the scheme. This is authorized by the Act and the scheme. Order 14 regulates and controls in all respects transporting and storing the regulated product pursuant to powers vested in the board by the scheme. Order 15 is the general regulation order passed under the powers vested in the board by section 10 of the scheme. The Act authorizes the Lieutenant-Governor in Council to vest in the board power to fix prices, both maximum and minimum, at which the regulated product or any grade or class thereof may be bought or sold in the Province. On the contention that

> the defendant board sought to accomplish indirectly what the law had disclosed they could not do directly,

it is submitted that the learned trial judge has misconceived the point in the case: see *Turner's Dairy Ltd. et al.* v. *Williams et al.* (1940), 55 B.C. 81; *Gallagher* v. *Lynn* (1937), 106 L.J.P.C. 161, at p. 163; *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia* (1939), 54 B.C. 48, at pp. 67-8; [1940] S.C.R. 444, at pp. 446-8; *Assam Railways and Trading Co.* v. *Commissioners of Inland Revenue*, [1935] A.C. 445. The expression made use of in the reasons for judgment is extracted from cases decided in the Privy Council dealing with questions affecting the respective legislative fields of Dominion and Provincial Parliaments. Neither these cases nor the quoted expression are applicable to any issue in the present case. As to the judgment against *Williams* and Barrow, they are not proper or

C. A.
1940

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

necessary parties to the action and the action should fail by reason of the provisions of section 9 (*c*) of the Natural Products Marketing (British Columbia) Act. These defendants have acted strictly within the powers and pursuant to the obligations imposed upon them by the Act and scheme. Even if you look at the evidence of *Williams* and Barrow it does not justify the judgment given: see *Larson* v. *Boyd* (1919), 58 S.C.R. 275, at p. 280. If at all, the evidence is only admissible when the orders are subject to different constructions: see Craies's Statute Law, 4th Ed., pp. 121-3; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763; *Scott* v. *Corporation of Tilsonburg* (1886), 13 A.R. 233, at pp. 237-8; *In re Barclay and the Municipality of Darlington* (1854), 12 U.C.Q.B. 86, at p. 92; *Westminster Corporation* v. *London and North Western Railway,* [1905] A.C. 426; *McGee* v. *Pooley* (1931), 44 B.C. 338, at p. 349. Municipal cases are restricted to municipalities: see *Rex* v. *Electricity Commissioners. Ex parte London Electricity Joint Committee Co. (1920),* [1924] 1 K.B. 171, at p. 193; *Rex* v. *Nat Bell Liquors Ltd.* (1922), 37 Can. C.C. 129, at p. 148. Costs were awarded against *Williams* and Barrow, but there is not a finding of bad faith and the section of the Act as to costs applies.

J. W. deB. Farris, K.C., for respondents: Tests of what constitutes a sale are mentioned in *Rex* v. *Canada Rice Mills Ltd.* [1940] 1 W.W.R. 302, at p. 304. That Parliament cannot do indirectly what it cannot do directly see *Board Trustees Lethbridge Northern Irrigation District* v. *Independent Order of Foresters,* [1940] 2 D.L.R. 273, at p. 280. Neither is this method open to Parliament's creatures: see *Attorney-General for British Columbia* v. *Macdonald Murphy Lumber Co.,* [1930] A.C. 357; *In re Insurance Act of Canada,* [1932] A.C. 41. On the defendants' contention that if the board has power to pass the orders the intent of the board is immaterial see *Attorney-General for Ontario* v. *Reciprocal Insurers,* [1924] A.C. 328, at p. 341. The purpose, intent and effect of the Legislature may be obtained by evidence of the history of the legislation: see *Attorney-General for Alberta* v. *Attorney-General for Canada* (1938), 108 L.J.P.C. 1, at p. 6; *In re Insurance Act of Canada,*

[1932] A.C. 41. It is the same old attempt in another way: see *Attorney-General for British Columbia* v. *Macdonald Murphy Lumber Co.*, [1930] A.C. 357. The conduct of the Government after the enactment is accepted as evidence of intent: see *Ladore* v. *Bennett*, [1939] 2 W.W.R. 566; *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, [1931] A.C. 310. Evidence of the members of the board on discovery is admissible: see *Turner's Dairy Ltd. et al.* v. *Williams et al.* (1940), 55 B.C. 81, at pp. 95 and 97; *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274, at 288; *Pells* v. *Boswell et al.* (1885), 8 Ont. 680; *Scott* v. *Corporation of Tilsonburg* (1886), 13 A.R. 233, at pp. 237 and 249; *Re Campbell and Village of Lanark* (1893), 20 A.R. 372. They cannot exercise their powers for a different purpose: see *Municipal Council of Sydney* v. *Campbell*, [1925] A.C. 338. As to statutory bodies less highly organized than city or municipal councils see *Westminster Corporation* v. *London and North-Western Railway* (1905), 74 L.J. Ch. 629; *McGee* v. *Pooley* (1931), 44 B.C. 338. As to the argument that the evidence is an attempt to interpret a written document see *Assam Railways and Trading Co.* v. *Inland Revenue Commissioners* (1934), 103 L.J.K.B. 583. On the facts proved the board is acting not only outside its statutory powers but beyond the powers of the Legislature. They cannot deny a citizen the right of access to the Court for attacking the Legislature, or access to the evidence: see *Electrical Development Company of Ontario* v. *Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario*, [1919] A.C. 687, at p. 693; *Smith* v. *London* (1909), 20 O.L.R. 133, at p. 153; *Ottawa Valley* v. *Attorney-General of Ontario*, [1936] 4 D.L.R. 594, at p. 603; *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District*, [1938] 2 W.W.R. 194, at p. 211; *Steen* v. *Wallace*, [1937] 3 W.W.R. 654. In pith and substance the Act is taxation: see *Halifax City* v. *Nova Scotia Car Works, Lim.* (1914), 84 L.J.P.C. 17. That this is indirect taxation see *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (1932), 45 B.C. 191, at 193; [1933] A.C. 168; *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.*, [1927] A.C. 934; *Rex* v. *Caledonian Collieries*, [1928] A.C. 358.

C. A.
1940

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Locke, in reply, referred to Clerk & Lindsell on Torts, 9th Ed., 21; *Charrington & Co.* v. *Wooder* (1913), 83 L.J.K.B. 220, at p. 224; Phipson on Evidence, 7th Ed., 582; *Re Fenton* v. *County of Simcoe* (1885), 10 Ont. 27, at pp. 40-41; *Credit Foncier* v. *Board of Review,* [1940] 1 D.L.R. 182.

Cur. adv. vult.

28th January, 1941.

MACDONALD, C.J.B.C.: First some preliminary observations. In the formal judgment under review it is declared that orders numbered 11, 12, 13, 14 and 15 of the appellant Lower Mainland Dairy Products Board are *ultra vires,* that two members of the board, its servants or agents, be restrained from compelling the respondents to comply with their provisions and that appellant Milk Clearing House Limited be restrained from acting as the designated agency pursuant to the orders. No claim was made in the prayer for relief in respect to order 11 and it was conceded at the hearing, as I recall it, that it was included in the judgment by error. Order numbered 12 designates appellant Milk Clearing House Limited as the agency to market the regulated products. This is authorized by section 5 (*a*) of the Act and by 10 (*a*) of the scheme later referred to: number 12 a penalty order is authorized by section 5 (*e*) of the Act and by section 10 (*k*) of the scheme. No objection was taken, as I understood counsel, to the validity of these two orders: the right to designate an agency and to impose penalties is clear; it was contended, however, that the agency designated, *viz.,* appellant Milk Clearing House Limited, was a colourable device or a mere sham. As to order 14, known as the "Base and Quota Order," in so far as "base" is concerned, having reference to the amount of milk a farmer produces on an average for a certain six months' period respondents' counsel said at the trial "that is a legitimate regulation that every one agrees with." We are therefore only concerned with order 14 (in part), all of order 15, and the type of agency referred to in the Act and in order 12.

The controversy herein relates therefore to the validity or otherwise of two orders promulgated by appellant Lower Mainland Dairy Products Board constituted by His Honour the

Lieutenant-Governor in Council to administer a scheme regulating the marketing of dairy products (also established by the Lieutenant-Governor in Council) in the lower Mainland of British Columbia pursuant to the Natural Products Marketing (British Columbia) Act, R.S.B.C. 1936, Cap. 165. This Act with detailed provisions outlining the powers of the Lieutenant-Governor in Council (section 4) and of the appellant board created by it (section 3) was declared valid by the Judicial Committee in *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708.

It was this board, so constituted and endowed with powers under an *intra vires* Act that passed the orders held to be *ultra vires*. Obviously if the board kept within the four corners of the "additional powers" conferred by section 5 and if the powers contained in the scheme devised by His Honour the Lieutenant-Governor in Council and vested in the board by section 4 are within Provincial authority no debatable question should arise unless considerations, later referred to, raise, not fanciful, but substantial questions of law and of fact.

It was held, as I interpret the reasons for judgment of the learned trial judge, that although on their fair grammatical construction the orders are "plain on their face" the Court should inquire "as to the motives which actuated the members of the board in passing the orders," or as put in another place "as to what was the purpose of the members of the board in passing the orders." That inquiry was made, inadmissible evidence in my opinion was received and colourful language employed by counsel for respondents in attacking the chairman of the appellant board which, if justified at all, should have been applied to the Legislature and to His Honour the Lieutenant-Governor in Council, the real authors of all that occurred, and the conclusion reached by the trial judge that one feature of the scheme or rather of the orders (the scheme was held to be valid) *viz.*, the appointment of appellant Milk Clearing House Limited as an agency, was "an imposing facade," "a mere sham" and that two members of the board "overstretched their hands" doing violence to the legal maxim "*Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*" It is a sound legal principle that when anything is

C. A.
1941

TURNER'S DAIRY LTD. ET AL. *v.* LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

prohibited directly, it is also prohibited indirectly; if, however, there are no facts to which the maxim can adhere it is of no utility here. The appellant board was not prohibited directly from doing any single act outlined in the orders declared to be *ultra vires;* it might, with deference, possibly apply to the trial Court: it cannot do indirectly what it cannot do directly, *viz.,* prevent a board legally constituted from passing orders legally authorized.

It was also found by the trial judge that

> the real purpose and effect of the impugned orders [inasmuch as some producers of milk supply one market and others another market] [was], . . . 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 that being so] . . . I am satisfied the orders cannot stand.

It will be found upon later examination that this, with respect, is not so; however the suggestion appears to be, that because of this "real purpose" an indirect tax beyond Provincial authority was imposed. Neither the trial judge nor counsel for respondents stated explicitly that a public body with delegated powers to do so for a public purpose imposed a tax: a direct statement is avoided. My brother O'HALLORAN for example in his reasons states "in substance they create an indirect tax"; my brother SLOAN "in their real purpose and effect" they "impose an indirect tax" while respondents' counsel in his factum states "in pith and substance" it is taxation.

Certainty is a feature of taxation legislation: the language employed must be clear and unambiguous. Here it is said to have been imposed in an impossible way, *viz.,* by indirection or by implication; no one points to any language anywhere in the Act, in the scheme, or in the orders, unambiguous or otherwise, imposing a tax: hence the submission must be that unambiguous words, or in fact any words at all directly revealing or indicating a tax are unnecessary; it is enough if in substance a tax is imposed by, I assume, the orders, because by no ingenuity can it be found in the Act. I can understand one saying that "in substance" certain words mean thus and so: where however no words can be found remotely indicating that the subject-matter referred to is taxation it is impossible to say that "in substance" it is taxation. These orders, in my opinion, either reveal a tax

or they do not: there is no middle ground: if they do, I venture to think that never before has a taxing statute been so curiously and loosely worded.

This conclusion, *viz.*, that the board was either given powers of taxation and exercised them, or exercised powers of taxation *ex mero motu*, an obvious impossibility, is based upon the decision of the Judicial Committee in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.*, [1933] A.C. 168. There a dairy products sales adjustment Act enacted in 1929 by Cap. 20 was considered; it was held *ultra vires* inasmuch as a public body, a "committee of adjustment" was created and made certain levies in the manner set out in, and as authorized by, the Act itself. These levies were held to be taxes. I shall later show why it was called a tax and point out the wholly different situation with which we are concerned. Were it not for that decision the present action, in my judgment, would not have been brought; the trial judge referred to it: the judgment is based upon it. The case put forward is that by the impugned orders (it cannot be said by the Act as it is *intra vires*) an attempt was made to circumvent that decision, as if that mattered, so long as powers conferred on the Legislature, not by the Courts but by the British North America Act, an Imperial statute, were utilized. It is enough to say that none of the powers thus conferred, made use of in enacting the orders was destroyed or declared beyond Provincial competency by the *Crystal Dairy* case: they relate to property and civil rights. It is a contradiction in terms to say that if on their fair construction the orders are found to be clearly authorized by the Act and as the trial judge correctly found by a valid scheme they can be read as doing something other than the plain intendment of the words suggest. The words of the present Chief Justice of Canada in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), 93 L.J.P.C. 137, at 141, where he stated that granted there is an absolute jurisdiction the words of a statute

> must take effect according to the proper construction of the language in which they are expressed

are applicable to these orders.

By the orders it is submitted apparently—and if I appear to be indefinite it is because, apart from the maxim referred to, no

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

concrete propositions of law were put forward—that the appel-land board "in substance" did what the "committee of adjust-ment" did under the 1929 B.C. Stats., Cap. 20, *viz.*, impose an indirect tax. Of course if this Act or the orders are similar in form or even in substance to what will be referred to hereafter as the 1929 Act declared to be *ultra vires* the inquiry is at an end. It is not boldly stated that an examination of that decision by the methods lawyers properly follow, *viz.*, by reading it, coupled with an examination of the present Act the scheme and the orders will disclose an indirect tax. That process of ratiocination is not followed; questions of alleged colourability were introduced at the trial; evidence was taken, not to clear up ambiguities or to show "in substance" what the orders meant but to show, strangely enough, that something entirely proper occurred, *viz.*, an attempt (I think a successful attempt) in drafting the Act, the scheme, and the orders to avoid conflict with the *Crystal Dairy* decision and to avoid the imposition of a tax. I do not understand how that proper use of legislative authority can be made the basis of an action. We know conflict with the *Crystal Dairy* decision was avoided by the Act: it is *intra vires*: I doubt if it was suggested to the Courts that it was so drawn that an indirect tax might in some way find shelter under it. That being so—the Act author-izing the orders being *intra vires*, it is seriously submitted that if the orders are literally, grammatically, in fact and in substance, within the four corners of the Act and an authorized scheme established by the Lieutenant-Governor in Council and relate to Provincial matters there is still a further question to discuss. It is not said in the reasons for judgment that these orders placed beside that decision must be regarded as bad: yet that is the result. In *Edwards* v. *Hall* (1855), 25 L.J. Ch. 82, at 84, Cran-worth, L.C. said:

> I never understood what is meant by an evasion of an Act of Parliament; either you are within the Act of Parliament or not. . . . If you are not within it, you have a right to avoid it, to keep out of the prohibition; if you are within it, say so, and then the course is clear.

This language is equally applicable to the orders and to a decision by the Courts: one is either within or outside their purview.

These orders in their practical results, it is said, accomplish what was condemned by the Judicial Committee in the *Crystal*

Dairy case; that, with respect, is not so. It was not there decided that orders such as we are concerned with must necessarily be *ultra vires,* nor was any marketing policy condemned; it was confined to an inquiry whether or not the 1929 Act with its set-up, not this Act and orders with a different set-up, imposed an indirect tax. The orders are not objectionable in form—that appears to be conceded—nor I would add in substance; they are authorized and relate to subjects within Provincial powers: on their face as the trial judge intimates they are plain. But the "face," we are told, is really a mask: remove the mask and an indirect tax is revealed but not to the naked eye; it is said to be revealed, with respect for other views, by, I fear, a process of fallacious reasoning. We cannot find anywhere in the orders or elsewhere *indicia* of taxation.

I referred to the need of unambiguous words. It is impossible to find a tax unless the Legislature by an Act imposes it, or delegates that right to a public body. It was not contended that the appellant board is a public body or if it is that the Legislature, as in the 1929 Act, delegated to it authority to impose levies; yet some public body, with delegated powers, whether the Clearing House Limited or the board must exist before taxation can be found. We have the benefit of many constitutional cases determining whether or not a tax exists and if so whether direct or indirect but none I am aware of decides that a tax may be found without the use of any language whatever relating to that subject. Clearly unless a board has independent powers of its own volition to impose a tax—and it has not—it is necessary to find words in the Act giving it powers to tax. If the board attempted to impose a tax it would be acting beyond its authority but that case is not put forward.

Ever since Joseph went up from Galilee to Judea to be taxed (St. Luke, chap. 2, verses 1-5) in fact long before (II. Kings, chap. 23, verse 35) a tax has always been imposed by sovereign authority, in that instance Cæsar Augustus. Only a sovereign power possessing that right can delegate it to subordinate bodies like municipalities or boards. If it is not delegated these sovereign powers cannot be exercised by subordinates. The Legislature as a sovereign body has the right to tax by appropriate

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

measures; it did not take that right by this Act much less confer it on the appellant board. We need not consider the question of direct or indirect taxes: the point is have we a tax at all?

In the 1929 Act itself the Legislature did delegate or confer the power to tax on an "adjustment committee" and as it was found that it levied an indirect tax the Act was held invalid. Section 2 of that Act constituted the adjustment committee. Section 9 conferred power to make certain levies: it was not, to compare it to the case at Bar, an attempted exercise by the committee of independent powers of its own. Its wide powers were outlined in sections 5 to 9. Sales were permitted by producers in the ordinary course and the full amount received belonged to the producers. From that sum received by sales on the fluid-milk market an amount was compulsorily deducted by the adjustment committee and transferred to producers who received a smaller return from sales in the manufacturers' market. A sold in the fluid-milk market and was entitled to a definite sum: B sold in another market and received a smaller amount: a levy or tax was imposed on A and given as a bonus to B and in the result both received equal amounts. On that state of facts it was held a tax was imposed by a public body for public purposes. I venture to think the Courts will not go further in determining where a tax may be found. The Judicial Committee did not decide that if the Legislature, as here, provided for price-fixing (and the *Shannon* decision shows it may do so: it is in the Act) and provided, not for free sales on the two markets at market prices with deductions from the proceeds received by one and a bonus to the other but rather for sales at a fixed price for the amount of the producers' quota sold, not in the open market (that is prohibited) but to an agency, that an indirect tax would be imposed: there are no deductions whatever under the present Act and orders, no bonuses; all are treated alike. If by price-fixing without taking anything from one producer and giving it to another an indirect tax is disclosed the Act should have been declared *ultra vires*: it is in the Act the power to fix prices is found. If we were dealing with the sale of two grades of wheat or of any other product A and B, one commanding a better market than the other, the grower of the better grade

receiving for years past the larger returns and to discourage or to lessen the growth of Grade A wheat and to increase the growth of the other the appropriate Legislature decided to fix a common price for both grades midway between the two they could do so without creating an indirect tax: no case decides otherwise. That too would be equalization of returns: it is not so therefore, as suggested, that where this occurs there must be a tax. It would be useless for the grower of Grade A wheat to say that in the past he received more for his product and that his real returns are still the same. That is what is said here. The answer is "that is all changed"; he now receives a fixed price regardless of grade. Price-fixing is the basic feature of this Act: it was not included in the 1929 Act; in fact it was excluded in one important aspect, *viz.*, in respect to consumers. When under the present Act the power to fix prices was held to be valid as well as all other parts of the Act it doesn't mean that prices must be fixed in a manner satisfactory to the Courts; only the electors can complain in that respect: the power of price-fixing is there: it is as wide as the name itself. There is therefore no tax.

Let us examine this question in another way. I said to respondents' counsel during the hearing of this appeal, at all events in substance if I may use that phrase properly,

if this Act had been the first milk marketing Act enacted in this Province and the orders in question had been passed under it, with the agency, later referred to, provided for, and with the scheme established: in other words if there had been no Act of 1929 and no *Crystal Dairy* case could we set these orders aside as *ultra vires* or as enacted without authority?

He replied,

the task would be more difficult as no evidence would be available.

The true answer is that such an action, under such circumstances, would utterly fail. There could, of course, be no question of colourability in that case—there should not be in this case—no question of trying to circumvent a decision of the Courts, nor of creating an "imposing facade." How could it be otherwise unless the present orders in conjunction with the Act, on their proper construction, disclose a tax? This viewpoint raises curious implications. Let us suppose that the dairymen of Nova Scotia procured legislation precisely similar to this Act, in fact copied it; also that the board passed similar orders and that the scheme contained similar powers. Drafts-

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

men ought to be familiar with decisions of the Courts based on the type of legislation they are drafting, not as a trap for the unwary but as a benign light showing how far Legislatures may or may not go in any direction: if they find a decision of the Judicial Committee reported fifty or a hundred years ago—there is no magic in a recent decision—based upon a comparable statute they ought to fashion their legislation around and about it in such a manner that it does not come into conflict with it; all this would appear to be elementary. That is what the Legislature did in enacting this Act: they avoided conflict with the *Crystal Dairy* decision: they did not impose by the Act itself or give to any board authority to impose an indirect tax and because that care and restraint was exercised the Courts pronounced the Act valid. However, the Nova Scotia draftsmen would not be obliged to read the *Crystal Dairy* decision: let us assume they did not do so; it would therefore be impossible, as in the case at Bar, to attribute a design to evade it: to speak of colourability, or of the "overstretched hand" because they knew nothing of these elements considered vital by respondents to a proper consideration of this case. If the decision under review is right the Supreme Court of Canada would, in the event that the supposititious Nova Scotia Act with its orders and the British Columbia Act with its orders came before it for adjudication, be compelled to hold the former orders good and the latter orders bad. Such a result could only arise through confusion of thought and by disregarding legal principles.

Let us again test it in another way. The Legislature, if not concerned with loading the Act with cumbrous details, could have included in it every single subject-matter contained in the impugned orders. It could, by the Act itself not only provide for an agency generally but also specifically for the creation of a joint-stock company to act as agent: it may be it could say in the Act that the Courts must not call it a sham. It could provide in the Act that sales and resales could be made to and by the agent, and to and by none others at fixed prices, worked out in detail in the manner outlined in the orders inserting every detail in a schedule to the Act. It could provide for one market and for a basic price with final returns computed after delivery and resale

precisely as outlined in the scheme and orders. It would not be necessary to omit from the schedule a single detail although it might be found advisable to amend the Act from year to year: that is not material to my point. Had the Legislature done so the Courts would, at least find it difficult—I, of course say impossible—to embark on the inquiry that took place in this case. The Courts ought to be content in such a case to look at the Act, read it intelligently, obtain evidence if necessary to remove obscurities, or to disclose precisely what the Legislature was doing; it should read, too, the decision in the *Crystal Dairy* case and on a question of construction of statutes decide whether or not this Act was a valid exercise of Provincial powers. If that course had been followed no one could question the motives and *bona fides* of members of the Legislature or characterize the agency as hocus-pocus to borrow a phrase from the armoury of respondents' counsel. It would be equally impossible to say it was an attempt to circumvent the *Crystal Dairy* case unless Legislatures must not exercise powers, never declared beyond their competency by the Courts, and clearly within it. Would such an Act be declared *ultra vires?* Wherein would it be beyond Provincial authority? Why should different principles be applied, where instead of placing everything in the Act and a schedule, these powers are delegated to a board that keeps strictly within the authority given? If subordinate bodies exceed their jurisdiction or usurp powers appropriate proceedings may be taken: we need not consider that until excess of jurisdiction or usurpation of powers is suggested: no one has pointed to a line, a phrase or a sentence in these orders and said in respect thereto "that is not covered by authority." I shall refer to the covering authority later to remove all doubts.

The truth is, with deference to other views, a Court of law is asked to give effect to the views of a vocal minority of producers and of dealers; it is asked to prevent the Legislature from implementing legislation declared to be valid: because nothing but implementation occurred or was about to occur when this action was launched. If so-called iniquitous features of the Act and orders are pointed out the Court should also hear the views of the less clamorous majority: I know all this is imma-

C. A. 1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

terial but if one discusses the aspects of the case upon which respondents rely one must drift into irrelevancies. It at least has this relevancy—I can conceive of no ground for speaking of "sham" agencies, and of "ever increasing bureaucracy," except on the ground that this is unjust legislation, not a *bona fide* marketing Act and that the Courts should not permit its enforcement. The complaint is that it is unjust, or as it is said illegal, to interfere with the emoluments of those who hitherto largely controlled the fluid-milk market. Briefly there are two markets for milk, the fluid market referred to, and the market for manufactured products, the former more lucrative. All producers strive to sell their milk in the best market; the result is apparent; prices for the producers in a buyers' market thus created are depressed. The principle of the Act is that demoralization of prices for all producers, for the present "haves" as well as for the "have-nots," will eventually ensue if all are permitted, without regulation, to compete in the fluid-milk market: the consumer possibly might benefit unless disorderly marketing would lead to abuses detrimental even to his interests; it is however said to be disastrous to the producers. Unless all the producers are protected in securing a fair return every one suffers: that is the view of the Legislature. We are not concerned with whether or not that view is sound: it is not our concern: I only refer to it because respondents' counsel vigorously condemned it, and made free use of epithets not without advantage, because I fear they assisted, in shaping in the minds of able judges the idea of colourability. He, in fact, caused an emotional disturbance in my brother SLOAN, which even I was powerless to allay, for did he not refer in his reasons to "the specious camouflage erected by inferior tribunals"? I will show presently that if there is camouflage anywhere—and with deference there is not—it is practised by the Legislature and by His Honour the Lieutenant-Governor in Council, not by any so-called inferior tribunal. This view of congestion in the fluid-milk market is shown to be that of the Legislature by the preamble to the 1929 Act and by the enactment of the present Act. The Legislature, concerned with the general welfare, believe that without regulation and control even the present advantages of the "haves" in the fluid-

milk market may prove to be illusory and short-lived; in other words they will lose much, if not all, of what they now possess through disorderly marketing and general demoralization of prices. These views I repeat, although they appear to be rational, may or may not be sound; again we are not concerned with policy: the Court must keep on its own side of the fence. If they are not sound redress should be sought by repeal or by amendment in the proper form, not in the Courts.

In all I have said hitherto I have assumed that on the fair construction of the language employed in the orders they are strictly within powers validly conferred. I do so all the more readily because, seemingly in support of my own view, no one, as I understand it, suggests anything else: certainly the trial judge does not say that tested in this way they are bad. Unless one looks at them through the *Crystal Dairy* case, using it, so to speak as a mirror, the orders are "plain on their face": they only appear to be distorted into another meaning when, as often occurs, the mirror is not properly held. Nor did respondents' counsel, as I understood him, submit that reading the orders literally and grammatically they contain provisions beyond powers conferred. He did not say that the orders disclose the existence of a public body authorized to tax and by the language used in fact imposed a tax for public purposes. That concluusion is reached, not in the proper way, *viz.*, by reading the orders in precisely the same manner as the Judicial Committee read the sections of the 1929 Act; it is reached after reading and interpreting certain evidence, much of it inadmissible and useless for our purpose.

I refer now to the place in the Act, the scheme and the orders of Milk Clearing House Limited, an incorporated company and an appellant herein restrained by injunction from performing its intended functions. If there is any merit in respondents' case it centres in this company: it has been called "a mere sham" and an "imposing facade": let us therefore submit it to detailed examination. It was to this company I referred when stating that provision for it and all other details might have been provided for in the Act itself. It was incorporated under the Companies Act to act as the agency contemplated by section 5 (*a*) of

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

the Act; its capital was fixed for the time being—it could be increased at any time—at $10,000; its shareholders are producers. It was never intended, it was submitted, to make a profit like an ordinary commercial concern, as if that mattered, and generally was a clever device invented by Mr. *Williams* the chairman of the board to circumvent the decision in the *Crystal Dairy* case. Indeed so much ingenuity has been expended—successful so far—in attempting to show that this agency is, as counsel put it, mere "hocus-pocus" created for some vague improper purpose, presumably to avoid imposing an indirect tax, that it ought to follow if it is not a sham respondents cannot succeed. The true view is that it is authorized by a valid Act. There is the further point that even if it should be regarded as a sham the question of discovering an indirect tax is not advanced one iota; the only result would be an hiatus in a truncated structure; not a tax.

What are the facts? Is it a creation of Mr. *Williams* the chairman of the board? True it is not material so long as it is legal but I am endeavouring to lay this spectre of a sham and a device. The authority to appoint a single agency is given by section 5 (*a*) of the Act; it is the Act that authorizes the board,—

> To regulate the time and place at which and to designate the agency through which any regulated product shall be . . . marketed;

and "marketing" is defined to mean buying and selling. Here we have authority given to the board by an *intra vires* Act to name an agency to buy and sell the regulated product. For double assurance His Honour the Lieutenant-Governor in Council, not an "inferior tribunal" was authorized by the Act to vest in the board power to

> designate the agency through which the regulated product shall be marketed:

scheme 10 (*a*). The corporate structure of the agency was not defined: is it suggested that the board could not designate a joint-stock company to act as agent? As stated in argument the board might have appointed a large department store in Vancouver; if so would it be "a mere sham"? So far we have the board doing what an *intra vires* Act authorized in language too plain to be controversial.

It was submitted that the word "through" in section 5 (*a*) of

the Act does not contemplate sales "to" the agency and "by" the agency. It is not inappropriate to speak of this as marketing "through" the agency; if some slight criticism of the use of the word might be made I would say *de minimis non curat lex*. I merely mention the point to dispose of it: the definition of "marketing" and the wording of section 5 clears up any doubts. The trial judge did not think otherwise: he held the scheme to be valid. It is by the scheme of His Honour the Lieutenant-Governor in Council that sales "to" and "by" the agency are authorized together with prohibition of all sales elsewhere (10 (*a*) and (*c*)). "Marketing" meaning to buy and sell, with a prohibition against "marketing" except through the agency, it follows that it alone may engage in buying and selling. It thus appears that this so-called device of providing an agency through which or to which all sales must be made, with prohibition of sales elsewhere, is authorized, not by an inferior tribunal with indirect motives of its own, but by the august tribunal referred to: the device or so-called sham has at least distinguished parentage. Everything done is found in the scheme and in section 5 of the Act: the right to prohibit sales elsewhere (section 10 (*c*)): the right to establish one agency only to buy and sell (section 10 (*a*)): how can such an agency, so authenticated, be called a sham? If there must be criticism or charges of camouflage let it be directed at the Legislature and at His Honour the Lieutenant-Governor in Council, including the Minister of Agriculture as one of its members, charged with the supervision of Legislation of this nature, not at the board, which without the slightest departure from the authority conferred carries out the provisions of a valid Act.

The foregoing should be sufficient: let us however pursue it further: this agency so created as aforesaid is called "a mere sham" for another reason. The trial judge said:

> It is pretended that it was so incorporated as an ordinary commercial concern whose object is to buy in the cheapest market and sell in the dearest market and in the ordinary course of trade to make a profit for its shareholders. I think the more one examines the evidence the more he must become convinced that this is a mere sham. I do not believe it was ever intended that the Clearing House should make any profit and if there were any doubt on this one needs only to examine the evidence of Mr. Sherwood, one of the directors of the company.

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

There is no occasion to speak of pretence when the purpose of its creation is outlined in the Act and scheme. It is not stated in its memorandum of association that it is formed to buy in the cheapest market and to sell in the dearest. The conclusion that it is "a mere sham" is, with deference, reached by ignoring the objects of its creation. It is clear from what I have outlined why it was created. Oh, but it is said, this is a mere device to avoid imposing a tax. Even if that were true and the board could itself impose a tax it would not be material. If that word must be used we should at least say "lawful device." When it is said that it was designed to interfere by price-fixing with returns otherwise received by some producers there are two answers (1) it is legal to do so under this Act and (2) the attempt to regulate marketing might as well be abandoned unless the Legislature can interfere with uncontrolled competition in the fluid-milk market. When the trial judge finds that it was never intended that the Clearing House should make a profit, I would ask is it any less a company or an agency on that account? As a matter of fact a spread of 4 cents was provided to cover expenses: if there should be any surplus it would go to the shareholders as profits. It is true there was some confusion as to whether or not profit-making was intended: views mistaken or otherwise on this point are not material. An agency thus validly created for specific purposes authorized by the Act cannot become *non est,* nor yet "a mere sham" either by mistaken opinions or correct opinions as to its objects. The board's membership may be altered from year to year. Would it be called a good agency in a year where its members held the proper view of its functions as outlined in the Act and the scheme, and a bad agency "a mere sham" in another year if its members thought that profit-making for producer shareholders was mainly contemplated? The point has no significance; if profits, they will go to producers: if none it matters not at all. It is scarcely necessary to add that since the decision in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, it is impossible to speak of this company as a sham organization—that argument was rejected there for less valid reasons. It is at present a skeleton organization—and that is regarded as proof that it is a sham; to say "it is not much of an agency" does not

advance respondents' case in any degree. The fact is it never functioned: this action interfered with it doing so; a beginning only was attempted. It has in fact many duties to perform, but legality does not depend upon the extent of a company's activities.

It is said to be a "mere facade" for other reasons, *viz.*, that the mode of delivery of milk continued as in the past. The agency does not take physical delivery of the milk, for the present at all events, nor is it equipped to do so; hence it is a sham, as if A may not contract to sell to B with delivery direct to C. The fact that by order 15 for the producer's quota of fluid milk he is to be paid 56 cents with full returns ascertained after resales by the Clearing House is treated as further evidence of a sham creation as if members of a group could not sell to the agency at a unit price and on a fixed basis with final returns deferred. Are such contracts or compulsory transfers beyond Provincial powers, unauthorized or void for uncertainty or as against public policy? What is the principle?

Events may prove that this agency is far from being a sham creation. The board might have provided—it has the right—as appellants' counsel stated in argument to make it not only the sole purchaser of all milk produced within the huge area affected at prices fixed by the board but also provide for direct sale and delivery with its own equipment to consumers without the intervention of the respondents in this action; the elimination of over a score of distributors would doubtless result in reduced costs of delivery. The board recognized, for the present at all events, that dealers and distributors, whether too numerous or not, had their own investments: hence, whatever may occur later, at the inception of this scheme they were not eliminated: no one I trust will take this as a suggestion on my part; I am merely discussing the implications of treating this agency as a sham. It is not without significance, although it is true that a minority of producers oppose this legislation, it is the dealers, not producers, who are the plaintiffs in the action. Would the Courts prevent the formation of one great agency authorized by a valid Act to buy and sell direct to the consumers without the intervention of middlemen? Such a company controlling the whole output under the supervision of a board fixing prices as outlined in

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

the orders would be strong enough to procure the best price for the producer and through eliminating duplicating distribution costs deliver at the lowest price to the consumer. If the present organization, so limited in its activities at present is a sham what word should be applied to the larger creation? Yet if this judgment is right that could not take place: it suggests the need of exercising the greatest care in confining the Court's activities to deciding legal problems.

Again it is said that orderly marketing could be accomplished without this agency. This is a statement without legal significance. Parliament in its wisdom provided for an agency: had it authority to do so? No other question is open for discussion. If one or more methods are available why may not any one of them be employed? One may take a longer road home to avoid a pitfall so long as one does not commit a trespass in doing so. These conjectures are beside the point. One could point to many valid reasons for its creation: its possibilities have been referred to. Respondents are not satisfied unless machinery is erected to disclose a tax.

A basic fallacy in respondents' submission is that having once dealt unsuccessfully by the 1929 Act with a specific subject-matter, *viz.*, relieving the evils that ensue through all producers attempting to share in the limited fluid-milk market it is not possible to deal with the same subject-matter by other legislation or orders; such a view is, with respect, wholly fallacious. The present Act being *intra vires* they must contend that it does not deal with that subject-matter; in other words does not interfere with the right of all producers to sell where they will and to obtain without interference returns formerly received. But that is not so. It is the *intra vires* Act that sets up entirely new methods of marketing and provides for the agency giving it the right to buy and to sell at fixed prices.

I have not discussed the orders in detail for the reason, among others, that no one ventures to say that in any single particular they are not authorized by the Act and scheme and do not relate to *intra vires* subject-matters. It is, of course, clear that the scheme is in the same position as the Act so long as it does not depart from the Provincial domain. So far as looking at the

orders to see if they are authorized is concerned, they are in reality disregarded by respondents' counsel and having laid them aside the contention is advanced that there is in reality no sale to the agency at all and no resale by it to the dealers (dairies); the agency is "a mere dummy" designed, I assume, by the Legislature in the first instance and by His Honour the Lieutenant-Governor in Council in the second, to conceal the real transactions in which it does not act *qua* purchaser. To one imbued with this view it appears to be useless to say that the Act, the scheme and the orders provide for a sale to and a resale by the agency: that is the only real sale that takes place because no other kind of transaction is dealt with anywhere. Yet in respondents' factum and in oral submissions we are asked to accept the view that there is really a sale direct by the producers to the dealers just as under the 1929 Act. The board, we are told, merely intervenes, as the adjustment committee before it, to take part of the proceeds from one producer and give it to another: I do not accept that view because, with great respect for other views, it has neither facts nor logic to support it. Counsel does not say that literally there is a sale to the dealers: he says that in reality it takes place; we must, we are told, dispose of the case, as if it did occur.

All this suggests failure to recognize that the Act under review is not only a new Act but an *intra vires* Act with price-fixing as one of, at least its basic features. If under it marketing may be conducted as under the 1929 Act with deductions made as formerly some one blundered in permitting it to be held *intra vires*. If what is called the real transaction leads to an indirect tax and the method in which that so-called real transaction is carried out is succinctly set out by the present Act and the scheme either the Act or respondents' submissions must be *ultra vires*: we know the Act cannot be questioned. Marketing, or in other words buying and selling, is I repeat authorized by the Act itself, also the agency: how then can it be called a sham or a puppet designed to circumvent something or other without inveighing against the Act? Is the complaint that the agency is a joint-stock company? There would be no merit in that suggestion. It must be a sham, if at all, because to put it as broadly

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

as possible it is doing things illegal or things unauthorized. No individual or entity, acting with legal authority, pursuing lawful occasions, can be regarded as a sham, nor be subject to interference by the Courts. It must be said, to be consistent, that the Act authorized sham sales. If an *intra vires* Act provides for an agency and authorizes sales to it and by it surely when it does that very thing it cannot be said to be really doing something else. True no sales occurred thus far: the orders were not implemented. But when they become operative it will be difficult to say that a transaction where a producer transfers title to milk to a company on terms that he will be paid for it at a price to be determined by the board is not a sale.

I have already dealt with the suggestion that these are sham sales because delivery is not made direct to the purchaser; also the claim that the latter's activities (I would add for the present) are limited. I might add a reference to the sale of certified raw milk in bottles governed by order 15, regulation 8 (h) and order 14, regulation 13; this it is said is a glaring example showing that no sale occurs. Under order 15, regulation 14 (d) delivery is taken on the vehicle of the producer and after certain checking redelivery is made there. Of course if there is any virtue in physical delivery to the agency and the Courts insist that without it, there cannot be a sale, that can easily be provided for, however inconvenient. It is clear, however, one can provide for delivery anywhere, on the vendor's or purchaser's premises, midway between the two or even by the use of a symbol.

I turn to the Act for an answer to all allegations. The right to appoint a single agency, to classify milk to determine the manner of its sale, the price at which it is to be bought and sold and to regulate the dairy business in the greatest detail is found in sections 4 and 5; every detailed power granted is *intra vires* and no departure occurs in the orders in a single instance. It is provided by one of these orders (15) that for the producer's quota of fluid milk he is to receive 56 cents and because all are treated alike (for it applies to all) it is called equalization in the unwarranted belief that where that word can be used it cannot be price-fixing, but taxation. The Act provides for price-fixing in the broadest fashion, the price at which the product may

be bought and the price at which it may be sold (scheme, section 10 (*g*)). Order 15, regulation 8, after providing that the price shall be according to classification fixes the price for the producer's quota sold at the agency at 56 cents per pound butter fat. For the amount of fluid milk in excess of the quota the producer gets the price for manufacturing milk, *viz.*, 25 cents a pound butter fat. If in computing final returns it results in equalization and equalization means an indirect tax regardless of the terms of the Act it is *ultra vires*. But who would suggest, in any event, that the Legislature by price-fixing cannot provide that the owners of products of different values should sell them at the same price for some good reason or for no good reason at all?

The right to make classifications (section 5 (*a*) of the Act) is clear, so also manner of distribution methods and grading. Subclause (*h*) of section 10 of the scheme—and this is important: it covers basis and method of computation—gives authority to determine the basis on which the producers will be compensated for the whole or any portion of any classification of the regulated product. Is this authority *ultra vires?* It is not so stated: what merit in saying that when it is carried out by the orders it results in an indirect tax? If the power itself is legal using it cannot have illegal consequences. Power is given too under 10 (*a*) of the scheme "to determine" not only "the manner of distribution" but "the quantity and quality, grade, or class" of the regulated product that should be marketed (*i.e.*, bought and sold): authority in meticulous detail is provided for each step taken: it is to disclose that fact I refer to the orders.

It appears to be suggested that to avoid "equalization" the board should pay one price to one producer and a different price to another producer for the same classification of milk. The scheme in fact prevents discrimination (section 10 (*f*)): if respondents had advanced the case that there was a breach of this regulation in respect to the former emoluments of the "haves" in the fluid-milk market it would be more convincing than the suggestion that somewhere we find an indirect tax. The board acted as the Act contemplated by sections 4 and 5—fixed a uniform price to stabilize the market and to regulate the industry keeping in mind that a *sine qua non* to regulation and to orderly market-

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

ing is the prevention of a disorderly invasion by all producers, without control, of the limited fluid-milk market where supply exceeds demand. Even if true, for the time being at all events, that some producers by proximity to markets, their own assiduity, or for other reasons could maintain their favoured places, it does not follow that they are beyond interference by the Provincial Legislature.

My brother O'HALLORAN refers to the compulsory nature of the sale, advancing for the first time the view that lacking a voluntary premise it cannot be a sale. It is said that because the board designated an agency to which alone milk may be sold and from which alone milk may be bought by dealers and manufacturers it is a compulsory sale and "the element of compulsion dominates all others." If, with deference, the suggestion has merit the attack should be directed elsewhere as these sales are provided for in the Act. No producer is compelled to sell to anyone: he is prohibited from selling except to the agency; that is what the Act authorizes.

A word on the submission that we are precluded by findings of fact from interfering with this judgment. Clearly the transactions contemplated by order 15, *viz.*, sale or no sale is a question of law: the Act and orders simply must be construed. We are in the same position as the trial judge to reach a conclusion: also equally in a position to say whether or not the members of the board "overstretched" their hand, meaning I assume, acted without authority. The same observations apply to the so-called findings of fact that the agency is a sham. If I am right in the method of approach the trial judge, with respect, misconceived the true situation.

Even if there are any material findings of fact they were, with deference, based upon inadmissible evidence. No evidence should have been admitted on the basis of an erroneous conception of the applicability of a maxim referred to at the beginning of these reasons. As to one item of evidence there should be no question: a factum prepared by the chairman of the board containing submissions to this Court when acting as counsel in another case, where a different question was under review was received in evidence. Counsel may, properly enough, take one position today and another tomorrow.

Evidence too was admitted under cover of pleadings containing, in my opinion, astonishing allegations. In the case of *Turner's Dairy Ltd. et al.* v. *Williams et al.* (1940), 55 B.C. 81, on a practice appeal this Court held (to refer to one reason only), inasmuch as the statement of claim as it then read, contained no allegations against certain defendants, *viz.*, members of the board, they could not be examined for discovery. Following this decision and I think prompted by it the statement of claim was amended by alleging a conspiracy by *Williams* and Barrow two members of the board, presumably to enact these orders. This allegation did not stem from a desire by indignant plaintiffs to proceed civilly against conspirators: damages were not sought: not even asked for. It should be called conspiracy *de convenance*. Two members of the board were really charged with conspiring to carry out the Act. Respondents' counsel told us—and I have no doubt it is true—that Mr. Barrow, a former Minister of Agriculture and a gentleman of the highest repute, would not be a party to wrong-doing; it would follow that if it exists *Williams* entered into a conspiracy with himself. A lawyer presumably may more readily be attacked: Mr. Barrow, however, was equally a party to the enactment of these orders. I would add that, in my opinion, Mr. *Williams's* conduct is not open to criticism: he did not overstretch his hand.

As to the law we were referred to many cases; with respect, as I view it they are of no assistance. It is not necessary to cite law to support the simple proposition we are concerned with and cases on problems entirely different are of no assistance. I refer to some of the principal cases relied upon by respondents' counsel to show, not only their inapplicability but also that any deductions of value support appellants' case. If it is clear, as I think it is, that the Legislature directly or through subordinate bodies may make use of every scintilla of power conferred upon it by the British North America Act and on the fair construction of the powers exercised in this case they do not go beyond the authority given the case is simple. It is true that in considering these orders or any document, contract or Act of Parliament one must regard the substance, not the form: but where is the difficulty about the substance or in other words the subject-matter of the

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

orders under review? Confusion of thought ensues by attempting to show that these orders "plain on their face" cannot be construed as the language used therein suggests, because a successful attempt was made by the Act and by the orders to avoid imposing an indirect tax; also to avoid conflict with a former decision of the Courts. Respondents' case is based upon the erroneous view that this is not possible, it is not only legal but also perfectly proper. It is the duty of the Legislature (1) not to contravene a decision of the Courts and (2) not to impose an indirect tax yet, doing its duty in these respects, is treated as wrong-doing.

Let me illustrate the inapplicability of respondents' cases by a reference to *Westminster Corporation* v. *London and North-Western Railway* (1905), reported in the House of Lords in 74 L.J. Ch. 629; the report of the trial (1901) and the decision of the Court of Appeal (1904) will be found in volumes 71 and 73 respectively at pp. 34 and 386. The point for decision was whether or not a board with authority to do one thing in fact did another, *viz.*, having authority to construct underground lavatories in addition constructed a subway. It had authority to construct conveniences but not a subway from one side of the street to the other. This case is used as if appellants under the guise of carrying out an order did something else not covered by any order. That sort of case may come up in the future: we are not concerned with it now. This case too was advanced to justify the use of certain objectionable evidence. If, of course, this board, under the guise of using its authority to construct lavatories in addition constructed a subway, without authority, it could be shown by evidence that it acted *mala fide*: certainly where there is authority to do one thing only and under colour of it the board does something else it is acting in bad faith and that may be shown by evidence. It was material for the defendants to show by evidence, if possible, that to construct the conveniences it was unavoidable that a subway should also be built. It was held by the House of Lords that although the structure could be used as a subway for underground pedestrian traffic that was merely an incident to the proper use of the authority undoubtedly granted: in other words to provide underground entrances meant the creation of a subway. In the result it was

found that the board acted within its authority. That was the whole inquiry—looking at the language used in the authority conferred, having regard to evidence confined to whether or not the building of the subway was in substance merely the building of the conveniences or something else in addition the decision given by the House of Lords followed. There was no reference to doing anything indirectly. There is no pretence either that in the orders in the case at Bar while power is given to do certain things the board attempted to do other things; that is why the case is of no assistance.

When it is said that the real inquiry is whether or not the appellant board in substance acted within authority conferred I agree at once but in ascertaining what, in substance, is meant by the orders one reads their contents; if upon doing so it is found they are not objectionable it is unnecessary to go further.

If it is clear that A is given authority to do a certain thing easily defined and in itself legal it is impossible to say that this in substance means he is doing or trying to do something else. I suggest therefore it is elementary to say that it is necessary to show these orders are illegal or unauthorized before we can be asked to follow respondents in peregrinations through all sorts of bypaths.

When they referred to seeking the substance of the authority given in the *Westminster* case what was meant was this—looking at the authority given does it in fact authorize the building of a subway as incidental to the conveniences? So too, in the case at Bar to find in substance what the orders mean one looks at them to see if they contain powers validly conferred and if evidence is necessary to clear up obscurities it may be given.

The Lord Chancellor pointed out at p. 630 in the House of Lords report that:

> Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. . . .

And again:

> When the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion.

All this is on the assumption that "the thing done is the thing

C. A. 1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Macdonald, C.J.B.C.

which the Legislature has authorized." I suggest it is wholly impossible to point out any "thing done" by the orders not authorized by the Legislature; again

> if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for the other.

Not only have we no fraud in the case at Bar, there was no attempt to do anything not authorized. Nor can the statement of Lord Macnaghten at p. 631, be disputed, *viz*:

> . . . that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith.

A board authorized to build underground conveniences could not use that authority to build a subway; it must act in good faith and it would have been restrained were it not for the reasons stated: certainly it would be *mala fide* to use powers given for other purposes on the pretence that it included unauthorized undertakings.

The statement of Lord Atkin in *Ladore* v. *Bennett*, [1939] A.C. 468, at 482,—

> that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail.

was referred to. If there is an "actual violation" of "constitutional restrictions" in the case at Bar the board, of course, should be restrained; no one has pointed out where the "actual violation" occurred. It can be said, too, as stated by Lord Atkin at p. 482,—

> nothing has emerged even to suggest that the Legislature . . . had any purpose in view other than to legislate . . . in relation to the class of subject which was its special care.

Nothing has emerged to suggest that the Legislature had any purpose other than its professed purpose of assisting the dairy industry in providing for an agency and in conferring power on His Honour the Lieutenant-Governor in Council to provide for sales to it and by it and prohibition of sales elsewhere. There is not the slightest ground for suggesting that the Legislature was designedly unjust and if so it would not be for the Courts to correct it: still less are there grounds for the suggestion that one member of the board with alleged evil intent conspired with

another member with no evil intent to Act beyond authority conferred.

Reliance was placed by respondents' counsel on *Municipal Council of Sydney* v. *Campbell,* [1925] A.C. 338. There the council had power (1) to acquire land to make or extend streets, and (2) in addition to acquire lands to carry out improvements or remodelling in any part of the city. There were two distinct powers. They in fact acquired land to obtain its increase in value under the guise of securing it to carry out a remodelling scheme. It was a case, not only of abusing authority conferred but going beyond that authority. The limited purpose specified for which the board might acquire land was clear; when they acquired it for a different purpose, *viz.,* for gain, rather than to beautify or remodel they did so without authority. Again evidence was properly adduced to show that they never had any intention of using the land acquired for the only purpose covered by authority. Again, too, the Court looked at the language used in conferring the authority and confined evidence to ascertaining whether or not they acted beyond the powers conferred. In that case the board travelled beyond the authority given: in our case there is no pretence that appellants, on the proper construction of the orders, literally or in substance did so.

There is a cross-appeal: a declaration that the scheme particularly section 10 (*d*) should be declared invalid was sought. The trial judge held it valid. I have said enough, without further discussion, to indicate that the cross-appeal should be dismissed. I would allow the appeal.

SLOAN, J.A.: In my opinion there is ample evidence to support the findings of fact made by the learned trial judge. That such evidence is admissible and relevant is to my mind not open to serious question. The pertinent authorities referred to in the judgment of my brother O'HALLORAN are, I believe, sufficient to support that view. In any event to hold in these days of an ever increasing bureaucracy that the Courts are powerless to sweep away specious camouflage erected by inferior tribunals to disguise the real purpose and effect of their law-making activities would mean, in the language of Lindley, M.R. in *Frankenburg* v. *Great Horseless Carriage Company,* [1900] 1 Q.B. 504, at 508,

C. A. 1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

Sloan, J.A.

that "substantial justice would be sacrificed to a wretched technicality."

In my view the facts found below bring the impugned orders within the reasoning and result of the *Crystal Dairy* case (1932), 102 L.J.P.C. 17. The said orders therefore, in their real purpose and effect, impose an indirect tax and for that reason must be declared *ultra vires.*

Whether the policy of the board is deserving of praise or censure is a subject upon which I must decline to speculate. We are not concerned with the board's sagacity but solely with its legal competence to pass the questioned orders.

Counsel for the appellant suggested that the board in setting up the single agency system was acting in the best interests of a large class of producers. That may be so for as BEGBIE, C.J., said in *Bishop of Columbia* v. *Cridge* (1874), 1 B.C. 5, at p. 9:

> The judgments of Solomon have been considered as not without merit, though every one of them outrages the whole spirit of *Magna Charta.*

The fact that the actions of the board are considered meritorious by a certain group cannot authorize it to exercise powers which by reason of the legislative limitations of the Province could not be validly conferred upon it.

During the hearing of this appeal I brought to the attention of counsel a matter which I considered relevant to the determination of whether the tax imposed herein was direct or indirect. I pointed out that whereas section 21 of the Act considered in the *Crystal Dairy* case, *supra* (B.C. Stats. 1929, Cap. 20), expressly prohibited the committee from fixing prices, the Act in question here, by section 5 (*g*) thereof, authorizes the Lieutenant-Governor in Council to vest in the board price-fixing powers which would, of course, include the power to fix the price to be paid by the ultimate consumer for milk purchased on the fluid market. I then asked this question: "How far does the price-fixing power affect the transmissibility of the tax?" In other words would it restrain the tendency of the tax to enter into and affect the price the taxpayer would seek to obtain for his product? Not without doubt, in view of the inadequacy of the discussion of the point, I have reached the tentative conclusion that such price-fixing power would not have that effect until exercised and then to the extent only to which such price regula-

tion, in its effect, might so affect the incidence of the tax that it became manifest the taxing authority was demanding the tax from the very persons it was intended or desired should pay it. *Attorney-General for British Columbia* v. *Kingcombe Navigation Co.*, [1934] A.C. 45.

Here the price-fixing power has not yet been exercised. In consequence the tax, in its incidence, remains indirect.

I would dismiss the appeal.

O'HALLORAN, J.A.: This appeal lies from a judgment declaring that some five orders of the appellant board, while in form appearing to be *intra vires* regulation of the marketing of milk are nevertheless invalid, because in substance they create an indirect tax. By agreement between counsel the operation of the orders was postponed pending the result of this litigation. It involves a decision as to the reality of the transaction embodied in the plan set up in the impugned orders. This cannot be done by studying the orders *in vacuo*. The Court should learn at least enough about the conditions in the milk industry to understand why the plan came into being. For without this knowledge, the Court cannot appreciate the impact of the plan upon those conditions and thus envisage it in practice as it was intended.

I. Statement of the case.

Milk is sold in the fluid and manufactured products markets. Much more of the milk produced is eligible for the fluid market than that market can absorb. Hence a great deal of it must be sold in the manufactured products market, principally for the production of butter, cheese and condensed milk, but at a much lower price because of outside competition in these products. Some dairy farmers sell all or nearly all their milk in the fluid market, while others have to be content with the manufactured products market. It is said for the former that better herds, locations, business methods, good fortune and other factors have brought this about. For the latter it is said, the fluid market thereby tends to concentrate in the hands of the few and larger farmers, and the great bulk of the smaller farmers cannot gain entry into the more profitable fluid market. The surplus fluid market milk available tends to create a "buyer's market" and it

C. A. 1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A.

is said the dealers (dairies) are enabled to dictate the price to the farmer.

These conditions generally stated have been the cause of continuing dissatisfaction and demands for legislative control. The Provincial legislation declared *ultra vires* in *Lower Mainland Dairy Product Sales Adustment Committee* v. *Crystal Dairy, Ltd.* (1932), 102 L.J.P.C. 17, aimed to remedy this situation by equalization of financial returns to all dairy farmers, no matter in which market their milk might be sold. By that legislation passed in 1929 the dairy farmer, who had sold his milk in the fluid market, was subjected to what was called an adjustment levy for the benefit of the farmer who had to sell his fluid-market milk in the manufactured products market. But the Judicial Committee upheld the decision of this Court, *vide* (1932), 45 B.C. 191, which in turn had affirmed the judgment of the learned trial judge Mr. Justice MURPHY (1931), 44 B.C. 508, that the plan imposed a tax on one farmer to bonus another and constituted an indirect tax beyond the power of the Provincial Legislature.

The present statute the Natural Products Marketing (British Columbia) Act, R.S.B.C. 1936, Cap. 165, was held *intra vires* in *Shannon v. Lower Mainland Dairy Products Board* (1938), 107 L.J.P.C. 115. It contains no provision for equalization of returns. In the present proceedings the respondents attacked the orders of the appellant board on the ground they are a colourable device to bring about equalization of returns. It is said that the effect of this colourable plan in practice is to impose an indirect tax. It is necessary therefore to understand the practical working out of the plan contained in the impugned orders. All dairy farmers in the area are prohibited from selling their milk to anyone but a single agency, the appellant Milk Clearing House Limited, which is also given sole power to sell to dairies and manufacturers.

II. The plan outlined in the impugned orders.

The appellant board has fixed the price per pound butterfat the Clearing House shall pay the farmer for his fluid-market milk and has also fixed the price at which the Clearing House shall sell fluid-market milk to the dairies. No price has been fixed for milk sold in the manufactured products market. The

difficulty here arises not in the fixed price of the fluid-market milk payable to the farmer but in the amount of money payable to him. For the farmer is not paid the fixed price for the volume of fluid-market milk which the Clearing House purports to buy from him, nor for the volume thereof actually sold in the fluid market by the Clearing House. The amount of money he is paid depends upon what is called his "quota," which it will be seen is simply a formula used to compute his equalized amount based on a plan of equalization of returns. The Clearing House purports to buy from each farmer a monthly volume equal to his "base," a term used to describe his average monthly production of fluid-market milk over a six-month period composed of the last three months and the first three months of the year before the orders were passed.

If the Clearing House has sold in the fluid market during the month, only 60 per cent. of the total volume of the "bases" it purported to buy from all farmers, then each farmer's "quota" (a term used to describe the percentage of his "base" for which he will be paid the fluid price), would be 60 per cent. of his "base." To illustrate, if the total of all "bases" was 100,000 pounds, of which 1,000 came from A, 1,000 from B, and 1,000 from C, and the total actually sold in the fluid market during the month was 60,000 pounds, then A, B and C at the end of the month would each be paid the fluid price for 600 pounds. Then let us carry the illustration further; suppose all of A's milk, half of B's milk and 30 per cent. of C's milk was sold in the fluid market: each would still receive the fluid price for 600 pounds and the manufacturer's price for the balance. It will thus be seen that farmer A would receive the fixed price for only 60 per cent. of the volume of his milk sold in the fluid market, although all his milk continues to be delivered direct from him to the same dairy, and all of it is sold in the same fluid market as before the orders were passed.

That occurs under the plan first, because only 60 per cent. of the total received (*viz.*, 60,000 pounds out of 100,000) was sold by the Clearing House in the fluid market at the fixed price; and secondly because only 50 per cent. of B's milk and 30 per cent. of C's milk was sold in the fluid market. Then what happens to

C. A.
1941

TURNER'S DAIRY LTD. ET AL. *v.* LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A

the proceeds of the other 40 per cent. of A's milk under the plan? The answer is that sufficient is deducted therefrom and added to the payments to B and C to make them equal to A's. That is the way the plan works out in practice. It is plainly equalization of returns. The foregoing analysis makes it clear that not only is equalization of returns the purpose and object of the plan contained in the orders, but that it is accomplished just as effectively as in the *Crystal Dairy* case, *supra*. Here it is true, the money is taken from farmer A before his monthly settlement while in the *Crystal Dairy* case it was taken afterward.

But the principle and purpose of the plan is the same. It may differ in form but not in substance. Another method of bookkeeping is employed, and a different routine of collection is pursued. There is, of course, no particular virtue in the word "equalization of returns." These very words were not used by Lord Thankerton in his speech in the *Crystal Dairy* decision but the meaning they express here was adequately conveyed there in other language. The term has been used in the evidence and in the argument before us and is now used to describe in apt words that what takes place under the impugned orders has the same effect in "a practical business sense" (to use the term employed by Sir Lyman Duff and adopted by Lord Maugham in the *Reference re Alberta Statutes, post*) as what occurred in the *Crystal Dairy* decision, *supra,* that is to say in Lord Thankerton's language (p. 19):

> To transfer compulsorily a portion of the returns obtained by the traders in the fluid-milk market to the traders in the manufactured products market.

III. The compulsory sale.

For the appellant it is contended the plan under review concerns milk sold by A, B and C and all the other farmers to the Clearing House and as there was no such sale in the *Crystal Dairy* case that decision can have no application here. Counsel for the appellants admits the farmers have to sell their milk to the Clearing House if they wish to remain in the milk business; but he says it is a sale nevertheless, and as the property in the milk then passes to the Clearing House, whatever occurs thereafter is of no interest to the farmers. There are two answers to this contention: first that it appears on the face of the impugned orders that the plan—of which the compulsory sale is an integral

part—is necessarily premised on the payment of equalized amounts; and secondly that the compulsory sale is a sham sale set up to circumvent the effect of the *Crystal Dairy* decision. As to the first answer that the plan is premised on the payment of equalized amounts; the price payable by the Clearing House to the farmer is fixed at so much per pound butterfat and the volume of fluid milk received by the Clearing House from each farmer is known at the time of receipt.

One naturally asks why the delay until the end of a monthly settlement period to enable the Clearing House to calculate the amount payable to the farmer for his fluid-market milk. Not because of price or volume, for one is fixed and the other ascertained immediately. It is not a delay in payment of a known amount of money. Nor is it to ascertain what percentage of the farmer's volume may be actually sold in the fluid market, for that does not enter into it. I see no escape from the conclusion which the previous analysis of the plan compels, that it is to calculate an equalized payment to all farmers for fluid-market milk during the settlement period, once the total volume of sales in the fluid market has been ascertained for that period. The orders reduced to what they really mean in practice, require all farmers to sell their fluid-market milk to the Clearing House for an amount of money calculated upon what is an equalized return —that is to say, payment of an equalized amount. The payment of an equalized amount to the farmers is thus seen as the determining reason for the compulsory sale provision.

Without it the intricate provisions relating to "quotas" would be purposeless. That is why it is said the compulsory sale is necessarily premised on the payment of equalized amounts. Instead of being merely incidental to a plan of orderly marketing, equalization of returns emerges as the pith and substance of the plan outlined in the impugned orders. This conclusion should dispose of the question, subject of course as to whether it results in an indirect tax. But the second answer, that the compulsory sale is a sham sale is also referred to in view of the importance counsel attached to it. It may be considered under two branches: first that it is not a contract of sale wherein the property in the milk is passed to the Clearing House; and secondly that the

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A.

purpose and object of the orders was equalization of returns, to be accomplished by a compulsory sham sale to a Clearing House set up as a figurehead to go through the motions of a pretended purchase hoping thereby to circumvent the effect of the *Crystal Dairy* decision.

As to the first branch: the arbitrary and one-sided transaction which the orders require to take place between the Clearing House and the farmer cannot be described as a "sale" in the sense that term is used in our law. The element of compulsion dominates all others. A contract of sale cannot take place when one of the so-called contracting parties is virtually deprived of the right to give or withhold his assent freely. Calling a transaction a sale does not make it a sale even in a statute, if in substance it is not a sale. The Milk Clearing House Limited is in reality a puppet set up by the appellant board to carry out the orders of the board as an integral part of the plan to secure equalization of returns.

Although the Clearing House is incorporated and a separate legal entity from the board, yet if it becomes material "to consider what is this thing which is described as a corporation" then as said by Lord Buckmaster in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.* (1921), 90 L.J.K.B. 1252, at p. 1257:

> . . . it may be established by evidence that in its operations it does not act on its own behalf as an independent trading entity, but simply for and on behalf of the people by whom it has been called into existence.

and *vide* also *Palmolive Manufacturing Co. (Ontario) Ltd.* v. *The King,* [1933] S.C.R. 131, at p. 140, as an example of two separate legal entities, yet held in fact and for all practical purposes to be merged, as one was merely the agent of the other subject in all things to its proper direction and control.

This so-called sale is in truth not a sale at all but a compulsory transfer to the Clearing House of the milk of A, B and C and other farmers. That this compulsory transfer is designed for the specific purpose of achieving equalization of returns, which could not be operative without it, is fully demonstrated by the illustrations given of the plan in operation and the foregoing analyses. It is confirmed by the evidence of the chairman of the appellant board. For when he was asked the reason for this compulsory measure and to state why the Clearing House could

not operate effectively as sole agent or broker for the sale of the farmers' milk he said:

> Under that arrangement, [*viz.*, Clearing House as agent of the farmer] every producer's milk would have to be followed right through until it was sold to the dealer. If producer A sold 100 per cent. of his milk to dealer X, then he would have to get fluid-milk prices for 100 per cent. of his milk. And if producer B sold 100 per cent. of his milk through the [same] agent, and it all went to the manufacturer for manufacturing purposes—to manufacture, he would get manufacturing prices only.

This must be taken to mean that if the board acted only as agent or broker it could not deduct anything from one farmer to equalize the payments to other farmers. To my mind it was another way of saying the board could not enforce equalization of returns without a compulsory transfer of the milk and therefore the compulsory sale provisions were inserted in the orders. The evidence of the chairman of the board just cited leads to the second branch mentioned, *viz.*, the reality of the transfer of the milk to the Clearing House. It is said that this compulsory transaction is not a transfer in substance although it may be in form. The learned trial judge found as a fact upon the evidence before him that it was a colourable device.

The ambiguous profit situation of the Clearing House; its vague financial set-up; its inadequate facilities in capital, plant and equipment to conduct operations on a scale entailed in the *bona fide* purchase of milk from the farmer and its distribution thereafter; the lack of any considered plan to raise or provide capital to operate in a commercial way; the fact the Clearing House must sell the milk in order to obtain money to pay the farmers for it; the continued delivery of the same farmer's milk to the same dealer in the same way; the fact that fixing of prices to the farmer and to the distributors, the fixing of dealers' "spreads" and other regulatory measures, may with the one exception of equalization of returns, all be enforced without the compulsory sale; these considerations when read together with the past and present conditions in the milk industry and previous attempts to cope with them, and the circuitous method adopted in the present plan to ascertain the *pro rata* amount payable to each farmer for his fluid-market milk, all point convincingly to the conclusion reached by the learned trial judge.

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A.

IV. Admissibility of evidence.

This finding of fact involves the admissibility of evidence to show the real scope and effect of the orders. The admissibility of evidence was one of the chief points in the argument before us. Counsel for the appellants did not dispute that such evidence may be introduced in respect to statutes and municipal by-laws. As I understand his argument it is that evidence is not admissible because the orders being *ex facie* valid, the authority exercised is not beyond the power of the scheme or the Legislature to delegate to the appellant board; it is said the same rule applies as in the interpretation of contracts, *viz.*, that evidence is not admissible unless ambiguity arises as to the meaning of the language employed in the orders. He asserted that ambiguity did not exist.

But it is not the construction of the orders that is in question, it is the reality of the plan embraced by them, and it is in particular the reality of the sale or transfer of the milk to the Clearing House. For the appellants rely upon the legality of that transaction to escape the charge of imposing an indirect tax. It is said by the respondents that the plan when seen in its reality by the light of the evidence will disclose that these orders *ex facie* valid in form though they may be, yet in substance are a colourable exercise of the board's power, for the reason that the board under the guise of exercising its own power is in reality attempting to carry out an object beyond its powers. It is said that under the colourable cover of a broad scheme to regulate the milk industry the appellant board in fact embarked upon a plan of equalization of returns which in its effect imposes an indirect tax.

It must be conceded that if the board had power to do directly that which it is charged with seeking to accomplish by indirection, or if it were a question only of the construction of orders admittedly within its competence, then appellants' objection to the admission of evidence would be on stronger ground. But if equalization of returns is found to constitute an indirect tax as charged, then no matter how unobjectionable the orders may be in form or how free from ambiguity their text may be, yet they are illegal as a colourable exercise of powers which the board does not possess, and which cannot be conferred upon it by its

parent Provincial Legislature. It is obvious that if the orders do in effect constitute an indirect tax then they are invalid.

But it cannot be said that the orders may not be colourable, simply because they are apparently valid in form and free from ambiguity in their text. Such an argument would be a denial of the well-recognized principle that the substance and not the form shall govern. Viewed in this light appellants' contention is reduced to this proposition, *viz.,* admitted that the orders may be colourable, yet because there is no ambiguity in their text, evidence may not be introduced to show they are merely a colourable device. The statement of this proposition carries its own rejection. Use of legal machinery for doing an illegal act will not purge its illegality, nor the indirectness of the means rid the act of its illegality, *per* the Earl of Halsbury in *Daimler Co.* v. *Continental Tyre &c. Co., Lim.* (1916), 85 L.J.K.B. 1333, at 1338.

Attorney-General for Ontario v. *Reciprocal Insurers* (1924), 93 L.J.P.C. 137 was a case where the impugned legislation was *ex facie* valid. Duff, J. (as he then was) speaking for the Judicial Committee, stated the principles which seem to govern this discussion. His Lordship said at p. 141:

> Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed.

This "plain meaning" rule advocated by counsel for the appellants might be in point here if the effect of the orders to which objection is taken, came within the competence of the board. But then his Lordship referred to the different principle which applies to a "law-making [body] . . . of a limited or qualified character," and said that in such case

> obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing.

Reading these two excerpts together and applying them to this case it should follow (1) If a "law-making [body] . . . of a limited or qualified character," refers in a particular case to the Dominion Parliament or a Provincial Legislature, *a fortiori* it must include an inferior law-making body such as the appellant board which is the creature of a Provincial Legislature. To hold otherwise would be to give an immunity to a

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A.

provincially created board not enjoyed by its parent Legislature or the Dominion Parliament; (2) if the appellant board is of a limited or qualified character, then examination of the effect of its orders is not limited to the proper construction of the language in which they are expressed; (3) that the "substance" of its orders may be examined with some strictness to determine what it is that the board is really doing; (4) obviously if the search for the intent of the board were limited to the form of the orders, no occasion would arise to examine their "substance" with "some strictness" to find what it is the board "is really doing."

That examination of the "substance" of the orders must include the consideration of external evidence where it is necessary to do so to understand the working out of the orders "in a practical business sense," I think is clear from what was said both by Sir Lyman Duff (with whom Davis, J. concurred) in *Reference re Alberta Statutes,* [1938] S.C.R. 100, at pp. 127-8, and by the Lord Chancellor, Lord Maugham, in the same case in the Judicial Committee, *vide* (1938), 108 L.J.P.C. 1, at pp. 6-7. Speaking of the examination of the effect of legislation Lord Maugham said:

> The Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be.

And further, at p. 6, having said it is not competent either for the Dominion or a Province

> under the guise or the pretence or in the form of an exercise of its own powers to carry out an object which is beyond its powers. . . .

the Lord Chancellor observed:

> Here, again, matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it.

It remains to be determined if this is a proper case for the Court to be informed by evidence as to what the effect of the orders will be. The learned trial judge on whom the initial burden fell came to the conclusion that it was. He had a wide judicial discretion in that respect. In my view he exercised it in accordance with correct principles and no injustice has resulted. I would add only that one need but read that evidence to realize that the legislative history and surrounding conditions have a direct bearing on the effect of the orders. Such evidence is essential in this case if the Court is to have knowledge of more

than half the problem, and intelligibly decide if the board, under the guise of exercising its own powers is in reality attempting to carry out an object beyond its powers.

Even if as argued by appellants' counsel, the orders are viewed by the rule which he contended applied to contract we find authority against the proposition that evidence is not admissible to determine the reality of the plan in the orders. *In re Watson; Ex parte Official Receiver* (1890), 59 L.J.Q.B. 394, a contract which was in form a hiring agreement was held to be in substance a bill of sale. The Court of first instance and the Divisional Court both held that the form of the documents only could be looked at. But the Court of Appeal held that the reality of the transaction was one of fact and that it was not prevented by the form of the document from going outside it and enquiring into the facts to see whether the document represented the real transaction. At p. 398 Lord Esher, M.R. said:

> I do not deny that people may evade an Act of Parliament, but they never will succeed in so doing by putting forward documents which contain a false description of the transaction, and the Courts will always go through those documents in order to arrive at the truth.

The Master of the Rolls said further 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.

The above decision, as well as *Maas* v. *Pepper,* [1905] A.C. 102, was recently applied by this Court in *Monarch Securities Ltd.* v. *Gold* (1940), 55 B.C. 70. True they are cases of contract. But they are now referred to because it was on the analogy to contract that counsel for the appellants advanced his strongest argument against admission of evidence to show the reality of the plan set up by the impugned orders. The problem is not one of construction but the reality of the transaction.

This being so we should overrule the objections taken to the admission of evidence which properly related to the purpose and object of the impugned orders and the reality of the plan set up therein. The evidence objected to and admitted was: (1) The ballot form Exhibit 6; (2) Marketing Board orders 3 through 9, Exhibit 4; (3) the evidence of E. G. Sherwood, a director of the appellant Milk Clearing House Limited; (4) the evidence of Charles E. Thompson and (5) the evidence of M. S.

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A.

Bryan verifying a radio speech made to the public by the appellant *Williams* on 13th May, 1939, when he was introduced and spoke as chairman of the appellant board; (6) the evidence given by the appellant *Williams* in cross-examination at the trial; (7) discovery evidence of *Williams* and Barrow.

The discovery evidence of *Williams* was first objected to on another ground. He was examined for discovery as an individual defendant. However, at the trial counsel agreed to treat his discovery evidence as if he had been examined as chairman of the appellant board, but subject to his being examinable in that capacity as an "officer of a corporation" within the meaning of rule 370c (1) of our Supreme Court Rules. The learned trial judge held him examinable under that rule applying the decision of MARTIN, J. (later Chief Justice of British Columbia) in *Centre Star* v. *Rossland Miners Union* (1902), 9 B.C. 190. I agree with the learned trial judge that *Williams's* discovery evidence was properly admitted at the trial as evidence of the chairman of the appellant board. By rule 1041 of our Supreme Court Rules the term "corporation" as used in the Supreme Court Rules

> shall have the meaning assigned to it under the "Interpretation Act," and shall include any association, union, or body whatever.

By section 24 (6) of the Interpretation Act, R.S.B.C. 1936, Cap. 1,—

> "Corporation" means any incorporated company, association, society, municipality, or body politic and corporate, howsoever and wheresoever incorporated, . . .

The appellant board is not "incorporated"; it cannot therefore be a "corporation" in the sense that term is defined in the Interpretation Act. But the additional words in rule 1041 "and shall include any association, union, or body whatever" widen the term "corporation" as used in the Supreme Court Rules to include legal entities which may not be "incorporated." Otherwise these additional words in rule 1041 would be meaningless. For if it were intended that the "association, union, or body whatever" should be "incorporated" this was already covered by the definition of "corporation" in the Interpretation Act, and no additional or qualifying language would be required.

In the circumstances the words "and shall include any asso-

ciation, union or body whatever" in rule 1041 should be regarded as words of amplification to include an unincorporated legal entity such as the appellant board. Accordingly for the purposes of discovery examination at least the appellant board should be regarded as a "corporation" within the meaning of rule 370c (1). In *Turner's Dairy Ltd. et al.* v. *Williams et al.* (1940), 55 B.C. 81 an interlocutory appeal in these same proceedings concerning refusal to answer questions on discovery examination, this Court held, applying *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426, that the appellant board was a legal entity suable as such. And *vide* also *Hollywood Theatres Ltd.* v. *Tenney* (1939), 54 B.C. 247, at pp. 275-7.

Then as to the discovery evidence of the defendant Barrow. I think it was proper evidence for the learned trial judge to consider in relation to past and present conditions in the milk industry in so far as it assisted him to understand the working out in practice of the plan outlined here. It related to a common issue between all the plaintiffs and all the defendants.

V. What is done constitutes a tax.

Thus far it has been established that the impugned orders are a colourable device to effect equalization of returns; that is to say in the language of Lord Thankerton in the *Crystal Dairy* decision, *supra,* they were designed (p. 19)

> to transfer compulsorily a portion of the returns obtained by the traders in the fluid milk market to the traders in the manufactured products market; the other . . . provisions afford the machinery by which this is enabled to be done.

Does what takes place under this colourable device constitute taxation? The principles of the decision of the Judicial Committee in the *Crystal Dairy* case require an affirmative answer.

It is true in that case there was an adjustment levy upon A to provide the money to equalize payments to B and C. There is no such so-called adjustment levy here. But once it is found (as it has been) that equalization takes place, it is manifest that what is done here is just as much a compulsory taking from A to pay B and C, as if it were in fact done by a levy expressed to be for that purpose. That it is not called a levy or that it is not shown in that form is not material. For the compulsory transfer and other provisions (in Lord Thankerton's language) "afford

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A.

the machinery by which this is enabled to be done." Again it is the substance and not the form which governs.

The impugned orders, in my view, fall within the elements of taxation stated by Duff, J. (as he then was) in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357, at p. 363 and by Lord Thankerton in the *Crystal Dairy* decision. The appellant board which passed the orders and thereby directs and controls the Clearing House is undeniably a public and not a private body. It is equally clear its orders were passed for a public purpose and unless held invalid are enforceable by law.

VI. Indirect tax.

The impugned orders impose a tax and the enquiry pressed further shows that the tax is indirect. Whether the plan imposes an indirect tax depends upon the tendency of the tax to "enter into and to affect the price of the product" *per* Duff, J. (as he then was) in *Lawson's* case, *supra,* at p. 362. That tendency is not ascertained by the "results in isolated or merely particular instances," *per* Viscount Haldane in *Attorney-General of British Columbia* v. *Canadian Pacific Railway* (1927), 96 L.J.P.C. 149, at p. 151. It is

> referable to, and ascertainable by, the general tendencies of the tax and the common understanding of men as to those tendencies:

per Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1887), 56 L.J.P.C. 87, at p. 89. The price payable to the farmer was increased by the impugned orders.

The price to the consumer in Vancouver was not fixed by the board although stated to be one of the lowest if not the lowest of any major city in Canada. When the appellant board fixed the price the dealer had to pay the Clearing House at 60 cents per pound butterfat, the price the dealer was then called on to pay was increased in two ways. First when the board fixed the price payable by the Clearing House to the farmer at 56 cents per pound butterfat, it thereby increased the price to the farmer by some six to eleven cents per pound more than the farmer had been receiving from the dealer. It is in evidence that before the orders were passed the dealers had been paying the farmer from 45 to 50 cents per pound butterfat for fluid-market milk. Secondly when the appellant board fixed the price payable by the

dealers to the Clearing House at 60 cents per pound butterfat (which allowed a four cent "spread" to the Clearing House) it thereby added another four cents to the price payable by the dealer.

Under the equalization plan in the board's orders the dealers had to pay some 10 to 15 cents per pound butterfat more than they did before. It is surely consistent with the "general tendency and the common understanding of men," that when dealers are compelled to pay such a substantial increase in the price of milk, that they will pass that increase or at least a goodly portion of it on to the ultimate consumer. The existence of that general tendency is the more certain since it is in evidence that the Vancouver consumer has been paying a comparatively low price and that strong representations have been made that it is too low. It is in point to observe also that although the equalization plan of the appellant board has brought about the price increases which give rise to that tendency, yet the board has refrained from fixing the price to the consumer or taking any step to prevent the natural operation of that general tendency.

It may be accepted therefore as a general tendency that the increased price to the farmer not to mention the additional four cent "spread" to the Clearing House, will be passed on wholly or in large part to the ultimate consumer, now benefiting from low comparative prices; and *vide* MACDONALD, C.J.B.C., in the *Crystal Dairy* case (1932), 45 B.C. 191, at p. 195, and in the same case MACDONALD, J.A. (as he then was) at pp. 211-2. In the circumstances therefore the effect of the impugned orders is to impose an indirect tax. Such a result is not authorized by the milk scheme, under which the appellant board operates. Even if it should be held to be within the milk scheme, then the scheme itself is illegal to that extent for obviously it cannot exercise powers which cannot be given it by the parent statute.

VII. *Re* appellants *Williams* and Barrow.

To succeed against the appellants *Williams* and Barrow, the respondents must show they did not act "in good faith in the performance or intended performance" of their duties as members of the appellant board; *vide* section 13 of the Natural Products Marketing (British Columbia) Act, *supra*. The evidence discloses that under the guise of regulations for the market-

C. A.
1941

TURNER'S DAIRY LTD. ET AL. v. LOWER MAINLAND DAIRY PRODUCTS BOARD ET AL.

O'Halloran, J.A.

ing of milk they incorporated into the orders of the board a colourable plan for equalization of returns which in its effect imposed an indirect tax. They sought to do something which has been found to be illegal. Therefore they have acted *mala fide, vide Westminster Corporation* v. *London and North-Western Railway* (1905), 74 L.J. Ch. 629, Lord Macnaghten at p. 632. Lord Lindley said at p. 636:

> Where a person is authorized by statute or by the common law to do what apart from such authority would be unlawful—for example, to commit a trespass—and the authority is conferred for some distinct and definite purpose, and is abused by being used for some other and different purpose, the person abusing it is treated as a wrongdoer from the first, and not only as a wrongdoer 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.

It was contended *Williams* and Barrow were not proper parties to the action; it was said there were no allegations against them. Reliance was placed on observations made in the course of the judgments in the practice appeal, *vide* (1940), 55 B.C. 81. But their description in the style of cause has been changed since then. The statement of claim has been amended since by charging these appellants in paragraph 28 thereof, with conspiring together to have the appellant board pass the impugned orders to obtain equalization of returns illegally or improperly, and to disguise the true purpose of the orders. During the course of the trial the learned trial judge ruled that these allegations against them were sufficient to constitute them proper parties to the action. I see no ground to hold otherwise.

Under cover of a broad scheme to regulate the milk industry the appellant board embarked upon a plan which in its reality results in an indirect tax. The impugned orders sought to conceal their true scope and effect and were a colourable use of the board's powers. The board attempted to do an illegal act under colour of a lawful authority.

I would, therefore, dismiss the appeals of all the appellants.

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

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

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

REX v. HOP LEE.

C. A.
1941
Jan. 15;
Feb. 3.

Criminal law—Offering to sell opium—Evidence—Duty of prosecution as to calling of witnesses—Can. Stats. 1929, Cap. 49, Sec. 4 (f).

One Murton, a constable in plain clothes, hired two adjoining rooms at the Dunsmuir Hotel in Vancouver which were connected by a dictaphone. Murton occupied one room and another constable occupied the other. One Hong Wong, who was in the employ of the police and could not speak English, brought the accused to Murton's room where he and Murton conversed as to the sale of a can of opium to Murton, including the price to be charged for it. The accused then left, saying he would be back the next morning. He came back, and after further conversation he left saying he would bring the can of opium in the afternoon, but he did not come back. Hong Wong was in the room with them on both occasions. Accused was convicted on a charge of offering to sell to Murton one can of opium for $475. On appeal, the main objection taken on behalf of the accused was that the prosecution failed to call or produce at the trial Hong Wong, who brought the accused to the police officer's room and was present throughout the interviews upon which the charge was founded.

Held, affirming the decision of MANSON, J., that on the facts of this case the Crown was not obliged to call Hong Wong as a witness.

APPEAL by accused from the conviction by MANSON, J. and the verdict of a jury at the Fall Assize at Vancouver on the 30th of September, 1940, on a charge of offering to sell and deliver one can of opium to one Murton for the sum of $475, without first obtaining a licence from the Minister of Pensions and National Health, or without other lawful authority. On the 18th of April, 1940, Murton who was a constable in plain clothes, visited Nanaimo with a Chinaman, Hong Wong, who could not speak English and was in the employ of the police. The constable saw accused there but did not speak to him. On the 25th of April Murton hired two rooms at the Dunsmuir Hotel in Vancouver which were connected by a dictaphone. Murton occupied one of the rooms and another constable was in the other room. Hong Wong brought the accused to the room occupied by Murton where the purchasing of a can of opium by Murton was discussed, including the price to be charged. The accused then left saying he would come back next morning. He came back in the morning, and after discussion accused said he would come

C. A. 1941

REX v. HOP LEE

back in the afternoon with a can of opium at about 5.30 o'clock. Murton's evidence was corroborated by the constable in the next room who heard the conversation through the dictaphone. Hong Wong was in the room on both occasions. The accused never came back.

The appeal was argued at Victoria on the 15th of January, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Ian Cameron, for appellant: The charge was for offering to sell opium. The constable and Hong Wong were both in the room at the Dunsmuir Hotel on the two occasions when the conversation took place between the constable and accused. The Crown did not call Hong Wong as a witness. Hong Wong was instrumental in getting the police to go to the hotel, and he brought the accused there. The accused claims he was suffering from asthma and wanted leave to go to the United States. Hong Wong should have been called as a witness by the Crown: see *Rex* v. *Seneviratne,* [1936] 3 W.W.R. 360, at p. 377. It is a principle of law that he must be called. In this case the jury asked that he be called. The Privy Council case must be followed: see *Rex* v. *Bagley* (1926), 37 B.C. 353, at p. 370; *Rex* v. *Sing* (1932), 50 B.C. 32; *Rex* v. *Mandryk,* [1939] 3 D.L.R. 543, at p. 545; *Rex* v. *Gauthier* (1921), 29 B.C. 401; *Rex* v. *Guerin* (1931), 23 Cr. App. R. 39. At least they should produce him for cross-examination.

Donaghy, K.C., for the Crown: The old law was that the Crown should call all witnesses, but now the rule is to call all witnesses who were at the preliminary hearing. This man was not a witness at the preliminary hearing. The defence could *subpœna* him if they wished and call him, and if he proved adverse they could cross-examine him. This man is a stool-pigeon and his evidence cannot be relied upon. The Colonial Laws Validity Act, 1865, does not apply to Canada. There is no duty cast upon the Crown to call this witness, and there has been no miscarriage of justice: see *Rex* v. *Sing* (1932), 50 B.C. 32. The Crown does not want to call a stool-pigeon, they are not reliable and it is not desirable to mention stool-pigeons in the case. He does not speak English and knows nothing as to the conversation

in the room at the hotel. The *Gauthier* case, *supra,* is not in point and the other cases cited only apply to the particular facts in those cases. It is not the duty of the Crown to call defence witnesses, it only results in confusion to do so. In murder cases the rule is more strictly applied: see Archbold's Criminal Pleading, Evidence and Practice, 30th Ed., 497; *Regina* v. *Holden* (1838), 8 Car. & P. 606.

Cur. adv. vult.

3rd February, 1941.

MACDONALD, C.J.B.C.: I would dismiss the appeal. I am content to say that on the facts counsel was not obliged to call the witness referred to. Even in respect to what is called "the unfolding of the narrative" if we had a plethora of witnesses it would not necessarily result in a miscarriage of justice to omit to call one or more of them.

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

SLOAN, J.A.: In my view Hong Wong was not a witness whose evidence was "essential to the unfolding of the narrative," *Rex* v. *Seneviratne,* [1936] 3 W.W.R. 360, at 377. In consequence under the circumstances of this case Crown counsel was not obliged to call him and the appeal must be dismissed.

O'HALLORAN, J.A.: The appellant was convicted of offering opium for sale contrary to the statute. He seeks a new trial on the main ground that Hong Wong, a police agent present when the offer was made, was not called by the prosecution as a witness at the trial. *Rex* v. *Seneviratne,* [1936] 3 W.W.R. 360 was relied on and particularly that portion of the speech of Lord Roche at p. 378, reading:

> Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

Counsel for the respondent did not dispute that principle, but maintained Hong Wong was not an essential witness to the "unfolding of the narrative on which the prosecution is based." His chief ground for that contention was that the evidence dis-

C. A.
1941

REX
v.
HOP LEE

O'Halloran, J.A.

closed Hong Wong did not understand the English language and obviously could not be an "essential witness" concerning the charge of offering to sell opium to constable Murton, since the offer took place entirely in English in conversation between the appellant and constable Murton.

In these special circumstances the contention of the respondent should be accepted as well founded. Other circumstances might impel a different conclusion. *Rex* v. *Sing* (1932), 50 B.C. 32 was referred to. It was a ruling given in the course of a trial. Its value is questionable, since the determining issue whether the witnesses were or were not essential in the sense described in *Rex* v. *Seneviratne, supra,* was not then considered.

Hong Wong was not called at the preliminary hearing. Moreover at the trial, where the appellant gave evidence in his own defence, no application was made by the defence to have Hong Wong called for cross-examination when the prosecution did not call him.

I would dismiss the appeal.

MCDONALD, J.A.: This is an appeal from conviction for having offered opium for sale to one Murton an officer of the Royal Canadian Mounted Police. The objection taken on behalf of the appellant is that the prosecution failed to call or to produce at the trial one Hong Wong who brought the appellant to the police officer's room and was present throughout the interview upon which the charge was founded. Hong Wong was not called at the preliminary hearing and the appellant was therefore not misled in that regard. If he had desired to have the evidence of Hong Wong it was open to him to have had him *subpœnaed* and called.

The neat point for decision is whether or not Crown counsel is obliged to call every witness who was present at the time that the alleged offence was committed, or whether it is open for Crown counsel to decide in his own discretion as to what witnesses he shall or shall not call. I can see no advantage to be gained by discussing cases decided in other jurisdictions where the broad rule has no doubt been laid down that Crown counsel is obliged to follow the course contended for by the appellant. So far as this Province is concerned the practice for many years has been

to follow the decision of MACDONALD, J. in *Rex* v. *Sing* (1932), 50 B.C. 32, where after a careful review of the leading authorities extending throughout many years, that learned judge held that counsel for the prosecution is not bound to call witnesses merely because their names are on the back of the indictment (or since grand juries have been abolished have been called at the preliminary hearing).

It was further held that Crown counsel might use his own discretion, but that as to witnesses called at the preliminary hearing he ought to have them in Court so that they might be called for the defence if they are wanted for that purpose. It was further held that if such witnesses should be called for the defence the person calling them makes them his own witnesses. The English cases on the subject are also cited in Archbold's Criminal Pleading, Evidence and Practice, 13th Ed., 497.

Although appeals to the Judicial Committee in criminal matters have been abolished I think we may safely adopt as a rule that laid down by Lord Roche speaking for the Judicial Committee in *Rex* v. *Seneviratne,* [1936] 3 W.W.R. 360, at pp. 377-8:

> It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Raj* v. *Reg.* (1914), I.L.R. 42 Cal. 422, to the effect that all available eye witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

As stated by counsel on the argument before us the statement contained in the sentence last above quoted is really axiomatic because Crown counsel must, of course, call a sufficient number

C. A.
1941

REX
v.
HOP LEE

McDonald, J.A.

of witnesses to unfold the narrative. Further than that he is not obliged to go. In the present case the evidence on which the Crown relied and the only evidence upon which the Crown did rely was that of the police constable Murton. He unfolded the whole tale and though contradicted by the appellant the jury chose to believe him. Any evidence which Hong Wong might give was not necessary to complete the narrative in any regard. In my view therefore Crown counsel in this case followed the practice which has been well established in this Province for many years and a practice which has received the approval of the Judicial Committee of the Privy Council.

I think, therefore, that the appeal should be dismissed.

Appeal dismissed.

In Admiralty
1940
Dec. 17.
1941
Feb. 28.

C. T. GOGSTAD & CO. v. THE S.S. "CAMOSUN."

Admiralty law — Collision — Channel—Vessels approaching one another—Both vessels on one side of mid-channel—Examination of witnesses de bene esse—Refusal to read on trial.

The entrance to First Narrows at Vancouver is about 750 feet wide with mid-channel in its centre. The S.S. "Lido," owned by the plaintiff, was inward bound, and when about 300 feet outside (or west) of the Lion's Gate Bridge, was in collision with S.S. "Camosun," outward bound.

Held, on the evidence, that the collision took place substantially north of mid-channel, that the S.S. "Lido" was on the wrong side of mid-channel and was solely responsible for the collision.

The evidence of several witnesses for the plaintiff was taken before trial *de bene esse*. Counsel for the plaintiff declined to read into the record the examination so taken of one of these witnesses.

Held, that such evidence is regarded as an additional examination to be utilized if necessary only in the event that witnesses cannot be examined later. The plaintiff is not bound to use it if he does not wish to do so.

ACTION arising out of a collision between the plaintiff's S.S. "Lido" and the S.S. "Camosun" at the entrance to Vancouver Harbour, about 300 feet west of the Lion's Gate Bridge. The

facts are set out in the reasons for judgment. Tried by MACDONALD, D.J.A. at Vancouver on the 17th of December, 1940.

Griffin, K.C., for plaintiff.
Clyne, and *D. K. Macrae*, for S.S. "Camosun."

Cur. adv. vult.

28th February, 1941.

MACDONALD, D.J.A.: I reserved a point on the admissibility of certain evidence. The evidence of several witnesses for the plaintiff was taken before trial *de bene esse*. Plaintiff's counsel exercised the privilege, as he conceived it, of declining to read into the record the examination so taken, of one of these witnesses. He was within his rights in doing so. To do a thing *de bene esse* signifies allowing or accepting certain evidence for the present until more fully examined, *valeat quantum valere potest*. It is regarded as an additional examination to be utilized if necessary only in the event that witnesses cannot be examined later in the action in the regular way. This evidence therefore was taken "for what it was worth." The plaintiff was not bound to use it if he did not wish to do so. I refer to *Atkinson* v. *Casserley* (1910), 22 O.L.R. 527.

This action arose out of a collision between the "Lido" and the "Camosun" on the night of October 15th, 1940, in the First Narrows at the entrance to Vancouver Harbour and at a point approximately 300 feet westerly of the Lion's Gate Bridge; it extends from Stanley Park, near Prospect Point, to the north shore. Liability depends upon the point of collision. By article 25 of the Collision Regulations in a channel such as this

> every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side. . . .

We are concerned with a channel somewhat special in its nature inasmuch as opposite the point of collision to the north silt accumulates to some extent near the navigable channel at the outlet of the Capilano River; it forms as Captain Reed testified, not merely a physical but also a mental hazard for navigators. At the point of collision I find as stated by Captain Reed, an independent witness called on behalf of the plaintiff and one with special qualifications to speak that the channel is approxi-

In Admiralty
1941

C. T. GOGSTAD & Co. v. THE S.S. "CAMOSUN"

Macdonald, D.J.A.

mately 725 feet in width with mid-channel in its centre bounded by the six-fathom lines. There was no question at the trial indicating or suggesting any other boundary-lines. It was not only so stated in evidence by all parties but both vessels navigated in respect to a channel so defined. Sometime after trial I was asked by counsel for the plaintiff to reopen the case and admit in evidence a notice to mariners dated October 27th, 1938, said to disclose, at all events in so far as the channel under the Lion's Gate Bridge is concerned, that the five-fathom lines form the proper boundaries of the navigable channel. As the trial proceeded otherwise and on the basis aforesaid I would not reopen it to admit this evidence. I express no opinion whether or not this notice to mariners determines the boundaries of the channel at the point referred to, *viz.*, under the bridge, or was on the other hand designed merely as an aid to navigation: it does not in any event define the channel at the point of collision. A short distance west of the bridge the course of the channel changes and it has special features. When too with so much particularity the channel was defined by plaintiff's witnesses, bounded as aforesaid by the six-fathom line I would not permit a case that failed on that basis to be recast *a fortiori* when, as intimated, the channel as actually navigated was otherwise defined: in other words all parties proceeded on the basis of common well-understood boundaries; it was made their channel. Captain Reed's evidence was explicit: it does not follow in any event that he would change it. Doubtless in view of the uncertain and shifting boundary to the north the six-fathom line would form a more satisfactory line of demarcation.

I was reasonably convinced at the conclusion of the trial that the collision occurred substantially to the north of mid-channel thus fixing responsibility on the "Lido." I reserved consideration for greater certainty; it enabled me to study further careful submissions by counsel: that view is confirmed. I base my judgment on ocular proof. If one followed, as charted, by the respective parties, the course of the "Lido" after approaching the examining vessel near Point Atkinson and the outbound course of the "Camosun" no collision would have occurred. I accept mainly the evidence of two independent witnesses who

observed the collision from Prospect Point. Their observations translated by expert testimony established the point as substantially north of mid-channel. Evidence too of other independent witnesses whom I accept as reliable disclosed the course of the "Camosun" when proceeding under the bridge at a point substantially to starboard of mid-channel at that point and other evidence pointed to the same conclusion. This evidence was altogether inconsistent with the course of the "Camosun" as described by witnesses on the "Lido" as the former approached and passed under the bridge. I refer to the evidence of Kelly and Allison, passengers on the "Camosun"; their attention was directed to the signal station on the bridge 91 feet to the north of mid-channel; they testified that the "Camosun" passed directly under it, or a little to the north. Where they stood this point could be readily determined.

In further confirmation having regard to the direction of the tidal current and the testimony of eye-witnesses, the "Camosun" did not navigate from the south to the north side of the channel on approaching the bridge. True the course outlined by Captain Watt of the "Camosun" was not adhered to; the entries in the log were made before the ship left the dock, said to be a common practice. Whatever may be said in that respect the course followed and the actual point of collision must determine liability. The course followed by the "Camosun" was not on the south side of the channel in passing under the bridge or beyond it. Other evidence of independent witnesses support this view. The master of the "Teco" inbound when he passed the "Camosun" outbound between Brockton Point and Calamity Shoal disclosed that it was near the centre of the channel when she passed the "Camosun" port to port. Another vessel the "Joan I" also inbound passed the "Camosun" when nearing the bridge. It placed the "Camosun" substantially to the starboard side of the channel.

As already intimated the evidence of Berry, Ockenden and Fraser is conclusive. I accept the statement of the two young men concerning the point where they stood and the aperture through which they viewed the collision. It would be incredible to disregard this evidence; nor is it possible to plead mistake.

In Admiralty
1941

C. T. GOGSTAD & Co. *v.* THE S.S. "CAMOSUN"

Macdonald, D.J.A.

With the line of vision fixed the measurements made and conclusions drawn by the surveyor Fraser were not questioned. From their position at the top of Prospect Point it was impossible to see mid-channel as defined or any part of the south channel. Their evidence in conjunction with the surveyor's measurements inevitably placed the point of impact substantially to the north of mid-channel.

Having reached this conclusion based upon observation of physical facts no purpose would be served by canvassing the course of the "Lido" as portrayed by plaintiff's witnesses from near Point Atkinson to the point of collision. The only material comment is that Captain Uldall the pilot found it necessary to make an allowance of I think approximately 100 feet in locating the point of collision. This by his evidence would at least bring the ship near mid-channel. I think the "Lido" crossing the tidal current drifted to the north side of the channel.

I have therefore, as indicated, discarded evidence more or less conjectural: I accept evidence to my mind of a more conclusive nature. It follows that the "Lido" was solely responsible for the collision. Judgment accordingly.

Judgment for defendant.

DES BRISAY *ET AL.* v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED AND CANADIAN NATIONAL STEAMSHIP COMPANY LIMITED.

C. A.
1939
Sept. 13, 14, 15, 18, 19, 20, 21, 22.
1940
Jan. 9.

Negligence—Goods stored on dock for shipment—Destroyed by fire—"Accidentally begun"—Spread of fire—Duty of warehouseman—Onus of proof—Costs—14 Geo. III. (Imp.), Cap. 78, Sec. 86.

The plaintiffs stored 1,588 cases of canned salmon on the dock of the Canadian National Steamship Company Limited in Vancouver, pending shipment. While so stored the dock and contents were destroyed by fire. In an action for damages against the owners and operators of the dock, it was held on the trial that as to the origin of the fire no evidence of negligence had been adduced and no facts proved warranting an inference of negligence, and the cause of the fire was incapable of being traced. It was one which had "accidentally begun" within the meaning of section 86, 14 Geo. III. (Imp.), Cap. 78, and the defendants were not liable in respect of the commencement of the fire, there being no proof of negligence in respect of the construction of the warehouse or its management or in the fact that it was not equipped with certain means of fire-control which the plaintiffs contended should have been installed.

Held, on appeal, affirming the decision of MANSON, J., except as to costs (O'HALLORAN, J.A. dissenting in part), that the appeal should be dismissed.

Per O'HALLORAN, J.A.: The Fires Prevention (Metropolis) Act, 1774, does not apply in this case of bailment. The respondent Canadian National Steamship Company Limited in its capacity as warehouseman and wharfinger was a bailee of appellants' goods, and it must follow, apart from special contract, that the *onus* was on the bailee to prove it did take that care of the appellants' goods prescribed in *Brabant & Co.* v. *King*, [1895] A.C. 632, at p. 640. This *onus* has not been discharged, and the appeal should be allowed as against the Canadian National Steamship Company Limited.

Held, further, as to the costs, that the adjudication thereon cannot be severed from the main judgment and therefore taxation will proceed on the basis of the existing tariff at the time the main judgment was pronounced.

APPEAL by plaintiffs from the decision of MANSON, J. of the 12th of September, 1939 (reported, 53 B.C. 207) in an action to recover $12,199.54, the value of canned salmon destroyed by fire on the 10th of August, 1930, while in the custody of the defendants. The respondents (defendants) are corporations owned by the Dominion Government, organizations carrying on coastal

C. A. 1939

DES BRISAY v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

and ocean-going freight and passenger trade. The pier carrying on the trade in Vancouver is operated by the respondent, Canadian National Steamship Company Limited, and the respondent Canadian Government Merchant Marine Limited was agent for a number of government-owned vessels known as Canadian Government Merchant Marine, and used the pier in question. The name Canadian National Steamships was used to cover all operations. The appellants, having 1,588 cases of canned salmon to ship to Montreal, got in touch with the Canadian Government Merchant Marine office in Vancouver and arranged space for the carriage of same on S.S. "Canadian Miller" and were instructed to deliver the canned salmon to the dock in question at the foot of Main Street in Vancouver. The salmon was delivered accordingly. In January, 1930, new structures were under construction on the dock in the way of sheds, and the east shed was partially separated from the west shed. While this work was going on they continued to do transportation business, and while the work was going on in the east shed and incomplete, the plaintiffs' goods were placed there. On Sunday, August 10th, 1930, while the dock was still in the course of construction, there was a fire which completetly destroyed the dock and with it the appellants' goods. The pier was 1,010.6 feet long and 220 feet wide. The substructure consisted of creosoted piles and the superstructure comprised freight sheds one storey high which extended the whole length of the pier. At the shore end there was a second storey above the freight sheds extending north 250 feet, used for offices and passenger accommodation.

The appeal was argued at Victoria from the 13th to the 15th and the 18th to the 22nd of September, 1939, before MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Maitland, K.C., for appellants: There are two defendants, namely, the Canadian Government Merchant Marine Limited as carriers, and Canadian National Steamship Company Limited as warehouseman, or bailee. The plaintiffs booked space with the Canadian Government Merchant Marine Limited for carriage of goods *via* steamship to Montreal, and carrying out instructions from said company, delivered 1,588 cases of canned salmon on the dock operated by the Canadian National Steamship Com-

pany, where a wharfage charge was payable. The goods were destroyed by fire while on the dock. The Canadian Government Merchant Marine is liable as a common carrier: see Halsbury's Laws of England, 2nd Ed., p. 12, sec. 16; Carver on Carriage by Sea, 8th Ed., secs. 2, 3 and 22; *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; *Forward* v. *Pittard* (1785), 1 Term Rep. 27, at p. 34; *Thorogood* v. *Marsh* (1819), Gow 105, at p. 107; *Covington* v. *Willan* (1819), *ib.* 115; *Royal Exchange Assurance v. Kingsley Navigation Co.*, [1923] A.C. 235, at p. 238. He is responsible from the time the goods are delivered to the place designated: see Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 17, sec. 23; Carver's Carriage by Sea, 8th Ed., p. 98, sec. 68; *Colepepper* v. *Good* (1832), 5 Car. & P. 380; *Burrell* v. *North* (1847), 2 Car. & K. 680. The Canadian National Steamship Company must exercise due care in protecting the goods against unexpected danger: Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 748, sec. 1232. There must be reasonable care of a thing entrusted to a bailee: see Beven on Negligence, 4th Ed., 931; *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122, at pp. 126-7; *Welden* v. *Smith*, [1924] A.C. 484, at p. 493; *Brabant & Co.* v. *King*, [1895] A.C. 632, at p. 640. A wharfinger is bound to guard against all probable danger: see Beven on Negligence, 4th Ed., 1018. The burden is on the defendant to show circumstances negativing neglect: see *Romano* v. *Columbia Motors Ltd.* (1930), 42 B.C. 168; *Herbert* v. *C. A. Ward, Ltd.*, [1937] O.W.N. 139. The proof rests on the bailee that he took reasonable care for the security of the bailment: see *Joseph Travers & Sons, Limited* v. *Cooper*, [1915] 1 K.B. 73; *Phipps* v. *The New Claridge's Hotel (Limited)* (1905), 22 T.L.R. 49; *Coldman* v. *Hill*, [1919] 1 K.B. 443, at pp. 447-451; *Lamdels* v. *Christie*, [1923] S.C.R. 39; *Furness, Withy & Co.* v. *Ahlin* (1918), 56 S.C.R. 553, at pp. 555-8; *Porter & Sons* v. *Muir Brothers Dry Dock Co. Ltd.* (1929), 63 O.L.R. 437, at p. 456; *Brooks Wharf* v. *Goodman Bros.*, [1936] 3 All E.R. 696, at p. 701; *Crum* v. *Big 4 Transfer Etc. Co. Ltd.*, [1930] 2 W.W.R. 337, at 338. The *onus* is on the defendant to show that the loss did not happen in consequence of its neglect: see *Charrest* v. *Manitoba Cold Storage Co.* (1909), 42 S.C.R. 253; *Murphy* v.

C. A. 1939

DES BRISAY v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

Hart (1919), 53 N.S.R. 79. As to duty of the defendant to disprove negligence see *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534, at p. 543; *Hutson et al.* v. *United Motor Service Ltd.*, [1936] O.R. 225; *Great West Supply Co.* v. *G.T.P. Ry. Co.* (1915), 8 W.W.R. 720, at p. 726. The defendant failed to satisfy the *onus*. The pier was still under construction and in control of the contractors. The south end was open, it was highly combustible and the fire hazard was high and made more so by business being carried on while the dock was under construction. There was no adequate provision for detection of fire, or for the control or extinguishment of fire. Fuel-oil pipes containing large quantities of fuel-oil were affixed under the floor, and the only division wall designed as a fire-wall was defective. The same care should be taken for the preservation of the goods as might reasonably be expected from a skilled store-keeper acquainted with the risks. The defendants knew of the danger from fire. No precautions were taken to obviate the risks: see *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510, at p. 512; *Davis* v. *Garrett* (1830), 6 Bing. 716; *Maunsell v. Campbell Security Fireproof Storage, &c., Co.* (1921), 29 B.C. 424, at p. 431; Salmond on Torts, 7th Ed., 182; *Sleat* v. *Fagg* (1822), 5 B. & Ald. 342, at 347; *Gunyon* v. *South-Eastern and Chatham Managing Committee* (1915), 84 L.J.K.B. 1212, at 1217; *James Morrison & Co.* v. *Shaw*, [1916] 2 K.B. 783. The learned trial judge wrongly considered the Fires Prevention (Metropolis) Act, 1774, 14 Geo. III. (Imp.), Cap. 78 applied: see *Shaw & Co.* v. *Symmons & Sons*, [1917] 1 K.B. 799; *Romano* v. *Columbia Motors Ltd.* (1930), 42 B.C. 168. Where a contract is departed from, a bailee is not protected by the Act: see *London & North Western Ry. Co.* v. *Neilson*, [1922] 2 A.C. 263, at pp. 273-4. The defendant must prove there was no negligence either in the commencement or spread of the fire: see *Musgrove* v. *Pandelis*, [1919] 1 K.B. 314; [1919] 2 K.B. 43; *Coates* v. *Mayo Singh* (1925), 36 B.C. 270, at pp. 272 and 284; *Port Coquitlam* v. *Wilson*, [1923] S.C.R. 235; *Ellerman Lines, Ld.* v. *H. & G. Grayson, Ld.* [1919] 2 K.B. 514; *Filliter* v. *Phippard* (1847), 11 Q.B. 347; *London and North Western Railway Company* v. *J. P. Ashton and Company*, [1920] A.C. 84; *Scott* v. *London*

Dock Co. (1865), 3 H. & C. 596; *United Motors Service, Inc.* v. *Hutson, et al.*, [1937] S.C.R. 294, at p. 303.

Des Brisay, on the same side: On the question of costs the learned judge, without jurisdiction, made an order directing taxation of the defendants' costs under Column 4, Appendix N. On September 12th, 1938, judgment dismissing the action was pronounced and there was no jurisdiction for the learned judge to make such an order: see *Vandepitte* v. *The Preferred Accident Insurance Co. of New York and Berry* (1930), 42 B.C. 315. On November 1st, 1938, old Appendix N was repealed and new Appendix N substituted. The judgment took effect from the date of pronouncement and before the change as to Appendix N: see *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Co.* (1915), 21 B.C. 515; *Royal Bank* v. *E. J. Bawlf & Co.*, [1919] 2 W.W.R. 361; *Delap* v. *Charlebois* (1899), 18 Pr. 417; *Butcher* v. *Henderson* (1868), L.R. 3 Q.B. 335; *Williamson* v. *Bank of Montreal* (1899), 6 B.C. 480. As to the retroactive effect of a statute see Craies's Statute Law, 4th Ed., 234.

A. Alexander (*A. R. MacLeod,* with him), for respondents: They say the negligence consisted of causing the fire, alternatively allowing it to spread, alternatively storing the goods in an unsafe warehouse. The goods were received by the Steamship Company under a contract partly in writing and partly verbal, stipulating it received the goods as warehousemen only, and that it would not be liable for loss or damage from whatever cause, unless resulting from negligence. There is no proof that the fire had its origin through any act or omission of the defendants. The Steamship Company warehoused the goods in a place reasonably safe. In its capacity as a warehouseman the company owed no duty and was not bound in law to provide fire resistance, fire-preventative or fire-control appliances of any kind. The company committed no breach by placing the goods in a building not under its sole control. There is no express term in the contract of bailment. There is no evidence that the portion of the pier in which the goods were stored was not under the sole control of the Steamship Company. The question of control was not a factor either in regard to the commencement of the fire or

C. A. 1939

DES BRISAY v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

the spread of the fire. The action is one of tort and the *onus* is on the plaintiff. The fire being of unknown origin the defendants are relieved from liability by section 86 of the Fires Prevention (Metropolis) Act, 1774, 14 Geo. III. (Imp.), Cap. 78: see *Fillitter* v. *Phippard* (1847), 11 Q.B. 347, at p. 357; *Port Coquitlam* v. *Wilson*, [1923] S.C.R. 235. The goods were received by the Steamship Company as warehousemen and not by the defendant Merchant Marine Company in the capacity of carrier. There were no final instructions upon which a carrier could act prior to the fire. In the case of the accidental destruction of the goods by fire the shipper has no remedy against the Marine Company: see *Milloy* v. *Grand Trunk Railway Co.* (1894), 21 A.R. 404, at p. 407; *Slim* v. *G.N. Railway Co.* (1854), 14 C.B. 647, at p. 653; Hutchinson on Carriers, 3rd Ed., 107 and 116-8. In any case the Marine Company is exonerated from liability by the provisions of the Canada Shipping Act, R.S.C. 1927, Cap. 186, Sec. 944. The Steamship Company was a warehouseman and not a carrier. On the responsibility of a warehouseman see Beal on Bailments, 276; *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122, at pp. 126-7; Beven on Negligence, 4th Ed., 1011; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 749. There is no duty either at common law or by statute to supply fire-resistant or fire-control: see *McAuliffe* v. *Hubbell*, [1931] 1 D.L.R. 835, at 837; *Finlay* v. *Chirney* (1888), 20 Q.B.D. 494, at p. 498; *Smart* v. *Sandars* (1848), 5 C.B. 895, at p. 914; *Maurice* v. *Goldsbrough Mort & Co.*, [1939] 2 W.W.R. 557, at p. 561; *Maving* v. *Todd and Others* (1815), 1 Stark. 72; *Sidaways and Another* v. *Todd and Another* (1818), 2 Stark. 400, at p. 401; *In the Matter of Webb and Others* (1818), 8 Taunt. 443; *Bowie* v. *Buffalo, Brantford & Goderich R.R. Co.* (1858), 7 U.C.C.P. 191, at p. 197; *Chapman* v. *Great Western Railway Co.* (1880), 5 Q.B.D. 378; *Turner* v. *Civil Service Supply Association*, [1926] 1 K.B. 50, at p. 58; *Fagan* v. *Green and Edwards, Ld.*, *ib.* 102. The *onus* of proof that the fire was not accidental is on the plaintiff: see *Canada Southern Ry. Co.* v. *Phelps* (1884), 14 S.C.R. 132, at pp. 144-5; *United Motors Service Inc.* v. *Hutson et al.*, [1937] S.C.R. 294, at p. 303. This view of where the *onus* lies is supported by *Lord Canterbury* v. *The Queen*

(1843), 12 L.J. Ch. 281, at pp. 285-6; *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951, at p. 958; *Musgrove* v. *Pandelis,* [1919] 1 K.B. 314, at p. 317; *Job Edwards, Ld.* v. *Birmingham Navigations,* [1924] 1 K.B. 341; *Collingwood* v. *H. & C. Stores,* [1936] 3 All E.R. 200. The law is the same in the United States: see *Whitworth et al.* v. *Erie Railroad Co.* (1882), 87 N.Y. 413; *Losee* v. *Buchanan et al.* (1873), 51 N.Y. 476, at pp. 498-9. *"Res ipsa loquitur"* does not apply to this case: see *The Sisters of St. Joseph of the Diocese of London* v. *Fleming,* [1938] S.C.R. 172, at p. 177; *Spencer* v. *Field,* [1939] S.C.R. 36, at p. 42; *Scott* v. *Fernie* (1904), 11 B.C. 91, at p. 96. The learned trial judge was justified, on the evidence, in finding that the defendants were not guilty of negligence either in starting the fire or in preventing its spread. The findings will not lightly be disturbed: see *"Hontestroom" (Owners)* v. *"Sagaporack" (Owners)* (1926), 95 L.J.P. 153, at pp. 154-5. All wharves in the port are inspected periodically by the Board of Fire Underwriters and the pier in question enjoyed a lower rate of insurance than most of the other piers in the port: see *Vaughan* v. *Menlove* (1837), 3 Bing. N.C. 468, at p. 475. The correspondence of W. D. Keeston, director of insurance, should have been excluded. He was not an officer of the defendant companies and he was not authorized to make binding admissions on their behalf: see Phipson on Evidence, 7th Ed., 240; *Burnside* v. *Dayrell* (1849), 3 Ex. 224; *Sykes* v. *Cooper* (1846), 7 L.T. Jo. 452; *George Whitechurch, Limited* v. *Cavanagh,* [1902] A.C. 117. The admissions of an ex-agent as to past transactions are not evidence against his former principal: *Peto* v. *Hague* (1804), 5 Esp. 134; *Fairlie* v. *Hastings* (1804), 10 Ves. 123. Evidence of an admission by a servant or agent of negligence is not evidence against the principal: see *Johnson* v. *Lindsay* (1889), 53 J.P. 599; *Rainnie* v. *Saint John City Railway Co.* (1891), 31 N.B.R. 552; *Small* v. *Belyea* (1883), 24 N.B.R. 16. Negligence must be proved to be effective cause of loss: see *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41; *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193; *Rickards* v. *Lothian,* [1913] A.C. 263; *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122. On the question of costs, the judg-

C. A. 1939

DES BRISAY v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

ment was not completely pronounced until December 12th, 1938, when the trial judge for the first time considered and disposed of the costs. The new Appendix N was in force at that time. The learned judge had control over it until the judgment was perfected. The arrangement made at the hearing was that upon judgment being given costs should be spoken to. He had power and jurisdiction under the authorities over his judgment until entry: see *Kimpton* v. *McKay* (1895), 4 B.C. 196, at pp. 204-6; *In re St. Nazaire Company* (1879), 12 Ch. D. 88, at p. 91; *In re Suffield and Watts, Ex parte Brown* (1888), 20 Q.B.D. 693, at p. 697; *Preston Banking Company* v. *William Allsup & Sons,* [1895] 1 Ch. 141, at p. 144; *Fritz* v. *Hobson* (1880), 14 Ch. D. 542, at p. 560 *et seq.; Charles Bright & Co., Limited* v. *Sellar,* [1904] 1 K.B. 6, at p. 11; *Canadian Land Co.* v. *Municipality of Dysart et al.* (1885), 9 Ont. 495, at p. 512; *Vandepitte* v. *Berry* (1928), 40 B.C. 408; *Andler* v. *Duke* (1932), 45 B.C. 256, at p. 259. Other cases on the exercise of discretion as to costs after entry of judgment are *Bryans* v. *Peterson* (1921), 19 O.W.N. 566; *Hardy* v. *Pickard* (1888), 12 Pr. 428; *Newcomb* v. *Green* (1923), 32 B.C. 395. The learned judge's discretion by which he directed the costs to be taxed on the higher scale was properly and reasonably exercised by him.

Maitland, replied.

Cur. adv. vult.

9th January, 1940.

MARTIN, C.J.B.C.: The appeal is allowed in part as to costs only, but our brother O'HALLORAN dissenting to this extent, that he would also allow the appeal as against the Canadian National Steamship Company. We think that as to the costs that the adjudication thereon cannot be severed from the main judgment; and therefore taxation will proceed on the basis of the existing tariff at the time the main judgment was pronounced.

SLOAN, J.A.: In my view the learned trial judge reached the right conclusion and I would dismiss the appeal.

O'HALLORAN, J.A.: I agree the appeal should be dismissed against the respondent Canadian Government Merchant Marine Limited as carrier except as to that branch thereof relating to

costs. I have nothing to add to the reasons for judgment of MANSON, J. in dismissing the action against that defendant. With respect, however, I am unable to reach the same conclusion in regard to the other defendant, the respondent Canadian National Steamship Company Limited in its capacity as warehouseman and wharfinger. The respondent wharfinger and warehouseman was a bailee of appellants' goods consisting of 1,588 cases of canned salmon which were lost while awaiting shipment in the respondent's dock in Vancouver. The dock and the appellants' goods were completely destroyed by fire originating in the dock.

Counsel for the appellants contended it was the duty of the respondent to show it had complied with its legal obligation as bailee to exercise the same degree of care towards the preservation of the goods of its bailor as stated by Lord Watson in *Brabant & Co.* v. *King,* [1895] A.C. 632, at 640:

> . . . might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred.

A wharfage charge was payable in respect of the goods. Storage was payable also after the lapse of a certain time. The respondent was a bailee for reward. Counsel did not raise any point as to this character of the bailment. The appeal was argued on the basis that it was a bailment for reward; and *vide Welden* v. *Smith,* [1924] A.C. 484, at 492-3. Counsel for the respondent contended however that section 86 of the Fires Prevention (Metropolis) Act, 1774, 14 Geo. III. (Imp.), Cap. 78, imposed an *onus* on the plaintiffs (appellants) to show the fire had an "accidental" beginning; and that accordingly the bailee's duty as aforesaid did not arise unless and until the plaintiffs had discharged that *onus.* While that section has not been re-enacted in this Province, as it has been in Ontario by The Accidental Fires Act, Cap. 146, R.S.O. 1927, it has been assumed throughout this case that it is in force in this Province by virtue of the English Law Act, Cap. 88, R.S.B.C. 1936; and *vide Wilson* v. *City of Port Coquitlam* (1922), 30 B.C. 449, and also [1923] S.C.R. 235, Mr. Justice Duff (as he then was) at pp. 242-4; and

C. A. 1940

DES BRISAY v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

O'Halloran, J.A.

Canada Southern Ry. Co. v. *Phelps* (1884), 14 S.C.R. 132, at 144.

In view of the decision of this Court in *Romano* v. *Columbia Motors Ltd.* (1930), 42 B.C. 168, I must find that the Fires Prevention (Metropolis) Act, 1774, *supra,* does not apply in this case of bailment. And it must follow apart from special contract that the *onus* was on the bailee to prove it did take that care of the appellants' goods prescribed in *Brabant & Co.* v. *King, supra. Romano* v. *Columbia Motors Ltd., supra,* was an action by a motor-car owner against a public garage company for damage to his motor-car by fire while it was stored for hire with the garage. It was held by five justices of this Court that the *onus* was on the defendant garage company to show it had taken reasonable care to prevent such damage. While the Fires Prevention (Metropolis) Act, 1774, was not expressly referred to in the judgments (although it was in argument) it seems conclusive that if the Act applied, the Court could not have held the *onus* was on the bailee in a case involving a fire of "accidental" beginning. It appears in the statement of facts (p. 168), that the cause or origin of the fire was never ascertained; *Wilson* v. *City of Port Coquitlam, supra* (where the statute was discussed), was referred to. While there was a division of opinion in the *Romano* case it was confined to whether the defendant garage in fact had discharged the *onus* upon it as bailee to show reasonable care had been taken against loss by fire. MARTIN, J. (as he then was) expressed succinctly at p. 170, the principle to be applied in the present case:

> With respect to the general principle of law applicable to this case of a motor-car damaged by fire while stored for hire by a garage company, I adopt the judgment of Lord Justice Scrutton in *Coldman* v. *Hill* (1918), 35 T.L.R. 146, and hold, after a careful consideration of all the evidence before us, that the learned judge below was right in finding that the defendant respondent had discharged the *onus* upon it as a bailee for hire to prove it " . . . [had used] the same degree of care toward the preservation of the goods entrusted to [it] from injury which might reasonably be expected from . . . a reasonable man in respect of his own goods. . . ."

I must conclude therefore that apart from special contract the *onus* was on the respondent bailee here to show that it took reasonable care under the circumstances. And I must find also, with respect, that the learned trial judge was in error in holding that the *onus* was on the appellant bailor to prove negligence in

respect to the loss of 1,200 cases of canned salmon, which the respondent held as bailee without any special contract. The *onus* that lay on the appellants in respect to the remaining 388 cases arose out of special contract (later referred to) and did not arise because of the Fires Prevention (Metropolis) Act, 1774, *supra*, which has no application for the reason given. The purpose of that statute—as its terms imply—was to relieve a person from liability for damage to his neighbours caused by the spread of fire "accidentally" originating on his premises. It would seem it was not intended thereby to alter the law of liability for negligence: *vide Canada Southern Ry. Co.* v. *Phelps, supra,* at pp. 144-5. It may be said with consistency therefore that the statute was not intended to alter a bailee's liability for negligence; and *vide* also *Collingwood* v. *H. & C. Stores,* [1936] 3 All E.R. 200. In *J. F. Shaw & Co., Lim.* v. *E. Symmonds & Sons, Lim.* (1917), 86 L.J.K.B. 549, at 552, Avory, J. expressed the view that the statute probably

> . . . intended only to exempt the occupier of a building, in the case of an accidental fire, from any liability at common law to his landlord or to his neighbour in the event of the fire spreading.

And *vide* also *United Motors Service, Inc.* v. *Hutson et al.,* [1937] S.C.R. 294, Kerwin, J., at p. 302.

This case is not one in which the cause of action arose from the spread of fire to adjoining premises. The decision of the Ontario Court of Appeal in *McAuliffe* v. *Hubbell,* [1931] 1 D.L.R. 835 is to be distinguished as it was not founded in bailment. In that case the plaintiff was a tenant of a suite in an apartment-house owned by the defendants, whom she sued for damages for personal injuries arising from a fire originating in the basement of the apartment-house. She sued as well for damages for loss of property said to have been in her suite and stolen therefrom. No question of bailment arose there, and in the present case we are not concerned with that chapter of the law which relates to the liability of a landlord for damage to his tenant's person or loss of his tenant's property. As in the *Romano* case of bailment so here we have to enquire if the bailee took reasonable precautions to protect the goods of its bailor from fire. There the enquiry centred on whether the watchman took reasonable care; here the enquiry centres not only upon

C. A.
1940

DES BRISAY
v.
CANADIAN GOVERNMENT MERCHANT MARINE LTD.

O'Halloran, J.A.

whether the watchmen took reasonable care but also upon whether reasonable safeguards were taken otherwise against the beginning and spread of fire.

Several governing facts emerge from the evidence: (1) The fire had burned twenty minutes before an alarm was turned in, or any steps were taken to extinguish it or prevent its spread. A number of watchmen's patrol signal-boxes connected with the B. C. District Telegraph Patrol Service were installed, but the fifteen-minute telephone service in connection therewith was suspended on the day of the fire; (2) the automatic-sprinkler system was not in operation; it was not connected with the water supply main which ran around the dock. The supply main itself was not connected with the city water main. Reliance was placed on a temporary main, but the water from it could not be used at the time, and as a result, there was no water available in the dock itself to extinguish the fire or prevent its spread from the place of commencement; the appellants' goods were stored some 150 feet from where the fire started; (3) the respondent had one watchman on duty, but he was stationed at the shore end of the dock, some 1,000 feet from where the fire started. At 3.45 p.m., he was in a room changing his clothes preparatory to going off duty at 4 p.m. While changing his clothes he noticed the smoke, ran towards the fire and sounded the alarm at 3.52 p.m.; (4) the construction of the dock was almost completed and it was in use prior to the formal opening which was to occur a few days later. These elements extend to the question of reasonable care; the *onus* to show reasonable care in respect to the 1,200 cases was on the respondent bailee; the more so as the facts relating to the origin and spread of the fire were so much within the means of ascertainment by the respondent bailee. Neither the respondents' manager, assistant manager nor its dock agent were called in evidence.

The respondent bailee upon whom the *onus* lay in respect to the 1,200 cases to show reasonable care was taken did not place in evidence the findings made by competent authority of the cause of the fire and its spread. Furthermore the watchman employed by the contractors engaged in completing construction of the dock was not called in evidence as to what he had done or

where he was immediately prior to the fire. In view of the known combustible character of the dock and the known danger from fire the evidence is sufficient in my view to show reasonable care was not taken by the respondent bailee to prevent spread of fire to the appellants' goods. One would think that prudence would have dictated added precautions in the use of watchmen, until at least the automatic-sprinkler system was connected up with the water supply and other important fire safeguards completed. The attention of the single watchman was directed to the shore end of the dock, nearly 1,000 feet from where the fire started. The fact that an alarm was not turned in until twenty minutes after the fire started in that type of construction and of known combustible character, would indicate in itself that such precautions as were adopted were not reasonably adequate against the spread of the fire. It is well known that the extent of fire damage, and particularly the spread of a fire are governed largely by the opportunity to cope with the fire as soon as possible after it starts. That implies early knowledge of the presence of fire. Unless reasonable precautions are taken to assure that early knowledge, the value of other fire precautions may be questionable. The evidence discloses an entire lack of reasonable precautions to assure that early knowledge.

The obligation of the bailee exercising as here a "public employment" involves the taking of reasonable care that the building in which the goods are warehoused is in a proper state so that the goods deposited therein may be reasonably safe in it. This must be read in the light of the evidence that a fire had occurred in the same part of the dock one month before; that the dock was known to be a fire hazard; that a fire might occur from the harbour side as well as from the shore side and from people using the dock; and that the shore end and the upper storey were open to the public on the afternoon of the fire; but the fire safeguards were not in operation and the watchman was devoting his attention to the shore end of the dock. But it is said, that even if the watchmen were doing their duty and the fire safeguards were in operation the loss by fire might have resulted anyway. And it is said that the percentage of total loss in dock fires in Vancouver has been high, no matter how

C. A.
1940

DES BRISAY
v.
CANADIAN
GOVERNMENT
MERCHANT
MARINE LTD.

O'Halloran,
J.A.

many precautions were taken. But that is not the issue here. It is admitted a wharfinger is not an insurer. Its liability arises not by reason of the loss of the goods by fire, but by reason of failure to take reasonable precautions against that loss. It is true the goods might have been lost, even if the bailee had taken reasonable precautions, but to reach that conclusion one is driven to make deductions from possibilities rather than from facts. If it had shown reasonable precautions were taken the bailee would have discharged the *onus* upon it even though the loss had occurred notwithstanding.

The bailee's liability arises not from the loss as such but from failure to take reasonable precautions against the loss—*vide Murphy* v. *Hart* (1919), 53 N.S.R. 79, Harris, C.J., who delivered the judgment of the Court at p. 86, or to put it another way, as His Lordship the Chief Justice of Canada did in *United Motors Service, Inc.* v. *Hutson, supra,* at p. 296:

> I am satisfied that the circumstances established in evidence afford reasonable evidence of negligence in the sense that, in the absence of explanation, the proper inference is that the damage caused was the result of the negligence of the appellants.

As said by Lord Loreburn, L.C. in 1909 in *Morison, Pollexfen & Blair* v. *Walton* (unreported) cited in *Joseph Travers & Sons, Limited* v. *Cooper,* [1915] 1 K.B. 73, at 87-88, 90 and 97:

> It is for him [the bailee] to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good.

For these reasons I am of the view the respondent bailee Canadian National Steamship Company Limited has failed to show that it took those reasonable precautions against loss by fire of the 1,200 cases demanded of it in its "public employment" even by its own standard of care.

The learned trial judge found that according to established custom the 1,200 cases were received on exactly the same basis as the 388, that is to say, subject to the special contract shortly to be referred to. With respect I am unable to draw this inference from the evidence. No such contract was entered into expressly or by implication. To my mind, there is no more ground for finding such a contract by anticipation than there is for finding a contract of carriage by anticipation; the learned judge refused

to do so against the defendant carrier. The 1,200 cases were delivered to the dock by water on the 30th of July, prior to the fire. A receipt (Exhibit 1) signed by the respondent's agent was issued. It did not contain the special clause in the receipts (Exhibits 2 and 3) issued by the same agent on the 8th of August following, when the 388 cases were received at the dock in two lots. These three documents may have additional significance in the routine of shipping goods, in an action against the carrier, but with that we are not concerned now. Suffice to say they were given the bailee by the bailor on receipt of the goods as evidence of the bailment. I am unable to import into Exhibit 1 the terms contained in Exhibits 2 and 3 issued nine days later. However, even if contrary to the view I have expressed, the 1,200 cases were received subject to such special contract the appeal should be allowed in respect thereto nevertheless for the reasons now to be given in regard to the bailee's liability for the loss of the 388 cases.

The 388 cases were received and held by the respondent bailee under a special contract

as warehousemen only, and are not to be liable for any loss or damage from whatever cause arising unless proved to have resulted from negligence of the commissioners or their servants

(accepted by counsel to mean the negligence of the respondent bailee).

This clause does not alter the ordinary duty of the bailee, but it does shift the *onus* of proof; that is to say, instead of the *onus* being on the bailee to show it has taken reasonable care, the *onus* is on the bailor to show the bailee has neglected to do so. In my view the appellant has met that *onus,* in the evidence already referred to disclosing not only lack of care by the watchmen, but also that there was no water available to extinguish the fire or prevent its spread. This latter imperative precaution was being delayed until the formal opening of the new construction which was to take place a few days later. I have obtained the impression from the evidence that the danger from fire was the greatest single risk that the bailee had to consider. By its singular neglect to take reasonable precautions the bailee suffered a tremendous loss itself, apart from that suffered by its bailors. Installation of an automatic sprinkler system and other safe-

C. A. 1940

DES BRISAY v. CANADIAN GOVERNMENT MERCHANT MARINE LTD.

O'Halloran, J.A.

guards indicates a measure of precaution against fire that the bailee itself considered necessary. Unnecessary delay in connecting up the sprinkler system so that no water was available at the time and place of the fire was a lack of care that should not be "reasonably expected from a reasonable man in respect of his own goods" if stored in his own warehouse of this character, *vide Romano* case, *supra*. In my view the bailee is not exempted from taking any precautions at all against fire and its spread, more particularly where, as here, fire is one of "the risks to be apprehended either from the character of the store-house itself or of its locality" in the language of Lord Watson quoted *supra* in *Brabant & Co.* v. *King*. The bailee is not required to take extraordinary precautions against fire and its spread. But where as here he has not in operation those precautions and safeguards which he himself is shown to have regarded as reasonable and necessary, he has thereby not only set one standard of reasonable care, but has also proven his failure to take reasonable care.

But it is contended it is not shown this lack of care was the "effective" cause of the appellant's loss; and that it cannot be said with certitude that the loss would not have occurred if all the reasonable precautions had been taken for the lack of which the respondent is sought to be fastened with negligence. But as already explained the special contract did not alter the duty of the bailee to take reasonable care of its bailor's goods. I think counsel for the respondent must be taken to have accepted this position in view of the contention advanced at p. 14 of his factum and now quoted:

> This is not only the standard of the common law duty of the defendant . . . in its capacity as warehouseman, but is also the duty which by contract between the parties it agreed to assume. It was to be liable only if the loss or damage resulted from its negligence, which is another way of saying that it would not be liable if it used ordinary care and diligence while in charge of the goods and by placing them in a structure reasonably safe suitable and usual.

Once it has been shown the bailee has neglected that duty—no matter on whom the *onus* lies to show it—then the same considerations exist as if there had been no special contract, and *Brabant & Co.* v. *King, supra*, applies.

The neglect of the bailee to take reasonable care having been proven, the bailor is not required to lay his finger on the specific

instance in all the chain which was responsible for the loss. Negligence is found as a matter of inference from the existence of the lack of care, in conjunction with all the known circumstances. The lack of care having been proven—then no matter upon whom the *onus* lies to prove it—if the bailee cannot satisfy the Court that the loss occurred from some cause independent of that lack of care he must make good that loss: *vide Joseph Travers & Sons, Limited* v. *Cooper,* and *Murphy* v. *Hart, supra.* Paraphrasing what was said and quoted in *United Motors Service, Inc.* v. *Hutson, supra,* I am satisfied that the lack of care established in the evidence affords reasonable evidence of negligence in the sense that in the absence of explanation the proper inference is that the damage caused was the result of respondent's failure as bailee to take reasonable care of the appellants' goods. I would allow the appeal also in respect of the 388 cases.

Another branch of the appeal related to costs. The judgment was pronounced on 12th September, 1938, and it should bear that date. Therefore the costs thereunder should be taxed according to the tariff then in force. In the result therefore I would allow the appeal against both respondents in respect to costs, but otherwise dismiss the appeal against the respondent carrier Canadian Government Merchant Marine Limited, and allow the appeal against the respondent bailee Canadian National Steamship Company Limited.

Appeal dismissed, except as to costs, O'Halloran, J.A., dissenting in part.

Solicitors for appellants: *Bourne & Des Brisay.*
Solicitor for respondents: *A. R. MacLeod.*

S. C.
1940
Dec. 16.
1941
Feb. 5.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* PETITION OF LAURA ELSIE ELLIOTT.

Testator's Family Maintenance Act—Petition—No specific claim in petition for relief — Omission fatal — Testator domiciled outside Province—Estate includes shares in British Columbia mining companies—Movables —R.S.B.C. 1936, Cap. 285.

In a petition under the Testator's Family Maintenance Act, the style of cause concludes "and in the matter of a claim by Laura Elsie Elliott under the said Act for maintenance." In the body of the petition paragraphs 1 to 22 inclusive contain a recital of alleged facts. Immediately following paragraph 22 are the words "Wherefore your petitioner as in duty bound will ever pray." No claim for specific relief is made.

Held, that to imply a claim on the part of the petitioner by reason of the fact that there is mention in the style of cause of a claim on her part under the Testator's Family Maintenance Act is not permissible. The omission is fatal to the petition.

The petitioner is the daughter of the testator, who in his lifetime was domiciled in the Province of Alberta. The estate included blocks of shares in two mining companies, one incorporated under the Dominion Companies Act and holding leases in mining properties in British Columbia, and the other incorporated and operating in British Columbia.

Held, that this Court has no jurisdiction to entertain the petition, and even if it had, the testator having had at his death an Alberta domicil, this Court would not make an order in favour of the petitioner against movables.

PETITION for relief under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by MANSON, J. at Vancouver on the 16th of December, 1940.

J. A. MacInnes, for petitioner.
Nicholson, for the estate.

Cur. adv. vult.

5th February, 1941.

MANSON, J.: Petition of Mrs. L. E. Elliott under the Testator's Family Maintenance Act, R.S.B.C. 1936, Cap. 285. Her father, the late William Stewart Herron, in his lifetime domiciled in the Province of Alberta, died on the 21st day of July, 1939. He left a substantial estate. By his will he left it to his wife, one grandson and two sons, with a request to his

wife that, if he predeceased her, she should bequeath $1,000 each to the petitioner and to his step-daughter. Letters probate were issued in February, 1940, in the city of Calgary, Alberta. The letters have not been resealed in this Province nor have ancillary letters been granted in this jurisdiction. The petitioner is a resident of Hollywood in the State of California, U.S.A. and a child of the testator by his first marriage. Leave was granted to her by the Court to serve the petition and affidavit in support upon Fred Whittaker, one of the executors, at the city of Calgary aforementioned.

The style of cause in this matter concludes "and in the matter of a claim by one Laura Elsie Elliott under the said Act for maintenance." In the body of the petition paragraphs 1 to 22 inclusive contain a recital of alleged facts. Immediately following paragraph 22 are the words "Wherefore your petitioner as in duty bound will ever pray." No claim for specific relief, nor indeed for any relief, is made. This omission was not brought to my attention when the matter was argued before me. It seems to have escaped the attention of both counsel. To imply a claim on the part of the petitioner by reason of the fact that there is mention in the style of cause of a claim on his part under the Testator's Family Maintenance Act, in my view, is not permissible. Reluctantly, I must hold that the omission is fatal and that the petition must be dismissed.

Should it be held in another Court that the view above expressed is erroneous and having regard to the fact that the petition was argued before me on the assumption that a specific claim had been made by the petitioner, I am disposed to discuss the matter as if that had been done.

Counsel for the estate at the very outset took the position that this Court had no jurisdiction to entertain the petition. He rested his submission upon four points: (a) That the testator was at the time of his death domiciled in another jurisdiction, to wit, the Province of Alberta; (b) that probate had been issued out of the Alberta Courts and had not been resealed in this Province; (c) that the estate had no assets in British Columbia; (d) that it was unnecessary that letters probate should issue in this Province or that the foreign letters should be resealed here.

S. C.
1941

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ELLIOTT

Manson, J.

Counsel for the petitioner cited authority to support the proposition that the estate having appeared in this Court it thereby submitted itself to the Court's jurisdiction: *vide Harris* v. *Taylor,* [1915] 2 K.B. 580; *Pope* v. *Pope* (1940), 55 B.C. 27. Counsel for the estate was careful to make his position clear, namely, that he appeared only to argue the matter of jurisdiction. He was entitled to do that and it is unnecessary that I should consider the authorities cited.

In part the estate consisted of a block of shares in Antler Gold Mines Limited, a company incorporated under the Dominion Companies Act, R.S.C. 1927, Cap. 27. The Antler Company owns a number of mining leases in British Columbia. The material does not disclose the location of the company's head office or of its registered office.

In part the estate consisted of 1,000 shares of Pioneer Gold Mines of B.C. Limited (N.P.L.), a company incorporated under the British Columbia Companies Act, R.S.B.C. 1936, Cap. 42. I infer, though the material does not so disclose, that the share certificate was among the papers of the testator at the city of Calgary at the time of his death. The material does not disclose the location of the company's head office or of its registered office, but under the Companies Act of this Province the registered office must be within the Province—*vide* section 21.

Section 79 of the statute requires that the register of members be kept at the registered office. A British Columbia company may, however, if so authorized by the articles, keep outside of the Province a branch register of members resident outside the Province—*vide* section 84 (1). The material does not disclose whether such a branch register was kept. A member of a company is one whose name is entered in the register of members—*vide* section 2, but a member is not necessarily an owner of shares. Section 76 (3) reads as follows:

> 76. (3.) The register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein.

The Act does not direct or authorize anything to be inserted in the register of members with respect to ownership of shares. An owner of shares in a public company, however, may apply to be registered as a member—*vide* section 78. Certain rights

are conferred by the statute upon members of a company and those rights may be exercised by a member despite the fact that he is not the owner of the shares registered in his name. It is well known that shares may be traded over and over again without change in registration on the register of members. The company does not concern itself with the matter of ownership. A share certificate endorsed in blank by the person in whose favour it has been issued is recognized in law as something more than mere evidence of title—it is recognized as the very chattel for which the owner can obtain the full value wherever he may be and without doing any act in another jurisdiction. *Winans* v. *Rex*, [1908] 1 K.B. 1022. In that case it was held, following *Attorney-General* v. *Bouwens* (1838), 4 M. & W. 171, that foreign bonds payable to bearer and marketable on the Stock Exchange, when physically situate in the United Kingdom at the death of the testator, are liable to estate duty even though the deceased was not a domiciled Englishman. As is said in Dicey's Conflict of Laws, 5th Ed., 345:

> Most of the reported decisions and of the enactments with regard to the local situation of a deceased person's personalty have immediate reference, not to jurisdiction, but to the liability of the deceased's property to the payment of probate duty.

So, too, the more recently reported decisions and enactments have reference, not to jurisdiction, but to the liability of the deceased's property to the payment of succession duty.

In *Erie Beach Co.* v. *Attorney-General for Ontario*, [1930] A.C. 161, the deceased had died domiciled in New York, holding shares in a company incorporated under the Ontario Companies Act. Under that Act the shares could be effectively dealt with in Ontario but the shareholders, all of whom were apparently domiciled in New York State, held all their meetings in New York, the company's business was conducted from New York, shares were issued and transfers made and recorded there. The Judicial Committee held, however, that since shares could be dealt with effectively only in Ontario by law, their *situs* for purpose of succession duty, was Ontario, Lord Merrivale, who delivered the judgment saying at pp. 167-8:

> A series of judicial decisions extending from *Attorney-General* v. *Higgins*, [(1857)] 2 H. & N. 339, in the Court of Exchequer in 1857, to *Brassard* v. *Smith*, [1925] A.C. 371, before this Board in 1924, have ascertained beyond

S. C.
1941

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ELLIOTT

Manson, J.

possible doubt the test which must be applied to determine the local situation of the shares of a joint stock company when the fact has to be determined in order to decide as to liability to or immunity from local taxation. . . . In *Attorney-General* v. *Higgins*, [(1857)], 2 H. & N. 339, as in *Brassard* v. *Smith*, [1925] A.C. 371, duty upon shares was in question. In *Attorney-General* v. *Higgins* Baron Martin held that when transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard* v. *Smith*, epitomized the crucial inquiry in a sentence—"Where could the shares be effectually dealt with?" The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo—so far as they might—have, in their Lordships' opinion, no material weight. The shares in question can be effectively dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there.

The *Erie Beach* case is a "duty" case and in my view there is no warrant for giving to it a broader application than is necessitated by the particular point under consideration, namely, the liability of the shares in the hands of the estate for duty. Lord Merrivale, as it seems to me, by his language makes it clear that the decision of the Judicial Committee was not intended to extend beyond the determination of the "duty" question. Furthermore, in considering the *Erie Beach* case it is not to be overlooked that the provisions of the Ontario Companies Act (R.S.O. 1914, Cap. 178) referred to by Lord Merrivale at p. 166 are not contained in the Companies Act of this Province. We have no sections corresponding to sections 56 and 60 of the Ontario Act and the material does not disclose that the Pioneer Company has an article of association corresponding to by-law 22 of the Erie Beach Company. Nor does it appear that the Pioneer Company uses a share certificate with the wording of the Erie Beach certificate as quoted by Lord Merrivale. It was on the strength of the statutory conditions that it was decided that the Erie Beach Company had a local habitation in Ontario—*vide* p. 167.

In 1937 the Legislature by chapter 10 of the statutes of that year inserted subsection (4*a*) in section 84 of the Companies Act. It reads as follows:

84. (4*a*.) On the death of a member registered in a branch register of members, the shares of the deceased member shall be transferable on the principal register or the duplicate of the branch register, as the case may be, at the place in the Province where the principal register is kept and not elsewhere; and a copy of every entry in the principal register or the duplicate

of the branch register pursuant to this subsection shall, as soon as may be after the entry is made, be transferred to the place where the branch register is kept.

The subsection has to do with the recording of the transfer of shares and not with the ownership of shares. It is clearly an enactment in aid of the "duty" statutes. It has no other purpose. It silently recognizes the *"mobilia sequuntur personam"* doctrine and does no more than stipulate that the transfer of shares by the estate of a deceased must be recorded in the principal register or in the duplicate branch register kept at the registered office. The subsection does not prohibit the sale by the estate of the shares. The "duty" statutes may impose a duty upon shares in a British Columbia company owned by a deceased —not merely registered in his name, and may stipulate that they shall not be transferred upon the register until the duty has been paid. Without the necessity of probate or administration within the Province, upon payment of the assessed duty, the shares will be registered in the name of a successor in title to the deceased, if he so desires; and if the deceased at his death was not the owner of the shares they will not be subject to duty. Shares in a company are *"mobilia"*—the *"mobilia"* doctrine operates in respect of them, and while they may by statute be the subject of duty in two jurisdictions, nevertheless, the *"lex domicilii"* prevails. The Courts of the jurisdiction of the "register" will not make an order with respect to shares which may conflict with the order of the Courts of jurisdiction of domicil. This view is consistent with that expressed by the Court of Appeal of New Zealand in *Re Butchart, Butchart* v. *Butchart,* [1932] N.Z.L.R. 125, at p. 131, which case is reviewed by Mannie Brown, Esquire, of the Ontario Bar, in his two very useful articles on Dependants' Relief Acts in 18 Can. Bar Rev., pp. 261 and 449; *vide etiam In re Roper (deceased),* [1927] N.Z.L.R. 731, and, in our own Courts, *In re Rattenbury Estate and Testator's Family Maintenance Act* (1936), 51 B.C. 321, at p. 324 where my learned brother, ROBERTSON, J., cites and follows *Re Butchart, Butchart* v. *Butchart, supra.* In my view this Court has no jurisdiction to entertain the petition and even if it had, the testator having had at his death an Alberta domicil this Court would not make an order in favour of the petitioner against movables.

S. C.
1941

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ELLIOTT

Manson, J.

Holding the view above stated, it is unnecessary to consider whether upon the material, if the Court had jurisdiction, an order should be made in favour of the petitioner. Counsel for the estate refrained from discussing the merits other than as *amicus curiæ*. The estate is indeed a substantial one and it would certainly seem that the petitioner and her husband are finding the struggle for existence not only hard but one which has undermined health at a rather early age. One does not know the reasons which actuated the testator in granting so little of his bounty to the daughter of his first marriage. Doubtless, now that her circumstances have been disclosed, beneficiaries under the will, apart from the petitioner's legal rights, may find it in their hearts to deal kindly with her.

Petition refused.

S. C.
1941
Jan. 14, 20.

REX v. YOHN.

Habeas corpus—Warrant of commitment—Imposition of hard labour—Want of jurisdiction—Sentence party served—Subsequent warrant without imposition of hard labour not allowed.

A warrant of commitment imposed a fine of $250, and in default of payment imprisonment for nine months with hard labour. Upon the accused taking *habeas corpus* proceedings a second warrant of commitment was issued by the magistrate in all respects similar to the first, except that the provision with respect to hard labour did not appear. Part of the sentence with hard labour was served. Upon petition for a writ of *habeas corpus*, it was admitted that the magistrate had no jurisdiction to impose hard labour.

Held, that the petition be granted and that the prisoner be discharged.

Rex v. *Hale* (1926), 49 Can. C.C. 253, followed.

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by SIDNEY SMITH, J. at Vancouver on the 14th of January, 1941.

C. W. Hodgson, for the prisoner.

George A. Grant, for the Crown.

Cur. adv. vult.

20th January, 1941.

S. C. 1941

REX v. YOHN

SIDNEY SMITH, J.: Petition for the issue of a writ of *habeas corpus*.

The warrant of commitment herein dated 7th December, 1940, recites that the prisoner appeared before D. Gillies, Esquire, a police magistrate and was adjudged to pay a fine of $250 and in default of payment forthwith to imprisonment for nine months in the common gaol at Oakalla with hard labour and the said police magistrate therein commanded the keeper of the said common gaol to receive the prisoner into his custody in the said common gaol there to imprison him and keep him at hard labour for a period of nine months.

It is admitted that the learned magistrate had no jurisdiction to order hard labour and that his conviction did not do so, and that the warrant of commitment was in error to that extent.

Upon the taking of these proceedings by the prisoner a second warrant of commitment was issued by the learned magistrate in all respects similar to the first except that the provision with respect to hard labour did not appear thereon.

It was urged upon me that the prisoner was now legally held under this second warrant.

The facts in the case at Bar are very similar to those in *Ex parte Hale* (1926), 47 Can. C.C. 108 where it was held in the first instance by Curran, J. that the second warrant could be relied on for the prisoner's detention for the unexpired portion of his sentence. This view, however, was not sustained on appeal (*Rex* v. *Hale* (1926), 49 Can. C.C. 253).

The present case is indeed more favourable to the prisoner than the *Hale* case for here part of the sentence with hard labour has been served. In the *Hale* case no attempt was made to impose hard labour upon the prisoner.

It was urged upon me that I should not follow the *Hale* case because no reasons were given and that moreover being a decision of another Province it was not binding upon me.

While it is true no reasons were given I cannot doubt that the Court of Appeal reversed the decision of Curran, J. on account of the illegal imposition of hard labour. The case is noted in Crankshaw, 6th Ed., 885, as an authority for the principle that,—

S. C.
1941

REX
v.
YOHN

Sidney Smith, J.

A warrant of commitment illegally imposing hard labour cannot be amended after the person has served part of the sentence even where no attempt was made to impose hard labour upon him.

I think I should follow the decision of the Court of Appeal of another Province in a criminal matter if only for the sake of uniformity of decisions under the Criminal Code.

I must therefore grant the petition. The return was made and the case argued on the merits and therefore the prisoner will be discharged from custody without the actual issue of the writ.

Petition granted.

C. A.
1941

Mar. 19, 24.

REX v. McKINNON.

Criminal law — Breaking and entering — Presumption from possession— Evidence—Sufficiency of—Criminal Code, Sec. 460.

The appellant was convicted for breaking and entering a shop where a quantity of merchandise was stolen. On the day of the breaking and entering the appellant rented a car at about 1 p.m. and was in possession of the car continuously until he was arrested in the car with one Rennie at about 10.15 p.m., very shortly after the burglary had been committed. In the glove pocket of the car was found a parcel of silk stockings which had been stolen from the store that was broken into on the evening in question. He and Rennie were in the car together during the afternoon. Rennie was convicted but in his case there was evidence identifying him as having entered the store.

Held, on appeal, affirming the conviction by police magistrate Wood (SLOAN, J.A. dissenting), that with *prima facie* evidence of guilt by reason of present possession unexplained and evidence of his movements at the time in question, in the company of a confederate, identified as having entered the store, sufficient facts and circumstances are disclosed if the magistrate chose to so find, to establish participation in breaking and entering.

APPEAL by accused from his conviction by police magistrate Wood at Vancouver on the 15th of March, 1941, on a charge of breaking and entering.

The appeal was argued at Vancouver on the 19th of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

McKinnon, in person, referred to *Reg.* v. *Curtley* (1868), 27 U.C.Q.B. 613; *Reg.* v. *Graham* (1898), 2 Can. C.C. 388.

A. W. Fisher, for the Crown, referred to *Baker* v. *Regem* (1930), 54 Can. C.C. 353.

Cur. adv. vult.

24th March, 1941.

MACDONALD, C.J.B.C.: I think the accused was properly convicted of breaking and entering: he was found in possession of goods proven to have been stolen shortly after that event. They were in his possession inasmuch as the goods were found in the pocket of a car rented by him and driven by him. True a confederate, recently convicted for the same offence was seated with him in the car; it was, none the less, the possession of the accused; it was his car and the goods were in his custody. It is possible, of course, that another riding in the car might without the accused's knowledge, plant stolen goods upon him. That is always so; all the accused had to do, however, was to account for the presence of the goods in his car; here there was no explanation. He might have said that someone else was responsible; with another present his explanation might have been accepted; he must, however, explain. This too is not a case where stolen goods are found in a place to which so many have access that reasonably it would not be proper to find that any one of them had exclusive possession.

Unless recent possession is reasonably explained, a *prima facie* presumption arises that he is the thief; also with proof of breaking and entering the store from which the goods were taken, coupled with proof of identity of the goods, he may on the facts as disclosed in evidence, be found guilty of that offence.

With, therefore, *prima facie* evidence of guilt, by reason of present possession unexplained and evidence of his movements at the time in question, in the company of a confederate, identified as having entered the store, sufficient facts and circumstances were disclosed, if the magistrate chose to so find, to establish participation in the breaking and entering.

MCQUARRIE, J.A.: I agree.

SLOAN, J.A.: With deference, I am unable to agree with the

C. A.
1941

REX
v.
MCKINNON

Sloan, J.A.

conclusion reached by my brothers. It is my view that when well-known and settled principles of criminal law are applied to the facts of this case, the appellant is entitled to succeed.

I take it as established that recent possession of stolen property, unless explained, raises a *prima facie* presumption that the possessor is either the thief or the receiver of the stolen property. In which category he is to be placed depends upon the circumstances of each case. As Blackburn, J. put it in *Langmead's Case* (1864), Le. & Ca. 427, at p. 441:

> When it has been shown that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances. If he had been seen near the place where the property was kept before it was stolen, they may fairly suppose that he was the thief. If other circumstances show that it is more probable that he was not the thief, the presumption would be that he was the receiver.

This principle was again enunciated in *Rex* v. *Pawlett* (1923), 40 Can. C.C. 312, a judgment of the Court of Appeal for Manitoba.

Then, too, this is a case dependent upon circumstantial evidence, and it is too well settled to require authority that in a case of this nature the trial judge must decide not whether the facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational hypothesis, since it is only on this last hypothesis can he safely convict the accused.

The last principle to which I will refer is that restated in *Woolmington* v. *Director of Public Prosecutions* (1935), 25 Cr. App. R. 72, at p. 95, in the following language:

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, . . . If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, . . . , the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Bearing in mind these guiding principles, I turn to the evidence upon which the appellant was convicted of breaking and entering a store and stealing goods therein.

The first witness called was Jean McCleery, the owner of the store premises in question. Her evidence was to the effect that sometime after 9 p.m. on the 11th of January, 1941, the lock

on the back door of the store had been broken, the store entered and 112 pairs of stockings and a few other articles stolen. She identified some articles produced as her property.

Evelyn McCleery, sister of the first witness, was called, and identified articles as from the store.

Kay Davidson testified that on the night of the 12th of January, 1941, at about 9.15 p.m. she looked in the store window and saw a man inside. She identified him as one Rennie. (He was tried jointly with the appellant and convicted as the thief.) She further saw a man on the corner opposite the store. He was acting in a peculiar manner, whistled, and then ran from the scene. "He was," she said, "a dark short Italian-looking fellow with black hair." She saw him at close range for she was about "5 or 6 feet from him." McKinnon is tall and fair and Miss Davidson swore that the man she saw was not in the Court room at the trial. From this evidence it is clear that she saw McKinnon neither in the store nor outside of it.

Norman Spencer was then called. He was with Miss Davidson and corroborated her testimony. He significantly added that he saw no car in the vicinity of the store.

The first police officer called (Sharples) testified that he and police officer Pearce on January 12th at 10.15 p.m. stopped a Chevrolet sedan at Main and Powell Streets (miles from the scene of the crime) in which McKinnon and Rennie were riding; McKinnon was driving. It was a "U Drive" car hired by McKinnon at 1 o'clock that day. In the glove compartment four pairs of stockings were found, wrapped in tissue paper and sealed with a Christmas seal. On the floor of the car, by the gear-shift lever a price tag was found. To revert to the evidence of Jean McCleery, the store owner, she identified the price tag and had this to say in relation to the stockings found in the car:

Is that type of stocking sold in any other store? Yes.

In Vancouver? Yes.

Commonly sold in a great many of the lingerie stores, isn't it? Yes.

Now there is nothing in those to indicate particularly that they came from your store—on those stockings? No, not exactly.

That tissue paper did not come from your store, did it? No.

The sister's evidence relative to the four pairs of stockings was to the same effect.

C. A.
1941

REX
v.
MCKINNON

Sloan, J.A.

To continue with Sharples: Nothing else was found in the car and McKinnon, on being asked, replied that he didn't know anything about them. ("We asked them where the stockings came from. They didn't know anything about them.")

The car had been driven apparently 200 miles since the time it was taken out.

Constable Pearce, upon being called, corroborated Sharples.

The prosecution then called detective Dyers. He examined the store and found the rear door had been forced. Outside the back of the store he found some empty boxes. McKinnon, at the police station, after being warned, had nothing to say except that he had rented the car at 1 o'clock.

The Crown thereupon closed its case. On those facts can it be said that the prosecution has proved that McKinnon broke and entered the store in question? With great respect, I think not.

If the stockings found in the glove compartment were identified as coming from the store, which I assume, and if, when in the glove compartment were in the exclusive or joint possession of McKinnon (*Pawlett's* case, *supra*), which I doubt, but will assume, then it seems to me from all the surrounding circumstances the proper and only presumption to be drawn is that McKinnon is the receiver or retainer of the property, not the thief. He cannot be both thief and receiver, or retainer. *Rex* v. *Brown, Roy and Swan* (1936), 50 B.C. 339.

The facts before us point to his participation in the proceeds of the crime by receiving or retaining the stolen property after the actual theft had been committed by others. There is no evidence that he aided and abetted the actual commission of the breaking and entering by Rennie. The evidence adduced by the Crown, in my opinion, negatives any such theory. Crown counsel before us did submit that from the evidence an inference could be drawn that Rennie and McKinnon had been together all day, but, in my view, the facts before us do not support that submission. After a careful perusal of the transcript I find only one passage in the evidence which bears upon that aspect of the matter. It is in the evidence of constable Sharples. He testified that after finding the stockings in the glove compartment the two men were arrested and brought to the police station. He was then asked:

Did they tell you where they had been?

and answered:

They said they had been over to Westminster, and they drove the car approximately 200 miles since the time they had it out, at approximately 1 o'clock in the afternoon.

This statement was made when these men were in custody and was introduced into evidence by Sharples without the slightest effort on the part of the prosecution to prove that it was a voluntary admission. Apart from that grave omission by whom was it made? Rennie or McKinnon, or both? And when? And under what circumstances?

To my mind an attempt in that manner by the prosecution to fix McKinnon with direct participation in a common unlawful purpose to break and enter the store premises ought not to be upheld. I will not take the responsibility of sending a man to gaol on that statement, and when that is excluded, what is left against McKinnon? Nothing more than stolen stockings in the glove compartment of a U Drive car. McKinnon made his explanation when he told the police officer at Main and Powell Streets, he knew nothing about the stolen property, a statement which may be true. The following hypotheses are consistent with that situation:

(a) McKinnon may have picked up Rennie who put the stolen stockings wrapped in tissue paper, in the glove compartment without any knowledge on the part of McKinnon of the theft.

(b) McKinnon may have picked up Rennie, knew of the theft and that part of the loot was placed in the glove compartment.

Excluding from our consideration mere suspicion, conjecture and speculation, I cannot see how any other reasonable hypothesis is possible on the evidence before us. It follows then, as I see it, that McKinnon may be innocent of any wrong-doing in this matter, because his explanation may reasonably be true. *Richler* v. *Regem*, [1939] 4 D.L.R. 281; *Rex* v. *Davis* (1940), 55 B.C. 552, at 556. Or, alternatively, he did receive and retain four pairs of the stolen stockings. His direct participation in the breaking and entering or as one aiding and abetting the breaking and entering is inconsistent with other hypotheses which are supported by the proven circumstances. Whether

C. A.
1941

REX
v.
MCKINNON

Sloan, J.A.

innocent or the receiver or retainer of the stolen goods, his conviction for breaking and entering must be set aside in the absence of any supporting evidence.

Crown counsel relied upon *Baker* v. *Regem* (1930), 54 Can. C.C. 353, but that decision is, in my view, merely illustrative of the principle that according to circumstances the possessor of stolen property may be presumed to be the thief. Under the circumstances of that case the Court considered the possessor the thief. It is of course a decision of fact and cannot afford much assistance in the determination of another case of fact.

I would, with deference, allow the appeal and quash the conviction.

O'HALLORAN, J.A.: The appellant's close association with Rennie before and after the robbery, coupled with the finding of some of the stolen goods in his motor-car, constitute objective facts, from which the inference of another fact may be properly drawn, *viz.*, that he abetted and aided Rennie in the actual theft.

That inferential fact carries with it such a compelling degree of practical certainty, that in the absence of any explanation by the appellant, he must be held guilty as charged.

I would dismiss the appeal.

MCDONALD, J.A.: The appellant was convicted before police magistrate Wood for breaking and entering the shop of one Jean McCleery and a quantity of merchandise then and there being found then and there stealing on 12th January, 1941. The day of the breaking and entering the appellant rented a car at about 1 p.m. and was in possession of that car continuously until he was arrested in the car with one Rennie at 10.15 p.m. very shortly after the burglary had been committed. He and Rennie were in the car together during the afternoon. In the glove pocket of the car was found a parcel of silk stockings which had been stolen from McCleery's store which had been broken into on the evening in question. Rennie was convicted by the learned magistrate and his appeal to this Court was dismissed. In his case, however, there was evidence to identify him with the crime. In the present case all the magistrate had before him was the evidence above mentioned. It is objected that on that evidence

C. A.
1941
REX
v.
MCKINNON
McDonald, J.A.

the magistrate could not properly convict. I think the objection cannot be sustained and that the conviction should stand. I am quite unable to distinguish this case from *Baker* v. *Regem* (1930), 54 Can. C.C. 353 which was a decision by six judges of the Quebec Court of King's Bench. There the accused gave an explanation which was not accepted; here the appellant chose to make no explanation whatever.

Appeal dismissed, Sloan, J.A. dissenting.

REX v. SOON GIM AN.

C. A.
1941
Mar. 19, 20.

Habeas corpus—Chinaman—Claims birth in British Columbia—Went to China when two years old—Identity—Burden of proof.

The applicant, Soon Gim An, claims he was born in Canada and was registered out and now seeks to re-enter Canada. It is admitted there is evidence of the birth in Canada of a person under the name of the applicant in 1914, and this child, after the death of his father, returned to China in 1916 when two years of age, where he remained ever since and was married. The sole question is whether he is the person registered out in 1916. He was rejected by the immigration authorities. On an application for a writ of *habeas corpus* it was refused, the learned judge stating that "upon the whole of the evidence I cannot say that it has been established beyond a reasonable doubt that the applicant is a British subject."

Held, on appeal, reversing the decision of MANSON, J., that there was misdirection in the learned judge stating that he was not satisfied "beyond a reasonable doubt" that the applicant had made out his case. The burden of proving a case "beyond a reasonable doubt" arises only in criminal cases. The applicant has successfully met the *onus* upon him by adducing a preponderance of evidence that he is a Canadian citizen.

APPEAL by defendant from the order of MANSON, J. of the 3rd of February, 1941, on an application for a writ of *habeas corpus*. The defendant claims he was born in Canada. There is evidence of the birth in Canada of a person under the name of the applicant in 1914. When two months old his father died and at two years of age he was sent to China and has remained there ever since and married. The mother is alive and resides in British Columbia and claims the applicant is her son.

C. A.
1941

REX
v.
SOON GIM
AN

The appeal was argued at Vancouver on the 19th and 20th of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Denis Murphy, Jr., for appellant: The applicant claims he was born in Vancouver and was sent to China when he was two years old. The learned judge said he was not satisfied "beyond a reasonable doubt" that he was of Canadian citizenship. The submission is that he applied a wrong principle of law on the evidence. This is a civil matter and the *onus* is on us but we only have to prove a *prima facie* case. The evidence shows we have his birth certificate. His father died when he was two months old. He was sent to an aunt in China when he was two years old where he remained until his fourteenth year, when he went to an uncle and worked with him as a farmer until he decided to come to his mother in British Columbia in his 26th year. He was married in China where his wife remained with his aunt. The evidence establishes that he is a Canadian citizen and that is sufficient: see *Shin Shim* v. *The King*, [1938] S.C.R. 378, at p. 381; [1938] 4 D.L.R. 88, at p. 90.

Elmore Meredith, for the Crown: He has not discharged the burden of proving his identity. Section 5 of the Immigration Act gives the comptroller sole jurisdiction: see *In re Chinese Immigration Act and Lee Chow Ying* (1928), 39 B.C. 322; *Rex* v. *Smith, Ex parte Soudas*, [1939] 3 D.L.R. 189; *Samejima* v. *The King*, 58 Can. C.C. 300; [1932] S.C.R. 640; *Zellinsky* v. *Rant* (1926), 37 B.C. 119, at p. 122.

Murphy, replied.

MACDONALD, C.J.B.C.: I would allow the appeal. There is, with deference, no question that the learned trial judge in his findings of fact proceeded on a wrong principle: he was not satisfied "beyond reasonable doubt" that the appellant was entitled to re-enter Canada. That is a principle applicable in criminal but not in civil proceedings. In the latter case it is enough if there is a preponderance of evidence pointing in one or the other direction.

My own inclination was to direct a new trial, thus refraining from reaching a conclusion on the evidence before us. However, I will not dissent from the view, as I understand it, of the other members of the Court that on the evidence the appeal ought to be allowed. I think it may reasonably be said, having regard to all the evidence, that it justified the conclusion that the applicant was born in Canada, later returned to China, and now has the right to re-enter this country.

I may add that it was assumed by both counsel that the trial judge had the right to hear additional evidence.

MCQUARRIE, J.A.: I agree.

SLOAN, J.A.: In my opinion the appellant must succeed. The learned trial judge erred in importing into a civil proceeding a rule relating to the burden of proof, which is limited, in its application, to criminal proceedings.

In my view it is not the obligation of the applicant in these proceedings to establish his Canadian citizenship beyond reasonable doubt. He has successfully met the *onus* upon him by adducing a preponderance of evidence in his favour on that issue.

The determination of MANSON, J. resting upon a wrong principle, cannot be sustained. A perusal of the record has satisfied me that the applicant has established by a body of uncontradicted evidence he is a Canadian citizen.

As both counsel were satisfied with the form of proceedings had and taken herein, I expressly refrain from expressing any opinion thereon in this case. The appeal is allowed.

O'HALLORAN, J.A.: I would quash the deportation order and allow the appeal accordingly.

MCDONALD, J.A.: The appellant seeks entry into Canada claiming to be a Canadian citizen. The comptroller of immigration sitting as a Board of Inquiry refused the right of entry. An appeal was unsuccessfully taken to the Minister. Thereupon proceedings by way of *habeas corpus* were taken before MANSON, J. who refused the order. This is an appeal from that judgment. In his brief reasons for judgment the learned judge stated that

C. A. 1941

REX v. SOON GIM AN

McDonald, J.A.

he was not satisfied "beyond a reasonable doubt" that the applicant had made out his case.

With due respect I think the learned judge misdirected himself as no such burden lay upon the applicant in this civil case. The burden of proving a case "beyond a reasonable doubt" arises only in criminal cases and for more than a century the words "beyond a reasonable doubt" have attained a significance in our jurisprudence applicable only to criminal cases. In civil cases the *onus* is satisfied by making out a case by a preponderance of evidence or, as it is sometimes put, on a balance of probabilities. This case must therefore be approached with these principles in view.

The following facts are not in dispute: (1) A male child named Soon Gim An was born to his mother, Lin Ho, in Vancouver on 16th April, 1914. (2) A birth certificate is produced, dated 29th July, 1914, giving the names of the parents. (3) That child, after the death of his father in Vancouver, was taken to China by Gum Sing on 20th April, 1916, and left in charge of his father's sister, Lee Shee. (4) Lin Ho remarried into another family and has lived in British Columbia up to this date. (5) In November, 1940, the applicant applied for re-entry into Canada, claiming to be the same Soon Gim An who was born here 16th April, 1914.

The following facts are not admitted but are sworn to and are not controverted by any other evidence: The boy Soon Gim An lived with his aunt, Lee Shee, and her husband until he was about 14 years old when he went to a neighbouring district to work on the farm of his uncle Jang Moon, whose wife is Ah Dai. He was employed by that uncle as a farm-labourer until he came to Vancouver as stated above. During that interval he visited his aunt Lee Shee some two or three times a year. He married meanwhile and his wife and children, in accordance with Chinese custom, lived and still live with the aunt Lee Shee where they were visited by Soon Gim An as opportunity permitted.

One Soon Kee, an uncle of Soon Gim An, visited China some ten years ago and saw the applicant there in the employ of his uncle Jang Moon. Soon Kee while in China also saw the boy's uncle, Lee Shee's husband, and as a consequence he interviewed

the Canadian Immigration authorities in Hong Kong in relation to this boy. We are not permitted to know of course what conversation took place. Soon Kee thereupon returned to British Columbia and saw Lin Ho.

Jang Kong, who is a friend of the family, visited in China from 1937 to 1939 and saw Soon Gim An, the applicant, living there with Lee Shee and employed by Jang Moon. This man brought back to Canada the birth certificate above mentioned and gave it to Soon Kee, the uncle.

One Jang King visited China in 1936. He saw the applicant working at Jang Moon's farm and also visited the aunt Lee Shee. In 1938, while still in China, he visited Lee Shee and on that occasion saw the applicant there and he brought a parcel to Lin Ho.

There is no suggestion from the learned judge below that he did not believe the evidence adduced by the applicant. The suspicions which seem to exist as to the authenticity of the applicant's claim appear to have arisen from two circumstances which I think have been satisfactorily explained. It is in evidence that Lin Ho visited China some ten years ago and did not visit Lee Shee or her son, Soon Gim An. This she explains by stating (and this is not controverted) that according to Chinese custom a woman who remarries after her husband's death is no longer *personæ gratæ* with the members of her husband's family. Any one who has had experience with the Chinese knows how faithfully such customs and traditions are preserved even to this day. It is further suggested that the matter could have been proven to demonstration by obtaining the evidence of Lee Shee. This of course is so but the obtaining of such evidence is not reasonably practicable now that the district where she resides is in the occupation of the Japanese.

If the applicant was fortunate enough to have been born in Canada then indeed he is possessed of a very precious heritage of which he is not lightly to be deprived. One of the rights that flow from his Canadian citizenship is the right to return to his native land. I think he has reasonably proven his case and that he ought to be set at liberty. I would therefore allow the appeal.

Appeal allowed.

Solicitors for appellant: *Murphy & Murphy.*
Solicitor for respondent: *Elmore Meredith.*

C. A.
1941
Feb. 10, 11; *March* 4.

CARLSON AND PENDRAY v. HAWKINS AND ELLERY.

Will—Validity—Alterations and interlineations—Initialled by testatrix but not by witnesses—Whether made before or after execution—Evidence on discovery—Whether admissible—Rules 370r and 370c.

The plaintiffs, the son and daughter of the testatrix by her first husband, seek probate of her will. The defendant Hawkins is the second husband of the testatrix and the defendant Ellery is an aunt of the testatrix. The will was executed on the 20th of April, 1928, in the presence of Miss Ellery, who was given charge of the will, and she testified that she kept it until the testator's death in January, 1940. Certain additions, interlineations and alterations were made in the will, that were initialled by the testatrix but not by the witnesses. Miss Ellery, in her statement of defence admits all the allegations of fact in the statement of claim and further says that the will in question was duly and properly executed by the deceased. At the instance of the defendant Hawkins she was examined for discovery, and on the trial portions of her said examination at the instance of the plaintiffs was admitted in evidence. She was not called as a witness on the trial. It was held on the trial that the will, after its completion, was handed to Miss Ellery by the executrix in a sealed envelope, which remained sealed until 1937 (the testatrix having had a severe stroke in 1935) and the inference should be drawn that the obliterations and alterations were made prior to the execution of the will.

Held, on appeal, reversing the decision of ROBERTSON, J., that Miss Ellery was really on the side of the plaintiffs, though named a defendant, and Hawkins alone contested the action. This evidence taken on discovery should not be looked at at all, and on this ground alone the appellant is entitled to a new trial.

Held, further, that the inference was drawn that the alterations must have been made before execution, as the will was sealed in an envelope immediately after execution and retained by Miss Ellery in that envelope until 1937. There is in fact no evidence that the envelope in which the will was found in 1937 was the same envelope in which it was placed in 1928, and there is undisputed evidence that the testatrix had possession of the will sometime as late as 1930, and made some notations upon the envelope in which the will was later found. The premise being ill founded, the inference falls.

APPEAL by defendant Hawkins from the decision of ROBERTSON, J. of the 21st of September, 1940, in an action by two of the executors appointed under the will, dated the 20th of April, 1928, of Lottie Louise Hawkins of the City of Victoria, who died on the 15th of January, 1940. The plaintiffs are the children of the testatrix. The defendant Thomas W. C. Hawkins resides in

Victoria and is the second husband of the testatrix and step-father of the plaintiffs. The defendant Charlotte Ellery is an aunt to the testatrix and one of the beneficiaries under the will. The question involved in the appeal is whether the trial judge was right in holding that the respondents had established that certain alterations, obliterations, interlineations and additions involving the substitution of the respondent Pendray and E. D. Todd as executors for the appellant, and the addition of a residuary clause, without which there would be an intestacy, were made before or after the execution thereof by the testatrix.

The appeal was argued at Victoria on the 10th and 11th of February, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Davey, for appellant: The respondents failed to call Charlotte Ellery, and the learned judge examined her discovery evidence. The discovery evidence should not have been admitted, but having been admitted it cannot be urged against the appellant. Further, the learned judge had no right to refer to portions not put in by the respondents. To decide the right to examine for discovery regard must be had only to those issues defined by the pleadings: see *Whieldon v. Morrison* (1934), 48 B.C. 492, at p. 495. "Opposite party" is synonymous with "party adverse in interest." They had no right to read against the defendant Ellery, as part of this case, portions of her examination for discovery by an adverse party: see *Carter* v. *Van Camp et al. Van Camp* v. *Carter and Anderson,* [1930] S.C.R. 156, at p. 165. The learned judge used this against the appellant, against whom he had ruled it was not admissible. It must be inferred from the fact that she was not called that she would not support the respondents' case: see Powell on Evidence, 10th Ed., 421; Wills on Circumstantial Evidence, 7th Ed., 44, 147 and 318. The learned judge had no right to refer to the portions not put in: see *Baxter* v. *Derkasz (No. 2),* [1929] 1 W.W.R. 673, at p. 678; *Gwin* v. *Starrs,* [1929] 3 W.W.R. 704, at p. 706. There should at least be a new trial: see *Posho Ltd.* v. *Gillie,* [1939] 3 W.W.R. 98, at p. 105. The burden of proof is on the respondents to establish that the changes were made prior to execution: see *Cooper* v. *Bockett* (1846), 4 Moore, P.C. 419,

C. A. 1941

CARLSON AND PENDRAY v. HAWKINS

at pp. 449-452; *Greville* v. *Tylee* (1851), 7 Moore, P.C. 320, at p. 328. The respondents submit that Mrs. Carlson's evidence establishes the facts from which the Court can infer that the alterations were made prior to the execution, but it is submitted they cannot discharge the burden of proof resting on them by calling only part of the evidence available: see Wills on Circumstantial Evidence, 7th Ed., 296 and 318. Any inference drawn from circumstantial evidence to be called must not only be consistent with part of the evidence, but it must not be inconsistent with any of the other facts: see *Hodge's Case* (1838), 2 Lewin, C.C. 227, at 228. For the Court to attempt to draw inferences from the scanty information given would be merely to speculate and guess as to when these changes were made: see *The King* v. *Burdett* (1820), 4 B. & Ald. 95, at pp. 149-152; *E.B.M. Co., Ltd.* v. *Dominion Bank,* [1937] 3 All E.R. 555, at p. 568. The learned judge based his inference that the changes in the will were made prior to execution, on the premise that the will was placed in a sealed envelope on being handed to Miss Ellery by the testatrix, that the envelope remained sealed until 1937, and that it was still sealed when opened by the plaintiff Carlson. It is submitted that the evidence does not establish that the envelope in which the will was found in 1937 was the envelope in which it was placed when signed in 1928. This Court can review the findings of fact by the trial judge where they are based upon inferences drawn from undisputed facts: see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243, at p. 267. The learned judge's reference to the discovery evidence constitutes a wrong approach to the case which makes it necessary for this Court to review his conclusions: see *Robins* v. *National Trust Co.,* [1927] A.C. 515; *Logan* v. *The King,* [1938] 3 D.L.R. 145, at p. 147; *Betcherman* v. *E. A. Pierce & Co.,* [1934] 2 D.L.R. 449, at p. 453. That there was improper admission of discovery evidence see *The North British & Mercantile Insurance Co.* v. *Tourville* (1895), 25 S.C.R. 177, at p. 191. Due weight was not given to the failure to call Charlotte Ellery: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 636; *Barker* v. *Furlong,* [1891] 2 Ch. 172, at p. 174; *Khoo Sit Hoh* v. *Lim Thean Tong,* [1912] A.C. 323, at p. 332;

The King v. *Burdett* (1820), 4 B. & Ald. 95, at p. 123; *The North British & Mercantile Insurance Company* v. *Tourville* (1895), 25 S.C.R. 177, at p. 191. No weight was given to the evidence of Charlotte Darragh, who was an attesting witness. The evidence of Norma Carlson, daughter of the testatrix, was misconceived by the learned judge, and he was mistaken in his appraisal of the evidence of Mrs. Drummond-Hay. Mrs. Carlson's evidence should be discredited. It is submitted there should not be a new trial but that the appeal should be allowed and probate of the will should go as originally written and not in its present condition, the respondents having failed to discharge the burden of proof which rested on them.

Higgins, K.C., for respondents: The trial judge accepted the evidence of Mrs. Drummond-Hay, who swore that the will had been altered before the will was signed. He also accepted the evidence of Mrs. Carlson that the envelope containing the will was kept sealed until she broke it in 1937. He was justified in admitting the will to probate: see *In the Goods of Cross* (1841), 1 Notes of Cases, 189 cited in The English & Empire Digest, Vol. 44, p. 311, sec. 1437. Evidence of what took place in an assault case against Hawkins is inadmissible and should have been disallowed: see Taylor on Evidence, 12th Ed., 513-517; *Commercial Securities Ltd.* v. *Johnson,* [1931] 1 D.L.R. 861, at p. 865. They must show that the judge on his findings was clearly wrong: see *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462. The admissions of the defendant Charlotte Ellery show conclusively that all the alterations were made before the will was signed. Wide latitude in the adducing of evidence is extended in probate actions: see Yearly Practice, 1940, p. 497; *Menzies* v. *McLeod* (1915), 34 O.L.R. 572, at p. 576. The evidence is binding on Hawkins as well: see *Woolway* v. *Rowe* (1834), 1 A. & E. 114; *In re Whiteley and Roberts' Arbitration,* [1891] 1 Ch. 563; Taylor on Evidence, 12th Ed., 475, sec. 743. It is not necessary for the plaintiff to call a party who makes admissions: see Taylor on Evidence, 12th Ed., 499, sec. 793.

Davey, replied.

Cur. adv. vult.

C. A.
1941

4th March, 1941.

CARLSON AND PENDRAY v. HAWKINS

MACDONALD, C.J.B.C.: I would direct a new trial.

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

SLOAN, J.A.: I agree that there should be a new trial for the reasons given by my brother McDONALD.

O'HALLORAN, J.A.: I would direct a new trial in order that the will of Lottie Louise Hawkins, deceased, may be proven in solemn form.

McDONALD, J.A.: The respondents seek probate of the will of the late Lottie Louise Hawkins in its altered state. The testamentary document on its face bears many obliterations and alterations which are initialled by the testatrix but not by the witnesses. The question for decision is whether or not respondents have discharged the *onus* which was clearly upon them to prove that the changes in the document were made before it was executed on 20th April, 1928. The learned trial judge, ROBERTSON, J., found for the respondents and admitted the altered will to probate. With respect I think the judgment cannot stand for the reason that it is founded upon serious error. I would place my judgment upon two grounds either of which, in my opinion, is fatal to the validity of the judgment below. The first ground arises from the fact that the learned judge while holding that the examination for discovery of the defendant Charlotte Ellery was not admissible as against defendant Hawkins nevertheless did look at that evidence and said:

> This is merely one of the matters which the Court may take into consideration in weighing this evidence. In this case, however, her evidence is before the Court. It is favourable to the plaintiffs' (respondents') case. The only result of the plaintiffs' failure to call Miss Ellery is to weaken their case against Hawkins.

I find it difficult to understand just what the learned judge meant. The only meaning counsel has been able to read into these words is this: The learned judge was of opinion that the evidence was admissible as against Miss Ellery herself and hence her evidence is before the Court. Assuming this to be so (though having in mind the decision in *Whieldon* v. *Morrison* (1934),

48 B.C. 492, I think it is not so, for the reason that as regards the respondents Miss Ellery is not on the pleadings an "opposite party" within the meaning of rule 370r nor a party "adverse in interest" within rule 370c) how can this evidence possibly be used as being "favourable to the plaintiffs' case," which of course can only mean unfavourable to the case of appellant Hawkins? Miss Ellery was really on the side of plaintiffs though named a defendant and Hawkins alone contested the action. I think it is clear that this evidence taken on discovery should not have been looked at at all; that this objection is fatal and that on this ground alone appellant is entitled at least to a new trial (see *Posho Ltd.* v. *Gillie,* [1939] 3 W.W.R. 98).

A further fatal objection to the validity of the judgment is I think that the learned judge draws the inference that the alterations must have been made before execution from the fact that the will was sealed in an envelope immediately after execution and retained by Miss Ellery in that envelope until 1937. There is in fact no evidence that the envelope in which the will was found in 1937 was the same envelope in which it was placed in 1928, and there is undisputed evidence that the testatrix had possession of the will sometime as late as 1930, and made some notations upon the envelope in which the will was later found. The premise being ill-founded the inference falls. This conclusion seems to me to be inevitable when it is remembered that respondents have the benefit of certain inferences drawn by the learned trial judge, while Miss Ellery though present in Court and represented by counsel was not called by respondents although on their own case she is the one person who was possessed of all the facts and who was alleged to have been in possession of the will in its altered form from 1928 until 1937 (see Wills on Circumstantial Evidence, 7th Ed., 318 and *E.B.M. Co., Ltd.* v. *Dominion Bank*, [1937] 3 All E.R. 555, at p. 568).

In view of the above conclusions it is not necessary to review the evidence at length, though it may be said in a word that the evidence of the two attesting witnesses Miss Darragh and Mrs. Drummond-Hay is so vague, and in at least one particular so contradictory as to form a rather weak base on which to found a judgment.

C. A.
1941

CARLSON AND PENDRAY v. HAWKINS

With all respect, the only doubt I have had is as to whether we should order a new trial or vary the judgment. Upon consideration I have concluded that the judgment should be set aside and a new trial should be had; the respondents to pay to the appellant his costs of the appeal, the costs of the former trial to abide the result of the second trial.

Appeal allowed; new trial ordered.

Solicitors for appellant: *Crease, Davey, Fowkes, Gordon & Baker.*

Solicitor for respondents: *Frank Higgins.*

C. A.
1941
March 26.

HAMILTON AND HAMILTON v. OLESON.

Families' Compensation Act—Infant killed—Action by parents—Time at which action can be brought by relatives of deceased—Probate Rule 35—R.S.B.C. 1936, Cap. 93, Sec. 4, Subsecs. (1) and (2).

Wilfred D. Hamilton, the infant son of the plaintiffs, was killed when run down by the defendant in his car at Vancouver on the 3rd of January, 1941. The plaintiffs brought action against the defendant on the 8th of January following under the provisions of the Families' Compensation Act. On the application of the defendant that the writ of summons be struck out and the action dismissed on the ground that said writ of summons discloses no cause of action, it was held that the provisions of subsection (2) of section 4 of said Act, under which the action was brought, are not applicable to the intervening period of fourteen days so as to allow an action to be commenced within that time, and the action should be dismissed as premature.

Held, on appeal, reversing the decision of SIDNEY SMITH, J., that subsections (1) and (2) of section 4 of the Families' Compensation Act are not affected in any degree or suspended by reason of Probate Rule 35. The rule stands by itself, unaffected by the Act. By section 4 (1) of the Act ordinarily the action must be brought in the name of the executor or administrator, but by subsection (2) this is subject to the qualification that if there be no executor or administrator the action may be brought by one or more of the dependants. The plaintiffs may sue at once where there is no administrator.

APPEAL by plaintiffs from the order of SIDNEY SMITH, J. of the 14th of January, 1941, striking out the writ of summons and

dismissing an action for damages brought by the parents of Wilfred Dwinnell Hamilton under the Families' Compensation Act against the defendant, for causing the death of their said son by running him down with a motor-car while crossing Kingsway at the intersection of Broadway in the city of Vancouver on the 3rd of January, 1941. Deceased died intestate on the 3rd of January, 1941, and the action was brought under section 4 (2) of the above Act on the 8th of January following. It was held that as letters of administration cannot be taken out until the lapse of fourteen days from the death, the provisions of the above subsection are not applicable to the intervening period of fourteen days so as to allow an action to be commenced within that time, and it is premature.

The appeal was argued at Vancouver on the 26th of March, 1941, before MACDONALD, C.J.B.C., SLOAN and MCDONALD, JJ.A.

McCrossan, K.C., for appellants: The writ was set aside because no administrator had been appointed and that the action was premature as letters of administration cannot issue until the lapse of fourteen days from the death of the deceased under rule 35 of the Probate Rules. Deceased's death was on the 3rd of January, 1941, and the writ was issued on the 8th of January following. The action is under section 4 (2) of the Families' Compensation Act and can be brought if there is no administrator appointed: *Holleran* v. *Bagnell* (1879), 4 L.R. Ir. 740; *M'Cabe* v. *Great Northern Railway Co.,* [1899] 2 I.R. 123; *Byrn* v. *Paterson Steamships Ltd.,* [1936] O.R. 311, at pp. 313-15. The Probate Rules do not apply in this case.

Christy Ann Sutherland, for respondent: No action can be started for fourteen days. The next of kin have no right of action. There must be some limitation to the words of the statute. Subsection (2) of section 4 of the Act seems to override subsection (1). A right of action does not arise until some default is made by the administrator. The action is premature.

McCrossan, replied.

MACDONALD, C.J.B.C.: I am sure everything has been said by Miss *Sutherland* that could usefully be said in support of the order, but not enough to convince us that it should stand.

C. A.
1941

HAMILTON
v.
OLESON

Macdonald, C.J.B.C.

We think, with great deference, the Chamber judge was in error in believing that the overriding subsections (1) and (2) of section 4 of the Families' Compensation Act, R.S.B.C. 1936, Cap. 93, are affected in any degree or suspended, so to speak, by reason of Probate Rule number 35. This rule stands by itself, unaffected by the Act. We can dispose of the point by construing the Act itself. True, by section 4 (1) of the Act ordinarily the action must be brought in the name of the executor or administrator, but by subsection (2) it is clear that this is subject to the qualification outlined therein. By that subsection, if there be no executor or administrator, the action may be brought by one or more of the dependants. The wording is, omitting the immaterial parts:

> If there be no executor or administrator of the person deceased, . . . , then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; . . .

No authorities we think preclude the view here expressed that the present plaintiffs may sue at once where there is no administrator.

As to the other points raised, *viz.*, that the material is insufficient inasmuch as it does not show that an administrator was not appointed, I would say that the application was heard on that basis, and, in any event, by law one could not have been appointed within the fourteen-day period referred to in the Probate rule; nor do we think the writ defective.

SLOAN, J.A.: I agree. I can only add that in so far as it is argued that the endorsement on the writ is defective, the plaintiffs plead their action is brought under the provisions of the Families' Compensation Act, and to my view such an allegation in the endorsement contains all the material elements necessary to found the action.

MCDONALD, J.A.: I agree.

Appeal allowed.

Solicitor for appellants: *Geo. E. McCrossan.*
Solicitor for respondent: *John A. Sutherland.*

JACOBSON v. VANCOUVER VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY.

C. A.
1941
Mar. 20, 21; *April* 5.

Negligence — Contributory negligence — Ultimate negligence — Railway— Pedestrian on track killed—Failure of pedestrian to get off the track —Sole cause of accident.

On the 30th of November, 1939, at about 1 o'clock in the afternoon, the deceased woman was run into and killed by a north bound passenger train of the defendant about 750 feet north of Sunbury crossing. Just north of the crossing there is a curve in the track to the right that limits the vision of the track to about 220 feet. The train went around this curve at about 38 miles per hour and the engineer blew his whistle and rang his bell while on the curve. The engineer saw the deceased woman on the track and facing the train when about 220 feet away. He immediately put on the brakes but did not stop until the rear car was a car length and one-half past the point of impact. It was held on the trial that the engineer was negligent in operating the train at too great a rate of speed under the circumstances, and that the deceased woman was negligent in not keeping a proper look-out and not seeing and hearing what could be seen and heard at the time and place of the accident, and they were equally guilty of negligence causing the accident.

Held, on appeal, reversing the decision of FISHER, J., that assuming negligence of both, namely, excessive speed of the train and failure to look by deceased, deceased alone could have averted the accident. When each had, or should have had, a clear view of the other, the engineer could only mitigate the force of the blow; the deceased, on the other hand, had time to avoid the accident, and having failed to do so was solely responsible.

APPEAL by defendant from the decision of FISHER, J. of the 1st of February, 1941, in an action by the plaintiff as executor of the estate of Emma A. Jacobson, claiming damages from the defendant under the Administration Act for the shortening of her expectancy of life, which loss and damage was caused on the 30th of November, 1939, on the right of way of the defendant in British Columbia, by the negligence of the defendant in the operation of a train owned and operated by the defendant while proceeding north on said right of way, and which ran down and killed the said Emma A. Jacobson. The scene of the accident was about 750 feet north of Sunbury crossing on the defendant's railway track and close to where it approaches the Fraser River. Just north of the crossing there is a curve in the

C. A. 1941

JACOBSON v. V.V. & E.R. & N. Co.

right of way to the right, which cuts off the view of the track ahead to about 220 feet. At about 1 o'clock in the afternoon of the 30th of November, 1939, a passenger train of the defendant company, proceeding north at about 38 miles an hour, crossed Sunbury crossing, and in going around the curve the engineer saw the deceased woman about 220 feet away, walking in the middle of the track towards the train. While rounding the curve the engineer rang his bell and blew his whistle. On seeing the woman the engineer put on his brakes but he struck the woman, knocking her into the ditch at the side of the track, and the train stopped when the last of the six passenger cars was about one and one-half car lengths past where the woman was struck.

The appeal was argued at Vancouver on the 20th and 21st of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Norris, K.C., for appellant: This woman was walking south in the middle of the track and facing the oncoming train early in the afternoon. She could see it at least 220 feet away. The whistle was blowing and the bell was ringing. The engineer was the only person who saw her. Under the Act we are entitled to go at a speed not exceeding 55 miles an hour, and there was error in finding we were going at too great a speed in the circumstances when we were travelling at 38 miles an hour. She was a trespasser and liable to prosecution under the Railway Act. If there was negligence the plaintiff must prove it was the direct cause of the accident: see *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41; *Grand Trunk Ry. Co.* v. *Hainer* (1905), 36 S.C.R. 180. It is not important in this case whether the woman was a licensee or a trespasser: see *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81; *Sale* v. *The East Kootenay Power Co., Ltd.* (1931), 44 B.C. 141; *Gallagher* v. *Humphrey* (1862), 6 L.T. 684; *Power* v. *Hughes* (1938), 53 B.C. 64, at pp. 70-1. There was no suggestion of negligence after the engineer saw the woman. On the evidence that the public had habitually travelled on the track in this locality, constituting a custom, see *The Maritime Coal, Railway and Power Co.* v. *Herdman* (1919), 59 S.C.R. 127, at p. 140; *The Grand Trunk Railway Company* v. *Anderson* (1898), 28

S.C.R. 541, at p. 551. Section 408 of the Railway Act is a constant prohibition with penalty for trespassing on the track. You cannot obtain a right by committing a statutory offence.

Denis Murphy, Jr., for respondent: The fishermen, to get to their boats, must cross the track. There are many of them, and that condition has existed for over 30 years. The railway put in these crossings. She was a licensee. Six people had been killed in this locality: see *Moyer* v. *Grand Trunk R.W. Co.* (1903), 3 C.R.C. 1; *The Lake Erie and Detroit River Railway Company* v. *Barclay* (1900), 30 S.C.R. 360. The engineer himself says this is a dangerous locality: see *Grand Trunk Ry. Co.* v. *Hainer* (1905), 36 S.C.R. 180; *Canadian Pacific Rway. Co.* v. *Hinrich* (1913), 48 S.C.R. 557. That the deceased was an invitee see *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Hiatt* v. *Zien and Acme Towel & Linen Supply Ltd.* (1939), 54 B.C. 17; *Barrett* v. *Midland Railway Company* (1858), 1 F. & F. 361; 175 E.R. 764.

Norris, in reply, referred to *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423, at p. 438.

Cur. adv. vult.

5th April, 1941.

MACDONALD, C.J.B.C.: Appeal from a judgment in an action brought by the executor of the estate of Emma A. Jacobson, deceased; she was killed on the 30th of November, 1939, by being struck by a locomotive while walking on appellant's railway track near New Westminster. The trial judge found joint negligence by the locomotive engineer and the deceased pedestrian, the former in running at an excessive rate of speed in a "dangerous locality" with knowledge of a custom—the trial judge called it leave and licence—followed by people in the neighbourhood of walking along the railway track; and as to the deceased pedestrian in failing to look properly and as found, by "not seeing and hearing what could be seen and heard." As the deceased "could have seen the oncoming train at approximately 200 to 225 feet" she was negligent in failing to keep a proper look-out, and also in disregarding the warning sound of the whistle and the ringing of the bell long before the train came within her vision. It will be observed that the deceased's negli-

C. A. 1941

JACOBSON v. V.V. & E.R. & N. CO.

Macdonald, C.J.B.C.

gence, as found, *viz.*, not seeing the oncoming train—and she could only see it when 200 or 225 feet away—discloses that if she had seen it at that point the accident would not have occurred; in other words, she would have had time to step out of the way of the train.

There was, I think, with deference, failure by the trial judge to consider the decisive feature in the case, *viz.*, whether or not, having found negligence on the part of both parties, one or the other might by subsequent action have averted the accident. It may be conceded that this was a "dangerous locality" to the knowledge of the company. A railway track is always a dangerous place for pedestrians when trains pass by; that danger however was equally apparent to the deceased as the trial judge found. It was not held to be a place "dangerous" in the sense that the deceased could not step off the track to a place of safety when she first heard, or should have heard the bell and whistle, or even after the locomotive came within her line of vision. Evidence was not led to show that, for example, by reason of a precipice or declivity she could not step aside: the pictures disclosed ample room to do so.

I assume too, only, however, for the purpose of this decision, that it was customary for people in the neighbourhood, including the deceased, to walk along the track between the rails to avoid an otherwise circuitous route and that the company was aware of this practice. That did not absolve the deceased from responsibility for the final negligent act which unfortunately, as I view it, was the sole cause of the accident. It only means that she was not a trespasser, in which event the degree of care required would differ. The locomotive was of course lawfully on the track driving, accepting the finding, at an excessive rate of speed. Granted equal rights—an assumption highly favourable to respondent—the ordinary principles relating to the laws of negligence would apply to the facts.

The judgment can only be supported on the basis of joint or contemporaneous negligence. Even if we overlook the warning given at an earlier period by the bell and whistle, calling upon deceased in an emphatic manner to step at once from between the rails, she had, by the findings, immediately preceding the

accident, a clear view of the train when from 200 to 225 feet away. What is found to be excessive speed on the part of the driver of the locomotive was by the evidence 38 to 40 miles an hour. Having regard to the slow locomotion of the pedestrian, approximately 3.6 seconds would elapse in covering 200 feet, or a greater time if the distance was 225 feet. With comparative ease 10 feet could be covered by a pedestrian in 3 seconds. During that time the driver of the locomotive was helpless, but deceased was not; she could have stepped out of danger; the engineer could only stop in 800 or more feet. The trial judge found that the speed should have been such that the train could have been stopped within the range of visibility, *viz.*, from 200 to 225 feet. No evidence was given to show the speed at which such a feat was possible; I fear it would be so low as to constitute an unreasonable requirement. However, the point is not material, as assuming negligence by both, *viz.*, excessive speed and failure to look, deceased alone could have averted the accident.

The judgment could only be supported on the basis of such decisions as *Swadling* v. *Cooper,* [1931] A.C. 1. It is impossible in my opinion to apply it; the distance of 200 feet was too great to admit of its application.

Nor can it be said that it was disabling negligence of the engineer incapacitating him from stopping in 200 feet that was responsible for the accident. Any alleged self-created negligence of this sort did not interfere with, much less prevent, deceased's opportunity to step aside. The equipment of the locomotive was not, as in *Loach* v. *British Columbia Electric Railway Company, Limited,* [1916] 1 A.C. 719, found to be defective. If we were concerned with a collision between a careless pedestrian on a highway and a motor-car properly equipped but travelling at an excessive speed 200 feet away we would not speak of disabling negligence. At all events, in the *Loach* case the driver, negligently on the track (like this pedestrian) could do nothing with his loaded wagon and horses to get out of the way of the car approaching a short distance away. This deceased had ample opportunity to do so.

The only possible findings in this case are joint negligence or

C. A.
1941

JACOBSON
v.
V.V. & E.R.
& N. Co.

Macdonald,
C.J.B.C.

ultimate negligence by one or the other, dependent upon the facts. As indicated the facts as found do not permit a finding of joint negligence.

I would add that if the train was travelling at what ought to be regarded as a reasonable rate of speed, say 25 miles an hour, the deceased would have had about 5 seconds to step aside. That is not material if it is clear that she should have been able to do so in 3 seconds.

I think therefore that respective obligations at least arose when each had, or should have had a clear view of the other: the engineer could only mitigate the force of the blow; the deceased, on the other hand, had time to avoid the accident, and having failed to do so, was solely responsible. There was no suggestion, nor would it be warranted that in a moment of peril she was not able to step aside.

I would allow the appeal.

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

SLOAN, J.A. agreed in allowing the appeal.

O'HALLORAN, J.A.: I would allow the appeal for the reasons given in the judgment of my Lord the Chief Justice.

MCDONALD, J.A.: This is an appeal from FISHER, J. in an action brought for damages under the Administration Act for loss of the reasonable expectation of life of Emma A. Jacobson, deceased wife of the respondent. The trial judge held that the appellant company was negligent in driving its train at too great a speed and that the deceased woman was equally negligent in failing to get off the track before being struck by the company's engine. It was found that the deceased was walking on the appellant's railway track with the leave and licence of the appellant. There is much to be said on both sides of the argument as to whether or not this finding can be sustained. In view of the conclusion which I have reached upon the whole case it is not necessary to reach a decision on this question, but for the purposes of this judgment I shall assume that she was a licensee as found.

We then have this situation: The deceased woman had lived for several years past beside the railway track and was familiar

with the times at which the appellant's trains passed her home. She knew the danger to which pedestrians were subjected when walking upon the tracks at the point in question by reason of the speed at which trains usually travel and by reason of the curve in the tracks; she had in fact warned others of this danger. On the day in question she had walked on the tracks about mid-day proceeding southerly a distance of some 1,800 feet before she was struck, the point of impact being some 200 feet north of the point where the engine came into her view around the bend. Meanwhile, at a distance considerably over 2,000 feet south of the point of impact the engineer had blown his whistle and had brought into operation his automatic bell which thereupon rang continuously until the moment of the accident. Nevertheless she continued to walk between the rails until she was struck. She was a woman of 53 years of age, possessed of all her faculties and may be assumed to have been reasonably active. It is common ground that the train was proceeding at approximately 38 miles an hour and that after the deceased woman came within sight of the engineer there was nothing the engineer could have done to avoid the accident. On his examination for discovery the respondent, in answer to a question as to whether there was room for his wife to step off on to the easterly side of the road-bed, answered: "Sure there would be lots of room." There is evidence that "there was a little ditch on that side of the track" but there is no evidence that this would have prevented her from stepping off. Under these circumstances I can reach no other conclusion than that this unfortunate accident was due wholly to the failure of the deceased woman to take reasonable care. The appeal is therefore allowed though I may express the hope that the appellant will not press for costs.

Appeal allowed.

Solicitors for appellant: *Norris & Pratt.*
Solicitors for respondent: *Murphy & Murphy.*

S. C.
1941
Feb. 20; March 3.

CRETZU v. LINES.

Police officer—Man molesting children—Children identify man to officer—Runs when ordered to stop—Second of two shots hits fugitive—Dies as result of shooting—Damages—R.S.B.C. 1936, Cap. 5, Sec. 71 (2); Cap. 93, Secs. 3 and 6.

The defendant, when patrolling, received a call from the police station that a man was molesting young girls. He picked up the complainant, her daughter and another small girl and proceeded to look for the man. On reaching 27th Avenue they saw a man walking westerly, whom the two girls positively identified as the man. On seeing the police car, the man turned into a lane where he was followed by defendant in his car. When ten feet away the defendant ordered him to stop but he started to run. Defendant then fired a shot in the air but he continued to run. Defendant got out of his car and followed, and when about 50 feet away fired a second shot. He stumbled when shooting and unintentionally hit the man. He was operated on but died about two weeks later. In an action for damages by the deceased's daughter:—

Held, that the death of deceased was the result of the wound, and that the defendant used a type or threat of force which was not justified in the circumstances, and damages were assessed at $750 under the Families' Compensation Act, and $750 under the Administration Act.

ACTION for damages under section 71 (2) of the Administration Act and under the Families' Compensation Act, owing to the death of the plaintiff's father who was negligently shot by the defendant, a police officer in the employment of the city of Vancouver. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 20th of February, 1941.

Denis Murphy, Jr., and *S. H. Anderson*, for plaintiff.
McTaggart, and *Lord*, for defendant.

Cur. adv. vult.

3rd March, 1941.

SIDNEY SMITH, J.: The plaintiff, as administratrix of the estate of her father, the late Charles Cretzu, sues under section 71 (2) of the Administration Act, R.S.B.C. 1936, Cap. 5, and also under the Families' Compensation Act, R.S.B.C. 1936, Cap. 93, for damages for the death of her father in consequence

(as she submits) of his having been negligently shot by the defendant who is a police officer in the employment of the city of Vancouver.

The facts are simple, are not materially in dispute and may be shortly stated. About 10 a.m. on the 25th of October, 1940, the defendant in the course of his official duties was patrolling in a police car in the neighbourhood of 25th Avenue and Main Street in the city of Vancouver. While thus engaged he received a radio call from the police station to the effect that there was a man molesting girls in the 4200 block, St. George Street, and instructing him to investigate. He proceeded to that block and found that the complaint came from a Mrs. Rose MacFarlane who lives at 4233 St. George Street and who had telephoned the information to the police station.

The defendant questioned Mrs. MacFarlane and understood from her that a man had molested her daughter and another girl, both aged about five years, and that this man was then walking west on 27th Avenue. The defendant thereupon took Mrs. MacFarlane and the two little girls into his car and proceeded after the man in question. The defendant turned the corner into 27th Avenue and immediately saw a man walking in a westerly direction. The two girls stated that this was the man who had molested them. They were emphatic about this. The man afterwards proved to be the deceased, Charles Cretzu.

Cretzu glanced back, saw the police car and turned south into the lane between Balkan Street and Prince Edward Avenue. The defendant in his car followed him into the lane. The defendant parked his car and called upon Cretzu to stop and approach him. Cretzu was then about 10 feet away. Instead of complying with this request Cretzu turned and ran in an easterly direction away from the defendant. The defendant thereupon got out of his car, called upon Cretzu again to stop, and when he still refused, fired a shot from his revolver into the air over his head to frighten him and in the hope that it would cause him to stop. When this first shot was fired Cretzu was 40 to 50 feet away from the defendant. Cretzu continued running. He crossed Balkan Street and mounted the lawn in front of the house known as 4236 Balkan Street. The defendant following

S. C.
1941

CRETZU
v.
LINES

Sidney Smith, J.

him reached the embankment between the roadway and this lawn. Cretzu was then 40 feet away from him. The defendant fired a second shot again into the air. Unfortunately, in the act of firing he stumbled on the embankment, thus confusing his aim and hitting Cretzu.

Cretzu continued to run and passed between two houses and was stopped by the fence at the rear of 4236 Balkan Street. The defendant knew the neighbourhood and knew of this fence and expected from the general direction in which Cretzu was running that he would find himself in this *cul-de-sac* and be caught there. When the defendant came up to him Cretzu was shaking and gasping. He asked the defendant why he had shot him. The defendant saw a hole in his coat and then knew for the first time that Cretzu had been hit. The defendant asked Cretzu why he had run away. Cretzu replied that "he had no pedlar's licence to gather junk and that he was afraid he was going to be arrested for that." The defendant at once took Cretzu to the General Hospital. He was operated upon for the purpose of cleaning out the wound. The wound healed but Cretzu died on 12th November, 1940. There was some medical testimony as to the exact cause of his death but I am satisfied that the death was the direct consequence of the shooting.

The defendant later found that the alleged indecent assault took place not that morning as he had thought but two weeks before. On the evidence I do not hold the defendant blameworthy for having formed this mistaken impression. On the contrary I expressly find that he had reasonable cause for believing and that he did believe that the indecent assault had been committed immediately before he received his instructions and that Cretzu was the man who had committed such assault. It is admitted by counsel that the offence of indecent assault falls within section 292 of the Criminal Code and that it is not an offence for which an arrest may be made without a warrant. It is also admitted that no warrant had been issued.

The defendant impressed me as being a zealous and capable officer. I think, however, that in this case he made an error of judgment. He had no right of arrest without a warrant. Moreover, I think that in any event he used more force than was

necessary in the circumstances; or, rather, that he used a type or threat of force which was not justified in the circumstances. When he stopped the car he was ten feet away from the defendant, when he fired the first shot he was 40 to 50 feet away, when he fired the second shot he was substantially the same distance or a little less. In other words Cretzu was not getting away from him. The defendant was 28 years of age and in fine physical condition. Cretzu was 53 years of age, rather thin, and not in robust health. If the defendant had continued pursuit without firing he would undoubtedly have gained upon him. In my view, therefore, the use of the gun in the circumstances was not justified. *Rex* v. *Smith* (1907), 13 Can. C.C. 326; *Vignitch* v. *Bond* (1928), 50 Can. C.C. 273; *Merin* v. *Ross* (1932), 46 B.C. 471. I also find that the defendant used it negligently. He pursued the defendant in a suburban neighbourhood at a short distance of 40 or 50 feet over uneven ground with a loaded revolver in his hand with no safety catch. I think this amounts to negligence.

I regret having to come to this conclusion but a high standard of conduct is required from police officers and although the defendant did everything with the best of intentions and, as he no doubt thought, in the proper execution of his duty, yet I think he overstepped the mark and must be held responsible for the consequences.

There remains the question of damages. I find that the deceased had no settled way of making a living. At one time he had been a carpenter but his status in life was rapidly deteriorating. During the years 1934 to 1937 inclusive he had been employed as a handyman at a logging-camp earning some $1,400 per year. For the last three years he had been in Vancouver doing odd jobs. Most of that time he was on relief.

He was a widower and had four children, as follows 1. A daughter Rose Lukey who was 25 years of age and married. 2. A daughter Flora Cretzu who was 21 years of age and had kept house for her father since the death of her mother in 1936. 3. A son George Cretzu, 17 years of age, who had had temporary employment. 4. A daughter Mary Margaret Cretzu, 11 years of age, attending school.

S. C.
1941

CRETZU
v.
LINES

Sidney Smith, J.

Dealing first with the damages under the Families' Compensation Act I doubt whether the deceased in the last three years of his life contributed very greatly toward the maintenance of his family. The evidence in this respect is rather meagre. I allow $750 apportioned as follows: To Mary $500, to Flora $250.

The question of the assessment of damage under the Administration Act for loss of expectation of life has recently been considered by the House of Lords in the case of *Benham* v. *Gambling*, [1941] 1 All E.R. 7, in which the Lord Chancellor indicated the main considerations to be borne in mind in assessing damages under this head. He pointed out that (p. 12):

> The thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. . . . The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up "life's fitful fever"—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost. . . . The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness.

He reached the conclusion that in assessing damages under this head whether in the case of a child or an adult a very moderate figure should be chosen. In that case the sum of £200 was considered the proper figure, the victim being a boy two-and-a-half years old killed in a road accident.

In the recent case of *Jacobson* v. *V.V. & E.R. & N. Co.* (1941) [*ante*, p. 207] my brother FISHER with the *Benham* v. *Gambling* decision before him awarded $1,000 where the deceased was a married woman 54 years of age in good health with three children, one of whom was married.

Applying as well as I can the foregoing and the other principles mentioned in the *Benham* v. *Gambling* case I think the proper award to make is $750.

For the sake of caution I may say that I have considered the matter of duplication of damages referred to in *McGinnes* v. *Murphy* (1940), 54 B.C. 460 and other like cases. The above amounts are without abatement in this respect. There will accordingly be judgment for the plaintiff for $1,500 and costs.

Judgment for plaintiff.

MINES, LIMITED v. WOODWORTH.

C. A.
1941
Feb. 4, 5;
March 4.

Contract—Option to purchase stock—First payment tendered and refused—Action for specific performance—Alternative claim for damages.

On the 20th of August, 1938, the defendant gave an option for the sale of 893,435 shares in the capital of Surf Inlet Consolidated Gold Mines Limited to one Petley, who assigned the option to one Phillips. Phillips then assigned the option to the plaintiff, Mines, Limited. The shares were in escrow with the superintendent of brokers. The option provided that on or before the 1st of August, 1939, or within five days after such earlier date as the consent of the superintendent of brokers shall be secured for the release from escrow of the shares covered by the option in such manner as to make them available for delivery in the amounts and by the dates respectively set forth, 5,000 shares at 20 cents per share, amounting to $1,000, and the remaining shares were to be taken up and paid for as set out in the paragraph. It was further provided that the purchaser was entitled to delivery of shares when paid for by him during the continuance of the agreement, subject to the release of said shares by the superintendent of brokers. On the 29th of July the plaintiff tendered $1,000, but the defendant refused to accept, giving the excuse that the shares were still in escrow and had not been released by the superintendent of brokers. The plaintiff brought action for specific performance of the option, and in the alternative for damages on the 12th of August, 1939. The plaintiff tendered the second monthly payment of $1,000 for a second instalment of shares prior to the first of September, 1939, but acceptance was refused on the same ground. It was held that the term as to release of the shares was solely for the benefit of the purchaser and the defendant broke his contract, but that the plaintiff had not proven that it suffered any substantial damages, and nominal damages were fixed at $10.

Held, on appeal, by the plaintiff for further damages and cross-appeal by the defendant for dismissal of the action, that the plaintiff elected to treat the contract as subsisting notwithstanding the defendant's breach, as he commenced action for specific performance immediately after the first payment was refused and he tendered another payment of $1,000 a month later under the contract. In view of the plaintiff's election to affirm the contract, coupled with its failure to show it was ready and willing to carry out the contract, the appeal must be dismissed and the cross-appeal allowed.

APPEAL by plaintiff and cross-appeal by defendant from the decision of McDONALD, J. of the 21st of September, 1940, in an action for specific performance of an agreement of the 20th of August, 1938, made between the defendant as vendor and one Petley as purchaser for the sale by the vendor to Petley of

C. A. 1941

MINES, LIMITED v. WOODWORTH

893,436 shares of the capital stock of Surf Inlet Consolidated Gold Mines Limited, which said agreement was assigned by Petley to the plaintiff herein. One million shares were received by the defendant as consideration for the transfer to the company of a mining property at Surf Inlet on Princess Royal Island. These one million shares were authorized to be allotted and issued under the provisions of the Securities Act of this Province subject to escrow restrictions imposed by the superintendent of brokers under the Securities Act. Prior to August 20th, 1938, the superintendent of brokers had released 106,565 of the million shares and the balance still in escrow were the shares dealt with under the above agreement. Under the agreement the purchaser was to pay for and receive 5,000 shares each month, the first payment to be made on or before the 1st of August, 1939. For the first five payments the purchaser was to pay 20 cents per share. On the 29th of July, 1939, the plaintiff delivered $1,000 to the Canadian Bank of Commerce for deposit to the account of the defendant. On the same day the bank returned the $1,000 to the plaintiff on the defendant's instructions not to accept any funds on his behalf until instructed to do so. On the 29th of August the plaintiff caused a further cheque for $1,000 to be tendered to the bank for deposit to the credit of the defendant, being the second payment under the agreement, but the bank refused to accept the tender pursuant to its instructions from the defendant. The defendant's ground for refusing acceptance of the money was that the superintendent of brokers had not released the shares from escrow, and he could not deliver them. The defendant cross-appealed on the ground that the release of the shares from escrow was a condition precedent to the sale of the shares being made, and that the action was premature as the shares were not released until after the action was brought.

The appeal was argued at Victoria on the 4th and 5th of February, 1941, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: The first payment due on the 1st of August, 1939, was tendered on the 29th of July, and was refused by the defendant. The breach was proved. The

C. A.
1941

MINES, LIMITED v. WOODWORTH

question is what damages flow from the breach and we claim $42,100. One dividend of 3 cents per share was paid in September, 1940. The market price on the exchange is not the proper test: see *Jamal* v. *Moolla Dawood, Sons & Co.*, [1916] 1 A.C. 175. We are entitled to be put in the same position that we would be if the amount had been accepted. He is liable for the difference between the market price and the contract price at the time of the breach: see Halsbury's Laws of England, 2nd Ed., Vol. 29, p. 184. The measure of damages is the estimated loss: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 228; *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678, at pp. 687-91; *Williams Brothers* v. *Ed. T. Agius, Limited,* [1914] A.C. 510, at pp. 522-3; *Pitfield & Co. Ltd.* v. *Jomac Gold Ltd. et al.,* [1938] O.R. 427. On the question of market value see *Spencer* v. *The Commonwealth* (1907), 5 C.L.R. 418; *Weed* v. *Lyons Petroleum Co.* (1923), 294 Fed. 725, at 733-4. If there is no market you must give him the profit on a resale: see *Wilmoth* v. *Hamilton* (1904), 127 Fed. 48, at p. 53; *McGilvra* v. *Minneapolis, St. P. & S.S.M. Ry. Co.* (1916), 159 N.W. 854, at p. 857. It depends on the law of supply and demand: see *McGarry* v. *Superior Portland Cement Co.* (1917), 163 Pac. 928; *Untermyer Estate* v. *Attorney-General for British Columbia,* [1929] S.C.R. 84, at p. 91; *Executors of Estate of Isaac Untermyer, Deceased* v. *Attorney-General of British Columbia* (1928), 39 B.C. 533, at p. 535; *Myer* v. *The Commissioner of Taxes,* [1937] V.L.R. 106, at pp. 119-22. We have to deal with it in a husbandlike fashion: see *In re Schuyler, Chadwick & Burnham* (1933), 63 F. (2d) 241. To get control of the company we have to go out on the market and buy, but there was no available market for these shares. There must be considered what profits could be made in case of the contract being consummated: see *Hinde* v. *Liddell* (1875), L.R. 10 Q.B. 265, at pp. 268-9; *Stroud* v. *Austin & Co.* (1883), 1 Cab. & El. 119; *Hadley* v. *Baxendale* (1854), 9 Ex. 341; *Don Ingram Ltd.* v. *General Securities Ltd.* (1939), 54 B.C. 414; *R. & H. Hall, Limited* v. *W. H. Pim (Junior) and Company, Limited* (1928), 33 Com. Cas. 324; *Stroms Bruks Aktie Bolag* v. *John & Peter Hutchison,* [1905] A.C. 515, at p. 524.

C. A.
1941

MINES, LIMITED v. WOODWORTH

McCrossan, K.C., for respondent: The facts in this case do not bring it within either the *Ingram* case or the *Baxendale* case. This was obviously an option for the purpose of getting control of the stock. The stock in question was in escrow and expressly subject to release by the superintendent of brokers. The release of the stock was a condition precedent to the option to purchase. The only hope was a sale to one Henderson, and he dropped his option on August 10th, 1939. The alleged breach was on August 1st, 1939, but there was no release of the stock until August 23rd, 1939. In fact the plaintiff had thrown up the option on August 10th, 1939. A second offer of $1,000 under the option for the second payment was made on August 29th, 1939. The writ in this case was issued on the 12th of August, 1939. The evidence shows they had no intention of taking up the option. On the question of damages: first, as to loss of profits it must be within the contemplation of the parties. He did not contemplate a resale as he was purchasing for the control of the mine. The option was for 33 months and there was no acceleration clause, and at all times the stock was contingent on release by the superintendent of brokers. Secondly, as to availability of the market it was continually on the exchange in New York and Toronto. He cannot prove any loss whatever: see *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67, at pp. 76-7; Halsbury's Laws of England, 2nd Ed., Vol. 29, p. 195, sec. 261; *Williams Brothers* v. *E. T. Agius, Lim.* (1914), 83 L.J.K.B. 715; Fry on Specific Performance, 6th Ed., 690 (note 4); Mayne on Damages, 10th Ed., 176; Meyer on Stockbrokers and Stock Exchanges, pp. 592-3; *Jamal* v. *Moolla Dawood, Sons & Co.*, [1916] 1 A.C. 175, at p. 179; *Re Schwabacher; Stern* v. *Schwabacher; Koritschoner's Claim* (1907), 98 L.T. 127, at p. 129; *Pitfield & Co. Ltd.* v. *Jomac Gold Ltd. et al.*, [1938] O.R. 427, at pp. 457-9. They should not be allowed to change an action for specific performance to one for damages: see *Hipgrave* v. *Case* (1885), 28 Ch. D. 356. The case of *Executors of Estate of Isaac Untermyer, Deceased* v. *Attorney-General of British Columbia* (1928), 39 B.C. 533, is in our favour. On the cross-appeal the proper construction of the option is that the release of the shares was a condition precedent to the sale and the option lapsed on the

1st of August, 1939: see *Coope* v. *Ridout,* [1921] 1 Ch. 291; *Morgan* v. *Lariviere* (1875), L.R. 7 H.L. 423. Next the action was premature because there was no release until August 23rd, 1939, and the action was brought on August 12th, 1939.

McAlpine, in reply, referred to Fry on Specific Performance, 6th Ed., 604-5.

Cur. adv. vult.

4th March, 1941.

MACDONALD, C.J.B.C.: I would dismiss the appeal and allow the cross-appeal. I may add that if I thought a breach of contract occurred, I would be of the same opinion as the trial judge in respect to damages.

SLOAN, J.A.: I agree with my brother O'HALLORAN that the appeal should be dismissed and the cross-appeal allowed.

O'HALLORAN, J.A.: For present purposes it is assumed in the appellant's favour (but without so deciding), that the respondent Woodworth committed a breach of an essential term of the option agreement when he refused to accept the sum of $1,000 tendered by the appellant Mines, Limited, for the payment due August 1st, 1939. When that breach occurred the appellant could have affirmed the contract (as it did) by demanding that the respondent carry it out despite his breach, or on the other hand, it could have accepted his breach as a termination of the contract, and then claimed damages accordingly. The appellant could not however affirm the contract and repudiate it at the same time, for that would be a manifest contradiction.

The appellant affirmed the contract. For it commenced an action almost immediately for its specific performance. Obviously the appellant would not ask the Court to decree performance of a contract which it had already elected to terminate because of the respondent's breach. Furthermore within a few weeks after the commencement of the action it tendered another payment of $1,000 under the contract. It would not have done so, if it had accepted the respondent's breach as termination of the contract. Again some eight months later in April, 1940, the appellant obtained an injunction restraining the respondent

C. A.
1941

MINES, LIMITED v. WOODWORTH

O'Halloran, J.A.

from transferring or otherwise dealing with 200,000 of his shares the subject-matter of the option agreement. That again was consistent only with the subsistence of the contract.

The injunction remained in force until 18th June, 1940, when the appellant consented to its being dissolved, as a condition enabling it to obtain an adjournment of the trial fixed for that day. The record is clear the appellant elected to treat the contract as subsisting notwithstanding the respondent's breach. Therefore any remedy to which the appellant may be entitled must be based on its election to treat the contract as subsisting. It cannot be entitled to a remedy founded upon any alleged acceptance of the respondent's breach as a termination of the contract, since the pursuit of that remedy would necessarily involve or imply the negation of the other. The remedies are mutually exclusive. The course of conduct which supports the one denies the existence of the other. A person may not blow both hot and cold. That is the doctrine of election.

One might go further to find a better statement than the following passage which received the approval of Lamont, J. when delivering the judgment of the Saskatchewan Supreme Court (in which he then sat) in *Standard Trust Co.* v. *Little* (1915), 24 D.L.R. 713, at 719:

> It not infrequently happens that for the redress of a given wrong, or the enforcement of a given right, the law affords two or more remedies. Where these remedies are so inconsistent that the pursuit of one necessarily involves or implies the negation of the other, the party who deliberately and with full knowledge of the facts, invokes one of such remedies, is said to have made his election, and cannot, thereafter, have the benefit of the other.

The learned trial judge described the appellant's action as a suit for specific performance "and in the alternative for damages." He dismissed the claim for specific performance because the appellant was not "ready able and willing to complete" the subsisting option agreement, but awarded nominal damages which the appellant now asks this Court to increase to a substantial sum. The appellant has not appealed from the refusal to decree specific performance.

The right of the appellant to be awarded any damages at all in the special circumstances presents a question of some nicety. Quite apart from the fact that the pleadings were not amended

to include an alternative claim of any nature, any damages awarded can relate only to a contract which the appellant elected to treat as subsisting. Having definitely affirmed the contract upon the respondent's breach thereof, the appellant's conduct then and since constitutes a denial that it accepted such breach as a termination thereof; and *vide Blackett* v. *Bates, post,* Lord Cranworth, L.C. at pp. 328-9. In any event the cause of action is founded upon the appellant's affirmation of the contract and not upon its termination. Even if it were sought to amend the pleadings to advance this latter claim, the power of this Court to allow pleadings to be amended to conform to the facts established in the evidence, *vide Wilkinson* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 161, could not be invoked. For the evidence points conclusively to the appellant's election to treat the contract as subsisting and that involves the negation and exclusion of a remedy which is inconsistent therewith.

It is clear therefore that the damages awarded cannot relate to a breach of a contract which the appellant had accepted as terminated on account of the respondent's breach. Clearly also the damages cannot be in addition to specific performance, for that remedy was refused. Then are they in lieu or in substitution of specific performance of the option agreement? In the course of discussing the suggestion that after Lord Cairns's Act (1858—21 & 22 Vict., c. 27, s. 2) a Court of Equity could give damages in lieu of specific performance, Chitty, J. said in *Lavery* v. *Purssell* (1888), 57 L.J. Ch. 570, at 575:

> Yes, but it must be a case where specific performance could have been given. It was a substitute for specific performance. It did not give the Old Court of Chancery a general jurisdiction to give damages wherever it thought fit; it was only in that kind of case where specific performance would have been the right decree, and there were reasons why it would be better to substitute damages; . . .

If the appellant had shown itself entitled to a decree for specific performance, then undoubtedly under the authority just cited the Court instead of granting specific performance could have given damages instead. But that is not this case. The appellant was properly refused specific performance because it was not able ready and willing to carry out the contract; *vide Wallace* v. *Hesslein* (1898), 29 S.C.R. 171, at 176-7. Having disabled itself from obtaining specific performance the appellant

C. A.
1941

MINES, LIMITED v. WOODWORTH

O'Halloran, J.A.

thereby disentitled itself to any substitute remedy necessarily premised upon the antecedent existence of the thing for which it was sought to be substituted. To entitle it to the substitute remedy of damages the appellant would be called on to establish the elements of proof required for a decree of specific performance, *viz.*, that it was able ready and willing to carry out the contract. It was unable to do so. Repudiation of the contract by the respondent did not relieve the appellant of that obligation: *vide* Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 229, and *Australian Dispatch Line* v. *Anglo-Canadian Shipping Co. Ltd.* (1939), 55 B.C. 177, at pp. 187-8. For we are discussing a contract the appellant elected to affirm despite the respondent's breach.

Manifestly the damages awarded cannot be in substitution for specific performance. Nor can the damages awarded be upheld on the ground that this is not a case where specific performance could have been decreed even though the appellant had shown it was prepared to carry out the contract. The option agreement concerned the progressive delivery of respondent's shares in a mining company and no difficulty lay in the way of a decree for its specific performance if the appellant had not disabled itself from the right to that remedy. In fact the respondent expressed his readiness and ability at the trial to comply with a decree for specific performance. The present case is therefore clearly distinguishable from *Dominion Coal Company, Limited* v. *Dominion Iron and Steel Company, Limited and National Trust Company, Limited,* [1909] A.C. 293, which concerned a ninety-year contract for the delivery of coal. Specific performance had been decreed in the Nova Scotia Courts (1908), 43 N.S.R. 77, but the Judicial Committee changed this to damages. At p. 311, Lord Atkinson said:

> . . . this is not a contract of which, on the authorities cited, specific performance would be decreed by a Court of Equity, . . .

A study of that case discloses that Lord Atkinson was referring to a contract of which from its nature the Court could not decree specific performance, and that he was not referring to a contract (such as we are considering), of which the Court would decree specific performance if the plaintiff had established it was able ready and willing to carry it out. This is manifest from the

fact that the plaintiff in the *Dominion Coal* case was found to be ready able and willing to carry out the contract. The Judicial Committee held in effect, that although the plaintiff had shown itself entitled to specific performance if specific performance of such a contract could have been decreed, nevertheless, as the nature of the contract did not permit that remedy, the plaintiff should be given damages instead. In its statement of claim the plaintiff in the *Dominion Coal* case had asked in the alternative for damages, *vide* p. 306 "in case the Court should be of opinion that the plaintiff's remedy was for damages for loss of their contract."

Moreover reference to the argument at p. 229 shows that the "authorities cited" to which Lord Atkinson referred were *Blackett* v. *Bates* (1865), 35 L.J. Ch. 324, and *The Powell Duffryn Steam Coal Company* v. *The Taff Vale Railway Company* (1874), 43 L.J. Ch. 575. In the former decision Lord Cranworth, L.C. refused a decree for specific performance on the ground that in no circumstances could that relief be given there because of the nature of the contract. In the latter decision in the Lords Justices' Court an injunction was refused for the same reason; and *vide* also *Phipps* v. *Jackson* (1887), 56 L.J. Ch. 550.

With respect therefore I can see no ground upon which to sustain the award of damages. This conclusion does not rest upon a matter of form or rigidity in pleading, nor is it in conflict with section 2 (7) of the Laws Declaratory Act, Cap. 148, R.S.B.C. 1936. For in view of the appellant's election to affirm the contract coupled with its failure to show it was able ready and willing to carry out the contract, I cannot see any way in which the pleadings may now be amended to enable the appellant to found a claim in damages; and *vide Hipgrave* v. *Case* (1885), 54 L.J. Ch. 399.

As this conclusion disposes of the appeal, no purpose may be served in discussing other important aspects argued by counsel. In my view the action should be dismissed. I would therefore dismiss the appeal and allow the cross-appeal.

Appeal dismissed; cross-appeal allowed.

Solicitor for appellant: *J. C. Ralston.*
Solicitor for respondent: *R. G. Phipps.*

C. A.
1941
Mar. 12, 18.

REX v. JACOBS.

Criminal law—Disorderly house—Tenant in possession—Agent of landlord —Duty to terminate tenancy—Criminal Code, Sec. 229, Subsec. 5.

The defendant, who was in the real-estate business, acted as agent for one Mrs. Charman, who owned a house on Keefer Street in Vancouver, and collected her rents. The premises were rented to a Chinaman on a monthly tenancy. On July 3rd, 1940, Mrs. Charman received a letter from the police advising her that the said premises had been operating as a common bawdy house and two women had been convicted in connection therewith, and the letter then quoted section 229, subsection 2 of the Criminal Code. She gave the letter to the defendant, who on the 15th of July following gave the tenant written notice to quit and deliver up possession of the premises on the 31st of August, 1940. On November 18th, 1940, the premises were again raided and there was a further conviction against the inmates for keeping a common bawdy house. On the next day the police notified the defendant of this, when he stated that owing to press of business the matter had been forgotten, and he had not followed up the July notice to quit. Defendant then notified the tenant again and the house was vacated in December. The defendant was convicted on a charge of being the keeper of a disorderly house, to wit, a common bawdy house, under section 229, subsection 5 of the Criminal Code.

Held, on appeal, reversing the decision of police magistrate Wood, that under the above subsection the only right the defendant had was to determine the tenancy or right of occupancy by giving a notice to quit. That right he exercised pursuant to the instructions he received from his principal. In view of the findings of fact, the learned police magistrate erred in law in convicting the defendant, and the conviction should be quashed.

APPEAL by accused from his conviction by police magistrate Wood of Vancouver for being the keeper of a disorderly house, to wit, a common bawdy house. The appellant is a real-estate agent and was the agent of a Mrs. Charman and received for her rents from 358 Keefer Street in Vancouver. The property was rented to a Chinaman. On July 3rd, 1940, the police notified Mrs. Charman that the above premises had been operating as a common bawdy house and two women were convicted in connection therewith. Mrs. Charman notified her agent, the accused, of this and he immediately sent a notice to the Chinaman tenant on July 15th, 1940, that he must vacate the property on the 31st of August, 1940. On November 18th, 1940, the premises were

again raided, which led to a further conviction against the inmates for keeping a common bawdy house. Accused was notified of this the next day, when he stated he had forgotten about the matter through press of business, but he wrote immediately to the tenant and the house was vacated in December following. On January 13th, 1941, these proceedings were commenced against him under section 229, subsection 5 of the Criminal Code.

The appeal was argued at Vancouver on the 12th of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: On being notified of the conviction of a sub-tenant he immediately notified the tenant of the termination of the lease on August 31st, 1940. On that date, owing to pressure of business, he overlooked having the tenant evicted and there was subsequently a second conviction. When notified of this he immediately had the tenant ousted. The learned magistrate found he carried out his instructions and there was no intention on his part to evade the law. The magistrate's statement admits that he took all reasonable steps to prevent the recurrence of the offence.

Castillou, for the Crown.

Cur. adv. vult.

On the 18th of March, 1941, the judgment of the Court was delivered by

SLOAN, J.A.: The appellant was convicted by police magistrate Wood at Vancouver for being the keeper of a disorderly house, to wit, a common bawdy house.

According to the evidence he had carried on a real-estate business in Vancouver for the past 32 years. Inspector Munro has known him for 20 years, and when in the witness box described him as "a gentleman." Mr. Wood, in delivering his judgment convicting the appellant, said:

> . . . everybody, particularly the police officers, . . . , spoke in a very complimentary way of [him].

The appellant was the agent of a Mrs. Charman and received for her rents from 358 Keefer Street, in Vancouver. This

C. A.
1941

REX
v.
JACOBS

property was rented by Mrs. Charman to a Chinaman. The appellant for his services received $1.25 a month commission.

On July 3rd, 1940, the acting chief constable of Vancouver sent a letter to Mrs. Charman advising her that the premises in question had been operating as a common bawdy house, and as a result two women had been convicted in connection therewith. The letter then quoted section 229, subsection 5 of the Code, and ended with this warning:

> Being the owner of the premises in question you are hereby notified that if these premises continue to operate as a common bawdy house action will be taken against you in accordance with the subsection of the Criminal Code above referred to.

On receipt of this letter Mrs. Charman telephoned the appellant and shortly afterward took it to him at his office.

On the 15th day of July, 1940, the appellant sent the following notice to Mrs. Charman's tenant:

> NOTICE TO QUIT
>
> I HEREBY as agent for Mrs. Julia Charman, your landlady and on her behalf, give you notice to quit and deliver up possession of the premises, situate at 358 Keefer Street in the city of Vancouver, which you hold of her as tenant thereof, on the 31st day of August next.
>
> I am advised by your landlord that she has received notice from the morality department of the city of Vancouver that an immoral house is being carried on on the said premises.
>
> If you will vacate sooner than the end of this month I will return you money that you have paid for this month's rent.
>
> Dated the 15th day of July, 1940.
>
> To Mr. Woo Jim (tenant).

On November 18th, 1940, the police raided the Keefer Street house and discovered evidence which led to a further conviction against the inmates for keeping a common bawdy house.

On November 19th, 1940, the day following the raid the police officers called on the appellant as agent for the premises and advised him of the situation. He said he had not followed up the July notice to quit, because in the press of business the matter had been forgotten, but he would write about it immediately. This he did, and in December the premises were vacated.

On the 13th day of January, 1941, the present proceedings were commenced against the appellant, and resulted in his conviction under section 229, subsection 5 of the Code, which reads as follows:

> If the landlord, lessor or agent of premises in respect of which any person

has been convicted as the keeper of a common bawdy house fails, after such conviction has been brought to his notice to exercise any right he may have to determine the tenancy or right or occupation of the person so convicted, and subsequently any such offence is again committed on the said premises, such landlord, lessor or agent shall be deemed to be a keeper of a common bawdy house unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

It seems clear that under this subsection the agent must "exercise any right he may have to determine the tenancy or right of occupancy" of those who are operating a common bawdy house in the premises of his principal, or failing that, he must take "all reasonable steps to prevent the recurrence of the offence." Unless he complies with the one or other of these statutory alternatives he shall be deemed to be the keeper of the common bawdy house.

In this case can it be said that the appellant failed to exercise any right he might have had to determine the tenancy or right of occupancy of the inmates of the house? What right did he have? The only right he had that I can see was to determine the tenancy or right of occupancy by giving a notice to quit. That right he exercised pursuant to the instructions he received from his principal Mrs. Charman. Mr. Wood recognized this by saying, when convicting the appellant:

> . . . my impression was that he was carrying out his instructions. He did what he was told to do, no more. There is no suggestion that the matter was followed up by his principal in any way so perhaps in a busy real-estate office he was not so much to blame as the principal.

In view of that finding of fact, it is my opinion, with respect, that the learned police magistrate erred in law in convicting the appellant. I would allow the appeal and quash the conviction.

Appeal allowed; conviction quashed.

C. A.
1941
Mar. 25, 26.

REX v. PAIS.

Criminal law — Evidence — Confession of accused — Admissibility — Trial within a trial—Refusal of—Prejudice to accused—Recent possession.

On the trial of an accused for unlawfully retaining in his possession stolen goods knowing the same to have been stolen, the question of the admissibility of certain statements made by the accused to police officers was raised and counsel both for accused and for the Crown desired the learned judge to follow the practice of having "a trial within a trial" as to the admissibility of the evidence, but he refused to do so. The police officers were then called for the Crown, and accused's parents were called for the defence. The learned judge held that the statements made by the accused were inadmissible as they had been induced by hope of reward, but he expressed the view that he was entitled to hear the evidence as to the finding of the goods in question and so much of the confession as strictly related thereto. Accused was convicted.

Held, on appeal, reversing the decision of ELLIS, Co. J., that when a statement alleged to have been made by an accused person is sought to be put in evidence, then an issue as to its admissibility should be immediately tried, and all witnesses having any knowledge of the facts relating to the making of the statement should be immediately called. The failure to follow this practice may work a great injustice to the accused, and assuming so much of accused's statement with relation to the finding of the stolen goods was admissible (without so deciding), even on this evidence the accused could not be properly convicted, and the conviction is quashed.

APPEAL by accused from his conviction by ELLIS, Co. J. on the 17th of February, 1941, on a charge of unlawfully retaining in his possession stolen goods knowing the same to have been stolen, to wit, two typewriters. The accused, who was eighteen years of age, lived with his parents on East 4th Avenue in Vancouver. Two detectives, investigating the theft of five typewriters, visited the parents' house on the 19th of December, 1940, and at 11.30 p.m. one of the detectives went into the house and told accused to go out to the car, which he did. The detective then asked the accused's mother to go out and tell the boy to tell the truth. The mother then went out to the car and told the boy to tell the truth. Then in answer to a question, the accused said he knew nothing about the typewriters. They then told the boy they would go and see one Chisholm whom they suspected had knowledge of the theft. On the way they asked

the boy if he was a Catholic, to which he replied that he was. One of the detectives then said "We will go and see Father Forget and you can tell your story to him." On the way the boy said he would tell them the story. As a result of what he said, accused took them to a house at 60 East 4th Avenue, occupied by a woman and her daughter. It is a house without a basement, but up on pillars. Accused opened a door under the front room of the premises, crept underneath, and pointed to a corner where there were two sacks. The detectives took the sacks and they found a typewriter in each sack. The detectives then warned him that anything he said would be used in evidence, and he later made the statement that he had approached the man Chisholm, who worked with him, and asked him if he could get rid of any typewriters for him. Chisholm said he could, with the result that five typewriters were delivered to Chisholm's suite. Chisholm sold two of them for $18 each, and then Chisholm told him to come and get the typewriters as he was scared. As a result, accused with another boy went to Chisholm's home where they got two of the three remaining typewriters, took them and hid them where the detectives found them under his direction.

The appeal was argued at Vancouver on the 25th and 26th of March, 1941, before McQuarrie, Sloan and McDonald, JJ.A.

Crux, for appellant: He was convicted of retaining goods in his possession, knowing them to have been stolen, namely, two typewriters. The submission is that confessions were improperly admitted. The learned judge erred in not having a trial within a trial. Typewriters were stolen from a Catholic school where the accused and his mother worked. The accused's action and statements were induced by threats. The two detectives took him to their car from his parents' house and induced the mother to tell him to tell the truth before they took him away. They then told him they would bring him to the home of one Chisholm, whom they suspected. On the way there they asked him if he was a Catholic, and when he replied that he was they then said they would bring him before a priest to whom he could tell his story, but before they arrived there he said he would tell everything. He then directed the detectives to a house at 60 East 4th Avenue, and under this house he showed where two sacks

C. A. 1941

REX v. PAIS

were hid, each containing a typewriter. It was after this that the detectives warned the accused. What disclosure was made was under threats without any warning: see *Rex* v. *Seabrooke,* [1932] 4 D.L.R. 116; *Sankey* v. *Regem,* [1927] S.C.R. 436. When accused went to the house where the two typewriters were, he made no statement as to the typewriters, he merely pointed out where they were. The evidence of what he said and did prior to warning was improperly received: see *The Queen* v. *McCafferty* (1886), 25 N.B.R. 396; *The Queen* v. *Leatham* (1861), 30 L.J.Q.B. 205; *Rex* v. *Harvey* (1800), 2 East, P.C. 658; *Rex* v. *Pawlett* (1923), 40 Can. C.C. 312; *Rex* v. *Andrews* (1925), 44 Can. C.C. 201; *Richler* v. *Regem,* [1939] 4 D.L.R. 281. After what happened previously the confession made after warning is inadmissible: see *Rex* v. *Kong* (1914), 20 B.C. 71, at p. 72; *Rex* v. *Myles* (1922), 40 Can. C.C. 84; *Rex* v. *Steele* (1923), 33 B.C. 197.

Castillou, K.C., for the Crown:: The trial judge could allow sufficient of the confession to go in to convict. The facts and documents disclosed in consequence of inadmissible confessions are receivable if relevant: see Phipson on Evidence, 7th Ed., 261; *Reg.* v. *Leatham* (1861), 8 Cox, C.C. 498. The earlier rule admitted the facts but anything qualifying or explaining was refused: see *Griffin's Case* (1809), Russ. & Ry. 151; *Rex* v. *Rosser* (1836), 7 Car. & P. 648. He stated that regardless of the confession there was sufficient evidence to convict: see also Archbold's Criminal Evidence, 30th Ed., 402. When the property is found the evidence is admissible: see *Rex* v. *Jenkins* (1822), Russ. & Ry. 492; Roscoe's Criminal Evidence, 15th Ed., 51-2. He was under arrest when the police told him to get into the car. This case is the same as *Griffin's Case.*

Crux, in reply, referred to Wigmore on Evidence, Can. Ed., Vol. 1, p. 858. An accused may know of the stealing when he is not the thief.

MCQUARRIE, J.A.: With some doubt I agree with my learned brothers that this appeal should be allowed and the conviction quashed. It is an appeal from ELLIS, Co. J., who convicted the

appellant on the charge that he, the appellant, unlawfully did retain in his possession stolen goods (two typewriters) of the total value of over $25, the property of Father Forget, knowing the same to have been stolen. The material facts are stated in the report of the learned trial judge.

The grounds of appeal are rather numerous, but in his argument before us counsel for the appellant has stressed as his main ground refusal of the appellant's application for a trial within a trial, before admission of certain alleged admissions or confessions of the appellant. In that connection the Crown called detectives, and some defence witnesses were heard. The appellant was not granted a hearing although his counsel asked that he be allowed to give his version of what had occurred before admission of the said admissions or confessions. He cited, *inter alia*, *Rex* v. *Seabrooke*, [1932] 4 D.L.R. 116, and *Sankey* v. *Regem*, [1927] S.C.R. 436. Secondly, he argued that there was no evidence that the appellant was in possession of the goods. It appeared to be common ground that there was no exclusive possession of the goods in the appellant, and as there was a considerable lapse of time between the theft and the recovery of the goods by the detectives, there could not be any violent presumption against the appellant. It must be remembered, however, that there was evidence that the appellant was seen in an automobile with Rennie, one of the identified thieves, shortly before and again shortly after the commission of the theft. Counsel for the appellant relied as to this ground on *Regina* v. *Gould* (1839), 9 Car. & P. 364 (the lantern case) and certain other authorities referred to in the judgment of my brother McDONALD, including Phipson on Evidence, 7th Ed., 261, all of which have been considered.

The learned trial judge after hearing counsel for the Crown, when he supported his judgment and rulings, finally decided that the alleged admissions and confessions should not be admitted, but that there still remained the finding of the goods. Counsel for the Crown admitted if the whole confession was excluded, the Crown could not support the conviction. He also admitted that the police ordered the appellant to get into the police automobile and that he was then under arrest or restraint, and it was only

C. A. 1941

REX v. PAIS

McQuarrie, J.A.

then that he offered to take the police to the place where the typewriters were.

The only real question therefore which requires our attention is whether if only the evidence of the finding of the machines is left, the conviction can be supported. The learned trial judge held that the appellant should be convicted. As stated in the first place, I have some doubt that the learned trial judge was in error, but do not care to dissent from the decision of the majority of the Court.

SLOAN, J.A.: I would allow the appeal for the reasons given by my brother MCDONALD.

MCDONALD, J.A.: The appellant was convicted by His Honour Judge ELLIS for that he did between 1st March, 1940, and 20th December, 1940, unlawfully retain in his possession stolen goods knowing the same to have been stolen, to wit, two typewriters, the property of Father Louis Forget.

He appeals from that conviction largely on the ground that he was greatly prejudiced by the learned judge's failure to follow the usual practice of holding "a trial within a trial" when it became evident that the admissibility of certain statements made by the appellant to the police officers would be contested. When counsel, both for the appellant and for the Crown, desired the learned judge to pursue this usual course he declined to do so, with at least one unfortunate result for the accused man. That the practice suggested is a proper practice cannot now be in doubt, as appears from the judgment of MARTIN, J.A. (as he then was) in *Rex* v. *Gauthier* (1921), 29 B.C. 401, where the practice is clearly laid down that when a statement alleged to have been made by an accused person is sought to be put in evidence, then an issue as to its admissibility should be immediately tried, and all witnesses having any knowledge of the facts relating to the making of the statement should be immediately called. It is important that this practice should be carefully followed, and the present case is an illustration of how the failure to follow it may work a great injustice to an accused person.

Counsel for appellant insisting, so far as he could reasonably do so, on his right, wished to call his client to give evidence only

on the issue as to the admissibility of the evidence regarding his statement, and to have his cross-examination restricted to that issue. He was denied this right, with the result that counsel in the end decided not to call him at all. Obviously, the accused was thereby greatly prejudiced in his defence.

In the *Gauthier* case, above mentioned, counsel was held bound by what had taken place at the trial in that he had not stood upon his rights on the one issue as to whether the evidence in question was admissible. That strict rule ought not, I think, to be applied here for the reason that what happened with regard to the calling of the appellant, to my mind, takes this case out of the rule in *Gauthier's* case.

The result of the practice followed on the trial was that the police officers were called for the Crown and the appellant's father and mother were called for the defence. In the end, as I read the remarks the learned judge made in the course of the argument, he was of opinion that the statements made by the appellant were inadmissible by reason of the fact that they had been induced by a hope of reward. Nevertheless, the learned judge expressed the view that under the decisions mentioned in the 7th edition of Phipson, at p. 261, he was entitled to hear the evidence as to the finding of the typewriters in question, and so much of the confession as strictly related thereto. He does not, however, indicate just what particular words of the statement he held to be admissible.

The earliest leading case on the subject is *Warickshall's Case* (1783), 1 Leach, C.C. 263, and the strongest case for the Crown is *Griffin's Case* (1809), Russ. & Ry. 151.

Stretching the decision in *Griffin's Case* to its limit, the only evidence, in my opinion, which could be looked at in this case is contained on p. 14 of the appeal book, *viz.*:

> As a result of the statement made by the accused he took us to a house at 60 East 4th Avenue, a house occupied by a mother and daughter by the name of Mrs. Sambues, and daughter.
>
> Describe those premises. The house is situate on the south side of the street and it is a house without a basement, only up on pillars. The accused removed—opened a door under the front room of these premises, and we crept underneath, and he pointed to a corner on the left side where there was two sacks, and he says, "There are two"——
>
> No, what did you do in respect to the sacks? We brought the sacks out, and on examination of them we found them to contain each a typewriter.

C. A.
1941

REX
v.
PAIS

McDonald, J.A.

Having regard to what was said in the Court of Appeal in New Brunswick in *The Queen* v. *McCafferty* (1886), 25 N.B.R. 396, where the older cases are fully discussed, I am doubtful that even so much of the appellant's statement ought to be admitted. Reference may be had to Taylor on Evidence, 12th Ed. 569, and Wigmore on Evidence, Can. Ed., Vol. 1, pp. 988 and 989. However, for the purposes of this decision I shall assume that the extract quoted is admissible and that when appellant was interrupted after saying the words "there are two"—— he intended to say "there are two of the typewriters." As I say, I am very doubtful about this, but in any event, my view is that even on this evidence the accused could not be properly convicted.

It will be noted that the appellant was not in exclusive possession of the premises where the two typewriters were found, and the evidence shows that some nine months had elapsed between the theft of the typewriters and their discovery. Where an accused person is found in possession of stolen goods after so long an interval no presumption arises against him as in cases of recent possession, and in any case possession of stolen goods does not put an accused person upon his defence unless the possession is his own and to the exclusion of all other persons.

Rex v. *Pawlett,* a decision of the Manitoba Court of Appeal, reported (1923), 40 Can. C.C. 312, and *Rex* v. *Andrews,* a decision of the Appeal Division in New Brunswick (1925), 44 Can. C.C. 201, are instructive decisions as to these phases of the matter.

I would allow the appeal and quash the conviction.

Appeal allowed; conviction quashed.

WESSELS v. WESSELS.

S. C.
In Chambers
1941
April 2, 3.

Practice—Evidence taken on commission at instance of defendant—Plaintiff not represented on taking of evidence—Application by plaintiff to open commission—Granted with leave to make copy thereof.

At the instance of the defendant, the evidence of one Levin was taken under commission in the city of New York, U.S.A. The plaintiff was not represented by counsel upon the taking of the evidence of Levin, and no clause was included in the order directing the commission authorizing the plaintiff to appear by herself or counsel upon the taking of the evidence. On the application of the plaintiff for an order directing the district registrar at New Westminster to open the commission:—

Held, that the plaintiff is entitled to have the commission opened and to make a copy of the evidence.

APPLICATION by plaintiff for an order directing the district registrar at New Westminster to open a commission. Heard by MANSON, J. in Chambers at Vancouver on the 2nd of April, 1941.

C. R. J. Young, for the application.
Sigler, contra.

Cur. adv. vult.

3rd April, 1941.

MANSON, J.: Application by the plaintiff for an order directing the district registrar at New Westminster to open a commission. At the instance of the defendant the evidence of one Levin was taken under commission at the city of New York, U.S.A. The plaintiff being without funds was not in a position to be represented by counsel upon the taking of the evidence of Levin and no clause was included in the order directing the commission authorizing the plaintiff to appear by herself or counsel upon the taking of the said evidence. In that respect the order for the commission was unusual.

Counsel for the defendant submits that the plaintiff should not have access to the evidence prior to the trial upon the principle that a party is not compelled to disclose his evidence until the trial. It is submitted further that the plaintiff in her statement of claim having charged fraud and conspiracy as between

S. C.
In Chambers
1941

WESSELS
v.
WESSELS

Manson, J.

the defendant and his witness Levin, she should not have access to the evidence taken on commission.

The English practice has prevailed from the outset in this Province and having prevailed through so many years I ought not to disturb it. The plaintiff is entitled to have the commission opened and to make, if she so desires, copy of the evidence. *Davidson* v. *Nicol* (1831), 1 D.P.C. 220; *Smith* v. *Greey* (1886), 11 Pr. 238, in which latter case Sir John Boyd, Chancellor, refused, on appeal from the Master in Chambers, an order imposing restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors upon the opening of a commission. His discussion of the practice is apposite and, while in the case at Bar the peculiar circumstance that the plaintiff was unrepresented upon the taking of the evidence is present, nevertheless, she doubtless would have been represented had it not been for her financial limitations. Her misfortune in that respect is no reason why the usual practice should be departed from.

The district registrar will open the commission forthwith upon the application of either party. The plaintiff may make a copy of the evidence of the witness Levin.

Application granted.

REX v. SAYERS AND HALL.

C. A.
1941
Mar. 17, 18; *April* 4.

Criminal law — Conspiracy — Election for speedy trial—Attorney-General intervenes — Indictment for trial by jury — Criminal Code, Sec. 825, Subsec. 5—Conviction—Appeal.

Both accused were charged that they unlawfully agreed and conspired together with others to commit an indictable offence, to wit, to steal the sum of $1,850 from one Lehman. On the 3rd of September, 1940, Hall elected for speedy trial in the County Court Judge's Criminal Court, pleaded not guilty to the charge, and a date for his trial was set. Sayers elected for speedy trial but his election was out of time. The Attorney-General preferred an indictment over his own signature for trial of both accused by a jury under section 825, subsection 5 of the Criminal Code. On the 24th of September, 1940, both accused were arraigned at the Vancouver Assize, pleaded not guilty, and after trial by jury were convicted.

Held, on appeal, affirming the decision of MANSON, J. (SLOAN and O'HALLORAN, JJ.A. dissenting), that no formal method of expressing an intention to resort to section 825, subsection 5 of the Criminal Code is required by the Act, there is direct proof, or in the alternative, *prima facie* proof of compliance with said section over the Attorney-General's own signature, consequently the trial Court was duly seized of the case, and unless this *prima facie* proof is displaced on objection duly taken before plea, the trial may lawfully proceed.

APPEALS from the conviction by MANSON, J. and the verdict of a jury at the Fall Assize at Vancouver on the 27th of September, 1940, on a charge that they did conspire together and with one Elwood and others unknown, to commit an indictable offence, to wit, to steal the sum of $1,850 from one Gottfried Lehman. Both appeared in the County Court Judge's Criminal Court on the 3rd of September, 1940, and both consented to a speedy trial and the case was set down for hearing on the 17th of September following. The Attorney-General later preferred an indictment over his own signature for a trial by jury.

The appeal was argued at Vancouver on the 17th and 18th of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Sayers, in person: We elected to have speedy trial in the county court and a date was fixed for the trial. Secondly, there was no order showing we were sent up for trial by indictment.

C. A.
1941

REX
v.
SAYERS
AND HALL

He referred to *Rex* v. *Giroux* (1916), 30 Can. C.C. 101; (1917), 56 S.C.R. 63; *Rex* v. *Wener* (1903), 6 Can. C.C. 406, at p. 413; *Rex* v. *Komiensky (No. 1)* (1903), *ib.* 524, at p. 527; *Rex* v. *Cohon* (1903), *ib.* 386, at p. 394; *Minguy* v. *Regem* (1920), 61 S.C.R. 263.

Hall, in person.

W. H. Campbell, for the Crown: When brought to trial they both pleaded. They cannot raise any question as to the trial after pleading: see *Rex* v. *Binkes* (1805), 2 Smith, K.B. 619; Archbold's Criminal Pleading, Evidence & Practice, 30th Ed., 140; *Rex* v. *County Court; Re Walsh* (1914), 23 Can. C.C. 7, at p. 13. As to Sayers, there was no jurisdiction in the county court as he was out on bail: see section 825, subsection 6 of the Criminal Code; *Giroux* v. *Regem* (1917), 29 Can. C.C. 258, at p. 260. In the case of Hall it was the Attorney-General's direction that makes it proper: see *Collins* v. *Regem* (1921), 35 Can. C.C. 390, at p. 392. An old miner had $1,800. He changed it to American money and hid it in his room at an hotel. The third accomplice, Elwood, stole it and the three divided the spoils.

Sayers, in reply, referred to *Rex* v. *Thompson* (1908), 14 Can. C.C. 27, at p. 31.

Cur. adv. vult.

4th April, 1941.

MACDONALD, C.J.B.C.: I do not think an objection can be raised in respect to the alleged right of appellant Hall to have this conviction quashed because of an election for trial in the County Court Judge's Criminal Court. With knowledge of facts of public record in respect to election—that ought to be assumed —the Attorney-General intervened by preferring an indictment over his own signature for trial before a jury, thus complying, in my view, with section 825, subsection 5 of the Criminal Code. As pointed out by my brother MCQUARRIE, it was necessary for the Attorney-General to intervene in this way in order that the accused might be tried together on a charge of conspiracy in which they were jointly concerned. The appellant Hall was it is alleged entitled to a speedy trial; appellant Sayers lost his right thereto; in one way only could they be tried together, *viz.,* by exercising the right conferred by section 825, subsection 5

of the Code. One must have regard to the facts and circumstances in deciding whether or not section 825, subsection 5 was invoked. The presumption is that it was rightly done. If the point had been raised before entering a plea of "not guilty" that fact, *viz.*, that section 825, subsection 5 was invoked, could have been established.

In *Minguy* v. *Regem* (1920), 61 S.C.R. 263 the then Chief Justice and Duff, J., now the Chief Justice of Canada, held that a special requirement on the back of the indictment signed by the Attorney-General to the effect that the case should be brought before the grand jury was sufficient compliance with section 825, subsection 5. The decisions of two other learned judges proceed on different grounds apart from the point referred to. Idington, J. dissented and Anglin, J., later Chief Justice, held for reasons stated that the endorsement was not sufficient. I do not think, with deference, it can be said that a binding decision was given on the point herein, having regard to the facts of this case, whatever assistance may be derived from a perusal of the judgments.

The point raised is wholly technical. I feel free to express what I think, with respect, is the rational view on the special facts that section 825, subsection 5 was applied. No form of words is specified to indicate that the Attorney-General requires the charge to be tried by a jury. It is not necessary, although usual, that indictments should be signed by the Attorney-General; Crown counsel may do so. In the County Court Judge's Criminal Court the latter sign indictments. In this case, after an election for a speedy trial the Attorney-General did so. In that way only could the accused be tried together, *viz.*, by resorting to section 825, subsection 5. If therefore we assume, as we should, knowledge of the law, the Attorney-General's intervention ought to be treated as a requirement for a jury trial under that subsection. It was open to the accused to object at the proper stage on the ground of lack of clarity or sufficiency, or on any other grounds. If he had a special matter of this nature to plead—and this was a special matter—he should have done so on arraignment and before a plea of "not guilty" was entered. The decisive point however is that section 825, subsection 5 was in fact invoked.

C. A.
1941

REX
v.
SAYERS
AND HALL

Macdonald,
C.J.B.C.

I observe that in *Collins* v. *Regem* (1921), 35 Can. C.C. 390, at 392, the present Chief Justice, then Duff, J., referring to *Minguy* v. *Regem* said he

> concurred in the opinion of the Chief Justice of this Court that where the Attorney-General prefers a bill of indictment under sec. 873 or where the bill of indictment is, by the special direction of the Attorney-General, so preferred that in itself constitutes a requirement that the case should be tried by a jury within the meaning of sec. 825, subsec. 5.

I suggest, having regard to all that occurred and the special requirements of the case at Bar for a joint trial, the signature of the Attorney-General should directly, or in the alternative, at least *prima facie,* be deemed a "special direction" under section 825, subsection 5. This will more clearly appear later when the actual words used in *Collins* v. *Regem* are referred to.

There is this further observation on the same page:

> I think that in this case there is sufficient evidence and there was sufficient evidence before the trial judge that the Attorney-General had required that the case should be tried by a jury within sec. 825, subsec. 5.

This is at least suggestive of the view now put forward that whether or not there was such a direction is a question of fact; that there was in the case at Bar sufficient evidence to support this conclusion; and in any event it was for the accused with, as I have said, at least a *prima facie* case of compliance with section 825, subsection 5 before him, to raise an objection before entering a plea of "not guilty." The point could then be made the subject of a further inquiry, if deemed necessary, by the trial judge. I do not think therefore we should hold that there was "absence of action" by the Attorney-General under section 825, subsection 5.

Further on the facts in *Collins* v. *Regem* it appears from the judgment of Brodeur, J. at 395 that the substantial words of direction on the indictment itself before the grand jury—now abolished in this Province—was as follows:

> "This indictment is preferred by the undersigned, the Attorney-General for the Province of Quebec,"

followed by the signature of the Attorney-General. There was no reference whatever to section 825, subsection 5 of the Code, nor any direction that it was about to be invoked. In this respect the head-note is misleading: the section was not referred to. It follows that the simple signature of the Attorney-General in our

case ought to be equally effective; certainly the words referred to do not carry more weight nor convey more information than his signature; it imports a special direction.

The Supreme Court of Canada was not, of course, concerned with the situation before us. There the accused, not having elected for a speedy trial, applied to the Court for an adjournment to allow him to exercise that option, if he so desired. The judgments however are of assistance. The differences in the point considered do not affect the applicability of these statements. For instance, Brodeur, J. said at p. 396:

> By the amendment of 1909 (art. 825, sec. 5) this right [that is to say, for a speedy trial] is refused when the Attorney-General requires that the trial shall take place before a jury. The law adds that the Attorney-General may make this demand, even though the accused has consented to a speedy trial before the Judge of Sessions. It seems to me that the signature of the Attorney-General on the indictment constitutes this demand referred to, in art. 825, sec. 5 of the Criminal Code.

This would appear to cover the precise point under discussion; we have the signature of the Attorney-General.

And again at p. 397:

> In the present case I consider that the Attorney-General in himself signing the indictment showed in unmistakable fashion that he required a trial by jury (art. 825, sec. 5, Crim. Code). That was the absolute right of the Attorney-General and he sufficiently expressed his desire so as to prevent us from considering that the Court was without jurisdiction.

I would say, for the present at all events, as we appear to be without the benefit of a decision precisely in point until at least it is determined by the final Court of Appeal in criminal cases, we have, as indicated, direct proof, or in the alternative, *prima facie* proof of compliance with section 825, subsection 5; that consequently the trial Court was duly seized of the case, and unless this *prima facie* proof is displaced on objection duly taken before plea, the trial may lawfully proceed. As stated by Brodeur, J. at 397, referring to the absolute right of the Attorney-General,

> he sufficiently expressed his desire so as to prevent us from considering that the Court was without jurisdiction.

I conclude therefore that no formal method of expressing an intention to resort to section 825, subsection 5 is required by the Act itself and we cannot virtually amend it by making additions thereto; further, as stated an objection as to insufficiency—and

C. A.
1941

REX
v.
SAYERS
AND HALL

at the most that is all it amounts to—should be taken on arraignment before plea. I do not deem it necessary to refer to any other points in the appeals; they should be dismissed.

MCQUARRIE, J.A.: The appellants were jointly charged in the Supreme Court of British Columbia Oyer and Terminer and General Gaol Delivery before MANSON, J., and a jury at Vancouver on the 24th of September, 1940. An extract from the proceedings at the trial shows that the preliminaries were as follow: [After setting out the extract the learned judge continued.]

We were not furnished with a transcript of the evidence and other proceedings except the judge's charge. The indictment was signed by the Attorney-General. Both the appellants were found guilty by the jury. The appellants gave notices of appeal separately and appeared in person on the hearing of the appeals. The main argument was advanced by Hall who claimed in effect that he had previously elected for trial before a judge without a jury and had pleaded not guilty and therefore that the Court of Assize had no jurisdiction to try him although the indictment or charge on which he and Sayers were tried was signed by the Attorney-General. He claimed that under section 825, subsection 5 of the Criminal Code there must be a definite statement in writing by the Attorney-General that he required that the charge be tried by a jury and that the signature of the Attorney-General was not a sufficient compliance with the said section.

Sayers as I understood it alleged that even if it were admitted that the Assize Court had jurisdiction to try him by reason of his election for speedy trial being too late he was entitled to be tried separately and the joint trial of himself and Hall was prejudicial to him. Otherwise he adopted Hall's argument. It is to be noted that the appellants were jointly charged and tried with conspiring together and it appears obvious that this was a proper case for a joint trial.

Part XVIII. of the Code as the heading indicates deals with the procedure for speedy trials of indictable offences. Part XIX. of the Code provides the procedure for trial by indictment. Generally speaking the procedure under Parts XVIII. and XIX.

is quite different. Under Part XVIII. the Attorney-General does not prefer the indictment or charge whereas under Part XIX. and particularly section 873 the charge may be preferred by the Attorney-General or an agent of the Attorney-General, or by a person with the written consent of the judge of the Court or of the Attorney-General, or by order of the Court, and in practice it is usually preferred by the Attorney-General. The charge in this case therefore could only refer to trial before the Assize Court.

I have read the reasons for judgment of the Chief Justice and as I agree with him it is unnecessary for me to review the authorities cited on this appeal or to deal with section 825, subsection 5 of the Code.

I would dismiss Hall's appeal. Sayers's chief and only arguable ground of appeal must thereby fail. His appeal also should be dismissed.

SLOAN, J.A.: In my view, with deference, the appeal of Hall and Sayers must be allowed.

It is common ground that on the 3rd of September, 1940, Hall properly elected for speedy trial in the County Court Judge's Criminal Court, pleaded "not guilty" to the charge, and a date for his trial was set. The Vancouver Assize opened on the 9th of September and on the 24th of September Hall, then in custody, was arraigned and pleaded before that Court and after a trial by jury was found guilty and sentenced to seven years' imprisonment. From that conviction Hall now appeals alleging that, once having elected for speedy trial, he could not be deprived of that right and that the Assize Court was without jurisdiction to try him.

Crown counsel sought to uphold the conviction upon two grounds. The first: that the signature of the Attorney-General to the indictment upon which the prisoner was arraigned in the Assize Court was a requirement by the Attorney-General under section 825, subsection 5 of the Code that the prisoner be tried by a jury. The second: that in any event the prisoner had waived any objection to the jurisdiction of the Assize Court by pleading therein to the indictment.

C. A.
1941

REX
v.
SAYERS
AND HALL

Sloan, J.A.

In my opinion, with respect, Hall, once having elected to be tried by and having pleaded to the charge in the County Court Judge's Criminal Court could not be arraigned before and tried by a jury in an Assize Court unless there appeared upon the record thereof the clear and unequivocal direction of the Attorney-General under said section 825, subsection 5 that a trial by jury be held.

To my mind this case falls within *Minguy* v. *Regem* (1920), 61 S.C.R. 263. In that case the prisoner was tried in the Court of King's Bench of Quebec before Desy, J., and jury after having had elected for speedy trial. Crown counsel submitted before the Supreme Court of Canada that the Attorney-General had directed that mode of trial having endorsed the requirement on the back of the indictment that "it should be brought before the grand jury." The Chief Justice (Sir Louis Davies) and Duff, J. (as he then was) held that the form of the indictment in that case was a compliance with the provisions of section 825, subsection 5.

Idington and Anglin, JJ. held the view that even with the endorsation of the requirement upon it the form of the indictment was an insufficient direction by the Attorney-General. Brodeur and Mignault, JJ., were of the opinion that as the appellant had not properly elected for a speedy trial the jurisdiction of the Court of King's Bench to try the offender had never been supplanted. Idington, J., at p. 266 said:

> The sole question with me herein is one of fact. Did the Attorney-General deliberately decide, in light of the foregoing facts, that the appellant should be deprived of his *prima facie* right of election to trial by a judge instead of by a jury?

And at p. 269:

> . . . section 825, subsection 5, . . . involves the taking away of a right of election given to an accused person and implies the exercise of a kind of judicial power or authority which the Attorney-General is, I submit, expected by the amendment to specially direct his mind to in each case coming up for action. . . .
>
> I am unable to see on this record any clear exercise of any such power . . .
>
> And again, if the Attorney-General really intended to take away the right from an accused of trial before a judge, I should have expected I respectfully submit, to find it expressed by apt language which would have left no room for argument, and that which we are referred to does not express anything but what is consistent only with a direction under section 873.

(*i.e.*, the ordinary proceeding by way of indictment).

Anglin, J. at p. 270 *et seq.*:

Only one of the objections to the validity of his conviction taken on behalf of the defendant calls for consideration. It is that based on the alleged absence from the record of anything which establishes the exercise by the Attorney-General of the power conferred on him by s.s. 5 of s. 825 of the Criminal Code (8-9 Ed. VII, c. 9, s. 2) to require that a person charged with an offence punishable by imprisonment for a period exceeding five years shall be tried by a jury notwithstanding that he has consented to a speedy trial by a judge. The jurisdiction of the Court of King's Bench in proceeding with the trial of this case is thus challenged. If there was a valid election by the accused for a speedy trial, the jurisdiction of that court was thereby superseded (ss. 825, 827, and 833, Cr. C.; *Reg.* v. *Burke* [1893] 24 Ont. 64); *Rex* v. *Bissonnette* (1919), 31 Can. C.C. 388, at p. 389, *per* Lamothe, C.J.) and could be re-established only by the Attorney-General personally exercising the special power conferred on him by s.s. 5 of s. 825. Being a condition of jurisdiction the fact that the authority had been exercised should appear on the face of the proceedings. The ordinary presumption in favour of this jurisdiction of a superior court scarcely covers such a case.

The law does not prescribe any particular method in which the Attorney-General is to act. Neither is notice to any person or body required. Nor is it necessary that the Attorney-General should make his requisition in open court. I am satisfield that the endorsement over his signature on the indictment of his authorization for its presentment, provided it is couched in terms which unmistakably imply action under s.s. 5 of s. 825, will suffice.

Page 272:

. . . the action taken by the Attorney-General in regard to the presentation of this indictment is referable quite as readily to s. 873 as to s.s. 5 of s. 825. It is therefore impossible to say that it imports a requisition under the latter provision.

It seems to me that that which is expressly stated in the judgments of Idington and Anglin, JJ. in relation to the necessity of an explicit direction by the Attorney-General is implicit in what was held by the Chief Justice and Duff, J.

In this case Crown counsel conceded that, apart from the indictment, which was in the usual form appropriate to the ordinary Assize Court procedure, there was nothing of record, verbal or written, manifesting any intention of the Attorney-General to invoke the provisions of section 825, subsection 5 of the Code. An indictment ordinary in form cannot, in my view, be translated into a document purporting to reflect the considered judgment of the Attorney-General in the exercise of the special power conferred upon him by section 825, subsection 5.

The Assize Court and the County Court Judge's Criminal Court are two separate and distinct tribunals. Once the County

C. A.
1941

REX
v.
SAYERS
AND HALL

Sloan, J.A.

Court Judge's Criminal Court has by a proper election and plea established exclusive jurisdiction over the prisoner that jurisdiction cannot be supplanted except by the clear unequivocal and conscious direction of the Attorney-General in the exercise of his authority under section 825, subsection 5. That direction is absent in this case and in consequence the Assize Court was without the jurisdiction to try the prisoner.

When once that conclusion is reached the second ground advanced by Crown counsel presents little difficulty.

I take it as too well established a principle of our law to require authority that where there is a total lack of jurisdiction it cannot be conferred by mere consent. Where, then, the jurisdiction of the Assize Court to try the prisoner is superseded by a valid election for speedy trial before another tribunal, and the condition precedent to its re-establishment, *i.e.*, a specific direction under section 825, subsection 5, is not in existence, a plea of a prisoner cannot be regarded as equivalent thereto. Lack of jurisdiction is not a defect in procedure which can be waived by pleading, nor is the case one to which Code section 898 can have any application.

While the form of the plea is in my view immaterial reference might be had to Code sections 900 and 905, subsection 2 and *Reg.* v. *Hogle* (1896), 5 Can. C.C. 53, at 55.

Hall's conviction, in my opinion, must be quashed, for the reasons stated.

Turning then to Sayers. His election for speedy trial was out of time and invalid. In consequence the Assize Court was never divested of jurisdiction to try him. Crown counsel conceded, however, that as this was a conspiracy case evidence was adduced against the two accused which could not have been introduced if Sayers had had a separate trial. It follows then that Sayers was seriously prejudiced by being tried jointly with Hall when the Crown had no right in law to try Hall in that Court. I would quash Sayers's conviction and direct a new trial in his case.

In taking leave of this matter I think it fitting to refer to an apt observation of Idington, J., in *Minguy's* case, *supra,* at p. 270:

> Those accused of crimes may, in the majority of cases, be at bottom in some minds entitled to very little consideration.

But we must guard their rights as sacredly as possible, and remember that society is not well served by the conviction of any man unless by due process of law strictly adhered to.

O'HALLORAN, J.A.: I am in full agreement with what has been said by my learned brother SLOAN. The Assize Court could not acquire jurisdiction in Hall's case unless pursuant to section 825, subsection 5, the Attorney-General had "required" that Hall should be tried there, instead of in the County Court Judge's Criminal Court in which exclusive jurisdiction had vested by virtue of the exercise by Hall of his statutory right to be tried therein.

Once the latter Court was possessed of that jurisdiction, it could not be deprived of its exclusive control over the prisoner, except by the unequivocal "requirement" of the Attorney-General under section 825, subsection 5. Mere signature of the indictment by the Attorney-General could not in such circumstances, constitute a "requirement" that the charge be tried by a jury.

In fact the Attorney-General did not intend or purport to do so, for the following paragraph appears in a letter from the department of the Attorney-General to Hall under date 10th January, 1941 (and directed to be filed when read by Hall to this Court):

Replying to your letter of the 8th instant, I beg to state that the Attorney-General did not order a jury trial in your case under authority of section 825, subsection 5 of the Code.

This should conclusively dispose of the matter.

In addition it is of value to note that in *Minguy* v. *Regem* (1920), 61 S.C.R. 263, the "requirement" of the Attorney-General of Quebec signed by him on the back of an indictment already signed by Crown counsel, was thus specifically worded (p. 272) but section 825, subsection 5 was not mentioned:

Le present acte d'accusation "indictment" est porte, devant le grand jury par ordre du soussigne procureur general. . . .

Despite this specific direction by the Attorney-General of Quebec only two members of the Court held it was a compliance with section 825, subsection 5. Two members of the Court held it was equivocal in view of section 873, and the two remaining members did not find it necessary to decide the point. If the specific direction in the *Minguy* case left room for doubt, the lack of any

C. A.
1941

REX
v.
SAYERS
AND HALL

O'Halloran, J.A.

direction at all, specific or otherwise in this case, should definitely exclude any arguable contention that the Attorney-General had by mere signature of the indictment exercised the exceptional power conferred upon him by section 825, subsection 5.

Furthermore reference to section 828 shows the danger of attaching sweeping implications to the Attorney-General's mere signature of an indictment. Under that section if Hall had elected for trial by jury, he could nevertheless have re-elected for trial before a judge alone, subject to the consent therein mentioned, notwithstanding the present indictment signed by the Attorney-General, and he could have been validly tried in the County Court Judge's Criminal Court; and *vide Giroux* v. *Regem* (1917), 56 S.C.R. 63. To hold that the effect of the Attorney-General's signature is as sweeping as contended by the respondent would nullify the operation of that section in any case where the indictment had been signed by the Attorney-General.

I would quash Hall's conviction and direct a new trial in Sayers's case. The appeals should be allowed accordingly.

MCDONALD, J.A.: The accused were convicted before MANSON, J. at an Assize held in Vancouver, for conspiracy to commit a theft. Sayers was sentenced to five years imprisonment and Hall to seven years. The learned judge charged the jury fairly and carefully and the appellants have no case on the merits. Their appeal is based largely on the ground that they were illegally tried by a jury as they had expressed their desire to be tried in the County Court Judge's Criminal Court. Assuming there was some doubt as to this (though I think it was very slight) such doubt was removed when the appellants, represented by counsel, pleaded Not Guilty, without pleading any special issue, or taking any objection to jurisdiction.

I would dismiss the appeals both as to conviction and sentence.

Appeals dismissed, Sloan and O'Halloran, JJ.A. dissenting.

ELVIN v. ELVIN.

C. A.

1941

March 24; *April* 8.

Divorce—Child of marriage—Custody—Right of access of guilty husband—R.S.B.C. 1936, Cap. 76, Sec. 20; Cap. 112, Secs. 12 and 13.

In April, 1939, husband and wife entered into a separation agreement whereby the sole custody of their child, a girl nine years old, was given to the wife with right of access for the husband. In June, 1939, the wife obtained an absolute decree of divorce upon an allegation of adultery, with an order that the husband was not to have access to the child except by leave of the Court. The husband did not defend. The wife, however, did grant the husband access until August, 1940, when she refused him further access. In November, 1940, the husband applied to the learned trial judge for access and it was refused. On appeal from this order:—

Held, reversing the decision of MANSON, J. (MCQUARRIE, J.A. dissenting), that the learned trial judge's reasons disclose that he considered extrinsic evidence heard by him outside the record and in the absence of the husband, on the divorce hearing, and further, one of the chief witnesses for the husband, with whom the child resided for five months, who gave strong evidence in favour of the father, was completely ignored by the learned judge for the obvious reason that he was not satisfied with the reasons given by her as to her opinion of divorce in general, which is entirely irrelevant as to the issue before the Court. On a proper reading of the evidence the conclusion reached by the learned judge, even as phrased, is not well founded. The appeal is allowed, and there should be an order allowing access according to the provisions which the parties themselves thought reasonable in April, 1939.

Boynton v. *Boynton* (1861), 2 Sw. & Tr. 275, applied.

APPEAL by respondent from the order of MANSON, J., dismissing his application for access to his daughter Beverley Mae Elvin, an infant. The petitioner and respondent, who is a doctor of medicine, were married in Whitehorse, Yukon Territory, in 1928. In the same year they came to the city of Vancouver, and shortly after went to California, where they remained until 1933, when they returned to Vancouver and lived on Dunbar Street until April, 1939, when they entered into a separation agreement. One child, Beverley Mae Elvin, was born in February, 1932. On the petition of the wife an absolute decree of divorce was granted by MANSON, J. in June, 1939, and the sole custody and guardianship of the child was granted to her mother, the father not to have access to the child except by leave of the

C. A. 1941

ELVIN v. ELVIN

Court, but the mother continued to allow the father access once a week until August, 1940, and after that the father was refused access to his child.

The appeal was argued at Vancouver on the 24th of March, 1941, before MCQUARRIE, SLOAN and MCDONALD, JJ.A.

Mayall, for appellant: On the 10th of August, 1940, the father was told he could not see the child any more, and this application for an order granting him access to his infant daughter was dismissed. Access is usually allowed to an offending father: see Rayden & Mortimer on Divorce, 3rd Ed., 316; *Boynton* v. *Boynton* (1861), 2 Sw. & Tr. 275, at p. 277; *Seddon* v. *Seddon and Doyle* (1862), *ib.* 640, at p. 641. In 1910 there was a change in the law in respect to guardianship of infants: see *Stark v. Stark and Hitchins,* [1910] P. 190; *B.* v. *B.,* [1924] P. 176; *White* v. *White,* [1938] 2 W.W.R. 217; *Re Gandy; Re Oland,* [1938] 3 D.L.R. 767; *Lillie* v. *Lillie et al.,* [1926] 1 D.L.R. 866; *Wallis* v. *Wallis and Grant,* [1929] 1 W.W.R. 631, at p. 639.

Brazier, for respondent: There is a very wide discretion in the learned judge below. The paramount object is the welfare of the child, and the learned judge concluded it was injurious to the health of the child to allow the father access: see *In re Porteous. Porteous* v. *Papineau* (1937), 51 B.C. 522; *Snyder* v. *Snyder* (1927), 38 B.C. 336, at p. 339; *In re Befolchi* (1919), 27 B.C. 460.

Mayall, replied.

Cur. adv. vult.

8th April, 1941.

MCQUARRIE, J.A.: I am quite impressed with the reasons for judgment of the learned trial judge as indicating a clear view of the law and a careful and conscientious consideration of the facts in this unfortunate domestic dispute between divorced parents of a nine-year-old female child as to her custody. There appears to be no doubt that the trial judge has been doing what he thinks best in the interests of the child which is the paramount issue in this difficult and distressing case. He is more familiar with the parties and the circumstances involved than we can

ever expect to be. The trial judge was in an advantageous position to hear the application on which the order appealed from was made, as stated in his reasons for judgment from which I quote the following:

It fell to my lot to try the divorce proceedings of Mrs. Elvin as against her husband, in the month of June, 1939. Dr. Elvin did not appear or defend. During the course of the trial the evidence established that the husband had been suspected by his wife on several occasions of infidelity—that she accused him of misconduct with other women and that he admitted the misconduct. . . . The petitioner admitted that she condoned his misconduct on more than one occasion and continued to live with him. The decree of divorce itself was pronounced upon a later act of unfaithfulness on the part of the doctor with some woman with whom he visited at a beer parlour and with whom he took a room at a down-town hotel. I formed the opinion at the time of the trial that the respondent was a man of loose morals, unmoral as well as immoral, and considered him unfit to have access to the little girl, and I directed that the mother should have the sole custody and that there should be no access on the part of the father without the leave of the Court. I had in mind, as I always have on occasions of this kind, that one's sins are not to be held against one forever, even as was suggested by the case quoted by counsel for the petitioner here, namely *B.* v. *B.*, [1924] P. 176. I left the door open to the father to establish his fitness to have some share in seeing to the welfare of the child and her upbringing at a later date. The father now avails himself of the terms of my order in that respect.

The findings of fact to which I refer are as follow:

My duty is to concern myself, not with the feelings of the parents but with the welfare of the child. There can be no doubt about that. I find as a fact, upon the evidence, that the character of the mother is beyond reproach and that she is in every way a fit and proper person to have the custody of her little girl. Despite the order which I made at the time of the decree of divorce, the mother has permitted access on the part of the father to the child. I find as a fact that that access has not been to the advantage of the child nor has it accrued to her welfare. Nothing is to be gained by going into the details. Suffice to say that I am entirely satisfied that the welfare of the child has not been helped by the visits of the father and his custody of her from week to week.

The learned judge goes on to make the following statement:

The child is now in a boarding-school at New Westminster—a very proper place for the child to be in view of the fact that the mother, a registered nurse is compelled to practise her profession. The evidence establishes that the little girl has profited from the training and discipline of the school. She is, of course, getting older and one naturally expects improvement, and that improvement has been present; not only that, but since the father has ceased seeing the child, the evidence points rather clearly to the fact that there has been an improvement in the child's general health.

I do not see why this Court should reverse the order appealed from. The learned trial judge saw and heard the parties and

C. A.
1941

ELVIN
v.
ELVIN

McQuarrie, J.A.

the witnesses called by them respectively and believed the respondent and her supporting evidence as against the appellant and his evidence and I think he was the one to decide between them. I agree with my learned brother MCDONALD where he says in his judgment herein that:

> It is common ground that under these statutory provisions, as well as at common law, a very wide discretion lies in the judge who hears the application and that such discretion, if exercised in accordance with legal principles and on proper evidence, ought not to be interfered with.

I am of opinion that he has properly exercised that discretion which ought not to be interfered with. For what it is worth I may say that I have always been convinced that under the circumstances of a case such as we have in this instance a young girl is much better off with her mother than she would be with her father.

With the greatest respect for the opinion of my learned brother MCDONALD I do not think that the case of *Boynton* v. *Boynton* (1861), 2 Sw. & Tr. 275 changes the situation here. The facts in that case in my opinion are disinguishable and the learned trial judge in the case at Bar has given effect to the principle of law that the question is what is just and proper as regards the custody of a child in the circumstances of the case and bearing in mind the interest of the child.

We were informed by counsel for the appellant that since the order appealed from was made the appellant has remarried and possibly there has been a change of circumstances. In that event, in my opinion, the proper course for the appellant to pursue is to make a fresh application to the trial judge which he can clearly do, particularly in view of the fact that the judge has left the door open. I would, therefore, dismiss the appeal.

SLOAN, J.A.: I would allow the appeal for the reasons given by my brother MCDONALD.

MCDONALD, J.A.: The parties to these proceedings were married in 1928 and lived together until 8th April, 1939, when they entered into a written separation agreement whereby the sole custody of their infant child, Beverley Mae, now nine years old, was given to the mother with right of access for the father. This agreement will be referred to hereafter. In June, 1939, on

the petition of the wife, an absolute decree of divorce was granted by MANSON, J. upon an allegation of adultery committed 26th May, 1939, with a person unknown to the wife. The husband, who is a physician and surgeon practising in Vancouver, did not appear to defend the petition, wherein it was prayed that the sole and absolute custody, control and guardianship of the said infant be granted to her mother, the petitioner. Although the only allegation of wrong-doing is as above set out it appears that the learned judge heard other evidence as to wrong-doing of which the appellant herein had no notice. In the decree, dated 26th June, 1939, the learned judge granted the sole custody of the infant to the mother and ordered that the appellant herein "shall not have access to the said infant except by leave of this Court." Notwithstanding this drastic order which had not in fact been asked for in the petition the mother did allow access from 1 p.m. to 9 p.m. on Saturday and Sunday in alternate weeks until August, 1940, since which time the father has been refused any opportunity to see his child. In November, 1940, an application was made to MANSON, J. to allow access. This application was refused and from that order this appeal is taken. The practice of disallowing an erring spouse access to his or her child was in a rather unsettled state for many years but was finally settled, so far as the father was concerned, by the Full Court in *Boynton* v. *Boynton* (1861), 2 Sw. & Tr. 275 where an order was made that the custody of the child, until further order, be with the mother, with provision for reasonable access for the father. That practice has, except in exceptional circumstances, been followed ever since. So far as an erring mother is concerned she was less fortunate for her right of access was not finally conceded until the decision in *B.* v. *B.*, [1924] P. 176. There it was laid down by Pollock, M.R. that the Court will have regard to the particular circumstances of each case, always bearing in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse, and an erring mother was given limited access to her daughter, the Court being of opinion that in the circumstances of the particular case such an order was for the benefit and interest of the infant. A review of the authorities is to be found

C. A. 1941

ELVIN v. ELVIN

McDonald, J.A.

in the 3rd edition of Rayden & Mortimer on Divorce at pp. 316 and 317.

The statutory law of British Columbia is contained in section 20 of the Divorce and Matrimonial Causes Act, Cap. 76, R.S.B.C. 1936, and in sections 12 and 13 of the Equal Guardianship of Infants Act, Cap. 112, R.S.B.C. 1936. By said section 20 it is provided that the Court may in a final decree for divorce make such provision as it may deem just and proper with respect to the custody of the children of the marriage. By section 12, above mentioned, it is provided that the Court in such case may by the decree declare the erring parent to be a person unfit to have the custody of the children of the marriage and in that case the parent so declared to be unfit is not to be entitled as of right to the custody of the children. It will be noted that this section makes no mention of access. By section 13, above mentioned, it is provided that the Court may make such order as it may think fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parent and may alter, vary or discharge such order on the application of either parent.

It is common ground that under these statutory provisions, as well as at common law, a very wide discretion lies in the judge who hears the application and that such discretion, if exercised in accordance with legal principles and on proper evidence, ought not to be interfered with. The contention here, however, is that the learned judge did not act in accordance with either of such requirements. We are told that the appellant herein has since remarried; nevertheless counsel informs us that notwithstanding what the learned judge said in his reasons in that regard he is still instructed to oppose any right of access for the father. We are further told that the *Boynton* case above mentioned was not brought to the attention of the learned judge and I think we must assume that in making the order which is contained in the decree for divorce he was unaware of that decision. We are entitled, I think, to assume that the respondent to the petition being properly advised had no reason to anticipate that on the hearing of the divorce petition so drastic an order would be made against him. This order was made without notice to him and it is now insisted that the order having been made the *onus* is on the

father to establish some change in circumstances which would justify the order being discharged. This argument serves only to indicate how unfortunate it is that such an order should have been made without notice and without due and careful consideration.

In his extended reasons for judgment on the application now in question the learned judge, speaking of the father's access from June, 1939, to August, 1940, says:

> I find as a fact that that access has not been to the advantage of the child nor has it accrued to her welfare.

If this finding is based on a careful reading of the evidence it ought not to be disturbed, though it is to be noted that the learned judge did not go so far as to hold that access by the father would be hurtful to the child. Upon the best consideration which I have been able to give to the matter I am convinced that on a proper reading of the evidence the conclusion, even as phrased, is not well founded. It is evident from the reasons that the learned judge considered extrinsic evidence heard by him outside the record, and in the absence of the appellant, on the divorce hearing, and there is the further fact that one of the chief witnesses for the appellant, Mrs. Mary Stone, with whom the child had resided from May until October, 1939, gave strong evidence in favour of the father. This evidence is completely ignored and obviously for the reason that the learned judge was not satisfied with the reasons given by this witness when he carefully catechized her as to her opinion as to divorce in general. These questions were put to the witness, as the learned judge said,

> in order that I may form an opinion of your evidence, I want to know what you think about divorce.

This to my mind was entirely irrelevant. With due respect, it is my view that neither the witness' opinion nor the learned judge's opinion as to divorce in general is relevant to the issue before the Court. It is the duty of a judge to interpret and administer the law as he finds it. For the above reasons I would allow this appeal and make an order allowing access according to the provisions which the parties themselves thought reasonable in April, 1939.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitor for appellant: *G. Mayall.*
Solicitor for respondent: *C. W. Brazier.*

S. C.
1941
March 3, 18.

WHIFFIN v. DAVID SPENCER LIMITED.

False imprisonment—Departmental store—Entrance of customer—Detained and examined by store employees—Damages.

The plaintiff entered the defendant's departmental store at 8.45 in the morning. She went up four flights of stairs and entered the ladies' wash-room. An employee, seeing her enter the wash-room, requested a sales-lady to go into the wash-room and question her. She questioned the plaintiff and then reported the matter to the store detective, who met the plaintiff as she came from the wash-room. He examined her bags, questioned her, and then requested her to go with him to a small office downstairs, where her clothing was examined by the store nurse. The detention lasted about three-quarters of an hour. In an action for damages:—

Held, that in the circumstances the control and detention were unwarranted, and damages were fixed at $200.

ACTION for damages for false imprisonment. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 3rd of March, 1941.

Lefeaux, for plaintiff.
W. A. Livingstone, for defendant.

Cur. adv. vult.

18th March, 1941.

SIDNEY SMITH, J.: This is an action for damages for false imprisonment. About 8.45 a.m. on 29th August, 1940, the plaintiff who is a housemaid entered the departmental store of David Spencer Limited. Her employer testified that he had driven her down-town in his car on his way to business. He also testified as to her excellent character.

It was what is known as 9-cent day in the store. She entered the food department from Cordova Street. This department opens at 8.30 a.m. The other departments do not open until 9 a.m. Employees are stationed at the various exits from the food department to prevent customers going from thence to the other parts of the store. The plaintiff crossed the floor of the food department and went up the main stairway to the main floor which is two floors above the food department. Thence she crossed the main floor to the men's clothing department, and

from there walked up the stone stairway for two more floors and entered the ladies' wash-room on the second floor.

There was some question as to the precise way in which she reached the ladies' wash-room but on the whole of the evidence I conclude that it was as stated. She was seen entering the wash-room by Mr. Frederick Haller, an employee of the defendant who was sitting at his desk on the second floor. He requested Miss Peters, a sales-lady, to go into the wash-room and question the plaintiff. Miss Peters did this in a very considerate manner. On being questioned the plaintiff said that she was not an employee of the store and that she had walked up the stairs. Miss Peters so reported to Charles Johnson the store detective, who is also a peace officer. He had been told of the matter and had proceeded to the second floor to investigate.

Mr. Johnson met the plaintiff as she left the wash-room, questioned her, examined her bags and requested her to go with him to a small office in the down-stairs store. There he questioned her further, asked her name and how she had got into the store, asked for her registration card, asked how much money she had and again examined the contents of the bags she was carrying. He then sent for the store nurse who examined the plaintiff's underclothing. The nurse did not touch her except to raise her dress a little higher than the plaintiff had done. Plaintiff was then in tears and hysterical. The nurse asked her several questions much to the same effect as the previous questions. These were also answered. The nurse then went out and Mr. Johnson returned. Later he brought two of the employees who were guarding the various exits from the food department. They said plaintiff had not passed their way. Later Mr. Johnson said to the plaintiff that he hoped they had not inconvenienced her and she was allowed to go. The total questioning upstairs and in the office occupied about three-quarters of an hour.

The plaintiff is a slight, timid, delicate-looking woman. I find that she was greatly upset by the incident. Her employer testified that even on the night of the 30th of August she was still very excited about the whole occurrence.

I accept the plaintiff's evidence. On the other hand I see no reason for doubting the testimony of any of the defendant's

S. C.
1941

WHIFFIN
v.
DAVID
SPENCER
LTD.

Sidney Smith, J.

witnesses. I think any contradictory answers that may have been given by the plaintiff during the questioning was due to her excited state at that time. Apart from this the evidence is not materially in dispute. It was argued on behalf of the defendant that stealing had been taking place in the store; that there was reason to believe persons were concealing themselves at the closing hour on the premises, remaining there through the night, mingling with the customers next morning and then departing with stolen goods. It was submitted that defendant's employees were justified in thinking that the plaintiff had been in the store all night for this purpose when she was seen there before it was open for the day's business. I cannot accept this view. At most the circumstance might put them upon enquiry. It would not justify the steps taken after the plaintiff had told Miss Peters how she had entered the store and had proceeded up-stairs. Miss Peters reported what the plaintiff had told her to the store detective. He had no grounds for doubting the plaintiff's statement.

In my opinion the control and detention of the plaintiff were unwarranted under the authorities. Winfield on Torts, 231; *Higgins* v. *Macdonald* (1928), 40 B.C. 150; *Conn* v. *David Spencer Ltd.* (1929), 42 B.C. 128; *Cochrane* v. *T. Eaton Co.*, [1936] 2 D.L.R. 513; *Cannon* v. *Hudson's Bay Co.* (1939), 54 B.C. 290. In all the circumstances of the case I fix the damages at $200. The plaintiff will have judgment for this amount and her costs.

Judgment for plaintiff.

SMITH AND FISHER v. WOODWARD *ET AL.*

C. A.
1941
Mar. 18, 19; *April* 8.

Executors and trustees—Claim against the estate—Counsel's advice—Settlement of claim by majority of executors—Payment of settlement from their own funds—Solicitor's costs in relation to settlement—Not payable out of estate.

Charles Woodward, who died on the 2nd of June, 1937, left a will appointing six executors, namely, two sons, two daughters and two of his employees. Shortly after his death a claim was preferred against the estate by Mrs. E. C. MacLaren, a grand-daughter of the testator and the only child of her deceased mother, who was a daughter of the testator. The claim was based on a letter written by the testator to her mother in August, 1907, and another letter she claimed was written to her by the testator in April, 1932, but was lost. A reconstruction of the letter was made by her, which she claimed contained in substance what was in the letter. The letters purported to guarantee to her certain shares in the Woodward Departmental Stores. Mrs. MacLaren intimated that failure to settle would result in litigation. The four executors, other than the two women, were disposed to settle rather than permit an action. They sought counsel's advice and were advised that Mrs. MacLaren had no enforceable claim against the estate. The two daughters of the testator refused from the outset to recognize the validity of Mrs. MacLaren's claim. The said four executors continued negotiations and eventually came to a settlement, the claimant's demands being paid personally by the two sons of the testator out of their own personal resources, the two daughters in the meantime holding aloof and refusing to be a party to it or ratify it in any way. Mrs. MacLaren then released all of her alleged claims against the estate. On the settling of accounts the district registrar allowed as payable out of the estate of Charles Woodward, deceased, solicitor's costs incurred by the four executors and trustees of the estate in effecting settlement of the claim preferred by Mrs. MacLaren, and on appeal by the two daughters of the testator the decision of the district registrar was sustained in the Supreme Court.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. (SLOAN and O'HALLORAN, JJ.A. dissenting), that a majority of trustees, contrary to the view of the minority and against the advice of counsel, entered into a private arrangement of their own to effect a settlement, but it must be treated as a personal transaction throughout. They cannot involve the estate or the appellants' interest in it. It is conceded that respondents cannot compel the estate to reimburse them for their personal outlay, that being so, on no principle can they be reimbursed for part of that outlay, namely, the costs incurred.

APPEAL by Mrs. C. L. Smith and Mrs. M. C. Fisher from the decision of MORRISON, C.J.S.C. of the 28th of January, 1941, affirming the decision of the district registrar at New West-

C. A. 1941

SMITH AND FISHER v. WOODWARD ET AL.

minster respecting the passing of the accounts of the estate of the late Charles Woodward. There were six executors and executrices of the estate, including the appellants Mrs. Smith and Mrs. Fisher, who are beneficiaries. The four other executors, two of whom were sons of the deceased, incurred certain legal expenses in the settlement of a threatened action by a grand-daughter of the deceased, whom the appellants from the outset refused to recognize as having a valid claim. The executors claim they are entitled to be reimbursed out of the estate for legal services rendered them as such executors in settling the threatened action without any cost to the estate.

The appeal was argued at Vancouver on the 18th and 19th of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Maitland, K.C. (*J. L. Lawrence,* with him), for appellants: A grand-daughter of Charles Woodward, deceased, claiming a share in the estate, threatened to bring action. The two appellants Mrs. Smith and Mrs. Fisher, daughters of deceased, from the outset refused to recognize the validity of the claim. They were two of the six executors. The four other executors, two of whom were sons of deceased, brought about a settlement of the grand-daughter's claim, the two sons paying the amount settled upon out of their own pockets. In bringing about the settlement they incurred certain legal expenses which they claimed should be paid out of the estate, amounting to $882.30. He is solicitor for the trustees who employed him and he has no direct claim against the estate: see *Staniar* v. *Evans. Evans* v. *Staniar* (1886), 34 Ch. D. 470, at p. 476. The costs must be properly incurred: see *Re Roemer,* [1928] 3 D.L.R. 860; Lewin on Trusts, 13th Ed., 473. An executor will not be allowed costs of an unsuccessful action: see *Re Dingman* (1915), 35 O.L.R. 51; *In re Beddoe. Downes* v. *Cottam,* [1893] 1 Ch. 547; *Re Millard,* [1924] 1 D.L.R. 805; *Jones* v. *Toronto General Trusts Corporation* (1919), 17 O.W.N. 259.

Collins, for respondents: A grand-daughter claimed $250,000 and if successful in an action might have been reduced to $78,000. The majority of the executors have power to compromise in face of a threatened action against the estate: see *In re Haughton.*

Hawley v. *Blake,* [1904] 1 Ch. 622, at p. 625. They had power to make a settlement under the Administration Act: see also Williams on Executors, 12th Ed., 602; *Simpson* v. *Gutteridge* (1816), 1 Madd. 609. Under what circumstances executors are entitled to costs see *Raser* v. *McQuade* (1904), 11 B.C. 161; *Standard Trusts Company* v. *Pulice* (1923), 32 B.C. 399; Annual Practice, 1940, p. 1400; *Sharp* v. *Lush* (1879), 10 Ch. D. 468, at pp. 470-1; *In re Love. Hill* v. *Spurgeon* (1885), 29 Ch. D. 348, at p. 350; Williams on Executors, 12th Ed., 1304 and 1308.

Maitland, replied.

Cur. adv. vult.

8th April, 1941.

MACDONALD, C.J.B.C.: Appeal from the judgment of the Chief Justice of the Supreme Court sustaining a decision of the district registrar wherein he allowed, as payable out of the estate of Charles Woodward, deceased, certain solicitor's costs incurred by four executors and trustees of the estate in effecting settlement of a claim preferred against it by one Elizabeth Eleanor MacLaren. The latter's claim was based mainly on a letter written by the late Charles Woodward to the claimant's mother on August 22nd, 1907. It purported to "guarantee" to her certain shares in the Woodward Department Stores, now part of the estate, under certain conditions; however, it is not material to outline the basis of Mrs. MacLaren's demand. Six executors and executrices were appointed to administer the estate, all beneficiaries; four of the executors who settled the claim are respondents; the executrices Cora Lillian Smith and Mary Catharine Fisher are appellants.

Mrs. MacLaren, through solicitors acting for her, threatened to sue, or at all events intimated that failure to settle would result in litigation, although no writ was in fact issued. The respondents, comprising a majority of the trustees, were disposed to settle rather than permit an action; appellants, however, refused from the outset to recognize the validity of the claim. Subsequently the four respondents sought advice of counsel. Mr. *C. H. Locke, K.C.* upon the facts outlined to him advised in

C. A. 1941

SMITH AND FISHER v. WOODWARD ET AL.

Macdonald, C.J.B.C.

writing that Mrs. MacLaren had no enforceable claim against the estate; reasons for this opinion were given in detail.

Respondents, notwithstanding counsel's advice and without seeking directions, continued to carry on negotiations with the solicitors for Mrs. MacLaren and eventually settled the claim. The terms are not material; it is enough to say that a substantial settlement was effected wholly *dehors* the estate; in other words, the claimant's demands were met out of the personal resources of the individual respondents. Appellants in the meantime held aloof, refusing to be a party to it, or to ratify it in any way. True, as a term Mrs. MacLaren released all of her alleged claims against the estate; appellants did not ask for this covenant, nor for any other term in the agreement: they did not execute it as one of the parties affected.

We have, therefore, a simple proposition; a majority of trustees, contrary to the view of the minority, and against the advice of counsel, entered into, in so far as the estate is concerned, a private arrangement of their own to effect a settlement. I am not criticizing the settlement nor respondents' conduct in effecting it; I merely say that if they wished—and they did—to make a personal arrangement with a third party, using their own funds in doing so and to settle a claim of this sort they might do so, but it must be treated as a personal transaction throughout. The identical reasons that would justify payment out of the estate of the costs of such a settlement would also justify payment out of the estate of the consideration for that settlement. Respondents could, without consulting the remaining trustees, make this personal arrangement; no one could prevent them from parting with their own funds to anyone with a good or bad claim; they cannot however involve the estate or the appellants' interest therein in the settlement by compelling them to pay part of the costs because gratuitously a condition was inserted that the estate should be released from any future claims. As intimated, it is conceded that respondents cannot compel the estate to reimburse them for their personal outlays; if that is so, on no principle can they be reimbursed for part of that outlay, *viz.*, the costs incurred; the two items cannot be treated differently.

This would appear to be the rational view to adopt. In the absence of any binding authority to the contrary—and I have not found any—I would give effect to it. I would allow the appeal.

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

SLOAN, J.A. agreed with O'HALLORAN, J.A.

O'HALLORAN, J.A.: The appellants are two of the six executors of the will of their father the late Charles Woodward. The respondents are the other four executors, two of whom are sons of the deceased and brothers of the appellants. The appellants object to pay out of the estate some $882.30, being the legal costs incurred in securing an absolute release to the estate of a very large claim made by their niece, a grand-daughter of the deceased. The claimant and the two appellants share the great bulk of the estate. The four respondent executors regarded the disputed costs as properly payable out of the estate. They were upheld both by the registrar and the learned Chief Justice of the Supreme Court.

The claimant grand-daughter in addition to her share under the will, advanced a claim estimated to amount to somewhere between $78,000 and $250,000 against the estate of the deceased. It was based upon a letter alleged to have been given by the deceased to her mother (his daughter) in the year 1907. Suit was threatened. Counsel consulted by the executors expressed the view on the facts before them, that the claim was unenforceable in law. So that the questions may not lose their distinction, it should be said that counsel were asked to advise on the legality of the claim and not upon the power of the executors to compromise the claim, or the liability of the estate for legal costs in procuring the release under discussion.

However, the two executor-sons of the deceased personally paid their claimant niece the sum of $20,000. In consideration thereof and the adjustment by them of several other matters in which the deceased and his grand-daughter had been mutually concerned, the claimant released the estate of the deceased and

C. A.
1941

SMITH AND FISHER v. WOODWARD ET AL.

O'Halloran, J.A.

his six executors from all claims and demands whatever. This settlement was approved by four of the executors, but the two appellant executrices refused to acknowledge the release to the estate, which the settlement made possible. The release was of distinct advantage to the estate. Without any payment out of the estate, a complete release was secured from a very large claim upon which action was threatened.

It was of special advantage to the two appellants as beneficiaries, since if the claim were successfully maintained in whole or even in part, or if a compromise should eventually result, their shares would be decreased accordingly. Even if the claim were ultimately rejected by the Courts, the estate could not escape solicitor and clients costs in opposing it, in what could reasonably be expectetd to be lengthy and expensive litigation. The release also avoided the ventilation of family differences in the Courts. It would also appear from the substantial character of the payment made by the two uncles, that these experienced business men felt, that even if there were doubt in law as to the validity of the claim, yet there was sufficient merit in it to justify a compromise.

It seems to me, with respect, that the legal liability of the estate for payment of the claim, has been confused with its liability for legal costs incurred in securing its release from a large and harassing claim without diminution of the estate assets. That important distinction is emphasized in paragraph 3 (b) of the affidavit of *Robert David Jordan Guy,* a solicitor in the office of Messrs. *Collins, Green & Eades,* solicitors for the respondents:

"3 (b) That after the dispute concerning the legal costs of the said settlement had arisen he had interviewed Mr. *C. H. Locke, K.C.*, who had as additional counsel for said four executors previously given a written opinion that said Mrs. MacLaren's said claim was unenforceable and that at such interview the said Mr. *Locke* had pointed out that his written opinion dealt solely with the question of liability, that he had not been called upon to advise upon the question of settlement and that in his opinion the settlement was decidedly for the benefit of the estate and that he was prepared to come before the district registrar to so personally state if there should be any necessity for it.

There can be no doubt that the settlement was decidedly for the benefit of the estate, since that settlement did not cost the

estate a penny, and without it the release from a substantial and harassing claim upon which action was threatened could not be obtained. In such circumstances I am satisfied that the legal costs incurred in procuring the settlement which made the release possible were properly incurred by the four respondent executors. Consequently they should be indemnified out of the estate; for as Lindley, L.J. said in *In re Beddoes* (1892), 62 L.J. Ch. 233, at 237:

> . . . a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred; . . . The words "properly incurred" . . . are, in my opinion, equivalent to "not properly incurred."

As stated above there is no doubt that the securing of the release was of substantial benefit to the estate. Perusal of the record before us leads undeniably to the conclusion that the settlement was entered into for the specific purpose of avoiding expensive litigation and securing the release. The following paragraphs are cited from the affidavit of William Mann, one of the respondent executors:

> 19. In an endeavour to prevent the estate of the said Charles Woodward, deceased, from becoming involved in what promised to be a very expensive lawsuit which it was feared would probably have been carried to either the Supreme Court of Canada or the Privy Council at large expense the executors other than Mrs. Fisher and Mrs. Smith instructed the said *F. Kay Collins* to try to avoid a lawsuit and to endeavour to effect a settlement in consequence whereof a settlement was arrived at on or about the 7th day of December which provided for the payment by Messrs. W. C. Woodward and P. A. Woodward to Mrs. MacLaren of the sum of $20,000 and the assignment by both of them to Mrs. MacLaren of a 2/5ths interest valued at approximately $5,800 in the estate of their late mother Mrs. Elizabeth Woodward.
>
> 20. In compliance with the terms of the said settlement Mrs. MacLaren gave a release to the estate of Charles Woodward, deceased of the claims she had put forward. This settlement was carried through without any of the consideration therefor being paid for by the estate and as a result the threatened litigation has been avoided.
>
> 21. The said Mr. *Collins* in negotiating and carrying out this settlement acted upon the instructions of the majority of the executors on behalf of the said estate for the purpose of conserving its assets and saving threatened heavy costs of litigation.

The facts as above set forth by William Mann are not seriously contested. But even if there were a doubt whether the object of the settlement was to obtain the release, nevertheless the substantial benefits resulting to the estate from it, should resolve

C. A.
1941

SMITH AND FISHER v. WOODWARD ET AL.

O'Halloran, J.A.

that doubt in favour of the respondents to the extent at least of indemnifying them from reasonable costs incurred for benefits received by the estate. In *In re Beddoes, supra,* Lindley, L.J. said at p. 237:

> And in cases of doubt costs incurred by a trustee ought to be borne by the trust estate, and not by him personally.

The settlement was referred to in argument as a "private" arrangement. But it can hardly be so described when its main purpose was to secure the release of the estate from a harassing claim estimated to amount to $78,000 to $250,000, upon which action was threatened. I agree with the learned judge below that what the respondents did was very much in the interest of the estate, and consequently it is proper that the estate should pay their costs incurred for its benefit.

I would therefore dismiss the appeal.

MCDONALD, J.A.: This is an appeal from MORRISON, C.J.S.C. who dismissed an appeal from Mr. Menendez, the registrar at New Westminster, who allowed to the respondents as executors certain costs paid to their solicitors for arranging settlement of the claim of one Mrs. MacLaren against the estate of her deceased grandfather, Charles Woodward. This claim the appellants, who are residuary legatees as well as co-executrices, were advised by their own counsel and by independent counsel was unenforceable. They accordingly objected to the claim being recognized. Thereupon the two brothers Woodward, respondents, as executors paid Mrs. MacLaren $20,000 by way of settlement out of their own funds. They declined, however, to pay their solicitor's costs of arranging the settlement, and seek to have these disbursements by way of costs allowed to the executors out of the estate on the passing of their accounts. In my opinion the learned registrar erred in making this allowance. I know of no ground either in law or in reason which would justify taking out of the appellants' purses money with which to pay the costs of arranging a settlement of a claim which they considered invalid and which through their counsel they had advised their co-executors they would not recognize, at the same time stating that neither would they pay any costs which might be incurred in arranging any settlement of such claim.

So far as appears (and any lack of information is due to the respondents' failure to appear before the registrar) the settlement in question was made to some extent at least for the benefit of the respondents Woodward themselves rather than for that of the estate.

I would allow the appeal with costs here and below.

Appeal allowed, Sloan and O'Halloran, JJ.A. dissenting.

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

Solicitors for respondents: *Collins, Green & Eades.*

IN RE WILLIAM C. R. DEGRUCHY, DECEASED.

Will—Execution of—Not signed in usual place, but endorsed on back "Will of" followed by the testator's signature—R.S.B.C. 1935, Cap. 308, Sec. 7.

A testator procured a will form of one piece of paper folded in the middle. It was printed in skeleton form, and on the back, when folded, were the words "Will of." He filled up the first page, and later in the presence of two witnesses, signed his name on the back of the will under the said words "Will of." The two witnesses signed their names in the usual place under the testimonium.

Held, to be in compliance with section 7 of the Wills Act, and probate was granted.

APPLICATION for probate of a will. Testator having procured a will form consisting of one sheet of paper folded in the middle, printed in skeleton form on the first, second and third pages and endorsed "Will of" filled it up on the first page alone and then handed it to his wife whom he had named as sole beneficiary and executrix and asked her approval. She replied that it needed signing and witnessing which he said would be attended to later. He left the form with her. Four days later when two old friends were with him he told them that he had decided to make his will and asked them to witness it. He then called to his wife to bring in "that paper" which she did, handing the

S. C.
In Chambers
1941

IN RE DEGRUCHY, DECEASED

form to him as he sat in his chair. The will was then completely folded so that the endorsement "Will of" on the back was uppermost; and under it, according to the positive evidence of one of the witnesses, he then wrote his name. The other witness said that at the moment he was looking at a paper and could not be sure that he saw him write his name but he believed that the testator wrote his name as deposed by the first witness. Testator then opened the will and folded it so that the printed testimonium alone in the usual form was uppermost, and asked the witnesses to sign, which they did. Testator then said "Well, that's fine," and immediately called his wife to whom he handed the will, telling her that it was his will and saying "That's all fixed up." Testator never signed in the usual place, or otherwise than by the writing on the back. Heard by ROBERTSON, J. in Chambers at Victoria on the 9th of April, 1941.

Crease, K.C., for the executrix: Section 7 of the Wills Act covers this case. As to the evident intention of the testator see *Cooper* v. *Bockett* (1846), 4 Moore, P.C. 419, at 438. Testimonium clause imperfect. Testator's signature following those of witnesses: *In the Goods of Puddephatt* (1870), L.R. 2 P. & D. 97; *In the Goods of S. P. Jones* (1877), 46 L.J. P. 80; *In the Goods of Archer* (1871), L.R. 2 P. & D. 252.

ROBERTSON, J.: I consider that this case comes within section 7 of the Wills Act, R.S.B.C. 1936, Cap. 308, and grant probate accordingly.

Application granted.

REX v. McLEAN.

S. C.
1941
April 15, 18.

Criminal law—Conviction by magistrate—Appeal to county court—Motion to quash granted—Whether a hearing and determination on the merits —Mandamus—Motion under section 130 of the County Courts Act—Criminal Code, Sec. 285—R.S.B.C. 1936, Cap. 58, Sec. 130.

An accused was convicted under section 285 of the Criminal Code by a magistrate. On appeal to the county court a motion was made to quash the conviction for lack of evidence. The judge, after hearing argument and references to the depositions, although they were not proved, quashed the conviction. The Crown obtained an order in the Supreme Court under section 130 of the County Courts Act, calling on the judge and the accused to show cause why the trial should not be proceeded with.

Held, that the hearing and granting of an application to quash is a hearing and determination upon the merits. The judge did not refuse to exercise his jurisdiction: the mistake, if any, was made while he was exercising it. The application must therefore be dismissed.

APPLICATION to show cause why an appeal to the county court from a conviction by a magistrate should not be proceeded with under section 130 of the County Courts Act. Heard by ROBERTSON, J. at Victoria on the 15th of April, 1941.

Pepler, K.C., D.A.-G., and *Arthur Leighton*, for the Crown.
Gould, for accused.

Cur. adv. vult.

18th April, 1941.

ROBERTSON, J.: The accused was convicted and sentenced on the 22nd of January, 1941, by the police magistrate in Alberni, B.C., on a charge of driving a motor in a manner dangerous to the public, etc., contrary to section 286, subsection 6 of the Code. His appeal to the county court came on for hearing on the 4th of March, 1941. It is admitted the appeal "was lodged in due form." Counsel for the Crown was prepared to call evidence and proceed with the trial. Before he could commence to do so, counsel for the appellant moved to quash the conviction on the ground "that there was no evidence, or insufficient evidence of an essential part or parts of the offence revealed in the depositions taken before the magistrate." Counsel for the Crown opposed the motion submitting that it "was a trial *de novo*, that it was

S. C.
1941

REX
v.
MCLEAN

Robertson, J.

the duty of the learned judge to hear the case on the merits and that there was no power to quash the conviction in the manner proposed." He further pointed out that the evidence would have to be heard again and that he had further witnesses to produce; that the record of the magistrate had been written in longhand by him and was obviously not intended to be a full report of the evidence taken at the trial. After some argument the learned county court judge held the motion to quash could be heard at that stage of the proceedings. Extensive references then were made to the depositions, although not proved in any way, and authorities were cited by both counsel. The learned judge refused to hear further evidence and quashed the conviction. Section 130 of the County Courts Act provides no writ of *mandamus* shall issue to a judge for refusing to do any act relating to the duties of his office but any party may apply to the Supreme Court upon an affidavit of the facts for an order calling upon such judge, and the party to be affected by such act to show cause why such act should not be done. It has not been suggested that this section is not applicable to a charge under a section of the Criminal Code. I shall assume, without deciding, for the purposes of the application, that it is.

The Crown obtained an order calling upon the learned judge and McLean to show cause why the trial should not be proceeded with. Counsel for McLean now appears to show cause. Section 751 requires the Court to which an appeal is taken to hear and determine the matter of appeal.

It was submitted by the Crown that as there was no admissible evidence before the Court there was no hearing and further that if there were any variance between the charge as laid, and, the evidence adduced in support thereof, the accused, not having supplied the proof required by section 753 of the Code, was prevented by that section from taking advantage of this.

Counsel for the accused argues that the appeal was properly before the Court, that the judge commenced to hear it when he entertained the motion to quash and, that, assuming he was wrong in considering the depositions, it was nevertheless a hearing on the merits even though the judge refused to hear the evidence which the Crown was prepared to adduce. It seems to me clear

the learned judge did not refuse to exercise his jurisdiction. Indeed the Crown does not deny this but submits that he exceeded his jurisdiction when he considered the unproved depositions. I think the following authorities dealing with applications for a *mandamus* are applicable to the application under section 130, *supra,* and support the submission on behalf of the accused. The leading case is *The Queen* v. *Justices of Middlesex* (1877), 2 Q.B.D. 516. There a person convicted by a magistrate appealed to the Middlesex Sessions. The proceedings commenced and on objection from the appellant that the omission of certain words in the conviction made the conviction bad, the justices quashed the conviction. The Crown then moved the Queen's Bench Division for a *mandamus* to the Sessions to hear the appeal on the ground they had refused to hear it on the merits. Mellor, J. said at p. 520:

> . . . , for they have exercised their jurisdiction, and it is a cardinal rule when jurisdiction is vested in magistrates or any body of men, which they may exercise so long as they act within their authority, that however erroneously they decide, we cannot supervise their decision.

And Lush, J. at p. 521 said:

> They returned, and they found the conviction bad on the face of it. That is a decision upon the legal merits of the case. If they decided upon the merits of the appeal, the legal merits, or the merits of the matters of fact, we cannot order them to rescind that decision. We are not a Court of Appeal from decisions of the magistrates, and, however erroneously they may have decided, we have no power to interfere.

In *Strang* v. *Gellatly* (1904), 8 Can. C.C. 17, a county court judge had quashed a conviction by two justices of the peace under the Summary Convictions Act of British Columbia for the breach of a highway regulation Act. In that case the Summary Convictions Act provided that notwithstanding any defect in the conviction or order the Court appealed to "shall . . . hear and determine the charge . . . , upon the merits," etc. The conviction was bad on its face. Under the section quoted it was argued the judge must hear the evidence and try the case *de novo* in any event. The conviction was quashed. Irving, J., to whom an application for *mandamus* was made, following the *Middlesex* case, *supra,* held that the Court had no power to interfere by *mandamus,* there having been a decision by the county court judge on the legal merits; and that as the judge

S. C.
1941

REX
v.
MCLEAN

Robertson, J.

had heard argument on the question and given a decision on the legal merits the Court had no power to decide or enquire whether such decision was right or wrong. See also the following authorities to the same effect: *Rex* v. *County Judge of Frontenac* (1912), 25 Can. C.C. 230; *Re Gross,* [1930] 4 D.L.R. 299; *Rex* v. *Stacpoole, Re Zegil,* [1934] 4 D.L.R. 666; *Rex* v. *Koogo* (1911), 19 Can. C.C. 56; *Rex ex rel. Curry* v. *Bower,* [1923] 1 W.W.R. 1104.

The Crown relies on *Rex* v. *Dunlap* (1914), 22 Can. C.C. 245. In that case the facts were that an appeal was taken to the county court against a conviction, by a police magistrate, for resisting an officer in the execution of his duty. The appellant moved to quash the conviction, citing among other cases, *Strang* v. *Gellatly, supra.* The learned county court judge although he held the conviction was clearly bad, felt that he was bound by reason of section 754 of the Code to hear and determine the charge and to refuse the motion. All the decisions I have mentioned agree that it is the duty of the Court to which the appeal is taken to hear and determine the charge upon the merits. But they also hold that hearing and granting the application to quash is a hearing and determination upon the merits.

The Crown also relies upon *Rex* v. *Olney* (1926), 37 B.C. 329. That was a case of exceeding jurisdiction. The county court judge had dismissed an appeal from a conviction by a justice of the peace before the accused pleaded guilty. He refused to allow the appellant to call evidence to show she did not understand the nature of the charge to which she pleaded guilty and did so in ignorance. The majority of the Court of Appeal held in so doing he acted without jurisdiction. In the case at Bar the mistake, if any, was made while the learned county court judge was exercising his jurisdiction.

I think the application should be dismissed with costs.

Application dismissed.

REX *EX REL.* NELSON v. SAPORITO.

S. C.
In Chambers
1941
April 19, 26.

Criminal law—Defence of Canada Regulations (Consolidation) 1940—Conviction under regulation 39C—Seizure and destruction on forfeiture of articles—Legality of order under regulation 58 (4).

Upon a conviction under regulation 39C of the Defence of Canada Regulations (Consolidation) 1940, there must be a seizure under subsection (1) of regulation 58 before subsection (4) of regulation 58, which provides for the destruction or forfeiture of seized articles, can be put into force.

APPLICATION for a writ of *certiorari*. Heard by MANSON, J. in Chambers at Vancouver on the 19th of April, 1941.

Hodgson, for the application.
Kirby, for the Crown.

Cur. adv. vult.

26th April, 1941.

MANSON, J.: Motion on behalf of the applicant for a writ of *certiorari* for the removal of an order made by a stipendiary magistrate into this Court for the purpose of having the same quashed.

The order in question was made on the 13th of March, 1941, by Charles Nichols, Esquire, described in the notice of motion as "A stipendiary magistrate in and for the county of Yale, Princeton, British Columbia." The applicant together with four others was convicted by the aforementioned stipendiary magistrate on the 13th of March, 1941, under the Defence of Canada Regulations (Consolidation) 1940, for that he was a member of an illegal organization, to wit, Jehovah's Witnesses, contrary to regulation 39C (2). At the beginning of the trial Mr. *Kirby* read to the Court a letter dated 24th February, 1941, addressed to him and signed by the Attorney-General for British Columbia, instructing him to prosecute the applicant and certain others for a violation of regulation 39C. The letter concluded with this paragraph:

And you are further authorized to represent me in an application to the stipendiary magistrate at Princeton, B.C. for an order under regulation 58 (4) of the said regulations for the destruction of any or all of the articles

S. C.
In Chambers
1941

REX
v.
SAPORITO

Manson, J.

seized in connection with the said case, following disposition of the charge under regulation 39C.

Mr. *Kirby,* acting upon the instructions set out in the paragraph of the Attorney-General's letter above quoted, after the conviction of the applicant applied to the magistrate for an order for the confiscation of the car of the applicant and of certain articles found in the car by the police, which articles and car were seized by the police. The application was made in open Court in the presence of the applicant and his counsel. The latter stated that he wished to discuss the matter with Crown counsel before the order was made. It would seem that the magistrate withheld the making of the order asked for to give an opportunity to counsel to confer. Counsel did confer after the magistrate had risen and counsel for the applicant discussed with Crown counsel the matter of the forfeiture of the motor-car to the Crown. Mr. *Kirby* advised counsel for the applicant that he had no choice but to carry out the instructions of the Attorney-General for confiscation of all articles seized, including the car, and that he would enter the order accordingly. Both counsel then repaired to the office of the magistrate and counsel for the applicant stated that he expected that none of the articles seized would be destroyed until the time had elapsed for an appeal from the conviction. The order was then drawn and left with the magistrate for signature and counsel for the Crown left with the magistrate a letter addressed to him, the body of which reads as follows:

As counsel representing the Attorney-General of the Province of British Columbia, I hereby consent to the destruction of all articles seized from the possession of any or all of the above accused and to forfeiture to the Crown of the Essex Terraplane Sedan from the possession of the accused, Louis Saporito, as provided for under regulation 58 (4) of the Defence of Canada Regulations (Consolidated) 1940.

The order reads as follows:

THE ABOVE ACCUSED each having been found guilty and sentenced for being members of Jehovah's Witnesses an illegal organization, under regulation 39C of the Defence of Canada Regulations (Consolidation) 1940.

UPON THE APPLICATION and with the consent of *J. O. C. Kirby,* Esquire, counsel representing the Attorney-General of the Province of British Columbia; AND UPON READING regulation 58 (4) of the said regulations:

IT IS HEREBY ORDERED that the Essex Terraplane Sedan (1934) Model K23710 Number 31-799 registration Number 141142 Engine Number 53338 Serial Number 84238, in the name of, and seized from the accused Louis Saporito, be forfeited to the Crown, and that all other articles seized in this

case be destroyed forthwith after expiration of the time allowed for appeal herein or after such appeal has been heard.

C. Nichols (17/3/41)
Stipendiary Magistrate.

The motion to quash sets up some ten reasons for so doing. It is unnecessary to deal with all of them. The relevant consent of the Attorney-General is "for the destruction of any or all articles seized." The consent is not in the broad terms of subsection (4) of regulation 58. The consent of counsel representing the Attorney-General is in a form more in conformity with the wording of subsection (4). The latter consent would probably suffice if the order were otherwise good.

It will be noted that the words "stipendiary magistrate" only are used beneath the signature of Mr. Nichols. It is submitted that the failure of the magistrate to disclose his jurisdiction is fatal. In view of the fact that Mr. Nichols in the applicant's notice of motion has been described as a stipendiary magistrate in and for the county of Yale, British Columbia, I think the submission fails.

It was submitted that the order ought to have been made in public. The hearing did take place in public. No new evidence was submitted later to the magistrate. The discussion which took place before him in his private office by both counsel had nothing to do with the proposed order beyond, perhaps, arranging that it would not be given effect to pending an appeal. I give no effect to this submission.

An examination of regulation 58 disclosed that its purport has been entirely misconceived in the proceedings taken. The regulation authorizes a search warrant to search premises and persons found therein and to seize articles found in the premises or on persons found therein which an officer of the law has reasonable ground for believing to be evidence of a "war offence" committed or about to be committed. Subsection (4) is of no avail until there has been a seizure under subsection (1) of regulation 58. It does not appear that there was any search warrant in the case at Bar. A conviction under regulation 39A is not a foundation for a seizure nor yet for an order under regulation 58 (4). The seizure was illegally made.

The order of the magistrate will be quashed. There will be no costs.

Motion granted.

C. A.
1941
May 27.

MANERY AND W. J. MANERY AND SONS GARAGE v. KAMPE.

Damages—Plaintiff a dealer in sale of cars—Breach of agreement to purchase a car—Subsequent sale of the car—Effect on measure of damages.

The plaintiff, who is a dealer in the sale of cars, entered into an agreement with the defendant for the sale of a car at a certain price. On the car being ready for delivery the defendant refused to accept and the plaintiff brought action for $200 as damages for loss of profit on the sale of the car. Shortly after commencement of the action the car was sold to another purchaser for the same price. The action was dismissed.

Held, on appeal, reversing the decision of KELLEY, Co. J., that in this type of case the vendor is entitled as damages to the difference between the wholesale and retail price.

Mason & Risch Limited v. *Christner* (1920), 47 O.L.R. 52, applied.

APPEAL by plaintiffs from the decision of KELLEY, Co. J. of the 1st of March, 1941, in an action for loss of profit on the sale of a Hudson motor-car sold to the defendant for $1,158. This price was after allowing the defendant $25 as expense money for taking delivery of the car at Vancouver. The wholesale cost of the car to the plaintiffs at Vancouver was $964.14, making a profit to the plaintiffs of $193.86. A written contract for the sale of the car by the plaintiffs to the defendant was entered into on the 17th of January, 1939, and a further agreement was entered into on February 24th following, whereby the heater and defroster were to be left out of the car and the purchase price was reduced to $1,158. Delivery was to be made on the 28th of February, 1939. The defendant refused to take delivery. The plaintiffs issued a writ of summons on the 30th of March, 1939. They resold the car on the 7th of April, 1939, for $1,183. The action was dismissed.

The appeal was argued at Vancouver on the 27th of May, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

McAlpine, K.C., for appellants: The loss of profits was $193.86 as between the wholesale and retail price. The car was sold afterwards, but in the case of a seller selling the unaccepted goods to another purchaser he would be merely satisfying an order which would in any event have come to him. In this case

the seller's damages resulting from the breach may be measured by his loss of profit on the goods which the buyer refused to accept: see Halsbury's Laws of England, 2nd Ed., Vol. 29, p. 192; *In re Vic Mill, Limited,* [1913] 1 Ch. 465.

J. A. MacInnes, for respondent: This was a contract for a specific car. We cross-appealed for costs. They suffered no damage and we are entitled to the costs: see *Cole* v. *Christie, Manson, and Woods* (1910), 26 T.L.R. 469; *Jackson* v. *Anglo-American Oil Co.,* [1923] 2 K.B. 601; *Civil Service Co-operative Society* v. *General Steam Navigation Company,* [1903] 2 K.B. 756, at p. 765.

The judgment of the Court was delivered by

MCDONALD, J.A.: It may be considered as fortunate that the Court finds itself able to reverse the judgment which KELLEY, Co. J. found himself so reluctant to enter. With due respect I think the question does not admit of serious debate. The principle to be applied is clearly stated by the learned authors of Halsbury's Laws of England, 2nd Ed., Vol. 29, at pp. 190 and 192. The same principle is again stated by Middleton, J. in *Mason & Risch Limited* v. *Christner* (1920), 47 O.L.R. 52, this opinion being affirmed by the Court of Appeal on this phase of the matter: see 48 O.L.R. 8, at p. 11. In this type of case the vendor is entitled as damages to the difference between the wholesale and retail price.

As to the suggestion of respondent's counsel that on this appeal we can only order a new trial, the answer is to be found in the decision of this Court in *Cudworth* v. *Eddy* (1926), 37 B.C. 407, where MACDONALD, C.J.A. said at p. 409:

> Should a new trial be ordered? In the Supreme Court a non-suit is a judgment on the merits. When a defendant asks for and gets a non-suit in the county court or judgment in the Supreme Court on the ground that the plaintiff has failed to make out a case and this is reversed, a new trial is not generally ordered. It is as if he had said, "I do not want this trial to go any further, I am prepared to stand on the failure of the plaintiff to make out his case." Then if it is afterwards found on appeal that the plaintiff has made out a case, the Court of Appeal will not usually grant a new trial. It is in the discretion of the Court to say whether we shall grant a new trial or not. This is a case in which the discretion of the Court should not be exercised in favour of a new trial, since I am convinced that the only defence was the alleged want of a licence.

C. A.
1941

MANERY
v.
KAMPE

The matter is further covered by the Court of Appeal of Ontario in *Martin* v. *C.P.R.*, [1932] 4 D.L.R. 191.

The appeal is allowed. Judgment will be entered for the appellant for $198.86, with costs here and below.

Appeal allowed.

Solicitor for appellants: *C. F. R. Pincott.*
Solicitor for respondent: *H. W. McInnes.*

C. A.
1941
April 28, 29.

REX v. KISHEN SINGH.

Criminal law—The Opium and Narcotic Drug Act, 1929—Possession of poppies—Crown's case closed—No evidence of proclamation of 1938 amendment to Act—Motion for discharge of accused refused—Case reopened—Evidence of proclamation allowed in—Appeal.

The appellant was tried, charged with possession of opium poppies under the 1938 amendment to The Opium and Narcotic Drug Act, 1929. The prosecution closed its case but did not put in evidence a proclamation by the Governor in Council bringing the 1938 amending statute into force. Counsel for the defence then moved that the appellant be discharged from custody. The learned judge refused the motion on the grounds: (1) He had searched the Canada Gazette and found the amending statute there proclaimed; (2) this coupled with his bringing the Gazette into Court as he did on delivery of judgment, was evidence that the statute was in force, although the Gazette had not been produced in evidence by the prosecution; (3) by reason of (1) and (2) it was his duty to take judicial notice that the statute had been proclaimed. Having so refused the motion, the learned judge then permitted the prosecution to reopen its case to put in the Canada Gazette. The appellant was convicted.

Held, on appeal, affirming the conviction by ROBERTSON, J. (O'HALLORAN, J.A. dissenting), that the trial judge may, in the interests of justice, on the application of Crown counsel, reopen the case to repair an omission of proof, when no possible prejudice to the accused could occur.

APPEAL by accused from the conviction and decision of ROBERTSON, J. and the verdict of a jury, at his trial at the Spring Assize at Victoria, on the 10th to the 12th of March, 1941, on a charge of having in his possession a drug, to wit, portions of the opium poppy other than the seed. On the trial, after the Crown

had closed its case, counsel for the defence moved that the appellant was entitled to be discharged on the ground that the prosecution had closed its case but did not put in evidence a proclamation by the Governor in Council bringing the 1938 amendment to The Opium and Narcotic Drug Act, 1929, into force. The learned judge refused the motion for reasons stated in the head-note. He then permitted the prosecution to reopen its case to put in the Canada Gazette.

Davey, for the Crown.

Henderson, for accused.

ROBERTSON, J.: Yesterday afternoon the Crown closed its case. The prosecution of this case is under The Opium and Narcotic Drug Act, 1929. That Act was amended by chapter 9 of the Statutes of Canada, 1938; but the operation of the Act was suspended. Section 9 of the last-mentioned Act, that is the Act of 1938, added clause 9 to the Schedule to the Act, and thereby, when the Act came into force, made it an offence to have the opium poppy in one's possession. However, as I have said, the coming into force of that Act was suspended by section 11 which provides that the Act shall come into force upon a date to be fixed by the proclamation of the Governor in Council. The Crown closed its case without proving the Crown's proclamation Mr. *Henderson* then raised the objection that there is no proof that the 1938 Act is in force, and if there is no proof of course the prosecution goes by the board.

However, counsel for the Crown relies upon section 18 of the Canada Evidence Act, which says, "Judicial notice shall be taken of all public Acts of the Parliament of Canada without such Acts being specially pleaded." Mr. *Henderson* refers to section 1128 of the Code, which provides that no order or conviction made by any justice or stipendiary magistrate shall be quashed, and so on, by reason of any objection that evidence has not been given of a proclamation of the Governor in Council. And subsection 2 says that such proclamation shall be judicially noticed. Mr. *Henderson* says that shows that a judge of the Supreme Court cannot take judicial notice of a proclamation but a

C. A.
1941

REX
v.
KISHEN
SINGH

Robertson, J.

justice or stipendiary magistrate may do so. I have not had time to consider that section.

However, I have found direct authority on this point. I refer to pp. 38-9 of Craies on Statute Law, 4th Ed.:

> The Supreme Court of the United States takes judicial notice of the statutes of all the States. The principles to be adopted by the judges, in case of any doubt arising, are thus stated by Fuller, C.J. in a manner which seems equally applicable to British Acts:—"On general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the [Federal] Courts of the United States. This subject was fully discussed in *Gardner* v. *Collector* (1867), 6 Wall. 499. After examining the authorities, the Court in that case lays down the general conclusion ('on principle as well as authority') that 'whenever a question arises in a Court of law of the existence of a statute, of the time when it took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.'"

Now that lays down the clear and distinct principle on which a judge must proceed. The judge taking judicial notice does not act on the evidence at all; that is something he must do himself. It is his duty to look at the statute and to say whether the statute has taken effect. I turn to the statute of 1938, which I find in the copy of the Canada Statutes, and I find at the end of chapter 9, which is The Opium and Narcotic Drug Act, 1929, Amendment Act, 1938, that this Act is "printed by Joseph Oscar Patenaude, I.S.O., Law Printer to the King's Most Excellent Majesty." Under the Evidence Act, of course, that is evidence or proof at once of the existence of the statute. Then I find section 11 which says the Act is not to come into force before a proclamation; and I look for the proclamation, and I find it in the Gazette which is now produced. And that copy of the Gazette is evidence by reason of section 21 of the Canada Evidence Act. Therefore, I find there was an Act, and I find the Act has been properly proclaimed.

[*Henderson*: Before continuing, I wish to raise a point, referring to that case quoted in the United States; there is no mention there of proclamation; it is all an Act.]

Mr. *Henderson,* I have heard you; and I drew your attention particularly to the language.

[*Henderson*: The language is there the date of the Act or the date it came into force; that date of it coming into force must be in the Act itself and not in the proclamation such as there is here. That is my contention, it must be in the Act. For instance, an Act might be passed this year, not to come into force until say the 1st of July next year; and that is done in cases where there are certain things that the public should have notice of before stringent application is made of the terms of the Act. That does not cover this particular case, that United States case, at all; because it covers the case just as suggested and nothing more. When you come to a proclamation you come to a document just like a by-law which must be proved as a by-law is proved in Court. It is there in the statute which says so.]

I do not think language could be clearer. The Court lays down the general conclusion, that whenever a question arises in a Court of law of the existence of a statute, of the time it took effect—now that is what I have got to find out, whether this statute is in existence and has taken effect; and it can only take effect by reason of a proclamation passed under section 11—whenever a question arises in a Court of law of the existence of a statute, or the time it took effect and so on, then I have to go to every possible legal source to find out. I have no doubt at all then that it is my duty to take judicial notice that this statute came into effect on the 1st of August, 1938.

In this case the Crown has asked that it be allowed to reopen its case. If this were a case where the evidence, sought to be introduced, could be disputed, I would consider very carefully and very seriously whether I would allow it. But in this case there can be no controversy at all. Counsel made a slip in not proving the proclamation, perhaps; I do not say he did, for perhaps he had a right to rely on judicial notice; but, in my opinion, it is a case where I should allow the Crown to reopen to put in the Gazette.

From this decision the accused appealed. The appeal was argued at Victoria on the 28th and 29th of April, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

C. A.
1941

REX
v.
KISHEN
SINGH

Henderson, for appellant: The original Act of 1929 does not mention poppies. Possession of poppies was made an offence by the 1938 amendment to the Act. Section 11 of the amendment provides that the Act shall come into force upon a date fixed by proclamation. The case was closed before the proclamation was proved. A statute is not a statute until it is proclaimed. The case was reopened and proof of the proclamation was allowed in. The learned judge followed an American case and held he could take judicial notice of the statute, but see Archbold's Criminal Pleading, 30th Ed., 420; *Dupays* v. *Shepherd* (1698), 12 Mod. 216; *Van Omeron* v. *Dowick* (1809), 2 Camp. 42; *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555; Mews' Digest, 2nd Ed., Vol. 6, p. 1472; Halsbury's Laws of England, 2nd Ed., Vol. 6, pp. 600-1; *Reg.* v. *Frost* (1839), 4 St. Tri. N.S. 85, at p. 386. There is not an act upon which he can be found guilty on the evidence. It is a question of jurisdiction and we were entitled to judgment when the case closed. That the learned judge may not take judicial notice of the proclamation see *Rex* v. *Marsham. Ex parte Pethick Lawrence,* [1912] 2 K.B. 362.

Davey, for the Crown: No injustice is done in reopening the case: see *Rex* v. *Marsh* (1940), 55 B.C. 484; *Rex* v. *Day* (1940), 27 Cr. App. R. 168. Where an injustice would be done then the evidence is not allowed: see *Rex* v. *Crippen* (1910), 5 Cr. App. R. 255; *Rex* v. *Sullivan,* [1923] 1 K.B. 47, at p. 58; *Rex* v. *Foster* (1911), 6 Cr. App. R. 196; *Rex* v. *Brixton Prison (Governor) Ex parte Servini,* [1914] 1 K.B. 77; *Rex* v. *Gregoire* (1927), 60 O.L.R. 363; *Rex* v. *Remnant* (1807), Russ. & Ry. 136; 168 E.R. 724.

Henderson, replied.

MACDONALD, C.J.B.C.: I would dismiss the appeal. We are concerned with a simple point, *viz.,* whether or not the Crown having inadvertently omitted to prove in the course of its case, and before closing it, as an essential element, a proclamation bringing an Act into effect, the trial judge may on application of Crown counsel reopen it to repair that omission under conditions where no possible prejudice to the accused could occur. There

is, with deference, no doubt in my view that this simple course may be followed. On no principle or authority, having regard to the facts, can such a course be questioned as illegal or non-permissible.

No question of jurisdiction, as appears to be suggested, arises. There was jurisdiction to enter upon the trial of the charge and of course to proceed with it to a final conclusion. The Act as it existed at the date of the trial made it an offence to have poppy in the possession of the accused. It was necessary, however, as part of the Crown's case, to prove the proclamation: that was part of the proof—simply an item of evidence necessary to show that the Act was in force. That evidence was provided when the trial judge reopened the Crown's case; it was resumed just as if it had not been closed. The proof was furnished therefore in the Crown's case after which the defence, if there was any, could be heard.

As stated, the omission was inadvertent: a mere matter of formal proof of a cursory character was adduced and a deficiency supplied without prejudice to the accused in the slightest degree.

I might add we are not dealing with an application to reopen the Crown's case after the conclusion of the whole case or after the defence was closed. I confine my decision to our own facts, *viz.*, reopening at the stage indicated to permit formal proof of a matter beyond controversy.

McQUARRIE, J.A.: After further consideration of the authorities relevant to this appeal I have come to the conclusion that I must agree with the majority of the Court that the appeal should be dismissed. As I understand it in view of the decision arrived at it is unnecessary for us to deal with the question of whether or not the Court should take judicial notice of a proclamation such as was required here to bring the statute into effect. That involves a rather difficult point of law and may not be free from doubt.

The learned trial judge reopened the case and allowed the Crown to prove the proclamation after which counsel for the defence and counsel for the Crown addressed the jury and the

C. A. 1941

REX v. KISHEN SINGH

appellant was convicted. There was no suggestion that the Court had no jurisdiction to try the charge or that after the proclamation was proved the offence was not fully established. It therefore resolves itself into a pure question of procedure as to which the trial judge had a discretion which he exercised properly and which we should not interfere with.

SLOAN, J.A.: In my view the appeal should be dismissed. Because of *Rex* v. *Gregoire* (1927), 47 Can. C.C. 288, a judgment of the Court of Appeal of Ontario, it is clear that a trial judge has the discretionary power to permit Crown counsel to call further evidence after he has closed the case for the prosecution. That discretion when exercised before the accused has entered upon his defence is subject to the limitation that its exercise must be in the interests of justice and the accused be not prejudiced thereby. When at a later stage of the case, that is to say, after the defence has given its evidence, then as was held by this Court in *Rex* v. *Marsh* (1940), 55 B.C. 484, following *Rex* v. *Day* (1940), 27 Cr. App. R. 168, the discretion ought not to be exercised except in a case where some matter arises *ex improviso* which no human ingenuity could have foreseen. In this case Crown counsel closed his case without proving the relevant proclamation. Upon the point being raised by Mr. *Henderson,* Crown counsel submitted that the Court could take judicial notice of the proclamation. Alternatively he applied to reopen his case to prove the proclamation. This last suggestion was acceded to by the learned trial judge, the case was reopened and the proclamation thereupon properly proved. To my mind that course of procedure was a proper exercise of discretion within the principles of *Rex* v. *Gregoire, i.e.,* it was in the interests of justice, and the accused not having entered upon his defence was not prejudiced thereby.

O'HALLORAN, J.A.: In 1938 The Opium and Narcotic Drug Act, 1929, was amended to make it an offence to cultivate, gather or produce any opium poppy as there described. But by section 11 of that amendment, being Cap. 9, Can. Stats. 1938, the amending statute was not to come into force until a date to be fixed by proclamation of the Governor in Council.

The appellant was brought to trial at the 1941 Spring Assize in Victoria charged with "possession" of such opium poppies "against the form of the statute in such case made and provided." The prosecution closed its case but did not put in evidence a proclamation by the Governor in Council bringing the 1938 amending statute into force. The only way in which the Court could be informed judicially that the statute was in force was by evidence of its proclamation forming part of the Court record in the case made by the prosecution. In the absence of such evidence in the case made by the prosecution, possession of such opium poppies could not be an offence. And obviously the Court could have no jurisdiction to hold or try a man for something which did not constitute an offence.

Therefore the appellant was entitled to be discharged from custody at the close of the case for the prosecution. Counsel for the defence moved accordingly. The learned trial judge then refused the motion and permitted the prosecution to reopen its case to put the proclamation in evidence. Counsel for the appellant immediately expressed his intention to appeal and stated he was not going to call any evidence. The appellant was convicted. When the appeal was dismissed I stated I would hand down written reasons in support of my dissent. I cannot agree that the reopening was discretionary because of inadvertence of the prosecution to put the proclamation in evidence before the close of its case. I cannot agree that want of jurisdiction is a matter of expediency to be dismissed as a mere technical objection.

In the language of Darling, J. in somewhat analogous circumstances, when speaking for the Court of Criminal Appeal in England in *Tyrrell* v. *Cole* (1918), 120 L.T. 156, 158, I consider the proceedings "were bad from the first. They violate an imprescriptible right of the British subject." Inadvertence was not relied on by counsel in this Court; and certainly the learned judge appealed from did not base his decision upon that ground. In any event as jurisdiction was the determining issue raised by counsel for the appellant it could not be affected by inadvertence of judge or counsel.

Counsel for the appellant directed his case to jurisdiction in definite and unequivocal fashion. He contended there was no

C. A. 1941

REX v. KISHEN SINGH

O'Halloran, J.A.

jurisdiction to try appellant, because in absence of evidence of the proclamation the appellant was not charged with an offence known to our law; and that being so, once the prosecution had closed its case, the learned judge should have dismissed the proceedings as a nullity; it was *coram non judice*. In the language of Lopes, L.J. in *Farquharson* v. *Morgan* (1894), 63 L.J.Q.B. 474, at p. 477 it was

> a want of jurisdiction of which the Court is informed by the proceedings before it, and which the judge should have observed, and a point which he should himself have taken.

The learned judge did not however "observe the want of jurisdiction" and "himself take the point."

Let us examine the course the learned judge pursued as he explains it in his reasons for dismissing the motion. Upon reserving judgment he first turned to the 1938 amending statute. He says [*ante*, p. 284]:

> Under the evidence Act, of course, that is evidence or proof at once of the existence of the statute. Then I find section 11 which says the Act is not to come into force before a proclamation; and I look for the proclamation, and I find it in the Gazette which is now produced [by the learned judge]. And that copy of the Gazette is evidence by reason of section 21 of the Canada Evidence Act. Therefore, I find there was an Act, and I find the Act has been properly proclaimed.

Thus far it would seem that the learned judge based his finding that the statute was in force upon the ground that his action in bringing the Canada Gazette into Court containing a copy of the proclamation, in the course of giving his decision upon the motion to dismiss for want of jurisdiction, was a production of that proclamation in evidence within the meaning of section 21 of the Canada Evidence Act. If he was right it ends the case. But in my view at least, the word "evidence" in section 21 with all that the term implies renders such a proposition untenable. In *Rex* v. *Yee Clun*, [1929] 1 D.L.R. 194, Bigelow, J. of the Saskatchewan King's Bench, quashed a conviction for a violation of the "Special War Revenue Act, R.S.C. 1927, Cap. 179, and amendments and regulations made thereunder" in the following circumstances.

The offence there charged was not an offence under the Act, but under Regulations made by the Minister pursuant to the Act. The Regulations were in the possession of counsel for the prose-

cution during the trial and available to the accused, but were not put in evidence. Bigelow, J. in quashing the convictions said at p. 196:

> Counsel argues that he did produce a copy of such regulation by having it in his possession during the argument. I cannot find any authority on the interpretation of the word "production" in such a phrase, but I would consider that it means that it must be produced as evidence and made part of the record of the Court.

That is supported by decisions of the Court of Criminal Appeal in England in *Duffin* v. *Markham* (1918), 88 L.J.K.B. 581 (Bread Order by Food Controller under Defence of the Realm Regulations) and *Tyrrell* v. *Cole* (1918), 120 L.T. 156 (Directions under Dried Fruits (Distribution) Order 1918).

It is also supported in Scottish Court of Judiciary in *Todd* v. *Anderson*, [1912] S.C. (J.) 105 (Regulations to Army Act, 1881). Bigelow, J. proceeded at p. 196:

> It might be that there was some valid objection to the document produced. Surely accused's counsel should have a chance to object to it! See *Reg.* v. *Wallace* (1866), 10 Cox, C.C. 500.

When he looked at the 1938 statute the learned judge appealed from was constrained by its very terms to conclude, not as he did that it was in existence, but that he could not take judicial notice of it as an existing public statute, unless legal evidence of its proclamation was put in by the prosecution as part of the Court record. The statute told him in direct effect, that upon the evidence before him, he had no jurisdiction to try the appellant. That is to say in the language of Lopes, L.J. in *Farquharson* v. *Morgan, supra,* he was informed by the proceedings before him of his want of jurisdiction.

He could not know judicially that the statute was proclaimed unless that fact was properly in evidence. Reading the proclamation in the Canada Gazette as he did could not make it evidence. Whether the statute was in force or not was an evidential fact. The proof thereof could not be dispensed with unless judicial notice could be taken of the proclamation. But as will be shown that is not permitted by section 21 of the Canada Evidence Act. For unless and until the proclamation was produced in accordance with the rules of evidence, he could not act judicially on the assumption that the statute was in force, or act in anticipation of evidence of its proclamation being presented. It is fundamental

C. A.
1941

REX
v.
KISHEN
SINGH

O'Halloran, J.A.

that a judge must decide upon the evidence of the facts before him. He is not permitted to decide on his personal knowledge of those facts. He is a judge and not a witness. 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," apply with equal aptitude to judges of the superior Courts.

There are certain things of which a judge may take judicial notice, but the proclamation of a statute is not one of them. It must be proven in evidence or perhaps, one should say, it proves itself when put in evidence. The legal existence of the 1938 statute in his Court depended upon the evidence of its proclamation, as an essential to his jurisdiction to try the appellant. Instead of regarding the 1938 amendment as an existing statute, is was with respect on the contrary his duty in the absence of evidence of its proclamation, to regard it as not in existence. But he could not consider the proclamation judicially unless and until it was put in evidence before him as part of the case for the prosecution, in the manner which Parliament in its wisdom does not permit the Courts to alter. But by following the course stated, he did in fact take judicial notice of the proclamation. For the learned judge said:

> Now that is what I have got to find out, whether this statute is in existence; and it can only come into existence by reason of a proclamation passed under section 11—whenever a question arises in a Court of law of the existence of a statute, or the time it took effect, and so on, then I have to go to every possible legal source to find out. I have no doubt at all then that it is my duty to take judicial notice that this statute came into effect on the 1st of August, 1938.

His reasoning in effect is this: although I cannot take judicial notice of the proclamation yet I must of the statute; but I cannot take judicial notice of the statute unless I first take judicial notice of the proclamation. The answer is that the 1938 amendment could not be a statute in existence until proclaimed. And as the learned judge could not be informed of its proclamation except by proper evidence, he could not take judicial knowledge of the 1938 amendment as a statute in existence until its proclamation was put in evidence before him. *McPhee* v. *Canadian Pacific Ry. Co.* (1915), 22 B.C. 67, upon which the learned judge relied does not support his conclusion. The reasoning

underlying the *dictum* of Irving, J.A. in that case appears in *Underhill* v. *C.N.R.* (1915), 8 W.W.R. 271, the decision of the Manitoba Court of Appeal which is referred to therein.

The Manitoba Court held that as publication of an order made by the Railway Board was not mandatory but discretionary under section 31 of the Railway Act, the order could be proved by filing a certified copy, which had been done. No such questions arise here. However, I have found a decision of the Manitoba Court of Appeal to support the conclusion reached by the learned judge, although I must say, with the highest respect for that Court, I am unable to follow it for reasons presently stated. It is *Rex* v. *Wagner,* [1931] 4 D.L.R. 761. In that case immediately after the testimony for the prosecution had been closed and before adjudication (no mention is made of a motion to dismiss), counsel for the Crown asked the magistrate to reserve counsel's right to produce an order in council showing that the Act was in force. And at p. 762:

> The magistrate answered in the negative and counsel then said: "You will take judicial notice of it?" And the magistrate answered, "Yes."

In giving his judgment a week later the magistrate said, p. 762:

> " . . . the only point I had any difficulty with was whether the Act was actually in force. Evidence was not produced . . . , as to whether the Game and Fisheries Act had come into effect. I found however, that the proclamation had actually been issued and the Act was in force and that disposed of the difficulties there so far as I was concerned, . . ."

The Court of Appeal upheld the magistrate on the ground that the purpose of section 10 of the Manitoba Evidence Act (similar in effect to section 21 of the Canada Evidence Act) requiring production of the Manitoba Gazette was merely to simplify proof of proclamation, and did not limit the means by which a judicial officer may officially become acquainted with the law, for on the day fixed for the coming into force of the statute everyone was bound to take notice of it even the accused and that extended to the magistrate.

If the reasoning of that decision is to govern, then the Courts would be required to take judicial notice of every order and regulation made or issued by the Governor in Council or by any minister or head of any department of the Government of Canada (*vide* section 21), whether published in the Canada

C. A.
1941

REX
v.
KISHEN
SINGH

O'Halloran, J.A.

Gazette or not. Truly a demanding task. The Courts would then take judicial notice of all such orders and regulations with their periodical amendments and additions, and act upon them as law, without opportunity to counsel of objecting to their admissibilty, or questioning their legality or applicability. The historic distinction between a public Act of Parliament in force at its passing and a proclamation of the Executive cannot be overlooked. In *Gardner* v. *The Collector* (1867), 6 Wall. 499, Miller, J. in giving the opinion of the Supreme Court of the United States, at p. 510, cited the following from 4 Co. Inst. 26:

> Every one is bound to take notice of that which is done in Parliament: for as soon as the Parliament hath concluded any thing, the law intends, that every person hath notice thereof, for the Parliament represents the body of the whole realm: and therefore it is not requisite that any proclamation be made, seeing the statute took effect before.

In the present case the statute itself required its proclamation, thereby taking it out of the general rule above set forth. This distinction was not recognized in *Rex* v. *Wagner, supra.*

The effect of *Rex* v. *Wagner* (which concerned a Provincial statute) if its reasoning governed here, would be in practical effect (1) to repeal section 21 of the Canada Evidence Act, and (2) to widen the meaning of "public Acts" in section 18 thereof to include proclamations, orders and regulations referred to in section 21. I am satisfied that sections 18 and 21 of the Canada Evidence Act do not permit the interpretation given them by *Rex* v. *Wagner.* In *Duffin* v. *Markham* and *Tyrrell* v. *Cole, supra,* the Court of Criminal Appeal in England made it clear that judicial notice could not be taken of the orders there considered. In *Tyrrell* v. *Cole,* the prosecution put in evidence the Dried Fruits (Distribution) Order 1918 together with what was described in the case stated as an "official print" of certain directions issued by the Ministry of Food in pursuance of that order. The controversy centred upon the "official print" which had been simply handed into the Court. By section 6 of the order (p. 157),—

> Any direction purporting to be given pursuant to this order or headed Dried Fruits (Distribution) Order 1918 shall, unless the contrary be proved, be deemed to be prescribed or given pursuant to this order.

One would think that was pretty strong ground for judicial notice. Yet Darling, J., speaking for the Court, after saying the

"official print" should have been proven by a copy of the Gazette, described the proceedings as "bad from the first" as "They [violated] an imprescriptible right of the British subject." In *The Queen* v. *Lowe* (1883), 52 L.J.M.C. 122, the Court for Crown Cases Reserved (Lord Coleridge, C.J., Pollock, B., Manisty, Lopes, and Stephen, JJ.) quashed a conviction of a bankrupt under the Fraudulent Debtors Act, 1869, because there was produced in evidence, not the entire London Gazette but only a page of what appeared to be the London Gazette containing the material advertisement. The page in question was produced from the file of bankruptcy proceedings under the seal of the county court. It was quite evident not one of the five judges considered it his duty to make a personal examination of the London Gazette to ascertain if the page in question was actually contained in the Gazette.

In the Scottish case of *Todd* v. *Anderson, supra,* the appellant was convicted of failing to attend military drills contrary to a statute to which section 163 of the Army Act, 1881, had been made applicable for the purposes of evidence. The applicable regulations under the Army Act were not put in evidence. The conviction was quashed because those regulations were not produced in evidence; Lord Salvesen said at p. 108:

> . . . although the Regulations prove themselves, it is a very different thing to say that they need not be produced in the course of the evidence, but may be referred to, as you refer to a statute, at any time after the evidence has been closed, for the purpose of convincing the Court that a statutory offence has been committed.

And further at p. 108, which has a bearing upon a remark by the learned judge that the trial had proceeded on a basis that the 1938 statute was in existence:

> It is admitted here that without the Regulations the prosecutor cannot succeed. It was contended . . . that, as the Regulations had been referred to in the evidence, they must be held to have been embodied in the evidence, and that they were practically produced. Well, I think it was Lord Halsbury who once said, that if you say that a thing has been "practically" done, you mean that it has not been done at all.

But the question of jurisdiction may be raised under a plea of not guilty. And of course jurisdiction cannot be waived.

Lord Guthrie and Lord Dundas agreed. The former made an observation at p. 109 which seems to apply here aptly, and to

C. A.
1941

REX
v.
KISHEN
SINGH

O'Halloran, J.A.

clarify in a few words the problem of judicial notice as it affects proclamations in relation to statutes:

> I rather think that what took place was probably due to a failure to detect the difference between a document which proves itself and a document which, like a statute, not only proves itself but does not require to be put in evidence.

If the Dominion Parliament had intended that judicial notice should be taken of the proclamation of a statute, one would expect a similar section in the Canada Evidence Act or in the Criminal Code, to that found in section 103 of our Summary Convictions Act, Cap. 271, R.S.B.C. 1936. The latter is similar to section 1128 of the Criminal Code which is restricted by Part XXII. thereof to extraordinary remedies such as *habeas corpus, certiorari* and such like. Furthermore if Parliament had intended that judicial notice was to be taken of the proclamation of the 1938 amendment in particular a provision to that effect could have been easily included in the amendment.

After the learned judge had announced that he found the Act had been properly proclaimed, he permitted the prosecution "to reopen to put in the Gazette." And that was done. If he were right in finding the statute was proclaimed, his jurisdiction was then established. His subsequent action in reopening the prosecution's case, would then be a matter of discretion, which would not concern us, as counsel for appellant did not raise it because he contended jurisdiction did not exist. If the learned judge was wrong in his initial conclusion that the statute was properly proclaimed, then his jurisdiction to try the case falls with it, and of necessity his jurisdiction to reopen the prosecution's case as he did, also falls.

Even where his jurisdiction is unquestioned the discretion of a trial judge to reopen a case is restricted at best, *vide Rex* v. *Gregoire* (1927), 60 O.L.R. 363, and *Rex* v. *Marsh* (1940), 55 B.C. 484. Those decisions were not concerned with jurisdiction and are inapplicable here. But where his jurisdiction does not exist a trial judge has no discretion at all in the matter. If the statute is not proven to be in force, it cannot create an offence in law. Unless it appears there is such offence in law, the proceedings are a nullity. If the prosecution has closed its case under such circumstances the whole proceedings are a nullity

and as such cannot be reopened; for there is nothing which can be reopened, it is *coram non judice.*

When the Court of Criminal Appeal in England quashed the conviction in *Tyrrell* v. *Cole, supra,* because the proceedings "were bad from the [start, and violated] an imprescriptible right of the British subject," it was but a more dramatic way of saying that the convicting Court had no jurisdiction. Here the proclamation went to the root of the Court's jurisdiction. If it was not put in evidence (as it was not) and if the learned judge could not take judicial notice of it (as he could not) then it was not before him, and he was wholly without jurisdiction to try the appellant for something which was not an offence in law. The learned judge recognized this in form (although not in effect) when he said at the outset of his judgment:

> . . . if there is no proof, [that the 1938 Act was in force] of course the prosecution goes by the board.

Let us take the example of an analogous case in a Court to which prohibition would lie, and counsel upon refusal of the motion to dismiss had withdrawn from the case on the ground the proceedings were a nullity, and then had taken prohibition proceedings. He would certainly invoke Lord Mansfield's statement of the law in *Buggin* v. *Bennett* (1767), 4 Burr. 2035; 98 E.R. 60, applied by Davey, L.J. in *Farquharson* v. *Morgan, supra,* at p. 479:

> If it appears on the face of the proceedings, that the Court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because all is a nullity; it is *coram non judice.*

In illustration by way of contrast, if the 1938 statute had come into immediate operation it could not then be argued as here that the Court did not have jurisdiction to try the appellant. There would then be an offence according to law and allowance of an application to reopen to admit evidence would be in the discretion of the judge, fully clothed with jurisdiction, to decide whether he would or would not reopen. If his decision was attacked in this Court, no question of his jurisdiction could arise, and the issue would be whether he had exercised his discretion on correct principles or an injustice was created thereby. But that is not the case here.

Farquharson v. Morgan, supra, illustrates the application of

C. A.
1941

REX
v.
KISHEN
SINGH

O'Halloran, J.A.

the principle. It was held there that in prohibition applications if the want of jurisdiction appears on the face of the proceedings, prohibition issues as of right, whereas in other cases its issue is discretionary. The reason therefor as there explained being, that if the want of jurisdiction is patent the proceedings are a nullity; it is *coram non judice*. In this case the want of jurisdiction was patent at the close of the case for the prosecution, because the 1938 statute informed the Court that in the absence of proof of its proclamation, there was no such offence in law. The alleged offence was patently not an offence at all, and as such "specially appeared to be out of the jurisdiction of a superior Court" within the long accepted rule in *Peacock* v. *Bell and Kendal* (1667), 1 Wms. Saund. 73, at p. 74; 85 E.R. 84, at pp. 87-8.

In *Duffin* v. *Markham, supra*, it would appear that if an application to reopen had been made it would have been upheld following the judgment of Cave, J., in *Hargreaves* v. *Hilliam* (1894), 58 J.P. 655 there referred to. But in the latter case Cave, J., distinctly based his decision upon section 71 of 7 & 8 Geo. 4, c. 53. That statute provided that where an information averred that certain public authorities had ordered a prosecution, such averment should be deemed sufficient proof of that fact "without any other or further evidence thereof." No similar or analogous provision exists here. In the circumstances neither the *Duffin* case nor the *Hargreaves* case can apply here. Moreover it must be assumed from the report of the *Duffin* decision, that no question of jurisdiction could have arisen there. In any event it is plain that judicial notice of the existence of the empowering statute did not depend as here, upon production in evidence of the order in question. In my view the reasoning which supports *The Queen* v. *Lowe, Todd* v. *Anderson* and *Tyrrell* v. *Cole, supra,* is not impaired by anything decided in the *Duffin* case.

It was said also that as the Assize Court had jurisdiction to enter upon the hearing, the objection to jurisdiction must fail. There are two answers thereto. First, the learned judge had no jurisdiction to enter upon a trial of the appellant unless he was charged with an offence known to our law. Production of the

proclamation in evidence was essential to give that jurisdiction. For example, the learned judge would have no jurisdiction to enter upon the trial of a man charged with wearing a rose in his button-hole. For there is no such offence known to law. In the second place, if the learned judge had apparent jurisdiction to enter upon the trial of the appellant, once his want of jurisdiction became manifest, by the failure of an essential thereof, such as the failure of the prosecution to produce the proclamation in evidence, his lack of jurisdiction related back to the commencement of the proceedings, and deprived him of jurisdiction to enter upon the trial of the appellant: *vide Giannini* v. *Cooper* (1918), 26 B.C. 382.

Without production of the proclamation in evidence there was no jurisdiction in the learned judge to try the appellant. Evidence of that proclamation was the foundation of his jurisdiction. But getting the proclamation before a Court in the illegal manner I have described, does not confer jurisdiction. In my view the whole proceedings were a nullity, and should be quashed.

As the appellant in such circumstances could not be said to be in jeopardy, no question of *autrefois acquit* should arise thereby. I mention this to show that justice could not be defeated in any event. But justice cannot be administered, if an accused is not tried according to law for then expediency will supplant principle. It has been authoritatively said that when a fact in a criminal case requires to be proved and is not proved, it is no answer to say that if it had been thought about, it could easily have been proved. Were it otherwise the door would be opened to great abuses in the conduct of the defence as well as the prosecution. When a question of jurisdiction arises as here, this aspect assumes an even greater importance for then questions of procedure and discretion are excluded, if not statutory.

I would quash the conviction accordingly.

McDONALD, J.A.: I would dismiss the appeal for the reasons given by the Chief Justice.

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

C. A.
1941
May 7.

REX *EX REL.* HAYWOOD v. MOORE.

Criminal law—Charge under section 4 of The Opium and Narcotic Drug Act, 1929—Accused tried summarily—Charge dismissed—Right of appeal—Can. Stats. 1929, Cap. 49, Sec. 4.

An appeal does not lie to the Court of Appeal from the dismissal of a charge under section 4 of The Opium and Narcotic Drug Act, 1929, entered by a magistrate under the summary convictions procedure (Part XV.) of the Criminal Code.

APPEAL by the Crown from the decision of police magistrate Beevor-Potts of Nanaimo, acquitting the accused on a charge under section 4 (*d*) of The Opium and Narcotic Drug Act, 1929.

The appeal was argued at Victoria on the 7th of May, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Davie, K.C., for appellant.

Cunliffe, for respondent, raised the preliminary objection that there was no jurisdiction to hear the appeal. The charge is laid under section 4 of The Opium and Narcotic Drug Act, 1929. There is the option of being tried by indictment or by summary conviction. He was tried summarily and was acquitted. Having chosen the course under Part XV. of the Code, there is an appeal to the county court. An appeal to this Court is from an indictable offence only. This is not an indictable offence under section 1013, subsection 4. They had their option and they chose summary conviction. There is no appeal to this Court: see *Rex* v. *Sam Hing* (1926), 45 Can. C.C. 202. The notice of appeal is out of time.

Davie: Under the said Act there is the right of appeal from summary conviction. An individual has certain rights but that does not apply to the Attorney-General of the Province. It is an indictable offence and the nature of the offence is not changed by being tried summarily. The Attorney-General should not be denied the right of appeal for the public in the way an individual is denied the right of appeal. *Rex* v. *Sam Hing* (1926), 45 Can. C.C. 202 is under another section.

C. A.
1941
REX
v.
MOORE

The judgment of the Court was delivered by

MACDONALD, C.J.B.C.: This is an appeal by the Attorney-General from an acquittal by a magistrate on a charge launched under section 4 (*d*) of The Opium and Narcotic Drug Act, 1929. Objection is taken to our jurisdiction to entertain it.

The Crown pursuant to section 4 exercised its right to try the accused under Part XV. of the Code, and after a hearing by the magistrate an acquittal was recorded. Unless one can find in the Code relating to summary conviction proceedings provisions respecting appeals to the Court of Appeal by the Attorney-General from an acquittal after summary trial under Part XV. has taken place, no appeal will lie: the only appeal given is to another Court. Nor is there any right of appeal conferred by section 1013, subsection 4 of the Code; that is confined to appeals from an acquittal on a charge proceeded upon by way of indictment. There is no jurisdiction, therefore, to entertain the appeal: it will be quashed. I would add, a reference to *Rex* v. *Sam Hing* (1926), 45 Can. C.C. 202.

Appeal dismissed.

REX v. COOPER.

S. C.
In Chambers
1941
April 17;
May 22.

Criminal law—War—Defence of Canada Regulations (Consolidation) 1940—Consent to prosecution—Proof of—Habeas corpus—Regulations 39A, 39B (1) and 63—Criminal Code, Sec. 706.

Regulation 39B (1) of the Defence of Canada Regulations (Consolidation) 1940, provides: "A prosecution for an offence against regulations 39, 39A or 39C of these Regulations shall not be instituted except by, or with the consent of, counsel representing the Attorney-General of Canada or of the Province."

The accused was convicted by the stipendiary magistrate for the county of Victoria for a breach of regulation 39A (*c*) of the Defence of Canada Regulations (Consolidation) 1940. On an application for a writ of *habeas corpus* it was submitted that the matter of the consent required by regulation 39B (1) goes to the jurisdiction of the magistrate to try, and that the magistrate's court, being an inferior Court, jurisdiction must be shown on the face of the warrant of commitment.

Held, that the magistrate has general jurisdiction by virtue of regulation 62 (2) and section 706 of the Criminal Code. Consent is a matter of

S. C.
In Chambers
1941

REX
v.
COOPER

procedure and of evidence only, and the person to be satisfied that the required consent has been given is the magistrate before whom the information is laid. Want of consent is a matter of defence to be raised by an accused upon his trial. The warrant of commitment is good on its face and the material does not disclose a want of jurisdiction.

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by MANSON, J. in Chambers at Vancouver on the 17th of April, 1941.

Henderson, for the application.
Pepler, K.C., D.A.-G., and *D. J. McAlpine,* for the Crown.

Cur. adv. vult.

22nd May, 1941.

MANSON, J.: Application by the prisoner Cooper for a summons for the issue of a writ of *habeas corpus* directed to the warden of Oakalla Prison Farm to produce the prisoner and for her discharge in the first instance on the issue of the writ.

The prisoner was convicted in the municipality of Saanich in the county of Victoria on the 23rd day of January, 1941, by H. C. Hall, Esq., a stipendiary magistrate in and for the said county for a breach of regulation 39A (*c*) of the Defence of Canada Regulations (Consolidation) 1940, which regulation reads in its relevant part as follows:

39A. No person shall . . . , have knowingly in his possession in quantity, . . . any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind containing any material, report or statement,

(*c*) intended or likely to be prejudicial to the safety of the State or the efficient prosecution of the war.

Regulation 63 of the said Regulations reads in part as follows:

63. (1) Every person who contravenes or fails to comply with any of these Regulations, or any order, rule, by-law, or direction, made or given under any of these Regulations, shall be guilty of an offence against that Regulation.

(2) Where no specific penalty is provided, such person shall be liable on summary conviction to a fine not exceeding five hundred dollars, or to imprisonment for a term not exceeding twelve months, or to both fine and imprisonment; . . .

It will be noted that no specific penalty is provided in regulation 39A. It follows that the provisions of regulation 63(2) apply. With regulation 63 is to be read section 706 of the Criminal Code

which makes Part XV., the summary convictions part, of the Code applicable. Regulation 39B in its relevant part reads as follows:

39B. (1) A prosecution for an offence against regulations 39, 39A or 39C of these Regulations shall not be instituted except by, or with the consent of, counsel representing the Attorney-General of Canada or of the Province: . . .

The warden returned the warrant of commitment. It reads:

SUMMARY CONVICTIONS.

WARRANT OF COMMITMENT ON A CONVICTION WHERE A PUNISHMENT IS BY IMPRISONMENT.

CANADA Province of British Columbia County of Victoria Municipality of the District of Saanich	To all or any of the constables or other peace officers in the said county of Victoria, and to the keeper of the common gaol for the county of Victoria, situated at the Oakalla Prison Farm on lot 84, group 1, New Westminster District, in the county of Westminster.

WHEREAS Lillian May Cooper late of Victoria, B.C. was this day at and in the said county of Victoria duly convicted before the undersigned for that she, the said Lillian May Cooper on the 13th day of October, 1940, at the municipality and county aforesaid, did unlawfully have knowingly in her possession in quantity books, pamphlets, circular or publication, to wit, "The Communist International" and "International of Youth" and "Manifesto of the Communist Party" and "What every Communist must know" and "The Revolutionary Movement in the Colonies" and "Communists at Work" and other such like books, pamphlets, circulars or publication, containing material, report or statement, intended or likely to be prejudicial to the safety of the State or the efficient prosecution of the war, contrary to the War Measures Act, being chapter 206 of the Revised Statutes of Canada, 1927 and the Defence of Canada Regulations (Consolidation) 1940, made and established thereunder and it was thereby adjudged that the said Lillian May Cooper for her said offence should be imprisoned in the common gaol for the said county of Victoria, situated at the Oakalla Prison Farm on lot 84, group 1, New Westminster District, in the county of Westminster, and there kept for the term of six (6) months. These are, therefore, to command you the said constables or peace officers, or any of you, to take the said Lillian May Cooper and her safely convey to the said common gaol for the county of Victoria, aforesaid, and there deliver her to the keeper thereof, together with this precept. And I do hereby command you, the said keeper of the said common gaol, to receive the said Lillian May Cooper into your custody in the said common gaol, there to imprison and keep her for the term of six (6) months, and for your so doing this shall be your sufficient warrant.

Given under my hand this 23rd day of January in the year 1941.

H. C. Hall
Stipendiary magistrate in and for
the county of Victoria.

S. C.
In Chambers
1941

REX
v.
COOPER

Manson, J.

Counsel for the prisoner raises many points but in reality many of them are no more than particulars of a few principal points and it is therefore deemed unnecessary to deal with all of them *seriatim*.

The magistrate had general jurisdiction to try the case by virtue of regulation 63 (2) (*supra*) and the Criminal Code, Sec. 706. It was a jurisdiction, however, which he might not exercise unless the prosecution was instituted with the consent of counsel representing the Attorney-General of Canada or of the Province as by regulation 39B (1) provided. A prosecution is instituted by the laying of an information. *Vide Thorpe* v. *Priestnall,* [1897] 1 Q.B. 159.

The consent need not be in writing. If writing were required Parliament could, and would, have so required by apt words as was done in 34 & 35 Vict., c. 87. The Sunday Observation Prosecution Act, 1871. That the giving of the consent in writing is the more desirable and satisfactory method of so doing is obvious. Doubtless that is the method usually adopted.

Consent is a question of fact to be proved to the satisfaction of the magistrate before whom the information is laid. While regulation 39B (1) stipulates that the consent must be that of counsel and it has been held that the consent of the representative of the authority named in the statute will not suffice (*Rex* v. *Halkett* (1909), 79 L.J.K.B. 12) nevertheless, in my view, the consent of the Attorney-General will suffice (*Rex* v. *Bickert,* [1941] 1 W.W.R. 663).

Counsel for the prisoner submits that the matter of the consent required by regulation 39B (1) goes to the jurisdiction of the magistrate to try and that, the magistrate's court being an inferior Court, jurisdiction must be shown on the face of the warrant of commitment.

As pointed out above, the magistrate has general jurisdiction by virtue of regulation 63 (2) and the Criminal Code, Sec. 706. True, the jurisdiction is one which may not be exercised until the consent of Crown counsel to the institution of the proceedings has been given. It is to be remembered that the person to be satisfied that the required consent has been given is the magistrate before whom the information is laid. He may not

be the trial magistrate and yet, if he is not, there can be no doubt of the right of the trial magistrate to proceed with the trial. Question arose in *Rex* v. *Thompson* (1913), 22 Can. C.C. 78 in the Supreme Court of Alberta, sitting *en banc,* as to whether it is necessary that a *fiat* from the Attorney-General authorizing the commencement of a prosecution for a breach of the Lord's Day Act, R.S.C. 1927, Cap. 123, should be put in evidence on the trial as a part of the case for the prosecution, and it was held by Harvey, C.J. and Stuart, J. that, the want of such a *fiat* being a matter of defence, it was unnecessary. There the *fiat* was delivered to and in the possession of the magistrate before the information was laid and at the trial the *fiat* was annexed to the information. But, had it not been and had a different magistrate tried the case from the one before whom the information was laid, then, in the absence of evidence that a *fiat* had been issued, the trial magistrate could not recite in the conviction that a *fiat* had been issued and communicated to the first magistrate before he took the information. Nevertheless it could not be said the trial magistrate had no jurisdiction. Clearly the conviction should not be quashed because the trial magistrate did not recite something in the conviction or in the warrant of commitment which did not appear in the evidence. To say that he should have acquainted himself with the fact of the *fiat* is to say that the prosecution should have led evidence proving the *fiat* and its communication to the first magistrate. That is unnecessary if I accept, as I do, the view expressed by Harvey, C.J. and Stuart, J. *The King* v. *Canadian Pacific Railway Co.* (1907), 12 Can. C.C. 549 is not an authority to the contrary—*vide* Stuart, J. in *Rex* v. *Thompson* in explanation of *The King* v. *Canadian Pacific Railway Co.*

Knowlden v. *The Queen* (1864), 5 B. & S. 532; 122 E.R. 930 was a writ of error case upon a judgment on an indictment for conspiracy tried in the Central Criminal Court. Twenty-two & 23 Vict., c. 17, s. 1, reads:

> No bill of indictment for conspiracy, among other offences, shall be presented to or found by any grand jury unless . . . , or unless such indictment for such offence be preferred by the direction or with the consent in writing of a judge or of the Attorney or Solicitor General.

The Solicitor General directed an indictment for a conspiracy

S. C.
In Chambers
1941

REX
v.
COOPER

Manson, J.

against one of four defendants and an indictment was preferred and found against them all. They were tried and found guilty and sentenced. It was held that it was not necessary that the indictment should aver that the conditions imposed by the statute had been performed, for example, that it had been preferred by the direction or with the consent of a judge or of the Attorney or Solicitor General. At p. 542 Blackburn, J. observed:

> Where there is a general jurisdiction to try, and a qualification is placed upon it by statute, the party who seeks to take advantage of the qualification or exception must show it.

Cockburn, C.J., in giving judgment affirming the conviction, at pp. 548-9 stated:

> The first and principal question is, whether the conditions required by stat. 22 & 23 Vict. c. 17, s. 1, as preliminaries to the presenting and finding indictments for the offences specified in that statute, must appear on the face of the record to have been complied with. I am of opinion that it is not necessary. The rule that every preliminary necessary to give jurisdiction must appear on the face of the record, is subject to the qualification pointed out by my brother Blackburn during the argument. Here the general jurisdiction of the grand jury to find a bill for the specified offences remaining as at common law, the statute only says, that before that jurisdiction is exercised certain conditions must be complied with: as soon as that is done the grand jury are seized of the subject-matter, and an indictment which sets forth the offence as at common law is sufficient. It would be very inconvenient that proof . . . of the consent of a judge or of the Attorney or Solicitor General having been obtained, should be given before the petty jury; and if they were stated on the record they might be traversed and must be proved. That cannot have been the intention of the Legislature; though, before the grand jury find a true bill, there ought to be enough to satisfy them that the conditions required by the statute have been complied with, and practically this will be done by the clerk of indictments, who, before he lays the indictment before them, would require the direction of the judge or the Attorney or Solicitor General to be produced. It does not appear to me that any practical inconvenience will result from holding this to be so; . . . And if there is any doubt whether a direction has been obtained from a judge, or from the Attorney or Solicitor General, the fact may be ascertained from the clerk of indictments. There can be no doubt that if a prosecution has been improperly instituted, and a deception has been practised on the officer of the Court or on the grand jury, redress could be obtained in some shape by the party improperly subjected to prosecution.

The reasoning of the learned Chief Justice is convincing and apposite in the case at Bar. It is said the Central Criminal Court was a superior Court of general jurisdiction while here the Court was one of inferior jurisdiction. There was in *Knowlden* exactly the same kind of a barrier to the exercise of

jurisdiction as that set up by regulation 39B (1). Counsel for the prisoner presses strongly the submission that in the case of inferior Courts jurisdiction must appear on the face of the conviction and of the warrant. Above I distinguished between jurisdiction and a barrier to the exercise of jurisdiction. The distinction which I have drawn is in my view exactly in accord with that drawn by Blackburn, J. in his observation above quoted and in accord with the reasoning of Cockburn, C.J. *Knowlden* on the point mentioned was followed in *Rex* v. *Waller,* [1910] 1 K.B. 364. Lord Alverstone, C.J. at p. 367 says:

> It is the duty of a clerk of assize to satisfy himself before the bill is presented to the grand jury that all the necessary steps preliminary to indictment have been taken, and, unless objection be taken by the prisoner that there was no consent in fact, it is to be presumed that the clerk of assize has discharged his duty in that respect. The case of *Knowlden* v. *The Queen,* [(1864), 5 B. & S. 532] accordingly establishes that the consent of the judge to an indictment under the Vexatious Indictments Act is not one of the matters which the prosecution is called upon to prove as a part of the case before the petty jury. The principle of that decision equally applies to the consent of the Director of Public Prosecutions under the present Act. If objection is taken by the prisoner the question will arise in each particular case as to the evidence which the Court will require to satisfy itself whether there is any ground for the objection.

In *Rex* v. *Metz* (1915), 11 Cr. App. R. 164, at 165, Lord Reading, L.C.J. cites with approval the *Waller* case and quotes the first sentence of Lord Alverstone's observations above quoted. In *In re Henderson, Stewart, Broder and Joe Go Get,* [1930] S.C.R. 45 the applicant for a writ of *habeas corpus* complained that the magistrate neglected to show in the warrant and conviction that the proceeding by summary conviction was by virtue of the authority of the Minister of National Revenue, Department of Excise, sections 133 and 134 of the Excise Act, R.S.C. 1927, Cap. 60. There the petitioner filed without objection from the Crown (as here) as exhibits to her affidavit (in addition to a copy of the warrant of commitment) copies of the information, of the conviction and of other papers to show the alleged want of jurisdiction. Prior to the proceedings in the Supreme Court of Canada *habeas corpus* proceedings were taken unsuccessfully twice in this Court, the first time before HUNTER, C.J.B.C., the second time before MACDONALD, J. The decision of HUNTER, C.J.B.C. is not reported but that of MACDONALD, J. will be found in

S. C.
In Chambers
1941

REX
v.
COOPER

Manson, J.

(1929), [41 B.C. 242]; 52 Can. C.C. 82. I quote only from the head-note of that case:

It is no objection to the conviction under the Excise Act, R.S.C. 1927, c. 60, that the informant is not shown on the face of the conviction to have been entitled to institute a prosecution under the Act. Such a question is a matter of procedure only not going to the jurisdiction.

In the Supreme Court of Canada Rinfret, J. says at p. 49:

I find nothing in sections 133 and 134 of the Excise Act to the effect that the commitment must show the proceedings to have been held "by virtue of the authority of the Minister of National Revenue, Department of Excise."

but later significantly observes on the same page:

Should we, however, infer from the provisions of the Excise Act taken as a whole that officers of excise alone are competent to lay informations concerning offences against section 176, even then it is not necessary, though perhaps desirable, to specify particulars of the informant in the warrant of commitment (Paley on Summary Convictions, 9th ed. p. 470). This would dispose of the argument that the authority of the informant is not shown in the warrant of commitment.

And the learned judge further observes at p. 50:

As to the contention that no proof of the authority of the informant was adduced at the trial, I would say that it does not raise the question of jurisdiction.

An appeal was taken from the dismissal by Rinfret, J. to the Supreme Court of Canada and the appeal was dismissed. I cannot accept the view of counsel for the prisoner that the *Henderson* case has no application on the ground that the offence there was an indictable offence. The offence was triable under the summary convictions provisions of the Code by virtue of section 127 (*c*) of the Excise Act (now section 118 (1) (*b*) of the Excise Act, 1934, being Cap. 52, Can. Stats. 1934), and was so tried.

In *Rex* v. *Montemurro,* [1924] 2 W.W.R. 250, MACDONALD, J., in this Court held that want of jurisdiction might be proved *dehors* the record but that decision is of no value to the prisoner in view of the fact that the matter of consent is a matter of procedure only and does not go to the jurisdiction. Matters of procedure cannot be enquired into on *habeas corpus* but matters of jurisdiction only. Furthermore, even if I could inquire into a matter of procedure I find nothing in the affidavit of the prisoner which establishes that the consent to the laying of the information was not given by counsel representing the Attorney-General of Canada or of the Province. An authorization by the Attorney-

General of the Province bearing date 17th October, 1940, authorizing counsel to prosecute the prisoner for an offence against regulation 39A and to conduct the prosecution on his behalf forms Exhibit D to her affidavit. Counsel representing the Attorney-General may have given the consent required by the regulation. The consent should be for the particular offence charged with particulars of time, place, etc., and should not be in general terms.

There was general jurisdiction in the magistrate and no more is required in the light of the authorities above cited. The matter of consent is a matter of procedure and of evidence only; want of consent is a matter of defence to be raised by an accused upon his trial. The warrant of commitment here is good on its face. The material does not disclose a want of jurisdiction.

The application is dismissed.

Application dismissed.

REX v. HALL.

Criminal law—Husband and wife—Divorce—Child under sixteen years of age—Non-support—"Destitute and necessitous circumstances"—Wife and child on relief—Criminal Code, Sec. 242, Subsec. 3 (b).

The accused was charged with "being a parent and under a legal duty to provide necessaries for his child under the age of sixteen years, did without lawful excuse fail to provide such necessaries, the child being in necessitous circumstances." The accused's wife obtained a divorce from her husband twelve years previously with the custody of the child who is now fifteen years of age. Prior to the birth of the son the wife got relief from the municipality of South Vancouver and for some years she got and is still getting $40 a month from the Mothers' Pensions. This, with what she is able to do herself with a small amount earned by the boy after school hours, is her only income. The accused is director-general of an organization known as The World Fellowship of Faith and Service. He gets no salary but is remunerated through collections and love gifts in money from individual members and friends of the movement. He travels extensively for the Fellowship, gives lectures, and it was proved that for some considerable time and as recently as 1939 he obtained $200 a month from the organization in Toronto. Accused was convicted and sentenced to six months' imprisonment.

C. C.
1941

REX
v.
HALL

Held, on appeal, affirming the conviction by police magistrate Wood, that the section under which the charge is laid does not create the duty, it only provides the penalty if such duty exists and has not been performed by the person charged. This duty arises under the English statute, 43 Eliz., Cap. 2, The Poor Relief Act, 1601, which is in force in British Columbia. The Crown has made the necessary proof for conviction, and the appeal is dismissed.

APPEAL by accused from his conviction by police magistrate Wood of the city of Vancouver on the 10th of January, 1941. The facts are set out in the reasons for judgment. Argued before ELLIS, Co. J. at Vancouver on the 9th of May, 1941.

Henderson, and *Banton*, for accused.
Orr, for the Crown.

Cur. adv. vult.

22nd May, 1941.

ELLIS, Co. J.: This is an appeal from a conviction of police magistrate Wood in and for the city of Vancouver, who on the 10th of January, 1941 convicted Hall on the charge

that he the said Alfred G. Hall at the said city of Vancouver, between the 25th day of October and the 5th day of November, 1940, being a parent and under a legal duty to provide necessaries for his child under the age of sixteen years, did without lawful excuse fail to provide such necessaries, the said child being in necessitous circumstances,

and sentenced him to be imprisoned in the common gaol for the county of Vancouver at Oakalla, at hard labour, for the term of six months.

The charge is laid under section 242, subsection 3 (*b*) of the Criminal Code, which reads as follows:

3. Everyone is guilty of an offence and liable upon indictment or on summary conviction to a fine of five hundred dollars, or to one year's imprisonment, or to both, who,

(*a*) as a husband or head of a family is under a legal duty to provide necessaries for his wife or any child under sixteen years of age; or

(*b*) as a parent or guardian is under a legal duty to provide necessaries for any child under sixteen years of age;

and who, if such wife or child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries.

By a decree of the Supreme Court of British Columbia issued some twelve years ago Mrs. Hall was divorced from her husband, and the custody of her children, all of whom, with the exception of David Roy Hall, the child in question, are now over sixteen

years of age, was given to her. The decree of divorce contained no provision for alimony or for the maintenance of the children.

The evidence established that the defendant is the father of the child, and that the said child is under the age of sixteen years. It was also proven that the defendant had not at any time provided any necessaries for his children, nor had any demand been made on him to do so. Mrs. Hall, before her son David was born, got relief from the municipality of South Vancouver and for some years got and is still getting $40 a month from the Mothers' Pensions, or, in other words, from the taxpayer. This assistance, with what she is able to do herself in earning money, is her only income. She said, in her evidence, that the boy goes to school, that he needs board and clothes and books and that it costs from $15 to $20 a month to bring him up.

The boy was called by the defence and gave the following evidence:

Direct examination by Mr. *Henderson*:

When will your next birthday be? July 2nd.

And you will be how old on that day? Fifteen.

You live with your mother? Yes, at 4468 Walnut Street.

And her name is? Dorothy E. Hall.

And your father, his name? Alfred Hall.

Is he the accused here? Yes sir.

. . . .

Well, have you at any time been destitute in all that time during, we will say, the last year? How do you mean by that?

Well, have you at any time been that you didn't have food? No, we haven't.

You have always had food? Yes.

And you have always had clothes? Yes.

So that you haven't been without food and clothes at any time? No.

During the last year? No, not in the last year at all.

Do you know the meaning of the word "destitute"? No.

Well you don't know what are necessaries? Yes, I know what necessaries are.

You do know what necessaries are? Yes.

Well, have you been without any of them during the last year? No, I haven't been without any of them, for all I needed all the year.

. . . .

Now you work, do you not? Yes. I work after school for about half an hour every day.

How long have you done that? Two years now, I think.

Two years? Yes, about two years in July.

It will be two years in July coming? Yes.

C. C. 1941

REX v. HALL

Ellis, Co. J.

And what would your earnings be? Well, two years ago, at first, it was about between $8 and $9 a month, and now it is up to between $10 and $15.

. . . .

This boy was bright and undoubtedly anxious to assist his mother and do what he could to assist the family budget.

His evidence, in my opinion, does not relieve the father of his duty.

The mother says they were in necessitous circumstances, so much so that the State had to be asked to give them assistance in order to live. This was done through the Mothers' Pension Act, and is still being done, and the boy was considered, and is still being considered, by the State as one requiring assistance.

As the magistrate in his reasons very properly says:

The duty to provide for children is a primary duty of parents before it is the duty of the taxpayer and this case is not one arising between the wife and father but between the State and the father.

Algiers v. *Tracey* (1916), 26 Can. C.C. 178—Court of King's Bench, Quebec—head-note:

For the purposes of a prosecution under Cr. Code, sec. 242A (Code amendment of 1913), for the summary conviction offence of non-support of a wife living in destitute or necessitous circumstances, it is no answer that the wife is being provided for by her parents if she has no legal claim against her parents for her support, and if they are little able to provide that support.

Rex v. *Wilson* (1933), 60 Can. C.C. 309—head-note:

The mere fact that a wife is being supported by the charity of relatives or others is not *per se* a defence to a prosecution under Cr. Code, s. 242 (3).

Per Harvey, C.J. (p. 312):

We all know that for some time past thousands of families unable to obtain work and without resources have been receiving relief from municipal and other sources. They are receiving relief because they are in destitute or necessitous circumstances but we would hardly be justified in holding that they have ceased to be in such circumstances because they have received relief to keep them from famishing or suffering.

Rex v. *Harenslak* (1936), 67 Can. C.C. 277. A wife owning the family home and household goods under a separation agreement may still be in "necessitous circumstances." She is not bound to dispose of home and effects before requiring her husband to contribute towards her support, and being dependent with children in her custody on public relief she is in "necessitous circumstances."

The magistrate found

Mrs. Harenslak was in destitute circumstances and the fact that she had to apply for relief, far from proving the contrary, proves that she was.

This decision was confirmed by the appellate Court.

Rex v. *Stevenson* (1936), 66 Can. C.C. 126. The head-note says:

The fact that relief is given is not in itself conclusive proof of want but it is good evidence.

Surely in the light of the principles set out in these decisions it cannot be said that if the mother is in necessitous circumstances the son she is supporting is not.

The accused is identified with an organization known as the World Fellowship of Faith and Service and is in fact international director of this body. It has branches in many parts of the world, including Toronto in Canada and San Francisco in California. It now appears that the headquarters are to be in Vancouver. Hall is director-general and the organization here is expected to play a leading role in the future. He is to get no salary but is to be remunerated through collections and love gifts in money from individual members or friends and supporters of the movement. In return Hall is to give lectures, guide the body, instruct its members and otherwise promote its teachings.

A good part of the evidence given by witnesses called by the defence was very vague as to Hall's financial position. Large portions of it must be assigned to that category of evidence classed as hearsay. It relates to conditions arising or existing after the dates set out in the information. It does show that Hall, since the organization of the Fellowship in Vancouver, around the first of this year, does not receive a fixed salary, excepting as previously stated. The auditor who audited the accounts for January, February and March and who got his information from the books of the Fellowship, and not from any personal knowledge, stated the collections and love gifts were small. He frankly admitted he had no knowledge otherwise of Hall's finances. In any event this evidence has no bearing on the case for the reasons already given.

None of the witnesses called by Hall could definitely state what he received by way of love gifts, obviously because many such gifts need not appear in the books of the Fellowship. Only those received by the treasurer would come under the auditor's

C. C. 1941

REX v. HALL

Ellis, Co. J.

eyes. Therefore this evidence cannot be comprehensive and can have only a limited weight, especially as positive evidence as to Hall's financial position was lacking, and what was said did not rebut the evidence of the Crown.

The Crown proved that Hall was getting for some considerable time, and as recently as 1939, a salary of $200 a month from the organization in Toronto, that he travelled in the interests of the Fellowship nearly all over the world, that he came to Vancouver from California in the Fall of 1940 at his own expense, if otherwise it was not proven, and lived in the Devonshire Hotel in this city in somewhat luxurious apartments, which he paid $100 a month for his lodgings only and not including meals or other living expenses; that he owned a liquor permit, and had until quite recently an account in a bank in California on which he issued cheques.

Hall is under no physical disability, but on the contrary is energetic, active and aggressive in the field of his operations.

Under the section of the Criminal Code that this charge is laid the *onus* is on the Crown to show that there is a legal duty on the father to provide necessaries for any child under sixteen years and who, if such child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries.

The only excuse set up by the defendant's witnesses is that he has no money and depends on uncertain assistance for his own existence. This evidence, considering its source, is insufficient.

The section does not create the duty, it only provides the penalty if such duty exists and has not been performed by the person charged.

This principle of law has been so extensively and ably dealt with by His Worship, Magistrate Wood, in his reasons that it, in my opinion, leaves little, if anything, for me to add.

The Crown urged in this Court and in the police court that this duty arises under an old English statute, 43 Eliz., Cap. 2, the Poor Relief Act, 1601. There appears to be no specific legislation in this Province imposing a civil duty on a parent to provide necessaries. If there is it has not been cited to me. On the other hand it has not been shown to me that 43 Eliz. is not

the law here. As far back as November 19th, 1858, Sir James Douglas published a proclamation intituled "A Proclamation having the force of Law to declare that English Law is in force in British Columbia" whereby it was enacted and proclaimed that:

> The Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation, and so far as they are not from local circumstances inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony till some time as they shall be altered by Her Majesty in Her Privy Council or by me the said Governor, or by such other legislative authority as may hereafter be legally constituted in the said Colony.

By section 3 of the British Columbia Act, 1866 (29 & 30 Vict.), Cap. 67, the colony of Vancouver Island and the colony of British Columbia were united into one colony under the name of British Columbia.

By The English Law Ordinance, 1867, the proclamation of November 19th, 1858, was repealed and it was enacted:

> From and after the passing of this Ordinance, the Civil and Criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia.

And finally we come to Cap. 88, R.S.B.C. 1936, which says:

> 1. This Act may be cited as the "English Law Act."
>
> 2. The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof.

And there the legislation rests.

The history of the introduction of English law into the colonies of British Columbia, and Vancouver's Island, and as it is now in force in the Province of British Columbia, is considered, reviewed and applied by MARTIN, J. (later Chief Justice of British Columbia and now living in honourable retirement) in his very able and extensive judgment in *Sheppard* v. *Sheppard* (1908), 13 B.C. 486. This judgment decided the Divorce and Matrimonial Causes Act, 1857 (Imp.), is in force in British Columbia and was approved by the Privy Council in *Watts and Attorney-General for British Columbia* v. *Watts*, [1908] A.C. 573. In his judgment the learned judge gives a thorough and critical analysis of the law.

C. C.
1941

REX
v.
HALL

Ellis, Co. J.

Mr. *Henderson* for Hall argued very strenuously that even if the Poor Law is in force here there is no way of enforcing it. In other words he argues there is no machinery by which the principles of the Act can be enforced. This difficulty in applying English law to this Province and in discarding portions of Imperial Acts, where it is manifestly impossible to give effect to every section, is extensively and thoroughly dealt with by the learned judge in *Sheppard* v. *Sheppard, supra.* Many illustrations are given showing the impossibility of giving effect to every detail of a statute in applying it to a new country like ours and of the absurdity of attempting so to do.

To give one short quotation from numerous illustrations the learned judge says at p. 512:

> This necessity of dispensing with impossible machinery has been recognized by their Lordships of the Privy Council in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381, at p. 393, in considering the question of the application of English law to the Straits Settlements "as far as circumstances will admit" wherein it was laid down that the law must be taken to be "modified in its application by these circumstances." This would be the case in a country newly settled by subjects of the British Crown.

I do not think it is necessary to say more on this point.

The Crown has made the necessary proof for conviction and I must uphold the conviction.

The appeal is dismissed and I find the accused guilty.

Appeal dismissed.

S. C.
1941

March 20;
June 3.

HAMILTON v. CANADA CREOSOTING COMPANY LIMITED.

Contract—Construction of hangar—Order for quantity of "split rings"—Specifications—Whether compliance with.

The defendant, building contractor, having received a contract to build a hangar at Patricia Bay, ordered from the plaintiff, manufacturer of steel split ring connectors used in timber construction work, a large quantity of split rings. A lot of the rings were delivered in October, 1939, and the defendant used some of them in a trial assembly of a truss at its North Vancouver plant. On November 17th it purported to reject this lot on certain grounds, one of which was that the rings were

not bevelled rings. The specifications did not call for bevelled rings. On November 29th, 1939, the plaintiff notified the defendant he had ready for delivery another lot of the rings, but the defendant rejected acceptance of them. The specifications provided in part: "The split-ring connectors of dimensions shown shall be made of galvanized mild steel. Each ring to be cut through at one point in its circumference in such a way as to form a tongue and slot. They shall be true circles and shall spring shut. The faces of metal smooth and free from rust." The defendant claims the rings were not true circles and did not spring shut. The plaintiff claims the trial assembly was to test the defendant's own work and not to test the rings.

Held, that the defendant makes too close a reading of the specifications. There should be reasonable resiliency. It is not necessary for the split ring to grip the core in order to function satisfactorily. The rings would fit into their grooves without damage to the wood and can be taken as "true circles" making allowance for reasonable tolerance, and that they come within the practical intent of the specifications. The strength and efficiency of a hangar would not be prejudicially affected if the rings had been used.

ACTION on a contract for the purchase and sale of a quantity of steel split rings used in timber construction work, the defendant having refused to accept the rings offered by the plaintiff on the ground that they did not comply with specifications. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 20th of March, 1941.

Collins, for plaintiff.
L. St. M. Du Moulin, for defendant.

Cur. adv. vult.

3rd June, 1941.

MORRISON, C.J.S.C.: The plaintiff manufactures in Vancouver steel split ring connectors which are used in timber construction work.

The defendant, a building contractor whose plant in British Columbia is at North Vancouver, having received a contract to build a hangar at Patricia Bay, ordered, through Mr. George Hermann, its manager in Vancouver, from the plaintiff quite a large quantity of split rings, also a small quantity of shear plates. No difficulty arises as to the shear plates.

One lot of rings was delivered in October, 1939, and a few numbers of them were used by the defendant in a trial assembly of a truss at its North Vancouver plant. On November 17th it

S. C.
1941

HAMILTON
v.
CANADA
CREOSOTING
CO. LTD.

Morrison,
C.J.S.C.

purported to reject this lot on the ground of alleged defects, one of which was that the rings were not bevelled rings. The specifications do not call for "bevelled" rings. I find that the defendant did not act reasonably in so doing on that ground.

The plaintiff manufactured and had ready for delivery another lot of 10,670 "A" rings and so notified the defendant on the 29th of November who promptly next day rejected those also by letter on November 30th. This precipitate rejection was not reasonable. That part of the specification covering the rings provided that:

> The split ring connectors of dimensions shown shall be made of galvanized mild steel. Each ring to be cut through at one point in its circumference in such a way as to form a tongue and slot. They shall be true circles and shall spring shut. The faces of metal smooth and free from rust.

One of the reasons for rejecting as above was that the rings were not true circles and did not spring shut—no mention was made of rust. Parenthetically I may say that the extent of rust was entirely negligible. I accept the submission on behalf of the plaintiff, based on evidence which I accept, namely, that reasonable tolerance should be allowed in the making of metal containers, which does not impair their usefulness in performing the function for which they are designed. This, I take it, is not disputed by Mr. Hermann in his evidence on discovery.

The plaintiff's evidence, put compendiously, is that the ring, the grooves in the wooden members joining the joints into which it is to fit, the bolt and the bolt hole are all designed with the end in view that a slip shall take place before the different parts of the joint come into full bearing, the idea being that the slip shall take place so that the different component parts of the joint should each come into full bearing.

I accept the evidence adduced on the plaintiff's behalf that it is not necessary for the split ring to grip the core in order to function satisfactorily. I am not fully satisfied that the trial assembly of the first truss fabricated for Patricia Bay hangar was in the hands of men experienced in that kind of test or that they had at the time adequate equipment for boring the holes where in preparing the wooden members it is necessary that the bolt holes be at right angles to the surface of the wooden members and that the position of the bolt holes and grooves surrounding

them in one member match their position in the next to it. In using templates to bore bolt holes in the different members there is apt to be difficulty in making the holes match in different members. If they do not match, the grooves around the corresponding bolt holes in the different members will not be matched, and difficulty will arise in putting the groove in the lower side of an upper wooden member on to the split ring which has already been placed in the groove in the upper side of the lower wooden member. This seems to have been the real difficulty at the trial assembly. The letter of November 22nd, 1939, to the defendant's general manager has this to say:

> We are taking a big chance on field fit on boring and grooving to templates and that chance should be reduced all possible through the use of the bevelled ring. I assure you our experience with the first trial truss assembly and dissembly was an eye-opener. After all, we are dealing with wood and not steel, and with the most careful laying out and boring we have to contend with knots, splits, variety of grain . . . that deflect the boring bit.

The defendant alleges that the rings are not true circles. I take it that they are designed to have some play, small it is true. I find that the rings in question would fit into their grooves without damage to the wood and can be taken to be "true circles," making allowance for reasonable tolerance and that they come within the practical intent of the specifications.

Counsel for the plaintiff submitted that the object of the trial assembly was not really to test the rings but rather to test the length and position of certain timbers in the trusses so as to ensure a member fitting in the truss when it was put in; in short to test the defendant's own work. I am asked to take into consideration the fact that the rejected 4-inch rings were subsequently sold to—and were all used elsewhere—by the National Defence Department in hangars and other buildings. I think the defendant makes too close a reading of the specifications. It is not reasonable to contend that the plaintiff did not conform to or live up to all the terms with literal exactness in dealing with such fissiparous operations, having in mind the correspondence and interviews. Such a standard is too narrow to be practically observed and not a fair guide in a concrete case. There should be reasonable resiliency. The means of harmonious compliance should not be left to such off-hand peremptory finality. I do not think that the strength or efficiency of a hangar would

S. C.
1941

HAMILTON
v.
CANADA
CREOSOTING
CO. LTD.

Morrison,
C.J.S.C.

be prejudicially affected if the rings had been used. I find the inspection of the rings at North Vancouver plant was most casual. They were in some instances left about in the rain and chucked hither and thither. I think a more balanced view should have been taken and before rejection the defendant could and should have made a more careful inspection of which the subject-matter at the time was susceptible. A number of the rings were produced at the trial as exhibits—I also had the advantage of a view at the plaintiff's works where tests were held of what was said to be similar rings by fitting them in grooves when the whole operation was demonstrated in the presence of both parties and some of their respective experts and was to me somewhat of a thaumaturgic exhibition. If the test by the defendant in assembling the trusses made by its workmen was found by it not to be satisfactory, all I can say is that none are so blind as those who do not wish to see. In short, sitting as a jury, if I may use the expression, I could not refrain from observing what I might term a clash of temperaments as between Mr. Hamilton and Mr. Hermann in their respective attitudes; the inoffensive inanimate rings being the vicarious victims.

The plaintiff is entitled to judgment for $591.48 as claimed in paragraph 3 of the amended statement of claim together with judgment for $1,757.77 as claimed in paragraph 7 of the amended statement of claim. The costs of the action together with that of the evidence taken on commission to be to the plaintiff.

Judgment for plaintiff.

REX v. STONE.

S. C.
In Chambers
1941
April 19, 26.

Criminal law—Defence of Canada Regulations (Consolidation) 1940—Conviction—Habeas corpus—Conviction in absence of accused—Regulations 39C and 62 (2).

Accused was acquitted by the police magistrate at Penticton on a charge of being a member of an illegal organization, to wit, Jehovah's Witnesses, contrary to regulation 39C of the Defence of Canada Regulations (Consolidation) 1940. On appeal to the County Court of Yale, the hearing before the learned county court judge was in public and judgment was reserved. Later in the day, in the absence of both the accused and his counsel, the learned judge noted in his book: "The appeal will be allowed and the respondent fined $100 and in default . . ." On *habeas corpus* proceedings:—

Held, that accused and his counsel should have been present when sentence was passed. Regulation 62 (2) of the said regulations prescribes: "The passing of sentence shall in any case take place in public." The applicant was not convicted nor sentenced in public. The prisoner will be discharged.

MOTION for a writ of *habeas corpus*. Heard by MANSON, J. in Chambers at Vancouver on the 19th of April, 1941.

Hodgson, for the motion.
H. W. MacInnes, for the Crown.

Cur. adv. vult.

26th April, 1941.

MANSON, J.: Motion on behalf of the applicant for a writ of *habeas corpus* and for the discharge of the applicant upon the return by the warden of Oakalla Prison Farm of the warrant of commitment.

The warrant shows the applicant to have been convicted on the 31st of March, 1941, by His Honour Judge Kelley, judge of the County Court of Yale, for that the applicant was on the 3rd day of February, 1941, at Penticton in the said county a member of an illegal organization, to wit, Jehovah's Witnesses, contrary to regulation 39C of the Defence of Canada Regulations (Consolidation) 1940.

Habeas corpus proceedings will lie when the accused has been convicted by a county court judge sitting in appeal from a summary conviction. Adamson, J., in *Rex* v. *Petit* (1931), 57

S. C. 1941

REX v. STONE

Manson, J.

Can. C.C. 216, at pp. 217, 218 and the authorities cited in support of that view.

The applicant was tried in the first instance by the police magistrate for the municipality of Penticton and acquitted. The Crown appealed and the learned county court judge convicted the appellant and sentenced him to pay a fine of $100 and in default of payment to undergo imprisonment for 60 days. The fine was not paid and the applicant was imprisoned at Oakalla Prison Farm.

The hearing before the learned county court judge was in public. Upon the conclusion of the taking of evidence judgment was reserved. Later in the day, in the absence of both the accused and his counsel the learned judge noted in his book:

> The appeal will be allowed and the respondent fined $100 and in default
> . . . .

Neither the applicant nor his counsel was before the learned judge when sentence was passed, nor were they notified of the time when or of the place where sentence would be passed. Clearly they should have been. Regulation 62 (2) of the aforementioned Regulations concludes with these words:

> The passing of sentence shall in any case take place in public.

The applicant was not convicted nor sentenced in public.

The prisoner will be discharged.

Motion granted.

C. A. 1941

May 5, 6, 20.

JACOBSON v. HUNTLEY.

Negligence—Collision between cars—Girl on bicycle injured—Cause of accident—Findings of fact—Appeal.

On the 3rd of May, 1939, at about 10.30 p.m., the infant Dorothy Jacobson was riding her bicycle southerly on the Oliver-Osoyoos Highway. When a short distance south of what is known as Bert Hall's Corner, the defendant driving a truck in the same direction overtook her, turned to his left to pass her, and after passing he then turned back to his right side. When in the course of so turning back a Chevrolet car driven by one Jory northerly struck the left rear end of the truck violently and swung the Chevrolet sharply to the left. It struck the girl, and carried her up the westerly bank of the road, causing her serious injuries. The road at this point has a black-top surface eighteen feet wide with a

gravel surface three feet wide on each side. The truck was not carrying clearance lights as required by the Regulations under the Motor-vehicle Act. It was held on the trial that the evidence established that the negligence which brought about the accident was that of Jory, that lack of clearance lights did not contribute to the accident, and the action was dismissed.

Held, on appeal, affirming the decision of MANSON, J., that the appeal is in the main concerned with facts and the usual principles applied thereto. In view of the very pronounced findings of fact in the Court below, this Court will not interfere.

Claridge v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462, applied.

APPEAL by plaintiffs from the decision of MANSON, J. of the 26th of July, 1940, in an action for damages resulting from an automobile accident which took place on the Oliver-Osoyoos Highway about one-half a mile south of Oliver and a short distance south of the cross-road known in the locality as "Bert Hall's Corner." At about 10.30 in the evening of the 3rd of May, 1939, it being a clear evening, the infant plaintiff, aged fifteen years, was riding a bicycle from Oliver in a southerly direction on the highway. The defendant Huntley was driving a truck in the same direction, and when just south of Bert Hall's Corner he overtook the bicycle and turned out to his left to pass it, and after passing, when turning back to his right side of the road, the left rear end of his truck was struck by a north-bound car driven by one Jory. The Jory car, after colliding with the truck, swerved sharply to its left and collided with the bicycle of the infant plaintiff, resulting in the bicycle being demolished and the infant plaintiff was carried up the bank at the side of the road and fell off just before the car stopped at a wire fence.

The appeal was argued at Victoria on the 5th and 6th of May, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

McAlpine, K.C., for appellants: The defendant was negligent in passing the bicycle approaching a curve, when he knew or should have known a car was approaching from the opposite direction. Immediately after the defendant's truck passed the bicycle and before he had got on to his own side of the highway the collision occurred. There is a slight curve in the road 300

C. A. 1941

JACOBSON v. HUNTLEY

yards south of "Bert Hall's Corner." The defendant should not have attempted to pass the bicycle when there was a car coming in the opposite direction: see *Rodgers* v. *Wainwright, Nelson* v. *Wainwright,* [1933] 3 W.W.R. 620, at p. 624; *Davidner* v. *Schuster, Riesenberg* v. *Schuster (No. 2),* [1936] 1 W.W.R. 120, at p. 121. Absence of clearance lights on the defendant's truck was a factor contributing to the accident and constituted negligence. The truck was 84 inches wide and should have had clearance lights. This is in breach of the regulations pursuant to the Motor-vehicle Act. The driver of the approaching car from the south had a right to assume that the vehicle ahead was of ordinary width: see *Beardsley* v. *Clark,* [1932] 2 W.W.R. 481, at pp. 482-4; *Northern Electric Co. Ltd.* v. *Kelly,* [1931] 3 W.W.R. 527, at p. 533. The learned judge below failed to appreciate the position of the truck at the time of the accident. The evidence is clear that it was so far over to the left that Jory did not have room on the road to pass.

Nicholson, for respondent: The findings of fact of the learned trial judge that Jory was between 600 and 700 feet away when Huntley passed the infant plaintiff, that Jory was coming at a high rate of speed down the centre of the road, that Jory had not resumed his own side of the road before attempting to pass Huntley, and that Huntley was on his own side of the road when Jory sought to pass, were amply justified on the evidence and should not be disturbed. Huntley was turning to his own side of the road and slowing down when he was struck. He intended letting off a passenger at the time. The rule is that the appellant must convince the Court that the trial judge is clearly wrong in his findings of fact: see *McKay Bros.* v. *V.Y.T. Co.* (1902), 9 B.C. 37; *Canadian Pacific Ry. Co.* v. *Bryce* (1909), 15 B.C. 510*n.*; *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.* (1927), 39 B.C. 241; *Nemetz* v. *Telford* (1930), 43 B.C. 281, at p. 283; *Beazley* v. *Mills Bros. Ltd.* (1936), 51 B.C. 197; *Barnes* v. *Bradshaw* (1937), *ib.* 338; *Chisholm* v. *Aird* (1930), 43 B.C. 354; *S.S. Hontestroom* v. *S.S. Sagaporack, S.S. Hontestroom* v. *S.S. Durham Castle,* [1927] A.C. 37, at pp. 47-8; *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304, at p. 306 *et seq.* The fact that the truck did not have clearance

lights is not of itself negligence: see *Howard* v. *Henderson* (1929), 41 B.C. 441; *Stewart* v. *Smith,* [1936] 3 W.W.R. 1; *Grand Trunk Railway* v. *McAlpine,* [1913] A.C. 838. The case of *Nesbitt* v. *Carney,* [1930] 3 W.W.R. 504 is readily distinguishable. It cannot be said that the learned trial judge was clearly wrong.

McAlpine, in reply, referred to *The William Hamilton Manufacturing Co.* v. *The Victoria Lumber and Manufacturing Company* (1896), 26 S.C.R. 96.

Cur. adv. vult.

20th May, 1941.

MACDONALD, C.J.B.C.: Greatly as I sympathize with the unfortunate infant plaintiff who, while exercising the greatest care, suffered severe injuries through gross negligence, I am unable to disturb the findings of fact of the learned trial judge or to hold that respondent was in any degree responsible for the loss incurred. The appeal is, in the main, concerned with facts, and the usual principles as stated in *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462 must be applied.

The learned trial judge adopted the right principle in approaching the question as to whether or not the acts of respondent were a factor causing the accident. After a careful and detailed review of the facts his Lordship assigned the sole responsibility to one Jory, an original defendant in the action, but later dismissed therefrom, doubtless because, as in fact stated by counsel, a judgment even if obtained could not be realized against him.

There was no misconception of the evidence or of the essential facts in the case. Much was said of the omission of the learned trial judge to refer to the evidence of Mrs. Bitterman, an eye witness of the occurrence. It is not, of course, necessary to refer to the evidence of every witness heard. If, of course, the evidence of a material witness was overlooked and in the result one might find, viewing the whole case, that the omission led to substantial error, other considerations would arise. That is not so in this case: all the substantial and material facts, the subject-matter of her evidence, were fully dealt with in the reasons for judgment disclosing thereby that her view of the occurrence was

C. A. 1941

JACOBSON v. HUNTLEY

rejected. There was, too, internal evidence in the case justifying rejection of her evidence if the trial judge decided to do so.

I would dismiss th appeal.

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

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

O'HALLORAN, J.A.: I agree in the result.

McDONALD, J.A.: The infant appellant Dorothy Jacobson on 3rd May, 1939, about 10.30 p.m. was proceeding on her bicycle in a southerly direction on the Oliver-Osoyoos Highway at a point near Bert Hall's Corner, where the highway is intersected by a road running east and west. She was overtaken by the respondent who was driving a truck 84 inches wide over all, and not carrying clearance lights as required by the Regulations under the Motor-vehicle Act.

There is a dispute as to just how the accident happened, but the findings of MANSON, J. the trial judge, are that the respondent was travelling more or less along the centre of the 18-foot black top road, and that after he had passed the plaintiff he proceeded for some 40 feet where he intended to stop to allow one of his passengers to alight. When he had effected this manœuvre he was travelling at the extreme right of the three-foot gravel shoulder at his right-hand side of the road and with his truck well up against the bank on the west side of the road. At this point one Jory, driving a 1927 Chevrolet sedan in a northerly direction at a high rate of speed, collided with the truck, whereby his car was swung violently to the left and up the westerly bank of the road where he carried the infant plaintiff, causing her serious injuries. The left front hub-cap of Jory's car struck the outside rim of the left rear dual tire on the truck, thus causing Jory's right-hand axle to be pushed back some 6 inches and hence his car to swing to his left, as stated.

On these findings of fact the learned judge dismissed the action, holding the respondent not to be guilty of any negligence whatever which contributed to the accident. The plaintiff appeals from this judgment and asks for a new trial largely on

the ground that the learned judge in making his findings of fact omitted to take into consideration the evidence of one Mrs. Bitterman, called by the plaintiff, who swore that the respondent did not in fact proceed down the middle of the road as found by the learned judge, but had turned to his left in order to pass the appellant, had turned back to his right and was on an angle of some 20 degrees and partly to his left of the centre line of the road when the collision took place.

It is true that the learned judge in his extended reasons for judgment made no mention of Mrs. Bitterman whatever, though her evidence, if believed, would no doubt have led to a different conclusion to that which the learned judge reached.

I know of no principle of law or of any authority which would justify us in making the assumption that the learned judge must have forgotten the evidence given by Mrs. Bitterman. On the contrary, I think that no matter what view we may have as to whether we might have reached a different conclusion, we have no right, at least under the circumstances of this case, to make any assumption that this evidence was overlooked. It is clear that the learned judge fully understood the issues involved, and the conclusions he reached are consistent only with his having rejected the evidence of Mrs. Bitterman.

The only other point that was pressed was that Jory stated that had the truck carried clearance lights as required by the statute he would not have mistaken it for a sedan, as he had done, and would have given it a wider berth. Aside from the fact that the learned judge entirely rejects Jory's evidence in every particular, I think there is no ground here for setting aside the judgment, because the judgment makes it clear that in the opinion of the learned trial judge, an opinion which on the evidence he was entitled to reach, the lack of clearance lights did not contribute in any way toward causing the accident.

In view of the very pronounced findings of fact I think we have no right to interfere, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *M. M. Colquhoun.*
Solicitor for respondent: *H. H. Boyle.*

C. A.
1941
March 13, 14, 17; *May* 20.

IN RE TAXATION ACT AND INCOME TAX ACT AND *IN RE* ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LIMITED.

Taxation — Income — Company manufacturers in Ontario — Head office in Ontario—Income alleged to be earned in British Columbia—Liability—R.S.B.C. 1924, Cap. 254, Sec. 4 (a)—R.S.B.C. 1936, Cap. 280, Sec. 3 (a).

The Firestone Tire & Rubber Company of Canada Limited, Hamilton, Ontario, manufacturers of pneumatic passenger and truck type casings and tubes, solid tyres, tyre accessories, repair materials and repair equipment, entered into a contract with Mackenzie, White & Dunsmuir Limited (referred to as the distributor), an incorporated company carrying on a wholesale business in the city of Vancouver, whereby the distributor had the exclusive right to sell Firestone products in a large portion of the Province at prices fixed by the Firestone Company. The distributor carries a stock of Firestone products varying in value from fifty to fifty-five thousand dollars. When it wishes additional stock it sends the Firestone Company a specification therefor (Exhibit 5). The Firestone Company then sends forward the goods asked for (freight prepaid) and with them a "memorandum invoice" (Exhibit 6) which describes the goods but does not mention prices, payment or terms of credit. The distributor is required to warehouse these goods at its own risk, while selling them at prices fixed by the Firestone Company, but the "right, title, ownership and property" therein remains in the Firestone Company "so long as the same or any part thereof shall remain in the said warehoused stock and shall not have been *bona fide* sold or otherwise disposed of to dealers or consumers." These warehoused goods are included on the asset side under the heading of "inventories" in the Firestone Company balance sheet. They are not included in any form in the distributor's balance sheet. Once every month the distributor is required to send the Firestone Company a "monthly inventory and sales report" (Exhibit 7) for the period ending the 20th of the month. That report in addition to particulars of the monthly opening and closing inventories of Firestone products warehoused, gives particulars of the products the distributor has received from the Firestone Company during the month and also particulars of the Firestone products the distributor has sold the trade during the month but without any prices or money amounts filled in. On receipt of this report the Firestone Company inserts therein (in Exhibit 7) the prices and money amounts of the reported sales and sends a copy of this amended Exhibit 7 to the distributor, at the same time billing the distributor for the money amount of the sales there appearing, by sending it an invoice (Exhibit 8) for that amount, payable on or before the 20th of the following month. This invoice (Exhibit 8) does not describe or refer to any particular goods but refers only to the money amount of distributor's sales for the preceding month, as calculated upon the particulars of product sales shown by the distributor in its report (Exhibit 7) after

the Firestone Company has added to Exhibit 7 the prices and total money amount thereof. The Firestone Company does not bill the distributor for the price of products it has forwarded the distributor during the said month. The above contrasts with the course prescribed in respect to certain Firestone products such as accessories, repair material, and repair equipment which the distributor purchases on terms of payment by the 20th of the month following. To these products Exhibits 6, 7, and 8, *supra*, do not apply. It is conceded for the purpose of this appeal that these last-mentioned products are purchased by the distributor from the Firestone Company in Hamilton, and accordingly that such sales are not taxable as income earned in British Columbia. This appeal does not concern them but relates only to the warehoused goods first referred to. On appeal from the decision of the Minister of Finance that the Firestone Company must pay income tax on profits made from the sale of warehoused goods in British Columbia, it was held by MURPHY, J. that the distributor, in selling the warehoused goods in British Columbia, did not do so as the Firestone Company's agent. The goods were sold to the distributor in Hamilton, in the Province of Ontario, on the basis of deferred payments involving possible price changes which did not call for any act to be done within British Columbia by the Firestone Company from which it can be said to have earned an income within the Province.

Held, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.B.C. and MCDONALD, J.A. dissenting), that the contract under review is a distributor's warehouse contract giving the distributor the right to sell goods which it has agreed to receive and warehouse. The distributors never agreed to buy the goods, but agreed to vigorously push sales and to sell to commercial accounts, indicating its true role as an agent selling respondent's goods in British Columbia.

John Deere Plow Co. v. *Agnew* (1913), 48 S.C.R. 208, distinguished.

APPEAL by the Commissioner of Income Tax from the decision of MURPHY, J. of the 24th of January, 1941 (reported, *ante*, p. 45), whereby the Firestone Tire & Rubber Company's appeal from the confirmation by the Minister of Finance of British Columbia of the income tax assessments levied against the respondent by the Commissioner of Income Tax for the said Province was allowed. The Firestone Company, incorporated under the laws of the Dominion of Canada, has its head office in Hamilton, Ontario, and manufactures automobile equipment at its plant in Hamilton. The Firestone Company had a distributor's warehouse contract with Mackenzie, White & Dunsmuir Limited, incorporated in British Columbia, wholesale dealers in automobile accessories. The contract and its attached schedule between the Firestone Company and the distributor

C. A. 1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

provides, *inter alia*: (1) The distributor is granted the exclusive right to sell Firestone products in a certain portion of British Columbia, at prices fixed by the Firestone Company; (2) the distributor is to receive and warehouse a sufficient stock of Firestone products to meet the requirements of the territory, and to "vigorously push the sale and distribution of Firestone products"; (3) right, title, ownership and property of such warehoused stock shall remain in the Firestone Company "so long as the same or any part thereof shall remain in the said warehouse stock and shall not have been *bona fide* sold or otherwise disposed of to dealers or consumers"; (4) the distributor is required to forward monthly to the Firestone Company the "monthly inventory and sales report" described in the head-note hereto; (5) provisions as to increase and decline of prices of warehoused stock; (6) provisions as to inspection discounts and deliveries; (7) accessories, repair material, and repair equipment are to be purchased by the distributor "outright"; (8) "the distributor shall pay to the company for Firestone products purchased from the company," the list price in force at the time of purchase, payment to be made on or before the 20th of the following month; (9) "the distributor has the exclusive right to sell Firestone products to dealers in the territory specified, but this contract is not to be construed as constituting the distributor the agent of the company for any purpose."

The Commissioner levied an assessment amounting to $9,577.

The appeal was argued at Vancouver on the 13th, 14th and 17th of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

H. Alan Maclean, for appellant: Since 1927 the Firestone Company has been earning income within the Taxation Act. They have been making sales in the Province through the agency of its distributor, Mackenzie, White & Dunsmuir Limited of Vancouver: see *Grainger & Son* v. *Gough* (1896), 3 T.C. 462; *F. L. Smidth & Co.* v. *F. Greenwood* (1922), 8 T.C. 193, at p. 203; *Weiss, Biheller & Brooks, Ltd.* v. *Farmer* (1922), *ib.* 381, at p. 406. The contract shows that the relationship between Firestone and distributor is that of consignor and consignment agent. The sale to the distributor is one completed in British

Columbia. The description of the contract is significant, namely, "Distributor's Warehouse Contract," suggesting bailment rather than sale. The distributor's duty is to push sales and to sell: see *Watson* v. *Sandie & Hull* (1897), 3 T.C. 611. The goods are sold at prices fixed by Firestone, and the prices at which the distributor shall account to Firestone, and the remuneration received by distributor is the equivalent of a commission: see *Ex parte Bright. In re Smith* (1879), 10 Ch. D. 566, at p. 570. In paragraph 10 of the contract the distributor is "accounting to the company for Firestone products at the price set forth in the schedule." Accounting is primarily the duty of an agent rather than a purchaser. The distributor under paragraph 6 is under no obligation until the goods are sold: see Halsbury's Laws of England, 2nd Ed., Vol. 1, sec. 415; *Adolph Lumber Co.* v. *Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306, at p. 307. The learned judge relied on *John Deere Plow Co.* v. *Agnew* (1913), 48 S.C.R. 208. It is distinguishable from the present case, but see *Helby* v. *Matthews*, [1895] A.C. 471. That the distributor is an agent see *Weiss, Biheller & Brooks Ltd.* v. *Farmer* (1922), 8 T.C. 381. The goods could not possibly have been sold to the distributor while the ownership still remains in Firestone: see *The Commissioner of Inland Revenue* v. *The Eccentric Club, Ltd.* (1925), 12 T.C. 657, at p. 690.

McAlpine, K.C., for respondent: The Firestone Company earned no income in British Columbia. To protect itself the Firestone Company retained title to tyres until they were sold. A man was employed to make adjustments on faulty tyres. He made no sales and it was expressly agreed that the contract should not be construed as creating the distributor an agent. When the distributor required tyres and other products he forwarded an order for them. The acceptance of the offer to purchase was always made in Hamilton, and the profits were made in Hamilton. All accessories were purchased outright. The question is whether the profits on the tyres are taxable because Firestone retained title until they were removed from the warehouse. Resales by the distributor were at distributor's risk, and on failure of purchaser to pay, the loss was distributor's. Price of tyres was adjusted when prices on the market varied. *Grainger*

C. A.
1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

& Son v. *Gough,* [1896] A.C. 325, is in our favour. The contract is made in Ontario. That the goods are paid for when sold is merely a term of the contract. It is merely a contract between a manufacturer and a wholesale dealer, giving exclusive right to sell the manufacturer's products. There is no control over the distributor: see *Performing Right Society* v. *Mitchell and Booker* (1924), 93 L.J.K.B. 306; *John Deere Plow Co.* v. *Agnew* (1913), 48 S.C.R. 208. The profits made by Firestone were a manufacturer's profit and made in the place of manufacture, namely, Hamilton, Ontario. They were manufactured there. Profits made outside British Columbia are not subject to taxation here.

Cur. adv. vult.

20th May, 1941.

MACDONALD, C.J.B.C.: This case turns upon the construction of the contract in question. I have examined the contract with care, and in my opinion the learned trial judge reached the right conclusion. I would, therefore, dismiss the appeal.

MCQUARRIE, J.A.: This is an appeal by the Commissioner of Income Tax of British Columbia from the judgment of MURPHY, J., setting aside an income-tax assessment against the respondent for the years 1927-1937 which had been made by the Commissioner of Income Tax and confirmed on appeal to the Minister of Finance. The appeal is brought under section 42 (6) of the Income Tax Act, Cap. 280, R.S.B.C. 1936. Approximately $9,000 is involved, to say nothing of taxes for following years. There is no dispute as to the facts. According to counsel for the respondent the whole question is—did the respondent earn any profit in British Columbia? It is manifest that if Mackenzie, White & Dunsmuir Limited is agent of the respondent, the respondent is liable for the tax. The relationship between them depends upon the contract. The respondent claims that it is a vendor and purchaser contract and not an agency agreement as alleged by the appellant. No question as to the validity of the Act is involved, nor was it raised below. The relevant facts are sufficiently stated in the reasons for judgment of my brother O'HALLORAN. In addition, I think it should be

pointed out that stock is kept in the respondent's property located at Vancouver, Victoria, New Westminster and Nelson. The fire insurance on that stock is carried by the respondent and Mackenzie, White & Dunsmuir Limited has no responsibility in connection therewith—see Exhibit 4.

Exhibit 4 is a letter dated March 1st, 1934, at Hamilton, Ontario, from the respondent to Mr. John Dunsmuir, Mackenzie, White & Dunsmuir Limited, Vancouver, B.C. The said letter reads as follows:

> You will be relieved of all responsibility whatsoever as to fire insurance on Firestone stock which is our property located at Vancouver, Victoria, New Westminster, and Nelson. This arrangement is to remain in force until the expiration of your contract August 31st, 1937.

It is to be noted that this letter definitely refers to the contract. It is true that it appears from the contract that originally the insurance was to be taken care of by Mackenzie, White & Dunsmuir Limited to the extent therein specified, but in any event, at least after the date of exhibit 4 respondent had to carry the insurance. That indicates another strong reason why the appeal should be allowed, particularly as in his reasons for judgment the learned trial judge stresses the fact [*ante*, p. 48]:

> The distributor is bound to receive and warehouse the goods set out in the memorandum invoice and so long as they remain in its warehouse or in its possession such goods are at the risk of the distributor.

I do not consider it necessary for me to review the authorities cited, as that has been done by my brother O'HALLORAN in a manner acceptable to me. I am inclined to agree with counsel for the respondent when he submits that every case must be decided on its own facts. In the result I am of opinion that the decision of the appellant as confirmed on appeal to the Provincial Minister of Finance is correct, and that on the undisputed facts the respondent comes within the Act. I would, therefore, allow the appeal.

SLOAN, J.A.: In my opinion the appeal should be allowed and as I am in such substantial agreement with the reasons for judgment handed down by my brother O'HALLORAN I deem it unnecessary to add anything thereto.

O'HALLORAN, J.A.: The respondent Firestone Tire & Rubber Company of Canada Limited is incorporated under the Dominion

C. A. 1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

O'Halloran, J.A.

Companies Act and its manufacturing plant is situate in Hamilton, Ontario. The sale of its products in the British Columbia area is conducted through Mackenzie, White & Dunsmuir Limited, Vancouver, under a "Firestone Distributor's Warehouse Contract."

The respondent's liability to pay income tax to the Province of British Columbia (for the purpose of this appeal at any rate) depends upon whether it owns the "Firestone" products sold in this Province by Mackenzie, White & Dunsmuir Limited (hereafter called "the distributor"). That is determined by the terms of the contract and the course of dealing prescribed thereby. If it is found that the respondent does own these products, then the distributor emerges *inter se* as its agent in their sale even though the distributor may sell them as an apparent principal. In that event the respondent must be held liable, for then the only sale which takes place occurs in this Province when the distributor sells to the trade.

It is common ground that certain "Firestone" products, such as accessories, repair material and repair equipment are sold the distributor in Hamilton, Ontario. The appellant Commissioner of Provincial Income Tax does not claim income tax on profits of the respondent derived from those sales. The invoices of such sales disclose the order to buy is accepted by the respondent in Hamilton; the invoices also disclose that the goods are forwarded to Vancouver on condition that they pay for them on the 20th of the following month. However, those sales are excluded from the present controversy, which concerns only "Firestone" products warehoused by the distributor in Vancouver, and for which the distributor is under no liability to pay as long as it can show they remain in its warehouse.

The distributor carries a stock of "Firestone" products in Vancouver valued at approximately $50,000. Once every month it sends the respondent a "monthly inventory and sales report" thereof (Exhibit 7) for the period ending the 20th of the month. It is important to note this report sets out under appropriate column headings—(1) the number of each product on hand at the beginning of that monthly period; that is the "opening inventory"; (2) the number of each product received from the

respondent during that monthly period; (3) the number of each product on hand at the end of that monthly period; that is the "closing inventory"; and (4) the number of each product sold by the distributor during that monthly period. It is obvious that (4) must equal the difference between (3) and the sum of (1) and (2).

On receipt of this "monthly inventory and sales report," the respondent sends the distributor a statement (Exhibit 8) of the amount it is required to remit in respect to the products listed in (4), *supra;* that is to say, for the goods sold by the distributor during the monthly period last ended. That statement shows on its face that the amount there set forth relates to the proceeds of sales made by the distributor during the last monthly period as disclosed in the "monthly inventory and sales report." It is of first significance to observe that it does not relate to sales made by the respondent to the distributor. It seems to me to be a determining point in this case that the amount there set forth does not relate to sales from the respondent to the distributor during that period. Examination of Exhibits 7 and 8 leaves no room for uncertainty on this point. Exhibit 8 dated 26th October, reads:

> Sales Sept. 21 to Oct. 20 attached . . . $20,490.66. Quantities O.K. . . . .

The word "attached" in the quotation refers to Exhibit 7, *supra,* which the respondent returns to the distributor attached to Exhibit 8, after having filled in (in Exhibit 7) the "price" column (5) and the "price extension" column (6). If the amount in Exhibit 8 related to sales from the respondent to the distributor it would check with the price extension of column (2), *supra,* in Exhibit 7, *viz.,* the number of products received from the respondent. But it does not check with column (2) but does check with the price extension of column (4), *supra,* which sets out the distributor's sales during that period. It is conclusive therefore that Exhibit 8 is not an "invoice" of sales made by the respondent to the distributor.

The fact is, the respondent does not at any time bill the distributor for any of these goods at all—as it would if it were in truth selling goods to the distributor, and as it does in the case of the sales referred to at the outset, with which we are not now

C. A.
1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

O'Halloran, J.A.

concerned. Exhibit 8 is not a sales invoice. It is in real effect, as stated, a statement from the respondent of the amount the distributor is required to remit in respect to its previous month's sales to the trade, after the fixed commissions have been adjusted. It is manifest from the nature of the transaction described that no sale or agreement to sell is made in Hamilton or in Vancouver, or at all, when the respondent ships the goods to the distributor. It is also apparent that the distributor does not buy or agree to buy goods from the respondent at any time after they are shipped to it or received by it.

This is confirmed, if confirmation is required, by the fact that Mackenzie, White & Dunsmuir Limited neither includes such goods in the inventory of assets shown in its balance sheet, nor discloses any liability in its balance sheet in respect thereto as it would if it had bought or agreed to buy the goods. The respondent, however, does include in its inventory of assets disclosed in its balance sheet the $50,000 worth of its products warehoused with the distributor in Vancouver. It is confirmed further by this extract from the evidence:

THE COURT: They [the distributor] may never sell them [the goods] and they remain the Firestone property. Suppose—without reflecting on the Mackenzie, White, Dunsmuir Company for a moment—suppose it went into bankruptcy, the Firestone Company would take those goods, they would not be entitled to rank as creditors. They could simply say "These are our goods," and take them. Is that not so, Mr. Dunsmuir?

Mr. Dunsmuir: Yes.

The conclusion reached in the Court below that the warehoused goods were sold to the distributor in Hamilton on the basis of deferred payments, with respect, cannot be supported, if the unquestioned facts to which I have referred are given the weight which their importance and relevancy demand. These facts of course are in harmony with the agreement. The foregoing analysis of Exhibits 7 and 8 definitely excludes any sale by the respondent to the distributor and clearly defines the working out in practice of the agency relationship which the agreement demands. The agreement correctly describes itself as a "distributor's warehouse contract." Nowhere in it does the distributor agree to buy the warehoused goods. If a sale were intended in a commercial agreement of this character, one would

not expect that intention to be cleverly disguised, but would expect to find it expressed in apt words.

It follows from what has been said that the distributor in Vancouver is not required to pay for the goods it receives from the respondent. Its obligation under the agreement is to account for them in the monthly inventory report, and to remit the proceeds of the sales thereof it has made during the last monthly period. The distributor obviously acts as an agent in the sale of the respondent's goods, as it is clear from what has been said that it does not itself purchase the goods from the respondent at any time. The goods are sent to the distributor in Vancouver where it holds them for the respondent. When the distributor can sell them it does so, and remits the proceeds to the respondent monthly, less the remuneration agreed on. This sale of respondent's goods by the distributor is the only sale which takes place and obviously takes place in Vancouver.

It is true the respondent fixes the prices at which the distributor may sell to the trade, and also fixes the portion of the price which the distributor shall remit when the latter has sold the goods. But in this case that is a convenient way in which to fix the distributor's commission as an agent. Agents usually receive a commission on sales, but the form in which the commission is payable may vary with the class of the business and the exigencies arising thereout. One of the exigencies of the tyre business is the maintenance of a uniform price to the trade in all parts of Canada. It requires the respondent to fix the uniform price, and to take measures all over Canada to see that it is not departed from. Once the respondent fixes the price at which the distributor shall sell, it matters not whether the latter's remuneration is fixed in terms of a percentage or as is done here in terms of a portion of the price the agent shall remit.

It goes without saying that if the respondent is to maintain and increase the market for its products in Vancouver, it is forced to keep a substantial stock in Vancouver to fill the demands of that market. For example, it would not be practicable for the distributor to take an order for a tyre and send that order to the respondent in Hamilton to be filled. The respondent could have its own warehouse in Vancouver stocked with goods and

C. A.
1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

O'Halloran, J.A.

keep a branch office there. But the business apparently does not warrant it. Again the respondent could have a distributor in Vancouver which would purchase all the "Firestone" products it kept in stock. A distributor of this description would likely buy the products in Hamilton and agree to pay for them on the 20th of the following month, as is done now in the case of accessories, repair equipment and repair material referred to at the outset.

But that policy was inexpedient, for the distributor would then have to invest a substantial sum in "Firestone" products. In that regard the responsible officer of the distributor said:

> We neither had the money nor the desire to invest as much as was called for on the basis of a shipment purchased.

In the result the respondent employed a responsible distributor to warehouse its goods in Vancouver, and which for a stipulated remuneration would sell its goods as effectually in its interest as if the respondent had its own branch office and warehouse in Vancouver. It is true this distributor sells the goods in its own name as if it owned them. But that does not destroy the agency relation, for as Channell, J. (Divisional Court) said in *Watson* v. *Sandie & Hull* as reported in [1898] 1 Q.B. 326, at p. 331:

> It is quite consistent with goods being treated as the property of the agent, as between the agent and the purchaser that, as between the agent and his foreign principal, the goods should be in fact the goods of the principal.

In the report of this decision in (1897), 67 L.J.Q.B. 319, Channell, J., is thus quoted at p. 321:

> The truth here is that Squire & Co. are really principals, because the contracts [with the trade] are made by a person [Sandie & Hull] who is, in fact, their agent, although he contracts in his own name.

What has just been said explains paragraph 10 of the schedule attached to the contract. It reads:

> 10. The distributor has the exclusive right to sell Firestone products to dealers in the territory specified but this contract is not to be construed as constituting the distributor the agent of the company for any purpose.

That requires the distributor to sell "Firestone" products to dealers in its own name, and debars it from contracting or representing itself as an agent of the respondent in such sales. But it does not affect the real relation between the respondent and the distributor *inter se,* which is that as between them, the sales to the trade are made by a person which is in fact the respondent's agent, although its sells in its own name.

The learned judge appealed from excluded agency on the ground the distributor's liability to pay arose when the goods "disappeared" from the inventory. He reasoned that this "disappearance" might result from fire, theft or other occurrences not connected with a sale by the distributor; and that the distributor's obligation to pay might therefore arise even though it had not sold the goods. But with respect that is entirely consistent with agency. For an agent who has goods of his principal for sale must account or pay for them, whether he sells them or loses them. It is his duty to sell them or return them. Supplementing what has been already said the agreement as a whole points convincingly to the conclusion that the distributor holds the goods for sale on behalf of the respondent and that at no time does it purchase the goods itself.

The provision for the respondent's lien in paragraph 4 stipulates the property shall remain in the respondent

so long as the same or any part thereof shall remain in the said warehoused stock and shall not have been *bona fide* sold or otherwise disposed of to dealers or consumers. . . .

By paragraph 5 the distributor may

resell in the usual and ordinary course of his business but not otherwise any of the Firestone products delivered or to be delivered by the company . . .

It is evident that the word "resell" in paragraph 5 and in one or two other places in the contract really means "sell." Read as "resell" it implies a previous sale to the distributor; but that is excluded by the language of paragraphs 4 and 5 just quoted, in addition to other cogent reasons already stated. If the distributor had already bought the goods, it could, of course, sell them at will, and it would not require the respondent's permission given in paragraph 5 to "resell in the usual and ordinary course of his business."

John Deere Plow Co. v. *Agnew* (1913), 48 S.C.R. 208 was much relied on to support the judgment appealed from. That case turned upon the right of an unlicensed extraprovincial company to sue in this Province, if it was "carrying on business" in the Province. The right to sue is not involved here, nor may the appellant's claim to the payment of income tax be determined by a decision as to whether the respondent is "carrying on business" in the Province within the meaning of the Companies Act

C. A.
1941

IN RE TAXATION ACT AND INCOME TAX ACT AND IN RE ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LTD.

O'Halloran, J.A.

provisions considered in the *John Deere Plow Co.* case. By section 3 (1) (*a*) of the Income Tax Act, Cap. 280, R.S.B.C. 1936, the income earned within the Province of persons not resident in the Province shall be liable to taxation.

By section 2 of the same Act "person" includes "corporations, agents and trustees"; and "income" includes:

> (*c*) All income, revenue, . . . , or profits arising, received, gained, acquired, or accrued due from . . . any venture, business, or profession of any kind whatsoever.

In my view "profits from any venture" within the Province may be quite a different thing from profits from "carrying on business" in the Province; the more so if the latter statutory phrase should be restricted as it was in the *John Deere Plow Co.* case, *vide* the concluding paragraph of the judgment of Duff, J. (as he then was) at p. 232, to a company which

> . . . had a fixed place of business at which it carried on some part of its own business within the Province.

Furthermore, if the point were necessary to decide in this appeal, I should hesitate to hold that liability for Provincial income tax upon "profits from any venture" must depend upon whether the "venture" is an "exercise of trade" as that phrase may be interpreted in decisions based on other statutes.

But there is another essential distinction between the *John Deere Plow Co.* case and the one now under review. In the former case Agnew bought all the goods he received from the John Deere Plow Company. Under his agreement (p. 230) he had to "settle by cash and notes" for the goods on the first of the month following each shipment. That is exactly the case here in respect to the accessories, repair material and equipment for which the distributor agreed to pay on the 20th of the month following shipment. But as stated at the outset hereof, the claim of appellant Commissioner of Income Tax is not concerned with these admitted sales to the distributor. But that is not the case in respect to the goods to which this appeal applies, for unlike the distributor in the present case, Agnew had agreed to buy all the goods which he had on hand.

That the John Deere Plow Co. contract was a contract of sale and not a "distributor's warehouse contract" (as the respondent's contract in this case is truly described on its face) is further evidenced by the provision (p. 230) therein that in the event of

Agnew's default in payment on the first of the month following shipment all moneys owing by him became payable at once and the John Deere Plow Co. was authorized to sell all the goods to which the agreement related, and after crediting Agnew therewith could hold him liable for any deficiency. These provisions are consistent only with a sale of the goods when shipped. It was on these facts that Duff, J. (as he then was) said at p. 231:

> It is, in my judgment, an agreement relating to the sale and purchasing of goods embodying elaborate provisions for the protection of the sellers.

The respondent's contract under review cannot be so described. It is a distributor's warehouse contract, as it says it is, giving the distributor the "right to sell" (paragraph 1) goods which it has agreed "to receive and warehouse" (paragraph 3). Nowhere does the distributor agree to buy the goods; but it does agree in paragraph 3 "to vigorously push sales" and "to sell to commercial accounts," . . . indicating its true role as an agent selling respondent's goods. The distributor did not buy or agree to buy the goods. If the distributor decided to terminate the agreement under paragraph 14 thereof, it could return the whole of the Firestone warehouse goods to the respondent. The respondent could not then compel the distributor to pay for them.

Needless to say, that would not be so, if the distributor had bought or agreed to buy the goods as happened in the *John Deere Plow Co.* case, and in *W. T. Lamb & Sons* v. *Goring Brick Co.* (1931), 101 L.J.K.B. 214 (Court of Appeal). In the latter case as here the plaintiffs were appointed sole selling agents of the defendants. But the plaintiffs had also agreed (p. 218) which is not the case here, to pay the defendants "for all goods supplied by the end of the month following delivery."

For these reasons, with respect, I would allow the appeal.

McDONALD, J.A.: Mr. Justice MURPHY in the Court below held that this case falls within the decision in *John Deere Plow Co.* v. *Agnew* (1913), 48 S.C.R. 208. While the matter is not entirely free from doubt I think the learned judge reached the right conclusion and there is nothing useful that I can add to his reasons for judgment.

Appeal allowed, Macdonald, C.J.B.C. and McDonald, J.A. dissenting.

Solicitor for appellant: *H. Alan Maclean.*
Solicitor for respondent: *C. L. McAlpine.*

C. A.
1941
May 26, 28.

IVEY AND OWL CABS v. GUERNSEY BREEDERS' DAIRY LIMITED.

Automobile—Highway—Horse drawn milk-wagon—Attempting U turn in middle of block—Collision—Negligence—Costs—R.S.B.C. 1936, Cap. 52.

On the 21st of December, 1939, the plaintiff, a taxi-driver, was driving his car easterly on 12th Avenue in Vancouver at about 6.30 in the morning, and he saw a horse drawn milk-wagon coming toward him at a point west of Vine Street. The horse appeared to stop, and he continued on at between 30 and 35 miles per hour. The milk-wagon turned to its left intending to make a U turn in the middle of the block, and in doing so blocked the whole width of the road. The plaintiff did not see the horse turning in front of him in time to stop or turn to either side, and ran into the horse. The plaintiff's action for damages was dismissed and the defendant succeeded on its counterclaim.

Held, on appeal, varying the decision of LENNOX, Co. J., that they both failed in their duty to avoid the risk of collision and the accident resulted from their combined negligence. The Contributory Negligence Act applies and the parties being equally at fault the appeal should be allowed accordingly.

APPEAL by plaintiffs from the decision of LENNOX, Co. J. of the 29th of January, 1941, in an action for damages resulting from a collision between the plaintiffs' taxi and a milk-wagon, the property of the defendant. On the 21st of December, 1939, at about 6.30 a.m., the plaintiffs' taxi was driven easterly on 12th Avenue, a short distance west of Vine Street and between Vine and Balsam Streets. The defendant's milk-wagon with horse, was going west on 12th Avenue. The horse was facing the taxi-driver on its own side of the road, when the driver turned the horse to his left, intending to make a U turn, and when the taxi-driver reached him, horse and wagon blocked the whole roadway. The taxi-driver was going at from 30 to 35 miles an hour, and did not see the horse turning in front of him in time to stop or turn to either side and he ran into the horse. The plaintiffs' action was dismissed and judgment was given the defendant on its counterclaim for $354.60 and costs.

The appeal was argued at Vancouver on the 26th of May, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

Bull, K.C., for appellants: The taxi-driver was taking a customer home at 6.30 in the morning in December. As he went

easterly approaching Vine Street he saw the horse and milk-wagon in front of him on the proper side of the street, and the horse appeared to stop, so he continued on. Suddenly the horse turned to the left and blocked the whole roadway. The taxi-driver had his head-lights on. He was going from 30 to 35 miles an hour. The driver of the milk-wagon was trying to make a U turn in the middle of the street. Twelfth Avenue is a through street. He was acting in contravention of the traffic laws: see *Wood and Fraser* v. *Paget* (1938), 53 B.C. 125; *Miles* v. *Michaud,* [1939] 2 W.W.R. 497. A motorist is not bound to anticipate that another's car will make a U turn at a point between intersections: see *J. W. Bailey* v. *Grogan. Grogan* v. *G. R. Bailey* (1937), 52 B.C. 422, at p. 427. The unlawful act is the real cause of the accident.

G. Roy Long, for respondent: This case comes within *Davies* v. *Mann* (1842), 10 M. & W. 546. It was a clear morning and there is evidence to support the finding of the trial judge: see *Callihoo* v. *Bradbury and Walker,* [1939] 3 W.W.R 344. The taxi-driver admittedly exceeded the speed limit of 30 miles an hour and he did not keep a proper look-out: see *Tart* v. *G. W. Chitty & Co.,* [1933] 2 K.B. 453, at pp. 457-8; *Sershall* v. *Toronto Transportation Commission,* [1939] S.C.R. 287.

Bull, in reply, referred to *Petroleum Heat & Power Ltd.* v. *British Columbia Electric Ry. Co.* (1932), 46 B.C. 462. An article entitled "The Rationale of Last Clear Chance" (1940), 18 Can. Bar Rev. 665, at p. 689, cuts down *Davies* v. *Mann* (1842), 10 M. & W. 546 as far as automobile cases are concerned.

Cur. adv. vult.

On the 28th of May, 1941, the judgment of the Court was delivered by

O'HALLORAN, J.A.: The learned trial judge dismissed the "taxi-driver's" action and allowed the "milk-cart driver's" counterclaim but without giving reasons. The taxi-driver appeals. No question of *quantum* is involved.

As I view the evidence both parties were at fault. The milk-cart driver was at fault in attempting to turn his horse-drawn vehicle in the middle of the block when he saw the approaching

C. A.
1941

IVEY AND OWL CABS v. GUERNSEY BREEDERS' DAIRY LTD.

lights of the taxi. Moreover, turning in the middle of a block is prohibited by section 37 (3) of city of Vancouver By-law No. 2234. The taxi-driver was at fault also in not realizing sooner than he did, that the slow moving milk-cart was in fact turning in the middle of the street. The procession of faulty acts committed by each party is not susceptible to a chronological analysis, from which sole responsibility may be calculated by a time and distance formula.

The facts of this case distinguish it from *Lauder* v. *Robson* (1940), 55 B.C. 375. *Inter alia,* the motor-car driver in that case could have swerved to his left and avoided the pedestrian who was not committing a breach of any statute or by-law in crossing the road. In the present case there is no evidence to indicate the taxi-driver could have avoided the accident by swerving to either side. There is clear evidence he could not have done so by swerving to his right.

In my view the facts of this case exclude either party from sole responsibility. They both failed in their duty to avoid the risk of collision. The accident resulted from their combined negligence. Accordingly our Contributory Negligence Act makes them both liable for the consequences of their common negligence, *vide Petroleum Heat & Power Ltd.* v. *British Columbia Electric Ry. Co.* (1932), 46 B.C. 462, MARTIN, J.A. (later C.J.B.C.) at 467.

In my view the parties were equally at fault and the appeal should be allowed accordingly, with costs of appeal to the successful appellants. The costs in the Court below should be apportioned in the manner directed in the Contributory Negligence Act.

Appeal allowed in part.

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

Solicitor for respondent: *G. Roy Long.*

THE CORPORATION OF THE DISTRICT OF OAK BAY v. THE CORPORATION OF THE CITY OF VICTORIA.

C. A.
1941
April 29, 30; *May* 1; *June* 12.

Water—Supplied by Victoria to Oak Bay—Dispute as to rates—Complaint to Public Utilities Commission—Rate fixed—Appeal to Lieutenant-Governor in Council—Referred to Court of Appeal—B.C. Stats. 1911, Cap. 71; 1938, Cap. 47, Secs. 105 and 106.

By the Oak Bay Act, 1910, Amendment Act, 1911, the City of Victoria was obliged to supply water to the municipality of Oak Bay, and the municipality was bound to pay for it. By agreement made in 1929 the municipality paid 7½ cents per thousand gallons for the water supplied by the city. The agreement expired on the 31st of December, 1937, and the city then sought to charge Oak Bay at the rate of 12.08 cents per thousand gallons. Pending the hearing of a complaint by Oak Bay to the Public Utilities Commission in relation to said rate, the municipality continued to pay for its water at 7½ cents. On hearing evidence, the Commission on the 19th of December, 1940, fixed the rate at 6.75 cents per thousand gallons. Under section 105 of the Public Utilities Act the city appealed to the Lieutenant-Governor in Council and under section 106 of said Act the Lieutenant-Governor in Council referred the appeal to the Court of Appeal. On preliminary objection that the questions raised on the appeal involve questions of law, and there is no jurisdiction to hear the appeal:—

Held (McQuarrie and Sloan, JJ.A. dissenting), that the questions involved are pure questions of fact and the appeal should proceed.

Held, on the merits, varying the order of the Public Utilities Commission (Sloan and O'Halloran, JJ.A. dissenting), that the Commission failed to take into account the cost to the city of providing men to guard their works during the war. This charge should be allowed as a reasonable expense for maintenance and care of the plant. Secondly, the Smith's Hill Reservoir and pipe connecting it with the main system might come in useful as a standby in case of emergency, and a reasonable allowance should be made in this case. Thirdly, the Commission held that the surplus water sold to certain industrial concerns at a low price was really provided as a bonus to these concerns, and that in reaching the figure to be used as a divisor the amount of water so supplied ought to be included. The history of the matter does not bear out this conclusion, but rather in so far at least as the two chief customers are concerned (Sidney Roofing Co. and Producers Rock and Gravel Co.), the obligation to furnish water was inherited by the city from its predecessor, the Esquimalt Waterworks Company. The water furnished these two companies ought to be taken into account and deducted, and its price ought to be looked on as so much salvage for the benefit of both parties. The matter should be referred back to the Commission in order that it may vary its finding in accordance therewith.

C. A.
1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

Per SLOAN, J.A.: The issues before the Court having been held to be pure questions of fact of which the Utilities Commission is by statute the sole judge the Court has no jurisdiction to entertain the appeal.

APPEAL by the City of Victoria to the Lieutenant-Governor in Council under section 105 of the Public Utilities Act (which appeal was referred by the Lieutenant-Governor in Council to the Court of Appeal pursuant to section 106 of said Act) from an order dated the 19th of December, 1940, made by the Public Utilities Commission, fixing the rate to be charged for water supplied by the City of Victoria to the Corporation of the District of Oak Bay. The city first obtained water from Elk Lake but this was discontinued in 1913. In 1912 the city commenced construction of the water supply system from Sooke Lake and brought it into operation in 1915. The Esquimalt Waterworks Company obtained water from Thetis Lake and Goldstream Lake and River, and in 1925 the city expropriated that system. In 1890 the city laid water mains or pipes in the Oak Bay district and supplied water there on the same basis as their own residents. Oak Bay was incorporated in 1906, and in 1909 the city sold to Oak Bay its water-pipes within the limits of the municipality and entered into a contract to supply water to the municipality in bulk. Under the Oak Bay Act, 1910, Amendment Act, 1911, the city and Oak Bay were respectively placed under an obligation to furnish and to receive, accept and pay for a supply of water at all times.

The appeal was argued at Victoria on the 29th and 30th of April, and the 1st of May, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

F. L. Shaw, for appellant, moved to amend the notice of appeal by adding certain grounds of appeal.

Haldane, for respondent: The objection to amend goes to the jurisdiction. This is an appeal under section 105 of the Public Utilities Act and is confined to an appeal upon any question of fact. Under section 97 an appeal on a question of law may be had upon application to a judge of the Court of Appeal but no such application was made. The jurisdiction is limited to the order in council. This Court has no jurisdiction to hear any

appeal outside of the original notice of appeal. Clauses 2 to 7 inclusive of the notice of appeal involve questions of law.

Davey, for appellant: The Court of Appeal has the right to amend. The grounds of appeal are distinct from the notice of appeal. These are questions of fact alone and include grounds 2 to 7 inclusive above mentioned. When the matter is referred to the Court of Appeal it has jurisdiction in questions of law or fact.

30th April, 1941.

MACDONALD, C.J.B.C.: The majority are firmly of the opinion that Mr. *Haldane's* contention, *viz.,* that the questions raised in the appeal are questions of law, cannot be entertained. I put it on the ground that these are pure questions of fact; when, too, other provisions of the Act are read all doubts, I think, are removed. The appeal should be allowed to proceed.

MCQUARRIE, J.A.: We have to take the Act as we find it; it is not for us to legislate to amend it or repeal it. But it appears to me that the Act is, to put it mildly, rather unworkable; something may have to be done with it. Now whether this appeal involves a question of law as well as a question of fact or a mixed question of law and fact, which I presume so far as we are concerned would be the same thing, it affects the jurisdiction. Well, I would like to agree with the majority that everything be gone into thoroughly, but as I see it, this is an appeal involving a question of law; and I think there is something in the preliminary objection. That is all.

SLOAN, J.A.: With great deference to the contrary view of my brothers, I find myself unable to agree. In my view the question whether or not the Commission has improperly excluded from its consideration evidence that it ought to have considered, is not simply a question of fact, but involves at least a question of mixed law and fact.

I propose to amplify my reasons at a later date, because it is a question that requires careful consideration in view of the limitation surrounding the exercise of *quasi*-judicial functions of boards of this character. See *St. John* v. *Fraser,* [1935] S.C.R. 441 and cases therein referred to.

C. A.
1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

Sloan, J.A.

I content myself by saying at this stage that, to illustrate by one heading of the notice of appeal, while the question as to whether or not water-guards are a wartime necessity is a question of fact the suggested failure of the board to consider this as a relevant element in the determination of rates, and the consequences that flow therefrom, involves principles of law and not fact alone. The appeal is from the adjudication of the board because of its alleged failure to consider evidence relevant to the issues. To say that this involves fact alone is, with great respect, to overlook the true basis of the appeal.

O'HALLORAN, J.A.: I agree that as presented on this preliminary objection, the subject-matter of the appeal is a question of fact. If necessary I shall hand down reasons later.

MCDONALD, J.A.: I agree.

Objection overruled, McQuarrie and Sloan, JJ.A. dissenting.

Shaw, on the merits: The cost of supplying war guards for dams, reservoirs and pipe-lines should have been included in the rate to be paid by the respondent. The cost of the Smith's Hill Reservoir should have been included in arriving at the rate to be paid. The Commission should have placed the water taken from the system into various categories depending on the use to which it was put, and fixed a price to be paid for water in each category as required by section 15 (*c*) of the Public Utilities Act. Apart from the Act, in order to arrive at an equitable and fair rate to be paid by the respondent, the Commission should have divided the water supplied by the appellant in categories depending on the service supplied, and fixed at a fair rate to be paid for each service depending on various factors involved, such as quantity used, purpose for which it was used, and guarantee of continuous supply. The Commission erred in finding that the appellant was subsidizing industry by supplying water to commercial and industrial consumers at less than its proportional cost. On the whole appeal the Commission should have found as a fact that the employment of special guards was a reasonable and necessary

precaution for the appellant to take in war time, and should have allowed this expense as part of the cost of providing the service, and should also have been found as a fact that Smith's Hill Reservoir was an asset reasonably acquired to give the service and that it now constitutes a standby; and should have found as a fact that the appellant is providing several classes of service and should have fixed a rate for each class.

H. G. Lawson, K.C., for respondent: Where an appeal is brought under section 105 of the Public Utilities Act the appeal is limited to questions of fact. Section 15 (1) (*a*) of the Act provides that the Commission shall consider all matters which it deems proper as affecting the rate. The effect of this provision is to vest power in the Commission to determine the relevancy or irrelevancy of any evidence submitted for its consideration. This goes to the admissibility of evidence and is a question of law: see Phipson on Evidence, 7th Ed., 12, 49 and 53; *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193, at pp. 197 to 207. Paragraphs 2 to 7 of the grounds of appeal are in effect a complaint that some matter of fact has not been treated as relevant. The findings of the Commission should not be interfered with. Property used as a standby if not in fact used for a period should be excluded from consideration in determining the rate: see *Taylor* v. *Northwest Light & W. Co.,* PUR1916A 372, at pp. 385 and 391; *Boise Artesian Water Co.* v. *Public Utilities Commission* (1925), 236 P. 525; *Re Spring Valley Utilities Company* PUR1920F 139; *Hoffman* v. *Elmira Water L. & R. Co.,* PUR1920D 266, at p. 270. The use to which water is put by the purchasers does not justify discrimination in the rate: see *Re Wisconsin Public Service Corp.* (1934), 7 PUR(NS) 1, at pp. 2 and 11; *Bailey* v. *Fayette Gas-Fuel Co.* (1899), 44 Atl. 251; *Erie* v. *Pennsylvania Gas Co.,* PUR1920B 396, at p. 404. The reasonableness of the rate depends on the value of the service: see *Canada Southern Railway Co.* v. *International Bridge Company* (1883), 8 App. Cas. 723, at p. 731; *Rickett, Smith & Co.* v. *Midland Railway Co.,* [1896] 1 Q.B. 260, at p. 264. It is contrary to section 15 of the Public Utilities Act: see *Ex parte Moncton T. E. & G. Co.,* [1927] 3 D.L.R. 1112, at p. 1117; *Salisbury & Spencer Ry. Co.* v. *Southern P. Co.,* PUR1920C

C. A. 1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

688, at pp. 689 and 711. In cases where a municipality owning a utility sells outside its boundaries see *Star Invest. Co.* v. *City & County of Denver,* PUR1920B 684, at p. 689; *Re Kenosha,* PUR1918D 751, at p. 756; *In re Bluffton,* PUR1921B 716. Only property used and useful in tendering the service is taken into consideration: see *Re Telluride Power Co.,* PUR1922B 168, at p. 186.

Haldane, on the same side: With respect to subsection (2) of section 8 of the Public Utilities Act as enacted by the 1939 amendment to the Act, that subsection is inconsistent with and must prevail over, and to that extent repeal by implication section 105 of the principal Act. A later or amending statute repeals by implication such of the provisions of the earlier statute as are inconsistent with or repugnant to the provisions of the later statute: see *Summers* v. *Holborn District Board of Works,* [1893] 1 Q.B. 612, at pp. 615 and 618; Maxwell on Statutes, 7th Ed., 139; *The Dart,* [1893] P. 33; *Neptune Steam Navigation Company* v. *Sclater. The Delano,* [1895] P. 40.

Davey, in reply: Said subsection (2) must be read with sections 73, 74, 75 and 107. It gives the Commission exclusive original jurisdiction as to rates. There is an appeal by implication in this kind of a case. Although the Commissioners are the sole body to fix rates, it does not preclude an appeal on the ground of error in fact. It must be referred back by this Court to the Commissioners to fix proper rates. The section must be interpreted to allow an appeal on a wrong principle.

Cur. adv. vult.

12th June, 1941.

MACDONALD, C.J.B.C.: I agree in the judgment of my brother MCDONALD.

MCQUARRIE, J.A.: I also agree with the judgment of my brother MCDONALD.

SLOAN, J.A.: I have reached the conclusion this appeal must be dismissed. In my opinion this Court is without jurisdiction to enter upon it.

Pursuant to the provisions of an 1911 Act of the Legislature

(Oak Bay Act, 1910, Amendment Act, 1911, B.C. Stats. 1911, Cap. 71) the city of Victoria was obligated to supply water to the municipality of Oak Bay and the said municipality was bound to take and pay for it. The price to be paid and its method of computation has long been a matter of controversy between these two public bodies, see *e.g. Corporation of City of Victoria* v. *Corporation of District of Oak Bay* (1939), 54 B.C. 517.

On the 31st of December, 1929, the city of Victoria and Oak Bay entered into an agreement whereby the price of water supplied by Victoria to Oak Bay was fixed at 7½ cents per thousand gallons. This agreement expired on the 31st of December, 1937, and no further formal agreement was made between the parties. Victoria has continued since that time to supply water and Oak Bay to take and pay for it at the 7½ cent rate.

In September of 1940 Oak Bay filed a complaint in relation to the said rate with the Public Utilities Commission. After hearing the evidence adduced the said Commission on the 19th of December, 1940, issued the following order:

Upon the complaint of The Corporation of the District of Oak Bay that the existing rates, as filed with this Commission, for water supplied to the applicant by The Corporation of the City of Victoria are unjust, unreasonable, discriminatory and in violation of law, and the Commission having determined, after a hearing, that the rate hereinafter mentioned is just, reasonable and sufficient:—

THIS COMMISSION HEREBY ORDERS that the rate to be hereafter observed and in force for water supplied to The Corporation of the District of Oak Bay by The Corporation of the City of Victoria shall be 6.75 cents per thousand gallons.

From this order the city of Victoria appealed to the Lieutenant-Governor in Council and the Lieutenant-Governor in Council referred the appeal to us.

I propose now to turn to the Public Utilities Act, Cap. 47, B.C. Stats. 1938, and amendments thereto (hereinafter called "the Act") for the statutory authority under which these various steps were taken.

It is common ground that the complaint filed by Oak Bay with the Commission was in accordance with and pursuant to section 19 of the Act which reads in part as follows:

19. The Commission may . . . upon complaint that the existing rates in effect and collected . . . by any public utility for any service are unjust, unreasonable, insufficient, or discriminatory, or in anywise in viola-

C. A.
1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

Sloan, J.A.

tion of law, after a hearing, determine the just, reasonable, and sufficient rates to be thereafter observed and in force, and shall fix the same by order.

The appeal from the Commission to the Lieutenant-Governor in Council is authorized by section 105 of the Act but such appeal is limited solely to questions of fact.

The appeal from the Lieutenant-Governor in Council comes to us under section 106 of the Act which reads in part as follows:

106. Where any appeal has been brought pursuant to section 105, the Lieutenant-Governor in Council may, in its discretion, either before entering upon the appeal or at any stage of the proceedings, refer the appeal, or any question arising therein, to the Court of Appeal.

I take it that the Lieutenant-Governor in Council can only refer to us that which is properly before him, *i.e.*, questions of fact.

If an aggrieved person wishes to appeal from the Commission on questions of law his appeal lies directly to this Court subject to leave to appeal being granted by a judge thereof (section 97 of the Act). This last-mentioned right of appeal on law was not invoked by the appellant.

Upon the opening of the appeal counsel for the respondent took objection to the form of the notice of appeal alleging that the grounds set out therein were not limited to questions of fact but involved questions of law or at least mixed questions of law and fact.

I reproduce ground number 2 which is illustrative of the points raised in the notice of appeal. It reads as follows:

2. That the Public Utilities Commission was wrong in failing to consider as part of the costs of supplying water the amount The Corporation of the City of Victoria is compelled to pay for war guards for the protection of its dams and reservoirs as this is a cost occasioned entirely by the war and in the event of a failure of the water supply through sabotage the Corporation of the District of Oak Bay will suffer in common with the rest of the community.

Whether or not there is the necessity for war guards is, I agree, a question of fact but, on the other hand, the necessity having been established, the question of whether or not the charge therefor should be included as part of the costs of supplying water seemed to me, with respect, to involve the determination of a principle, *i.e.*, the legal effect of certain findings of fact, and is at least a question of mixed law and fact. So with the rest of the grounds advanced especially numbers 3 to 7 relating to the "divisor method" of computation of costs, upon which issue and

that of the Smith's Hill Reservoir a number of American authorities were cited in support of the respective legal positions of the appellant and respondent. The majority of the Court, however (my brother McQUARRIE and I dissenting), were of the view that no questions of law were involved in the appeal. The Chief Justice in delivering the judgment of the Court said [*ante*, p. 347]:

> The majority are firmly of the opinion that Mr. *Haldane's* contention, *viz.*, that the questions raised in the appeal are questions of law, cannot be entertained. I put it on the ground that these are pure questions of fact; when, too, other provisions of the Act are read all doubts, I think, are removed. The appeal should be allowed to proceed.

It is therefore settled, as far as this appeal is concerned, that the questions before us "are pure questions of fact."

That brings me then to consider whether or not an appeal lies from the findings of fact by the Commission in a proceeding instituted by a complaint under said section 19. I limit my observations to that aspect of the matter as it is the only one in question.

First of all it is clear that the general intent of the Act is to vest in the Commission an exclusive jurisdiction except where specifically otherwise provided. That is found in section 107 which reads as follows:

> 107. The Commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act and, save as in this Act is otherwise provided, no order, decision, or proceeding of the Commission shall be questioned, reviewed, or restrained by injunction, prohibition, or other process or proceeding in any Court, or be removed by *certiorari* or otherwise into any Court.

"Save as in this Act is otherwise provided" preserves the rights of appeal previously given by sections 97 and 105 and 106, to which reference has already been made above, and the right to a case stated under section 104. These sections are, of course, in the original Act of 1938.

Leaving that for a moment I now turn to section 8 of the Act. This section reads in part as follows:

> 8. No public utility shall make demand or receive any unjust, unreasonable, unduly discriminatory, . . . , or any rate otherwise in violation of law; . . .

It will be recalled that section 19 provides that the Commission may on complaint that the existing rates are

C. A. 1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

Sloan, J.A.

unjust, unreasonable, . . . , or discriminatory, or in anywise in violation of law, after a hearing, determine the just, reasonable, and sufficient rates.

And it will be remembered that by the order of the Commission it was declared that the rates charged by the city of Victoria were "unjust unreasonable discriminatory and in violation of law."

Bearing these things in mind we can now read the 1939 amendment to the Act which adds subsection (2) to section 8 as follows:

(2.) It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, or whether service is offered or furnished under substantially similar circumstances and conditions.

It seems to me that this amendment is couched in clear enough language and effect must be given to its intent. As I pointed out above the majority of this Court held that on this appeal from the order of the board declaring the rates "unjust, unreasonable, discriminatory and in violation of law" the only questions before us were "pure questions of fact" and the amendment having declared that the Commission "shall be the sole judge" of such questions of fact I am unable to see by what process of logical reasoning we have the right to enter upon an inquiry to determine if a body vested with the exclusive jurisdiction to determine a fact is wrong in its conclusion.

Keeping in mind the wide provisions of section 107 it is not difficult to see that the Legislature wishing to discourage frivolous complaints followed by expensive and lengthy appeals carved out of section 105 the right of appeal on fact when the jurisdiction of the board was invoked by a complaint under section 19. In more precise phraseology in my opinion section 105 has been repealed in part by the necessary implications of the later section 8 (2) of 1939. In my opinion the designation by statute of a Commission as the sole judge of any matter vests in that Commission the absolute, final, and exclusive jurisdiction to determine it.

We were not referred to any decisions upon this point by counsel but I note that Helm, J., in delivering the judgment of the Supreme Court of Colorado in a case on appeal from the Superior Court of Denver—*Darrow* v. *People* (1885), 8 P. 661—reached the same conclusion. In that case the charter of the

city of Denver was under consideration. It provided that the legislative power of the city should be vested in a council consisting of a board of aldermen and a board of supervisors. A section of the charter contained the following with reference to these bodies:

> Each Board shall be the sole judge of the qualifications, election and returns of its own members . . .

In considering this section Helm, J., said in part (p. 664):

> . . . the doctrine is firmly established that if, . . . , the word "sole" or "exclusive" or "final" is used, the Courts are thereby divested of all jurisdiction over the subject.

And at p. 666 when discussing the power of the boards the learned judge refers to "the exclusive character of their jurisdiction." With great deference to other views, in my opinion the matter is not open to serious argument.

It was contended by counsel for the appellant that the 1939 amendment was enacted

> so that no other tribunal shall either entertain an action to fix rates or to override the Commission's findings in collateral proceedings.

With respect I cannot agree with that submission. The possibilities foreseen by counsel were also anticipated by the Legislature and met by section 73 which reads as follows:

> 73. The finding or determination of the Commission upon any question of fact within its jurisdiction, . . . , shall be binding and conclusive upon all persons and in all Courts.

Sections 74 and 75 are also in interest in this regard and I cannot construe the 1939 amendment as having any relation to that aspect of the matter.

In my opinion it was a deliberate and successful action on the part of the Legislature, to abrogate the right to appeal on fact to the extent I have indicated. The order of the Commission cannot be challenged in the manner attempted in these proceedings and the appeal must be dismissed for want of jurisdiction to entertain it.

O'HALLORAN, J.A.: This is an appeal from a decision of the Public Utilities Commission. It is the first appeal which has come before this Court since the Commission was formed under the Public Utilities Act, Cap. 47, B.C. Stats. 1938 (assented to 9th December, 1938). It involves the price of water which the city of Victoria as a public utility in that respect under the

C. A.
1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

O'Halloran, J.A.

statute, supplies an adjoining municipality, the district of Oak Bay. The former owns and distributes the water supply which the latter buys in bulk at its municipal boundary.

On 1st January, 1938, the city of Victoria sought to charge Oak Bay at the rate of 12.08 cents per thousand gallons for water supplied Oak Bay in bulk at its municipal boundary. A tentative rate of 7.5 cents was arranged pending determination of the proper rate. Oak Bay contended either charge was "unjust, unreasonable, . . . discriminatory . . . [and] in violation of law." A hearing was held before the Public Utilities Commission. The Commission ruled that a rate of 6.75 cents per thousand gallons was "just, reasonable and sufficient." The city of Victoria appealed under section 105 of the Public Utilities Act, *supra,* to the Lieutenant-Governor in Council, which referred the appeal to this Court as it has power to do under section 106.

The appellant complains the Commission failed to include in the Oak Bay rate two items of necessary cost, *viz.,* (a) additional protection of its dams and reservoirs during the present war, and (b) the annual cost of the reservoir on Smith's Hill. The main ground of complaint, however, arises out of the practice of the city of Victoria supplying certain industries and commercial enterprises with water "below cost." "Cost" is used in this judgment to mean the unit cost per thousand gallons passing through Fountain Square in Victoria, based upon operation, maintenance and depreciation charges, together with a reasonable return upon necessary investment; *vide* Caption III. hereof. The appellant sought to compel Oak Bay to share the loss incurred by these sales "below cost." Oak Bay refused as it would then have to pay a higher rate. The Public Utilities Commission upheld the Oak Bay contention.

However, before proceeding to discuss the merits of the appeal, we have first to decide a preliminary objection raised by the respondent, that the Court is without jurisdiction to entertain the appeal.

I. Preliminary objection to jurisdiction.

Part X. (sections 96 through 107) of the Public Utilities Act, Cap. 47 of the statutes of 1938 and amendments, provides three types of appeal from decisions of the Public Utilities Commis-

sion. The first lies to the Court of Appeal on a question of law, *vide* section 97. The second also lies to the Court of Appeal, but is confined to a case stated upon any question which "in the opinion of the Commission or the Attorney-General is a question of law," *vide* section 104. The third appeal is restricted to a question of fact and lies only to the Lieutenant-Governor in Council, *vide* section 105.

But by section 106, where an appeal has been brought pursuant to section 105, the Lieutenant-Governor in Council may—

> refer the appeal, or any question arising therein, to the Court of Appeal; and may thereupon give directions . . . generally as to the procedure to be followed, and, except as varied by such directions, the rules of the Court of Appeal shall be applicable. . . . The Court of Appeal shall give such judgment as to it seems proper.

This appeal has been referred to the Court of Appeal by the Lieutenant-Governor in Council. It comes under the third class of appeal mentioned, and is thereby confined to questions of fact. The objection is taken *in limine* however, that the Court has no jurisdiction to entertain the appeal, since by section 8 (2) as amended in 1939,—

> It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, . . .

The contention is in short, that the Public Utilities Commission has been made the sole and final judge on all questions of fact, thereby rendering innocuous and repealing by implication, the appeal on fact to the Lieutenant-Governor in Council provided by section 105 and the consequential reference thereof to this Court under section 106. I am unable to give effect to that contention. In the first place I do not think it is supported by the structure and intendment of the statute as a whole. The statute is divided into twelve parts, of which Part X. relates exclusively to appeals. If it had been intended to enlarge or abridge the right of appeal, Part X. was the place to express that intention. In so far as appeals on questions of fact are concerned, sections 105 and 106 of Part X. are the master sections, to which all other sections in the statute must bow in that respect.

In the second place, it seems clear that the purpose of section

C. A.
1941

CORPORATION OF CITY OF VICTORIA
v.
CORPORATION OF DISTRICT OF OAK BAY

O'Halloran, J.A.

8 (2) was not to deny an appeal on a question of fact to the Lieutenant-Governor in Council, but rather to make the Commission the sole judge of what is a question of fact (as distinct from a question of law) so that when an appeal is launched to the Lieutenant-Governor in Council, no dispute should arise as to whether the subject-matter is or is not a question of fact. The strength and reasonableness of this view emerges more clearly if we consider the second class of appeal already mentioned, *viz.*, the appeal to the Court of Appeal on a case stated upon any question which "in the opinion of the Commission or of the Attorney-General is a question of law."

The scheme of the statute is directed to balance the rights of appeal. On the one side where it is a matter of law, the appeal lies to the Court of Appeal. On the other side, where it is a matter of fact, frequently founded on specialized knowledge, the appeal lies to the Lieutenant-Governor in Council. But in between there is a "no man's land," where abound questions of mixed law and fact as well as questions concerning which opinions may easily differ as to whether they are matters of law or of fact. It may be of some significance therefore that the appeal by way of case stated is not expressed to be upon a question of law, but is expressed to be upon any question "which in the opinion of the Commission or the Attorney-General is a question of law." It would seem the machinery is thereby provided for preventing the Commission arbitrarily or wrongly holding that a question in dispute is a matter of fact with appeal only to the Lieutenant-Governor in Council.

For if the Attorney-General is of opinion that a question which the Commission holds is a matter of fact is in reality a matter of law, he may invoke the case stated appeal to the Court of Appeal. Conversely, if the Commission regards as a matter of law that which an applicant or the Attorney-General may regard as a matter of fact, the Commission may invoke the case stated appeal to the Court of Appeal. The result of course is, that an appeal to the Lieutenant-Governor in Council on a question of fact may proceed without doubt arising that it is a question of fact. Some such safeguard is undoubtedly demanded if the appeal to the Lieutenant-Governor in Council is to receive the effect the statute provides.

The value of the appeal procedure above outlined is enhanced by the power given to the Commission in section 8 (2). The Commission is thereby constituted a tribunal of first instance with exclusive original jurisdiction to determine

> whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, . . .

The jurisdiction of all Courts of first instance is thereby excluded. As said by Lord Watson in *Barraclough* v. *Brown* (1897), 66 L.J.Q.B. 672, at 676, the Legislature

> . . . has therefore by plain implication enacted that no other Court has any authority to entertain or decide these matters.

To hold otherwise, in the language of Lord Watson, *supra*, further at p. 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.

The Public Utilities Commission is a specialized tribunal well equipped for its duties. It is composed of three members: an economist and an engineer both with wide knowledge of public utility questions together with an experienced lawyer. It is not strange that the Legislature should avail itself of their specialized knowledge and experience by constituting the Commission a tribunal of first instance with exclusive original jurisdiction.

In the circumstances I would overrule the preliminary objection. I might add, the appellant has not sought to avail itself of the right of appeal under section 97 (general appeal with leave on any question of law), or under section 104 (case stated "upon any question which in the opinion of the Commission or the Attorney-General is a question of law").

II. Smith's Hill Reservoir.

The appellant contends the Commission erred in excluding from computation of the Oak Bay rate, the annual cost (including depreciation and return upon investment) of the Smith's Hill Reservoir amounting to some $12,000.

Smith's Hill Reservoir is situate in the city of Victoria. It was constructed in 1908 when the water supply came from Elk Lake "to increase the pressure throughout the whole of the city's distribution system." In 1915 the appellant completed its "Sooke system." In 1925, the appellant acquired the "Gold-

C. A. 1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

O'Halloran, J.A.

stream system," although it is not denied the "Sooke system" itself could provide sufficient water for a city the size of Seattle, nearly ten times greater in population. The two systems do not depend on each other, but as the map presented to us shows, they join in one main shortly before reaching Fountain Square.

It is admitted that prior to July, 1934, all water supplied by the appellant to Oak Bay was delivered through the former's distribution system, and the pressure afforded by Smith's Hill Reservoir was a benefit to Oak Bay. But since July, 1934, Oak Bay has received its water in a twenty-inch main laid from Fountain Square to the Oak Bay boundary. It is stated in the admissions of facts (paragraph 20),—

> As the pressure in the said twenty-inch main is higher than the pressure that the reservoir [Smith's Hill] can provide Oak Bay receives no benefit from such reservoir.

It is quite plain that Smith's Hill Reservoir is not necessary to supply Oak Bay with water. Then is it needed as an emergency or "standby" supply? The answer must be in the negative. As already pointed out the appellant has two water systems "Sooke" and "Goldstream," which join in one main not far from Fountain Square. If the "Sooke system" were interrupted, the "Goldstream system" would provide the emergency or "standby" supply, and *vice versa*. In either case Oak Bay would receive its water supply as usual through the main from Fountain Square to Oak Bay, just the same as if Smith's Hill Reservoir did not exist.

The Commission ruled that this reservoir and its adjunct the Hillside main, should be excluded from the rate base. It held, with which I agree:

> The possibility of these two mains, [Sooke and Goldstream] both in good operating condition, failing at the same time is too remote to be taken into consideration. It is true that recently some water was supplied to Oak Bay from Smith's Hill, but this was due to the fact that the Goldstream main is in such bad condition that part of it has not operated as a supply main for some time past. It is unreasonable to ask the customer municipality [Oak Bay] to pay a return on the Goldstream main which is not operating, and on a reserve supply which is only of use because of the continued failure of that main.

Not only is the possibility of these two systems being interrupted at the same time too remote for practical consideration, but in any event, Smith's Hill Reservoir can hardly be described

as a real emergency or "standby" supply, since its supply of water (some 16 million gallons) would only last, as stated, in the admissions of fact (paragraph 20)

about one day in the summer dry period or two days in winter-time unless the large consumers were cut off entirely. Such supply to Oak Bay would be at a very low pressure and would leave the higher levels of Oak Bay without water.

Even if Smith's Hill Reservoir could be regarded as a real emergency or "standby" supply, yet I cannot see any grounds to charge Oak Bay with two emergency or "standby" supplies. The rates of a public utility should be limited to tangible assets, *viz.*, to those in use or required for use in the reasonable future. They should not extend to intangible assets not usable or required for use, for indefinite periods in the future, acquired perhaps in optimistic days, or in an attempt to keep anyone else from owning potential sources of supply: *vide* pp. 200-201, Vol. III.—report of "British Columbia Coal and Petroleum Products Commission" (1938).

In the circumstances this branch of the appeal should be dismissed.

III. Sale of water "below cost" by appellant to some industrial and commercial users.

The total annual cost of delivery of water to Fountain Square in the city of Victoria was found to be $207,000. That included operation, maintenance and depreciation charges, and a 6 per cent. return upon capital investment accepted at $2,630,000. The annual throughput of water to Fountain Square was found to be 3,868 million gallons. It was calculated upon the average output through Fountain Square for the years 1938 through 1941, less leakage and minor adjustments. The rate per thousand gallons at Fountain Square (5.35 cents) was then obtained by dividing the annual cost of $207,000 by the annual throughput of 3,868 million gallons. An additional rate of 1.4 cents per thousand gallons is charged Oak Bay (5.35 plus 1.4=6.75) to cover the cost of the "Cross Town main" in conveying the water from Fountain Square to the Oak Bay boundary.

Out of the annual throughput of 3,868 million gallons passing through Fountain Square some 260 million gallons is supplied to Oak Bay. The city of Victoria supplies some 600 million

C. A.
1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

O'Halloran, J.A.

gallons to industrial and other special users under preferred arrangements. Of this 600 million gallons some 500 million gallons relate to commercial and industrial use, 40 million gallons to hospitals, aged homes, refuges and orphanages; 40 million gallons without charge to parks and cemeteries, and 15 million gallons to two golf courses (not in Victoria or Oak Bay). The core of the matter really lies in the 500 million gallons for industrial and commercial use at preferred rates (about twice the volume taken by Oak Bay).

The argument for the city of Victoria was that Oak Bay as a suburb of Victoria benefited proportionately from those special users, and that accordingly for the purposes of ascertaining a just and reasonable rate per thousand gallons (a) the 600 million gallons aforesaid should be deducted from the accepted annual output through Fountain Square, (b) any sums received by the city of Victoria from the sale of the said 600 million gallons should be deducted from the accepted annual cost of $207,000, and (c) the proper rate would then be the annual cost as adjusted in (b) divided by the annual output as adjusted in (a).

In refusing to accept this submission of the appellant, the Commission said:

> The city's contention, that the quantities delivered for low return to certain industries should not be included in the divisor, cannot be admitted. Grants of cheap water are indirect subsidies. The effect on the city's finances is the same as if the city gave a cash subsidy to the industries sufficient to pay the difference between the preferential rates granted and the standard rates. The effect on waterworks revenue is decidedly prejudicial to other customers. Where the benefit falls is relatively immaterial. The city cannot be permitted, through its control of the water supply of the district, to compel surrounding municipalities to subsidize the city's industries.

It appears to me with respect that the Commission's conclusion in this respect is unanswerable. It should not be overlooked that while the preferred industrial and commercial use volume is now stated at 500 million gallons circumstances might easily arise to double or treble this volume.

Supply of water "below cost" to industry, is in fact a bonus, subsidy or exemption, as pointed out by the Commission. By section 177 of the Municipal Act, Cap. 199, R.S.B.C. 1936, neither the city of Victoria nor the municipality of Oak Bay

may do so without the authority of a by-law passed with the assent of 60 per cent. of the electors. Section 177 reads:

> Except where in this Act it is specifically provided to the contrary, a Municipal Council shall not have the power . . . to give any bonus or exemption from any tax, rate, or rent, or remit any tax or rate levied or rent chargeable, unless the same is embodied in a by-law . . . which has received the assent of not less than three-fifths in number of the electors who shall vote upon such by-law.

Until such by-laws have been passed by the city of Victoria and the district of Oak Bay, the power of the district of Oak Bay to agree to appellant's subsidy of industrial water users clearly does not exist. If concessions to industrial water users are of the importance and advantage urged by counsel for the appellant, no difficulty should be experienced in passing appropriate by-laws in both municipalities; and *vide* section 20 Public Utilities Act, *supra.* It should not be necessary to add that a municipal corporation cannot do indirectly what it cannot do directly: *vide Scott* v. *Corporation of Tilsonburg* (1886), 13 A.R. 233, at 237 and 249 and *Municipal Council of Sydney* v. *Campbell,* [1925] A.C. 338.

The appellant relied on section 15 (*c*) of the Public Utilities Act, *supra,* as a mandatory direction to the commission to segregate industrial water use into a distinct class or category for the purpose of fixing a special rate therefor. That section reads:

> Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of services; . . .

In my view "class of service" is not determined by the particular use made of the water after it comes through Fountain Square. If it were, the employment of the word "shall" would compel scores of categories with different rates applicable to domestic use, gardens, office buildings, garages washing motor-cars, and various kinds of industrial and commercial uses. It seems rather, "class of service" was directed to a case where different types of commodities, services or things are furnished. The water which comes through Fountain Square is the same "class of service" even though it is put to a thousand different uses as it likely is, after it reaches the consuming public.

Again, even if "class of service" in section 15 (*c*) is capable of the interpretation favoured by the appellant, there is nothing

C. A.
1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

O'Halloran, J.A.

in the section which implies (1) that it is applicable to a city or municipality limited in its powers by section 177 of the Municipal Act, *supra,* and *vide* definition of "public utility"; or (2) that the rate of any such class or category may be fixed "below cost." Section 15 (*b*) demanding "a fair and reasonable return upon the appraised property" as an essential element in the fixing of a rate, clearly negatives any implication that a rate may be fixed which is below a "cost" which as here, includes a return upon investment as well as depreciation. The loss occurred in sales "below cost" to favoured consumers is made up by charging a higher price to the great body of consumers.

There is no suggestion here of a decrease in the "cost" of unit output by reason of greater volume resulting from sales "below cost." On the contrary the appellant sought to increase the rate to Oak Bay by reason thereof. A public utility becomes such—as distinct from a private utility—because it controls or sells a commodity or thing which the great majority of the people must have. Such a utility is properly regarded as a public servant, fixed with a primary public duty to the people it serves in the public interest, to keep the price of its commodity as low as essential operation, maintenance and depreciation charges together with reasonable return upon necessary investment, will permit. It becomes "affected with a public interest" in the sense used by Lord Chief Justice Hale and adopted by the House of Lords in *Simpson* v. *Attorney-General* (1904), 74 L.J. Ch. 1, Lord Macnaghten, p. 8. In other words it becomes a "public employment" as described by Lord Chief Justice Holt in *Lane* v. *Sir Robert Cotton* (1701), 12 Mod. 472; 88 E.R. 1458, at 1464. If sales "below cost" to favoured consumers should defeat this primary public duty, the very concept of a public utility is thereby negatived.

Many phases of this question were considered in the report of the "British Columbia Coal and Petroleum Products Commission" (1935-1938) which, if not the cause was undoubtedly a factor in the enactment of the Public Utilities Act, now under consideration. It was discussed at pp. 106-108 of Vol. I. of that report relating to special jobbers' contracts in the oil industry. I quote from p. 108:

> The consumer, although an important customer of industry, is unorganized and inarticulate, while large industrial concerns as an organized force, can successfully negotiate . . . for special contracts, all the more readily, in fact, because although three parties [my note, *viz.*, (1) producer, (2) favoured purchaser, (3) general consumer] are vitally concerned in the formation of the contract, one of them the consumer, is not represented during the course of the negotiations.

It was discussed also at p. 279 of Vol. II. of the report relating to the coal industry:

> We can understand that a large industrial consumer may not incur the same costs for distribution as in the case of the domestic trade. He is entitled, therefore, to any reduction in costs in that respect; but we see no reason why he should obtain a lower price at the mine, for the coal sold him costs no more (except in the case of special preparation) and no less than the coal sold the dealers for the domestic trade. Certainly, we see no justification for sale below cost, particularly if the loss thus incurred is saddled upon another class of consumer.

In my view therefore this branch of the appeal should be dismissed also.

IV. Other water uses the appellant desires to deduct from the accepted annual output of water to Fountain Square (*vide* Caption III).

Under this heading are 15 million gallons supplied to two golf courses not in Victoria or Oak Bay. But Oak Bay has two golf courses within its own municipal limits. The appellant can have no case for a deduction in this respect.

Under this heading also (*vide* Caption III., *supra*) are some 40 million gallons used in city of Victoria parks and cemeteries, and a further 40 million gallons the city of Victoria supplies to its hospitals, aged homes, refuges and orphanages. These municipal obligations, responsibilities and powers of the appellant as a municipality should not be confused with its *status* and obligations as a public utility of water under the Public Utilities Act. Oak Bay likewise has its municipal obligations.

Whatever mutual advantage may accrue to either municipality in the carrying out of their respective municipal responsibilities and wherever the balance of that advantage may lie, it has no place in determining the rate which the city of Victoria as a public utility may charge its customer the district of Oak Bay. It is not merely a matter of a sale of something by one municipality to another. It is a matter of the supply of an essential thing by a public utility. And "public utility" as defined in the

C. A. 1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

O'Halloran, J.A.

statute does not include a municipality in respect of services it furnishes within its own boundaries, with a few exceptions of which the supply of water is not one.

I would also dismiss this branch of the appeal.

V. War guards.

The city of Victoria required additional guards for its dams at Sooke and Goldstream, since the outbreak of the present war. The military authorities claimed such protection was a municipal responsibility. The city of Victoria incurred that expense accordingly. The Commission does not seem to have ruled on the point. I do not think it is really debatable that in war time some additional protection is needed. The cost thereof is a proper cost of water and Oak Bay should bear its proper share. The amount is stated to be not large at present, but as the point has been raised, I would refer it back to the Commission to determine the "just, reasonable and sufficient" cost thereof in the circumstances. The amount so found should be included in the computation by which the rate is ascertained at Fountain Square, and the Oak Bay rate amended accordingly.

VI. Conclusion.

At the opening of the appeal the majority of the Court refused to accede to a preliminary objection by counsel for the respondent that the subject-matter of the appeal was one of law and not of fact, and that consequently no appeal lay as presented under sections 105 and 106. In agreeing with the majority I stated I did so on the view of the matter as presented in the argument on the preliminary objection. After listening to the argument on the merits of the appeal I am, with respect, confirmed in the opinion that the preliminary objection was correctly overruled.

The appeal as a whole was really concerned with one question, *viz.*, whether the rate fixed for Oak Bay was "unjust or unreasonable." By section 8 (2) of the Public Utilities Act, *supra,* that is made a question of fact. No doubt in the process of coming to a conclusion upon the statutory fact as to whether a certain rate is unjust or unreasonable, principles of law may have to be applied. But in that respect I see little distinction from the case of a jury, which in coming to its conclusion of fact, must apply the principles of law as stated by the judge. In this appeal

the Court in coming to its conclusion on the statutory question of fact, must be governed by applicable principles of law which it is deemed to know.

In the result, therefore, I would affirm the findings of the Public Utilities Commission, except in the one minor respect discussed in Caption V. hereof. I would direct the order of the Commission to be amended in that regard, but in all other respects the appeal should stand dismissed.

McDONALD, J.A.: By various statutes passed since 1873 the city of Victoria became entitled to appropriate all waters within twenty miles of the city limits. This included the Goldstream system theretofore owned by the Esquimalt Water Works Company, which system with its whole undertaking and obligations was finally taken over in 1925. Meanwhile the adjoining municipality of Oak Bay had been incorporated in 1906, and in 1909 the city sold to Oak Bay the water-pipes theretofore laid within that municipality and agreed to supply water to Oak Bay in bulk. Various contracts have been entered into and various disputes have arisen as to the price to be charged for such water delivered in bulk at the boundary between the two corporations, the city having by a statute passed in 1911 become obliged to deliver and Oak Bay to accept water in perpetuity. No satisfactory arrangement has ever yet been made as to prices.

As a method of settling these difficulties Oak Bay filed a complaint with the Public Utilities Commission, pursuant to section 19 of the Public Utilities Act of 1938, complaining that the rate of 7.5 cents per thousand gallons then being charged was unjust and unreasonable. After hearing the parties the Commission gave its decision, fixing a price of 6.75 cents. From that decision the city appealed under sections 105 and 106 of the Act to the Lieutenant-Governor in Council. Thereupon, acting under the powers conferred by said section 106 the Lieutenant-Governor in Council saw fit in its discretion to "refer the appeal" to this Court.

It will be convenient here to discuss just what safeguards the Legislature (whether wisely or unwisely being not our concern) saw fit to provide, in view of the very wide powers invested in the

C. A. 1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

McDonald, J.A.

Commission by the statute. These safeguards fall into three classes:

(1) An appeal to this Court by leave of one of its judges upon any question as to the Commission's jurisdiction or upon any question of law;

(2) A case stated to this Court upon any question which in the opinion of the Commission or of the Attorney-General is a question of law;

(3) An appeal to the Lieutenant-Governor in Council upon any question of fact. On such appeal the Lieutenant-Governor in Council may confirm, reverse, or may in its discretion "refer the appeal or any question arising therein" to this Court.

Aside from these provisions no party feeling himself aggrieved by any order of the Commission has any right of access to any Court, such being the prohibition imposed by section 107 of the Act.

Upon the opening of the hearing before us objection was taken to our jurisdiction, upon the ground that the matters we are asked to consider are questions of law and not of fact and that no leave has been given. I have formed an opinion contrary to this contention and shall hope to develop my reasons as I proceed.

Let us look first at just what the Commission in this case was called upon to do and did do, when this complaint came before it. Reading sections 19, 15 (1) (*a*) (*b*), and 44 together what happened was this: The complaint under section 19 was in effect that "the existing rates in effect and collected or (by the amendment of 1939) any rates charged or attempted to be charged" were unjust and unreasonable. Upon the hearing the Commission with a view to fixing a fair and reasonable charge for the services furnished and to giving the city (as a public utility) a fair and reasonable return upon the appraised value of its property used or prudently acquired to enable the service to be furnished, inquired (section 44) into every fact which in its judgment had any bearing on that value, and (section 15) considered all matters which it deemed proper as affecting the rate, and thereupon fixed the rate to be charged. I think it is clear that in every step taken the Commission was dealing with questions of fact and not of law. In fact no question of law such as the

interpretation of the statute or as to the admissibility of evidence or anything of that sort arises at all. The question before the Commission, and now before us, was and is, on the evidence here what is a fair rate?—and that, I think, is a pure question of fact. No question of misdirection in the usual sense, or of wrongful exclusion or admission of evidence arises. There is some analogy in the very common practice in an appellate Court in holding that, admitting all the facts to be as found by the trial judge, nevertheless he drew a wrong inference or a wrong conclusion or deduction from those facts. In such cases I think an appellate Court is not deciding a question of law but in reality is making the finding of fact that ought to have been made below.

But, it is suggested that the addition in 1939 to section 8 of the Act of the following words as subsection (2), alters the situation entirely:

(2.) It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable.

It is said that this amendment was intended to repeal sections 105 and 106 as to appeals on questions of fact. With due respect for contrary opinion, I hold a strong view that nothing of the kind was intended. Certainly the Lieutenant-Governor in Council did not think so, or it would not have gone through the solemn farce of referring the appeal to us. This, of course, may have no weight one way or the other—I merely state the fact in passing.

Reading the whole statute together, with all its amendments, I think the addition to section 8 serves two purposes: firstly it makes it clear that the injustice or unreasonableness of a rate is a question of fact (as stated above) and not of law; secondly it makes the Commission the sole judge of that fact, but as a judge of first instance only. In other words the decision of the Commission on that question is final and binding upon all the world, saving only this that the right of appeal provided by sections 105 and 106 is not interfered with. As a matter of fact the provisions of sections 73 and 74 of the Act are just as vigorous and forcible in regard to the finality and conclusiveness of the Commission's findings of fact as are those of the addition to section 8, and yet these provisions are followed by sections 105 and 106 in the original Act. The more I have considered the matter the more

C. A.
1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

McDonald, J.A.

I am convinced that the draftsman of the addition to section 8 was endeavouring and endeavouring only to get rid of the necessity of the very argument which we have had here as to whether the fixing of a rate was to be considered a question of fact or one of law. Of course he failed in his effort, a result sometimes experienced by those who try to express in words the will of the Legislature.

It is further suggested that section 19 read with the addition to section 8 conveys the meaning that as to a public utility opening operations in the first instance there would be no finality, *i.e.*, that in such case the right of appeal is preserved, but that as to altering an existing rate which is contended to be unjust and unreasonable different considerations apply and the right of appeal is lost. This suggestion, I think, is met by the fact that section 19 read with its 1939 amendment expressly includes both cases and there is nothing anywhere in the Act to indicate that there should be a different approach to the matter or a different procedure followed, whether the rate is being fixed for a first time or the existing rate is being attacked. A rate proposed for the first time may be quite as unjust as a rate already being charged and the contrary is equally true.

Coming now to the merits. The appeal falls under three main heads:

(1) The Commission failed to take into account the cost to the city of providing men to guard their works during the war. The amount up to this moment is small but the matter is important as the costs may greatly increase before the war is over. My conclusion is that the Commission must have inadvertently overlooked this item. No mention of it is made in its reasons, and I can conceive of no possible reason why the charge should not be allowed just as any other item of reasonable expense for maintenance and care of the plant, so necessary for the welfare of the inhabitants of both communities.

(2) The Commission held that Smith's Hill Reservoir and the pipe connecting same with the main system are unnecessary to the furnishing of a water supply to Oak Bay and hence no return on the city's investment should be allowed. While it is true that since 1934 Oak Bay has received no direct benefit from

these works and only as a remote possibility in case of a stoppage of supply from the main system it may ever hope to receive any such benefit nevertheless it is not seriously in dispute that this reservoir and pipe were in fact useful and necessary when acquired. Further the reservoir contains 16,000,000 gallons of pure water at all times and no one can say that in case of emergency this might not come in very useful as a standby for Oak Bay as well as for the city.

While we are not bound by the American authorities cited in this connection, these are none the less a very useful guide and the common practice there is to make a reasonable allowance in such cases. I think in fairness an allowance ought to be made on this account.

(3) The Commission held that the surplus water sold to certain industrial concerns at a low price was really provided as a bonus to these concerns and that in reaching the figure to be used as a divisor the amount of water so supplied ought to be included. The history of the matter, I think, does not bear out this conclusion but rather in so far at least as the two chief customers are concerned the obligation to furnish water was inherited by the city from its predecessor the Esquimalt Water Works Company. I think the water furnished to the Sidney Roofing Company and Producers Rock and Gravel Company Limited ought to be taken into account and deducted, and its price ought to be looked on as so much salvage for the benefit of both parties to this dispute.

Under this heading the city contends that the divisor ought also to be reduced by the amount of water furnished to the Empress Hotel and Crystal Gardens and for its parks, hospitals and cemeteries. While it is true that Oak Bay does receive a benefit from the inclusion of these items in reaching the divisor, I am not prepared to hold that the Commission was wrong in deciding that these things were provided by the city for its own benefit and that of its inhabitants and are a matter of no concern to Oak Bay which has similar obligations to its own inhabitants.

For these reasons I would, with respect, refer the matter back to the Commission in order that it may vary its finding in accordance therewith.

C. A. 1941

CORPORATION OF CITY OF VICTORIA v. CORPORATION OF DISTRICT OF OAK BAY

I think the city should have its proper costs of this appeal and of the rehearing.

Appeal allowed, Sloan and O'Halloran, JJ.A. dissenting.

Solicitor for appellant: *F. L. Shaw.*
Solicitors for respondent: *Lawson & Davis.*

C. A. 1941

May 22, 23; *June* 12.

FAMOUS FOODS LIMITED v. LAURIE'S PIE COMPANY AND LIDDLE.

Bill of exchange—Changing name of payee after acceptance—Materiality—Forbearance to sue—Consideration—Belief in cause of action—Promissory note—Compromise of liability.

Dexter Foods Limited (a business carried on by one Oldaker), secured an acceptance of the defendant to a ninety-day draft payable to the order of The Bank of Toronto for $1,020. The draft represented the purchase price of flour purchased that day by the defendant from Oldaker, but delivery of the flour was to be made later and defendant was to pay for the flour as he received it. On receipt of the draft Oldaker altered the name of the payee from "Bank of Toronto" to the "Famous Foods Limited" and initialled the alteration. The draft so altered was taken to the manager of the plaintiff company and accepted in payment of flour sold by him to Oldaker, and placed by him in the Bank of Montreal for collection. The alteration of the name of the payee by Oldaker was made without the knowledge of the manager of the plaintiff company. When the draft came due the defendant paid $321.30 on account, representing the purchase price of flour he had received from Oldaker up to that time. At this time Oldaker disappeared, leaving his creditors unpaid, and defendant received no further consignments of flour. On defendant being threatened with action for the balance due on the draft he signed a demand note for $650, and the plaintiffs agreed to accept monthly payments of $50, but in case of default the whole balance would immediately become due. No further payments were made by the defendant and on action being brought on the demand note it was held that the plaintiff was entitled to judgment for the amount claimed.

Held, on appeal, affirming the decision of HARPER, Co. J., that if one "*bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration." The respondent being guilty of nothing worse than a failure to notice the change in the draft, and honestly believing he had a good claim on the draft, forebore to sue, took a demand note and agreed to extend the

time for payments. The suggestion that respondent deliberately shut his eyes and in bad faith abstained from making enquiries as to the alteration is not justified on the evidence or supported by the findings below.

APPEAL by defendants from the decision of HARPER, Co. J. of the 8th of April, 1941, in an action to recover $650 due from the defendant Liddle as maker of a promissory note of the 30th of November, 1940. The defendant Liddle, who was in the pastry business, was buying flour from Dexter Foods Limited, the business carried on by one Oldaker, and Oldaker in turn was purchasing the pastry flour from the plaintiff company. On August 1st, 1940, Oldaker secured an acceptance of the defendant to a ninety-day draft payable to the order of The Bank of Toronto for $1,020. This draft represented the purchase price of flour purchased that day by the defendant from Oldaker, but delivery was to be made later, and defendant was given an official warehouse receipt for this flour. After receipt of the draft Oldaker altered the name of the payee from the "Bank of Toronto" to the "Famous Foods Limited" in substitution therefor, and initialled the alteration. This draft so altered was taken to Tosi, manager of the plaintiff company and accepted by him in payment of flour he had sold to Oldaker. The alteration of the name of the payee had been made by Oldaker without the knowledge of Tosi. When the draft became due the defendants paid $321.30 on account. This sum represented the purchase price of the flour that he had up to that time received from Oldaker. This amount was received with the explanation that the defendants had not received all the deliveries of flour that they were entitled to. Prior to this Oldaker had disappeared, leaving his creditors who vainly sought to locate him. The plaintiff then demanded payment of the balance of the draft and the defendants being afraid of having their business tied up, signed a demand note for $650 payable to the plaintiff and paid $51.22 in cash, representing the balance owing on the draft. The plaintiff then agreed that $50 per month would be accepted in payment of the demand note, but in case of default the whole amount would become due. The defendants made no further payments and this action was brought to enforce same.

C. A.
1941

FAMOUS FOODS LTD. v. LAURIE'S PIE CO. AND LIDDLE

The appeal was argued at Vancouver on the 22nd and 23rd of May, 1941, before MCQUARRIE, SLOAN and MCDONALD, JJ.A.

McCrossan, K.C., for appellants: The defendants purchased flour from one Oldaker, who received acceptance of a draft from the defendants for $1,020, but the flour upon which the acceptance of said draft was conditional and contingent was not delivered except in respect of $320 worth of such flour, and this was paid for in cash. On receiving the acceptance of the draft Oldaker changed the name of the payee in the draft and gave it to one Tosi, manager of the plaintiff company, in payment for flour he had received from said company. The defendants never received any more flour from Oldaker, who ran away and could not be found. There was a material alteration in the draft and it is void: see section 145 of the Bills of Exchange Act, R.S.C. 1927, Cap. 16; Maclaren's Bills, Notes and Cheques, 6th Ed., 401. The alteration of the payee is material: see *Asche* v. *Dufresne* (1916), 49 Que. S.C. 508; *Goldman* v. *Cox* (1924), 40 T.L.R. 744; Halsbury's Laws of England, 2nd Ed., Vol. 2, p. 714; *Union Bank of Canada* v. *North Shore and Northern Land Co.* (1916), 23 B.C. 64; *Suffell* v. *Bank of England* (1882), 9 Q.B.D. 555, at p. 568. The *onus* of proof is on the plaintiff. He is not the holder in due course: see section 58 (2) of the Bills of Exchange Act. It must be regular on its face: see section 56 of said Act; *Bellamy* v. *Williams* (1917), 41 O.L.R. 244. It is obvious it was not regular on its face: see 1 Sm. L.C. 13th Ed., 818; Chalmers on Bills, 10th Ed., p. 258; Byles on Bills, 20th Ed., 298; *Imperial Bank* v. *Heisz*, [1930] 1 D.L.R. 339, at p. 344; *Herbert* v. *La Banque Nationale* (1908), 40 S.C.R. 458. As to the Court of Appeal setting aside the Court below see *Evans* v. *Bartlam*, [1937] A.C. 473, at p. 479. The alterations were obvious. On the question of knowledge see *Jones* v. *Gordon* (1877), 2 App. Cas. 616, at pp. 624-5; *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, at p. 220; *Grant* v. *Imperial Trust*, [1935] 3 D.L.R. 660; *Waterous Engine Co.* v. *Town of Capreol* (1922), 52 O.L.R. 247, at p. 250; *Frey* v. *Ives* (1892), 8 T.L.R. 582; *Woollatt* v. *Stanley* (1928), 138 L.T. 620. As to the renewal note, the original draft being void there was no consideration for the note: see Halsbury's Laws of Eng-

land, 2nd Ed., Vol. 2, p. 710; Byles on Bills, 20th Ed., 298; *Banque Provinciale* v. *Arnoldi* (1901), 2 O.L.R. 624; *Bell* v. *Gardiner* (1842), 4 Man. & G. 11; *Edwards* v. *Chancellor* (1888), 52 J.P. 454. On the question of forbearance to sue see Leake on Contracts, 8th Ed., 467; Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 143; *Jackson et ux.* v. *Yeomans* (1869), 28 U.C.Q.B. 307, at p. 311; *Wade* v. *Simeon* (1846), 2 C.B. 548; *Poteliakhoff* v. *Teakle,* [1938] 3 All E.R. 686; Pollock on Contracts, 10th Ed., 190-1; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, at p. 283; *Billington* v. *Osborne* (1895), 11 T.L.R. 569; *Callisher* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449, at p. 452. In order that a compromise may be supported the parties must have equal knowledge, or at least equal means of knowledge, in the matter: see Kerr on Fraud and Mistake, 6th Ed., 113; *Cook* v. *Wright* (1861), 1 B. & S. 559; *Huddersfield Banking Company, Limited* v. *Henry Lister & Son, Limited,* [1895] 2 Ch. 273, at pp. 280-1.

Nicholson, for respondent: The action is brought on the promissory note and not on the bill of exchange. The evidence shows there was forbearance to sue when the promissory note was given. He asked for time, and forbearance to sue is good consideration. The learned judge below found there was a *bona fide* compromise. We rely on the case of *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, at p. 283. See also *Crears* v. *Hunter* (1887), 19 Q.B.D. 341, at pp. 344-6; *Re Ross, Hutchison* v. *Royal Institution for the Advancement of Learning,* [1931] 4 D.L.R. 689, at 690 and 693.

McCrossan, replied.

Cur. adv. vult.

On the 12th of June, 1941, the judgment of the Court was delivered by

MCDONALD, J.A.: The respondent sold flour to one Oldaker, who operated under the name of Dexter Foods Limited, and took in payment, as well as in payment of some bad cheques, certain commercial paper among which was included a certain draft for $1,020 drawn by Oldaker on the appellant and duly accepted. This draft was on a printed form in which the payee was origin-

C. A.
1941

FAMOUS FOODS LTD. v. LAURIE'S PIE CO. AND LIDDLE

ally The Bank of Toronto. Lines were drawn through the bank's name and that of the respondent written in. This change was initialled by Oldaker but not by the appellant, who states (and his statement being uncontradicted was accepted by HARPER, Co. J. the trial judge), that the change was made after acceptance and without his knowledge. This acceptance was given for flour purchased by appellant from Oldaker and was payable in 90 days; it being a condition of the sale agreement that the flour should be stored and paid for from time to time as deliveries of flour were made.

These conditions were quite unknown to respondent who took the draft in good faith and for value shortly after its acceptance and neither respondent nor his banker noticed the alteration. In this latter regard they were in the same boat with appellants' banker who not only took no notice of the alteration, but when the draft fell due, on appellants' instructions, paid $321.30 to respondent on account, this being the value of the flour appellants had received up to that time. At this time appellant made known to respondent the terms on which he had accepted the draft, and protested against paying any further, for the reason that Oldaker, playing true to his reputation as a crook, had disappeared and no more flour was forthcoming. Oldaker was known throughout by all parties concerned to be dishonest and to have served a gaol sentence for fraud.

In this situation when appellant refused to pay respondent's solicitor was given instructions to take the necessary steps to collect. Lengthy negotiations ensued. Appellant consulted his solicitor and finally a compromise was reached under which appellant paid $51.32 on account and gave a demand note for the balance of $650, receiving at the same time a letter from respondent's solicitor to the effect that so long as $50 a month was paid on account no further payment would be required. The present action was brought on this promissory note, upon appellant declining to pay the first $50 payment which fell due. In the proceedings leading up to trial the draft came under examination and the alteration assumed a very sinister appearance which became even more malign as the action proceeded. As a matter of fact neither respondent nor his solicitor had taken any note

of the alteration until it was brought to their attention, and during the negotiations for settlement the draft remained in the Bank of Montreal and was not looked at by anyone. Everyone knew of its existence and the controversy arose only over the question of which of the two—respondent or appellant, should suffer for Oldaker's rascality. It had to be one or the other, and appellant fearing litigation which would certainly have ensued had he failed to settle, entered into the arrangement above mentioned.

Counsel for appellant sought strenuously to bring himself on the facts without the authorities which hold that

> if [a man] *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration:

per Cockburn, C.J. in *Callisher* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449, at p. 452. This case is cited by Riddell, J. in *Drewry* v. *Percival* (1909), 19 O.L.R. 463 and that learned judge at p. 470 goes on to say:

> In *Ex parte Banner* (1881), 17 Ch. D. 480, some doubt seems to have been cast upon this principle (see p. 490) by Brett, L.J.; but this doubt is in turn spoken of with disapproval by the Court of Appeal in *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; and there can, I think, be now no doubt that the law is as stated by Cockburn, C.J.

This view of the law is approved by all the well known text-writers and is in line with the decision in *Holsworthy Urban Council* v. *Holsworthy Rural Council,* [1907] 2 Ch. 62.

For the purposes of this judgment I shall adopt the view which was evidently that of the trial judge, *viz.*: that by reason of the provisions of the Bills of Exchange Act and the decisions thereunder, an action on the draft itself would, on the evidence adduced, have failed. This, however, is far from being decisive of the case. The point here is that the respondent, being guilty of nothing worse than a failure to notice the change in the draft, and honestly believing he had a good claim on the draft, forebore to sue, took a demand note and agreed to extend the time for payment. The suggestion that respondent deliberately shut his eyes and in bad faith abstained from making enquiries as to the alteration is not justified on the evidence and is not supported by the findings of the learned trial judge. His findings are, in

C. A. 1941

FAMOUS FOODS LTD. v. LAURIE'S PIE CO. AND LIDDLE

fact, quite to the contrary, either by express words or by necessary implication.

I see nothing for it but to dismiss the appeal with costs here and below.

Appeal dismissed.

Solicitor for appellants: *Geo. E. McCrossan.*

Solicitor for respondent: *A. E. Branca.*

C. A. 1941

June 2, 12.

REX v. BLANCHARD.

Criminal law—Seduction—Conviction—Bail pending appeal—Accused joins Air Force—Stationed in Quebec when appeal is heard—Appeal dismissed—Motion by Crown for bench warrant and for order estreating bail—Refused.

Accused was convicted on a charge of seduction and was granted bail pending his appeal against conviction. Immediately after bail was granted him he joined the Air Force and was stationed in the Province of Quebec when the appeal was heard. At the conclusion of argument the appeal was dismissed by the Court of Appeal. Counsel for the Crown then moved the Court for issue of a bench warrant to bring accused back from Eastern Canada and also for an order estreating bail.

Held, that no ground has been disclosed to support the contention that the issuance of a bench warrant by the Court of Appeal is necessary or incidental to its appellate jurisdiction. Further, said Court has no jurisdiction to estreat bail.

APPEAL by accused from the conviction by MORRISON, C.J.S.C. and the verdict of a jury at the Fall Assize at Vancouver on the 15th of October, 1940, on a charge that he unlawfully did seduce and have illicit connection with a woman of previous chaste character, then under twenty-one years of age, while in the employment of the said H. Blanchard as housemaid. Accused was granted bail pending his appeal against conviction. He then joined the Air Force, and at the time of hearing the appeal he was stationed in the Province of Quebec. At the conclusion of argument before the Court of Appeal, the appeal was dismissed. Counsel for the Crown then moved the Court for the issuance of a bench warrant to bring Blanchard back from the

Province of Quebec. He also moved for an order estreating bail.

The motion was heard at Vancouver on the 2nd of June, 1941, by McQUARRIE, O'HALLORAN and McDONALD, JJ.A.

W. H. Campbell, for the motion, referred to *Rex* v. *Wah Lung* (1928), 40 B.C. 267; *Rex* v. *Stewart* (1931), 23 Cr. App. R. 82.

Burton, contra.

Cur. adv. vult.

On the 12th of June, 1941, the judgment of the Court was delivered by

O'HALLORAN, J.A.: At the conclusion of argument on 2nd June the Court pronounced its judgment unanimously dismissing the appeal of the appellant from his conviction at the Vancouver Assize. Counsel for the Crown immediately moved the Court for the issuance of a bench warrant to bring Blanchard back from Eastern Canada where it was stated he is in the Air Force, and moved also for an order estreating bail. Counsel for the Crown based his application on *Rex* v. *Stewart* (1931), 23 Cr. App. R. 82 and *Rex* v. *Wah Lung* (1928), 40 B.C. 267.

After the luncheon adjournment counsel for Blanchard joined with counsel for the Crown in pressing for the issuance of the bench warrant; counsel for the Crown then applied for an adjournment of the motion to estreat bail. The whole matter was reserved. Both the application for the bench warrant and the application to estreat bail, or for any adjournment thereof, are refused for reasons now stated. The formal order dismissing the appeal has not yet been signed and entered.

In *Rex* v. *Stewart, supra,* the Court of Criminal Appeal in England did order the estreating of bail, but under a special jurisdiction this Court does not possess. The Court of Criminal Appeal also issued a bench warrant in that case, but under circumstances quite different from those existing here, which do not require the exercise of the Court's jurisdiction in that respect. Before discussing *Rex* v. *Stewart* it is in point to remark: First, our Court of Appeal is not a Court of original jurisdiction, although it is true it possesses such original jurisdiction as may be necessary or incidental to its appellate jurisdiction: *vide* section 7 of the Court of Appeal Act, Cap. 57,

C. A. 1941

REX v. BLANCHARD

R.S.B.C. 1936, and *In re Kwong Yick Tai* (1915), 21 B.C. 127. Secondly, an appellant in a criminal appeal is not required to be present in Court when his appeal is heard, although he has the right to be present if he wishes: *vide* sections 1018 and 1021, subsection 6 of the Criminal Code.

This Court has no jurisdiction to grant bail or to take any proceedings arising out of or in relation to bail. Bail is granted not by the Court, but by "its Chief Justice or Acting Chief Justice" as *persona designata* under section 1019 of the Code. And *vide* also section 1096 *et seq.* and especially section 1099. It will be noted that *Rex* v. *Wah Lung, supra,* where bail was estreated, was a decision not of the Court of Appeal, but of the Chief Justice of the Court of Appeal sitting in Chambers. In England, however, a specific jurisdiction "to admit the appellant to bail pending the determination of his appeal" is conferred on "the Court of Criminal Appeal" by section 14 (2) of the Criminal Appeal Act, 1907; and *vide* Wrottesley & Jacobs' Law and Practice of Criminal Appeals, 235 *et seq.*

Study of *Rex* v. *Stewart* discloses that the Court acted under the special jurisdiction I have mentioned. While the main report is at p. 82, at p. 68 of (1931), 23 Cr. App. R. there is a report of the grant of bail on 30th July. On 26th October, Stewart surrendered to his bail for the hearing of his appeal. At the rising of the Court on that day his appeal being part heard, the Court again admitted him to bail. On the following day he failed to surrender to his bail. The Court then issued a bench warrant for his apprehension, ordered that the bail be estreated, and adjourned the hearing of the appeal. On 4th November the appellant surrendered and his appeal was dismissed on 13th November. The bench warrant clearly arose out of a flouting of the bail order made by the Court.

In this case the bail was not and could not be granted by this Court. Blanchard was represented by counsel and as already pointed out, was under no obligation to be present at the hearing of his appeal. There was no flouting of the Court such as occurred in *Rex* v. *Stewart*. Furthermore, in dismissing Blanchard's appeal the Court made no further substantive order of its own, such as occurs where the Crown has successfully appealed

from an acquittal, and an order for arrest and imprisonment is necessarily made by this Court. In my view no ground has been disclosed to support a contention that the issuance of a bench warrant by this Court is necessary or incidental to its appellate jurisdiction in this case. And of course this Court has no jurisdiction to estreat bail.

This matter should not be left without correcting any misapprehension regarding the instantaneous effect of judgments of this Court in criminal matters, which may have arisen by reason of an observation in *Rex* v. *Wah Lung, supra,* at p. 268 and relied upon by counsel for the Crown, that

> the appeal was not determined until the final order was drawn up and entered.

If Blanchard's appeal had been allowed then, subject to section 1025A, the pronouncement of the judgment would have been a final determination of his right to liberty without waiting for the judgment to be signed and entered. That immediate right to liberty would be subject of course to the exercise of the jurisdiction which this Court possesses of reopening any appeal before its judgment has been perfected by signing and entry: *vide Kimpton* v. *McKay* (1895), 4 B.C. 196, at 204-206; *Rex* v. *Wah Lung, supra,* and *Rithet Consolidated Ltd.* v. *Weight* (1932), 46 B.C. 345, at 347.

When the appeal is dismissed as it was here, the appellant on bail is deemed instantly to revert to the close custody of his gaoler to the same extent as though he had never been bailed at all. For even after he was bailed he was still, of course, *in custodia legis,* although not in close custody. His appeal was determined immediately upon the judgment pronouncing its dismissal, subject, however, to the power of the Court to reopen the appeal before its judgment has been perfected by signing and entry.

So far as can be ascertained this is the first occasion since the inception of this Court in 1909 that an application of this nature has been made. In coming to this conclusion I have had the benefit of the considered views of my learned brother SLOAN in addition to my learned brothers who heard the application.

Motion dismissed.

C. A.
1941
June 10, 12.

REX v. KRAWCHUK. (No. 2.)

Criminal law—Murder—Manslaughter—Provocation—Evidence of—Sufficiency of charge to jury—Criminal Code, Sec. 261.

Accused and his wife lived on a farm about one mile from Prince George. He was a section-hand on the Grand Trunk Pacific Railway, and his duties took him away from home from time to time. One Terachuk, who was an old friend of Krawchuk, lived at their house, but after he had been there for some time accused, thinking he was too intimate with his wife, drove him away from the house on two or three occasions, but Terachuk would come back when accused was away, and accused would find him there when he returned from his railway work. This caused trouble between accused and his wife, who thought Terachuk was unfairly treated. On September 14th, 1940, Terachuk came to the house in the morning, and early in the afternoon he and Mrs. Krawchuk went into Prince George. Accused, who was home at the time, then told one Stowoa, a farm-hand on the farm, that he was going to make trouble, as his wife had purchased property in Vancouver without telling him about it and he was afraid she was going to leave him. He then went into Prince George, but he did not see Terachuk or his wife. At about 6 o'clock in the evening Terachuk and Mrs. Krawchuk returned to the house and Terachuk and the farm-hand went to look after the cattle. When they were returning to the house about a half-hour later they heard a shot, and looking up they saw Krawchuk facing his wife who was close to him. They then saw Krawchuk fire two shots from a revolver at his wife, and she fell. Terachuk then grappled with the accused, two more shots were fired, one hitting Terachuk in the hand. Accused was convicted on a charge of murder.

Held, on appeal, affirming the decision of SIDNEY SMITH, J., that the accused gave evidence in his own defence and his story was a direct contradiction of the evidence given by Terachuk and Stowoa. He denied the conversation with Stowoa, and he set up what would have been a complete defence, had the jury accepted his evidence. He said that when he came to the barn he saw Terachuk and his wife in a compromising position and that Terachuk attacked him; that Terachuk had a revolver in his hand, and in the struggle that ensued between them the revolver was discharged. It is contended that the learned judge ought to have told the jury that they might disbelieve substantially the whole of the evidence tendered by the Crown and also disbelieve Krawchuk's story of his struggle with Terachuk, and yet might find that Krawchuk unlawfully and intentionally shot his wife but did so under such provocation as is defined by section 261 of the Criminal Code. The verdict of manslaughter which is now contended might have been found had the question been left open by the learned judge, was excluded by the evidence given by the appellant himself.

APPEAL by accused from the conviction by SIDNEY SMITH, J. and the verdict of a jury at the Spring Assize at Prince George

on the 17th of May, 1941, on a charge of murdering his wife Natallia Krawchuk at his farm near the city of Prince George on the 14th of September, 1940. Krawchuk was a section-hand on the Grand Trunk Pacific Railway, and his duties took him away from home at intervals. One Terachuk, who had been a friend of the Krawchuks for some time, lived at their house and was there at times when Krawchuk was away at work. There was evidence that Terachuk was unduly attentive to accused's wife, that accused knew this and drove Terachuk from his house on two occasions when coming home from his work. On the day of the crime the accused found out that his wife had purchased property in Vancouver without telling him about it, and he was in fear that his wife was going to leave him and go to Vancouver with Terachuk. Early in the afternoon Terachuk and Mrs. Krawchuk went to Prince George (about one mile away), and shortly after Krawchuk walked to Prince George. He did not see Terachuk or his wife when in Prince George. Late in the afternoon Terachuk and Mrs. Krawchuk came back to the house, and Terachuk, with one Stowoa (a farm-hand) went out to look after the cattle. When they were returning to the house and were near the barn they heard a shot, and looking up they saw Krawchuk with a revolver in his hand close to Mrs. Krawchuk, and they saw him fire two more shots at her, and she fell. This was at about 6.30 in the evening, and the police arrived shortly after 7 o'clock, when Krawchuk was taken into custody. Mrs. Krawchuk died shortly after the shooting.

The appeal was argued at Vancouver on the 10th of June, 1941, before McQUARRIE, SLOAN and McDONALD, JJ.A.

Hurley (*Denis Murphy, Jr.*, with him), for appellant: After Krawchuk shot his wife Terachuk grappled with him, and in the struggle two shots went off, one of the bullets hitting Terachuk in the hand. The revolver was found next day by the police. Only two shots hit Mrs Krawchuk, but neither hit her fatally. Krawchuk swore that on the day of the crime he went to the barn and saw Terachuk and his wife in the act of adultery, when Terachuk attacked Krawchuk and hit him. The title deeds for the property purchased by Mrs. Krawchuk in Vancouver were found in the barn under the straw five days after the crime. The

C. A. 1941

REX v. KRAWCHUK (No. 2)

defence is that he did not do the shooting at all, but that the fatal shot was fired while the revolver was in Terachuk's hand, and the learned judge neglected to put to the jury the defence of "provocation": see *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136, at p. 141. The jury might have disbelieved Terachuk. Inconsistent defences may be raised: see *Rex* v. *Illerbrun* (1939), 73 Can. C.C. 77, at p. 78; *Rex* v. *Thorpe* (1925), 18 Cr. App. R. 189, at p. 190. Provocation is a matter that must be extracted from the evidence: see *Rex* v. *Manchuk,* [1938] S.C.R. 18; *Reg.* v. *Rothwell* (1871), 12 Cox, C.C. 145, at p. 147; *Rex* v. *Ellor* (1920), 15 Cr. App. R. 41, at p. 44; *Rex* v. *Jackson,* [1941] 1 W.W.R. 418; *Rex* v. *Palmer* (1913), 8 Cr. App. R. 207; *Rex* v. *Hall* (1928), 21 Cr. App. R. 48, at p. 54. There was error in the learned judge giving his opinion as to his believing certain witnesses, thereby rendering nugatory the direction that they were the sole judges of fact: see *Rex* v. *Palmer* (1913), 8 Cr. App. R. 207, at 210; *Rex* v. *Marriott* (1924), 18 Cr. App. R. 74, at p. 75. The finding of Mrs. Krawchuk's hand-bag in the barn after the crime was not put to the jury: see *Rex* v. *Nicholson* (1927), 39 B.C. 264, at p. 270; *Brooks* v. *Regem* (1927), 48 Can. C.C. 333, at pp. 356-7.

Wilson, K.C., for the Crown: The woman's character need not be commented on. The plea of accident cannot be supported by the evidence, and was not accepted by the jury: see *Rex* v. *Burgess and McKenzie* (1928), 39 B.C. 492, at p. 495; *Rex* v. *Hopper* (1915), 84 L.J.K.B. 1371, at p. 1372; *Rex* v. *Hill* (1928), 49 Can. C.C. 161; *Rex* v. *Clinton* (1917), 12 Cr. App. R. 215. The whole issue turns on the question of provocation.

Hurley, replied.

Cur. adv. vult.

12th June, 1941.

MCQUARRIE, J.A.: I agree with my brother MCDONALD that the appeal should be dismissed for the reasons which he has stated.

SLOAN, J.A.: I have had the benefit of reading the judgment of my brother MCDONALD and am in agreement therewith. The accused took the stand and relied solely upon the exclusive defence

of accident. He went to the jury on that issue alone. He cannot now complain that the learned trial judge failed to conjure up a fantastic theory which was never advanced below and which is wholly inconsistent with the defence that was relied upon at the trial.

The appeal must be dismissed.

McDONALD, J.A.: The appellant was convicted of the murder of his wife, Natallia Krawchuk, before SIDNEY SMITH, J. and a jury at the recent Assizes held at Prince George. Several objections are made to the learned judge's charge, but in my view only one of them merits serious discussion. This is the question of whether or not the learned judge should have left it open to the jury to find a verdict of manslaughter. In his charge he told them that only two verdicts were open, and manslaughter was not mentioned at any time during the trial either by judge or counsel.

For the purpose of this appeal it will be sufficient to state the facts very briefly. The evidence offered by the Crown was that of one Stowoa and of one Terachuk. Stowoa swore that during the early afternoon of the day of the crime the appellant stated to him after his wife had left for Prince George with said Terachuk that "he was going to make a trouble" because she bought property in Vancouver and he did not know anything about it. Stowoa and Terachuk also gave evidence to the like effect, *viz.*, that after Terachuk and Mrs. Krawchuk had returned from the village Krawchuk fired three shots at his wife, one of which proved to be fatal; that thereupon during Terachuk's effort to obtain possession of the revolver in the appellant's hands two further shots were fired and injured Terachuk, and that this shooting took place at a point some 25 feet from Krawchuk's barn and at or near a spot where the police afterwards found a pool of blood.

The appellant took the witness stand in his own defence and his story was a direct contradiction of the evidence given by Terachuk and Stowoa. He denied the conversation above mentioned and he set up what would have been a complete defence, had the jury accepted his evidence. He said that when he came

C.A.
1941

REX
v.
KRAWCHUK
(No. 2)

McDonald, J.A.

to the barn he saw Terachuk and his wife in a compromising position and that Terachuk attacked him; that Terachuk had a revolver in his hand and in the struggle which ensued between them the revolver was discharged, but that he had become unconscious and did not know with what result. He stated that this struggle took place at or near the barn door. By bringing in a verdict of "Guilty of Murder" it is obvious that the jury wholly discarded the appellant's evidence. But it is argued that the line of defence taken throughout the trial ought now to be disregarded and that the learned judge ought to have told the jury that they might disbelieve substantially the whole of the evidence tendered by the Crown and also disbelieve Krawchuk's story of his struggle with Terachuk and yet might find that Krawchuk unlawfully and intentionally shot his wife but did so under such provocation as is defined by section 261 of the Criminal Code. The verdict of manslaughter which it is now contended might have been found had the question been left open by the learned judge was in my view excluded by the evidence given by the appellant himself. We have not here a case such as *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136, where it was held that the jury might have declined to believe the appellant as to his not having been angry when he shot and, hence, to have found provocation. That is a quite different thing from the appellant taking the stand and telling a story which the jury must have found to be a fabrication from beginning to end—a story which must be entirely disregarded, except as to Terachuk and the deceased woman having been in the barn, and must be disregarded along with substantially the whole of the evidence offered by the Crown, before there is a shadow of a case on which to found a verdict of manslaughter. In the *Hopper* case counsel at the trial expressly set up his defence of manslaughter as a second string to his bow, in case he should fail to prove the killing to have been accidental. In the present case counsel did not at any stage suggest manslaughter. It is all very well to rely on remarks made from time to time by learned judges as to the duty of a trial judge to put such questions to the jury as appear to him properly to arise on the evidence even if counsel has not suggested such questions; but such remarks must be read as

generally guiding principles and in regard to the case to which they have relation. They cannot, I think, be taken to mean that a judge is required to conjure up some fantastic defence inconsistent with substantially the whole of the evidence offered in the case. After all, as was pointed out by Lord Alverstone, C.J., in *Rex* v. *Hampton* (1909), 2 Cr. App. R. 274, at 276:

> A summing-up is not a dissertation upon the law, but must have reference to the way in which each case has been conducted at the trial.

The decision in *Rex* v. *Manchuk*, [1938] S.C.R. 18, so much relied upon by counsel for appellant, does not in my judgment touch the facts in the present case. The general principles of law there laid down as to the meaning of section 261 of the Criminal Code do not assist us in disposing of this case. The same may be said of *Rex* v. *Jackson,* [1941] 1 W.W.R. 418, where the prisoner entered the witness box and gave evidence wholly going to prove that he shot both "Solomon" and "Elizabeth" and that he did so under provocation (within section 261). The only question was whether the jury would believe him. They did believe him, and hence it was held that the verdict of manslaughter should stand.

As MARTIN, J.A. (as he then was) pointed out in a majority judgment in *Rex* v. *Burgess and McKenzie* (1928), 39 B.C. 492, at p. 495:

> It is the duty of the trial judge to confine the issue to the real question and not allow the jury to be perplexed or diverted therefrom by irrelevant directions or otherwise.

His Lordship cites several cases among which *Rex* v. *Thorpe* (1925), 18 Cr. App. R. 189 seems most applicable here and contains an analysis of the *Hopper* and other cases.

If there were any real doubt about the matter I think it is concluded by the decision in *Rex* v. *Clinton* (1917), 12 Cr. App. R. 215, where the line is clearly drawn between a case such as that of *Hopper* and a case such as that at Bar. In my opinion the learned trial judge took the right view and the appeal should be dismissed.

Appeal dismissed.

C. A.
1941
June 10, 11, 12.

REX *EX REL.* McKAY v. SUTTON.

Criminal law—War measures—Regulations by Governor in Council—Application of section 706 of the Criminal Code—Offences over which Parliament has legislative authority—R.S.C. 1927, Cap. 206, Sec. 3.

The respondent was convicted under the provisions of Part XV. of the Criminal Code by a police magistrate, of being a member of an illegal organization, namely "Jehovah's Witnesses" contrary to regulation 39C of the Defence of Canada Regulations (Consolidation) 1940. On *habeas corpus* proceedings on the submission of accused that the jurisdiction of the magistrate was dependent upon the applicability of section 706 of the Criminal Code and that said section has no application because the offence charged is not one created under the legislative authority of the Parliament of Canada but merely by regulation of the Governor in Council, the conviction was quashed.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. that section 706 of the Criminal Code extends to "offences over which the Parliament of Canada has legislative authority." The subject-matter of the Defence of Canada Regulations (Consolidation) 1940, is within the legislative authority of the Dominion, and while the power to make regulations in relation thereto may be delegated to the Governor in Council, such powers must necessarily be subject to determination at any time by Parliament. The accused was convicted of an offence over which the Parliament of Canada has legislative authority. The magistrate was in consequence acting within the jurisdiction conferred by section 706 of the Code and the appeal must be allowed.

Rex v. *Singer*, [1941] S.C.R. 111, distinguished.

APPEAL by the Crown from the decision of MORRISON, C.J.S.C., discharging the defendant from custody on a writ of *habeas corpus*. The defendant was committed by the police magistrate for the municipality of Penticton on a charge of unlawfully continuing to be a member of an illegal organization, to wit: "Jehovah's Witnesses" after the publication in the Canada Gazette of regulation 39C of the Defence of Canada Regulations (Consolidation) 1940, and after publication pursuant to sub-paragraph (1) (*b*) thereof of a notice by the Governor in Council in the Canada Gazette declaring the said organization contrary to regulation 39C of the Defence of Canada Regulations (Consolidation) 1940.

The appeal was argued at Vancouver on the 10th and 11th of June, 1941, before MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

H. Alan Maclean, for appellant: This is a civil appeal and the question is the interpretation of section 706 of the Criminal Code. It was held that the offence is not an offence triable summarily under Part XV. of the Criminal Code. "Legislative authority" includes what can be heard. We say this is an offence over which the Parliament of Canada has legislative authority. Parliament has legislative authority over punishment and penalty: see *Burroughs* v. *Paradis* (1915), 24 Can. C.C. 343. The magistrate has jurisdiction irrespective of section 706 of the Criminal Code: see section 40 of the Interpretation Act. Section 706 of the Code is the same as section 4 of the Summary Convictions Act.

Hodgson, for respondent: This is an offence against regulation and is not an offence against the Act. Section 706 of the Criminal Code only applies to an offence against an Act of Parliament. Section 706 of the Code does not apply, and the magistrate had no jurisdiction: see *Rex* v. *Singer,* [1941] S.C.R. 111, at p. 115. The Regulations are not deemed to be part of the Act. There has been an omission in the Act to declare that the Regulations are part of the Act. There is no jurisdiction in the magistrate to try the case. Section 535 of the Criminal Code of 1892 abolished the distinction between felony and misdemeanour. Irrespective of the section dealt with, the principle applies as laid down in the *Singer* case.

Maclean, replied.

Cur. adv. vult.

On the 12th of June, 1941, the judgment of the Court was delivered by

SLOAN, J.A.: The respondent Sutton was convicted under the provisions of Part XV. of the Criminal Code, by a police magistrate at Penticton, of being a member of an illegal organization, *viz.,* "Jehovah's Witnesses" contrary to regulation 39C of the Defence of Canada Regulations (Consolidation) 1940.

His conviction was quashed by MORRISON, C.J.S.C., upon *habeas corpus* proceedings and the Crown now appeals to us. The learned judge below gave no reasons but I presume he felt obliged to give effect to the argument of Sutton's counsel which was

C. A.
1941

REX
v.
SUTTON

repeated before us. Briefly stated the respondent's submission came to this: The jurisdiction of the magistrate was dependent upon the applicability of section 706 of the Code and the said section has no application because the offence charged herein is not one created under the legislative authority of the Parliament of Canada but merely by regulation or order of the Governor in Council. In support of his contention he relied upon *Rex* v. *Singer,* [1941] S.C.R. 111, and in particular the observation of Rinfret, J., at p. 115, wherein he said:

> . . . a regulation under the War Measures Act, is not an enactment passed by Parliament; it is an enactment made by the Government.

With deference this submission is, in my view, unsound and cannot be supported. *Rex* v. *Singer, supra,* did not relate to section 706, but there the Court was considering whether or not, under section 164 of the Code, a regulation was an "Act of the Parliament of Canada" and it was held it was not. The case would be in point if said section 706 was limited in its scope as is said section 164 to offences against Acts of the Parliament of Canada. It is not so limited but extends to "offences over which the Parliament of Canada has legislative authority."

In a time of national emergency the legislative authority of the Parliament of Canada in relation to the "security defence peace order and welfare of Canada" extends as Viscount Haldane said in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.,* [1923] A.C. 695, at 705, "to deal adequately with that emergency."

It is beyond dispute that the subject-matter of the Defence of Canada Regulations (Consolidation) 1940 is within the legislative authority of the Dominion and while the power to make orders and regulations in relation thereto may be delegated to the Governor in Council, in the language of Sir Charles Fitzpatrick, C.J.C. in *Re George Edwin Gray* (1918), 57 S.C.R. 150, at p. 157:

> Such powers must necessarily be subject to determination at any time by Parliament, . . .

The legislative authority of Parliament is not abandoned by the limited delegation of its powers to the executive Government. The subject-matter is still within the strong hand of Parliament.

As Duff, J. (as he then was) said in *Gray's* case, *supra,* at p. 170:

> The powers granted could at any time be revoked and anything done under them nullified by Parliament, which Parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the Legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law.

It follows from what I have said that the accused was convicted of an offence over which the Parliament of Canada has legislative authority: the magistrate was in consequence acting within the jurisdiction conferred by section 706 of the Code and the appeal must be allowed with all consequential directions that may be necessary including the rearrest of the respondent.

Appeal allowed.

SANSAN FLOOR COMPANY v. FORST'S LIMITED.

Contract—Installing tile floors—Construction of floor beneath under separate contract—Buckling of tiles owing to escape of moisture from below—Reflooring necessary—Liability.

The defendant had under construction a large concrete mercantile building in Vancouver, with basement. He employed an architect to prepare the plans and specifications but had neither a supervising architect nor a master of works. The contract for the concrete shell of the building was given to one Vistaunet and independent contracts were let for plumbing, heating, etc. The original specifications called for a laminated main floor and laminated second floor in each case, covered with shiplap and masonite (laminated consists of planks two inches by six inches on edge). When the laminated portion was completed the defendant decided to surface the main and second floors with an asphalt floor tile instead of masonite. He then entered into a contract with the plaintiff company to put in the tiling. One Christie, manager of the defendant company, and one Watt, manager of the plaintiff company, then had discussions as to the proper installation between the laminated and the tiling. It was necessary to sand the laminated in order to have a smooth surface. Watt offered to put in three-ply with waterproof installation beneath, as there was some moisture in the laminated, but he thought that this should be done by Vistaunet. The contract was

S. C.

1941

SANSAN FLOOR CO. v. FORST'S LTD.

then given to Vistaunet, who did the sanding of the laminated and put in the 3-ply but he did not put waterproof installation beneath the 3-ply. Watt then laid the tiles, and he was paid $1,000 on account of the purchase price. The balance of $3,243.88 remained unpaid because within two months of completion, owing to the moisture from the laminated, the tile surface was very badly buckled and cracked, so badly that the whole floor had to be scraped down to the laminated and resurfaced. In an action for the balance due on the contract:—

Held, that no evidence was led suggesting that the plaintiff's work was in itself unworkmanlike or unsatisfactory. The situation did not arise through fault in the plaintiff's conduct or workmanship. The defendant chose to rely upon persons other than the plaintiff in the matter of the installation of the foundation floors. He chose to supersede the plaintiff in this important matter. The plaintiff is entitled to judgment.

ACTION to recover the balance due on a contract to surface the main and second floors of a concrete mercantile building under construction by the defendant company on Hastings Street East in the city of Vancouver. In February, 1940, the defendant decided to surface the main and second floors with an asphalt floor tile, and entered into a contract with the plaintiff company which handles a surface flooring known as Ace-Tex Asphalt Type Tiles, both supplying and laying the same. The plaintiff laid the tiles, the contract being for $4,243.88 and the defendant paid the plaintiff $1,000 on account. The balance remained unpaid because within two months from completion the tile surface very badly buckled and cracked, necessitating reconstruction of the whole surface. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 10th, 11th and 18th of March, 1941.

Richmond, for plaintiff.
A. Alexander, for defendant.

Cur. adv. vult.

14th June, 1941.

MANSON, J.: In the spring of 1940 the defendant had under way the construction of a large concrete mercantile building on Hastings Street East in the city of Vancouver—a two or three-storey structure with basement. The defendant employed an architect to prepare the plans and specifications, but had neither a supervising architect nor a master of works. The contract for the concrete shell of the building seems to have been let to one

Vistaunet. Independent contracts were let for plumbing, heating, glazing, sheet-metal work, etc. The original specifications called for a laminated main floor and a laminated second floor, in each case covered with shiplap and masonite. As early as 21st February, 1940, the defendant had decided to surface the main and second floors with an asphalt floor tile (*vide* Exhibit 4—addenda to specifications) instead of masonite, and got in touch with the plaintiff and other floor people with a view to getting from them figures on the cost of laying such a surface floor. The plaintiff handles a surface flooring, which is known as Ace-Tex Asphalt Type Tiles; it both supplies and lays the same. Christie, the office manager and financial controller of the defendant knew something about Ace-Tex before the plaintiff's manager, Watt, was called in to discuss matters toward the end of January or early in February.

There were several discussions between Watt and Christie. The Forst brothers, Edward and Alex, both directors of the defendant, only took casual part in the conversations with Watt. He lauded the quality of his product and quoted on three different qualities, one-quarter inch, three-sixteenths inch and one-eighth inch. Price was an important consideration and the one-eighth inch was the cheapest. The cover flooring to be laid over the laminated was discussed and Watt told Christie that, while tongue and groove would do, he would prefer 3-ply and that if three-ply were used it should be nailed with resin-coated nails. A smooth surface was necessary to take the Ace-Tex and that necessitated the laying of the 3-ply on a smooth laminated. It was necessary to sand the laminated. Watt quoted on the laying of the 3-ply a price of five cents a square foot, this, as he says, to include a waterproof installation beneath. It does not appear whether he told the defendant that his figure included waterproofing. The price did not include the sanding of the laminated. Watt says he was not anxious for the 3-ply job as he felt it was more in the line of Vistaunet and he was content that he should get the job. The latter quoted for sanding the laminated and laying the 3-ply without a waterproof installation. His figure was 5.8 cents per square foot and his tender was accepted. Laminated, or mill construction, consists of planks 2″ x 6″ laid

S. C.
1941

SANSAN FLOOR CO. v. FORST'S LTD.

Manson, J.

on edge. The planks contain a considerable degree of moisture —dry planking is not used because it is not available on the market. The under side of the laminated is faced with lath and plaster to form the ceiling of the rooms beneath. It absorbs moisture from the wet plaster. Vistaunet testifies that he told Christie that he had not seen 3-ply laid on laminated—that, if he were asked, he would not recommend such an installation and that he did not know if the 3-ply would stand the dampness. He says that he got the addenda to the specifications through the mail (Exhibit 4) and sent his tender by mail to the architect—that he was called in a second time by Christie and told him that he was not quite satisfied with the 3-ply installation but that, if they were, he would lay it. On cross-examination he adheres to his evidence as to his conversation with Christie, adding that he thinks one Wilson (the architect's assistant) was present on the second occasion. Wilson was not called as a witness. Vistaunet admits Christie may have spoken to him about consulting with Watt, but denies that he agreed to do the job to Watt's requirements. He says he did consult Watt but only about the laying of the 3-ply and not about the danger from dampness. The latter question was not raised and in his conversation with Watt no mention was made of the necessity for waterproof sheeting. Christie denies that Vistaunet mentioned the danger from dampness, but Alex Forst admits he heard him say that he did not approve of 3-ply. Vistaunet obviously desired to defend his own position, nevertheless I formed the impression that he was truthful.

The addenda to the specifications in their relevant part were inadequate. They read as follows:

> Contractor shall nail down 3-ply 5/16" fir sheathing on top of laminated floors on first and second floor, where marked masonite, for tiles—contractor to lay asphalt floor tile.

The laminated should not have been sealed (*vide* evidence McCarter) and it should have had air channels. One doubts if waterproofing would have prevented the situation that later developed. It would seem that Watt never saw the addenda.

It is agreed that Watt said nothing to the defendant of the danger from dampness. Watt admits it was not, in his opinion, good practice to lay the 3-ply without a waterproof installation

and that to lay it on a wet surface would make a difference. On discovery he says he considers waterproofing necessary. The defendant says it relied upon Watt as an expert and depended on him to advise as to a proper installation beneath the Ace-Tex. Watt knew his business. There was nothing the matter with his tiles nor with his application of them.

On April 1st, 1940, Watt submitted a tender (Exhibit 1) to the defendant which reads in part as follows:

> We hereby offer to provide and lay ⅛" thick Ace-Tex Asphalt Type Tiles in the following colours, for the following prices.

His tender was accepted and he laid the tiles. The contract amounted to $4,243.88. On 25th July, 1940, shortly after the completion of the job the defendant paid the plaintiff $1,000 on account. Three thousand two hundred and forty-three dollars and eighty-eight cents remains unpaid because within two months of the completion of the job the tile surface very badly buckled and cracked—so badly that the whole floor, or almost the whole of it, will have to be scraped down to the laminated and resurfaced. The moisture in the laminated buckled the 3-ply and with it the tiling. The defendant counterclaims in damages.

Watt says he saw Vistaunet on the premises at a time when the latter was getting ready to sand the laminated. He was not on the job again apparently until the 3-ply was laid over three-quarters of the top floor when he saw that waterproof sheeting was not being laid beneath the 3-ply. He says that the laminated had a white dust over it. The dust would be the result of the sanding and would indicate that at least the surface of the laminated was dry enough to permit sanding. He made no protest about the failure to use waterproofing to either Vistaunet or the defendant.

By way of defence Watt takes the position that he carried out his contract. He says that the foundation upon which he was to lay his tiles was no concern of his so long as he was given a smooth well-nailed cover floor. He says that he was not asked to advise with regard to the foundation floors and that he did not do so—that he quoted a price for laying the 3-ply with waterproofing which the defendant did not accept—that it let a contract to another contractor to prepare the cover floor for

S. C.
1941

SANSAN FLOOR CO. v. FORST'S LTD.

Manson, J.

him—that the defendant having made its contract with Vistaunet, he was under no obligation to tell the latter, an experienced contractor, how to do his work. He adds that he presumed the architect had drawn proper specifications for the foundation floors. He says that he actually laid the tiles on a dry surface and furthermore that he did not know of the dampness in the laminated. An examination by boring would have disclosed it; simple inspection would not have done so. (*Vide* evidence McCarter).

The defendant undoubtedly contributed to the happening of which it now complains. It was inexperienced in building construction. It did not insist on proper specifications. It had no general contractor for the whole undertaking nor for the whole floor job but let its own contracts for the several parts of the work. It had no proper supervision nor, indeed, any at all except such as it could give by its own officers. Its economy has proved expensive.

The evidence does not establish that there was any contract between the parties other than that contained in the tender and acceptance—Exhibit 1. It is stated by Edward Forst that Watt advised the defendant on the laying of the 3-ply. He did recommend it and advised how it should be nailed for his purpose. He was concerned that he should have a smooth surface upon which to apply the tiles. Should he have concerned himself to make certain that the surface would remain smooth? He was not asked to draw the specifications with regard to the laying of the 3-ply—the architect drew such specifications as there were. Had Watt and his men not gone on the job till after the 3-ply was all laid he would not have known that there was no waterproofing and he seems never to have known that there were no air channels in the laminated. Despite the evidence to the contrary I cannot find as a fact that the defendant, to the knowledge of Watt, looked to Watt to supervise the installation of the 3-ply and I cannot find as a fact that Vistaunet was instructed to look to Watt for his specifications. The case at Bar does not fall within *Smith* v. *Brunswick Balke Collender Co.* (1917), 25 B.C. 37. There the contract provided that the owner was to construct the foundation for bowling-alleys to be installed by the defendant,

but the contract specifically provided that the owner was to construct under the supervision of the defendant and the defendant by its agent did supervise. The truth of the matter, as it seems to me, is that the defendant let its floor contracts without any knowledge of the construction of floors; it did not know the danger to be guarded against and the architect did not mention the danger nor guard against it in the specifications.

This was not a case of a warranty nor of an implied warranty that the work would endure. No evidence was led that suggests that the plaintiff's work was in itself unworkmanlike or unsatisfactory. The situation complained of did not arise through fault in the plaintiff's product or workmanship. In *Duncan* v. *Blundell* (1820), 3 Stark. 6, at p. 7, Bayley, J. observed:

> Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him choose to supersede the workman's judgment by using his own.

The defendant chose to rely upon persons other than the plaintiff in the matter of the installation of the foundation floors. He chose to supersede the plaintiff in that very important matter.

The plaintiff is entitled to judgment. The counterclaim must be dismissed.

Judgment for plaintiff.

REX v. LUM HOP.

Criminal law—Charge of being in possession of opium—Accused's hand forced on box containing opium—"Possession"—Interpretation—Can. Stats. 1929, Cap. 49, Secs. 4 (1) (d) and 17—Criminal Code, Sec. 5, Subsec. 2.

The accused visited a fellow Chinaman in his room, and while there the occupant of the room asked him to hand over a small bone box. As accused was about to place the lid on the box detectives rushed into the room and forced his hand down upon the box, pressing it into his palm. Accused swore that he did not know the box contained opium. He was convicted of being in possession of opium. On appeal by way of case stated:—

Held, that in the circumstances the accused did not have "possession" of the

S. C.
1941

REX
v.
LUM HOP

opium. "Possession" as used in section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929, means actual physical possession, and this type of possession he did not have. Neither did he have constructive possession within section 5, subsection 2 of the Criminal Code.

CASE STATED by Harry G. Johnston, Esquire, stipendiary magistrate in and for the county of Westminster. Accused was convicted of having opium in his possession in violation of section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929. The facts are set out in the reasons for judgment. Heard by SIDNEY SMITH, J. at Vancouver on the 11th of June, 1941.

Sullivan, K.C., for the prisoner.
A. S. Duncan, for the Crown.

Cur. adv. vult.

17th June, 1941.

SIDNEY SMITH, J.: Case stated by Harry G. Johnston, Esquire, stipendiary magistrate in and for the county of Westminster, British Columbia.

The facts are clearly set out in the case stated and need not be repeated. The prisoner was convicted for a violation of section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929. It reads as follows in its relevant part:

> 4. (1) Every person who . . . (*d*) has in his possession any drug . . . shall be guilty of an offence, . . .

The prisoner gave evidence that he had no knowledge of the nature of the contents of the small bone box which the occupant of the room asked the prisoner to hand to him. Under the above section, however, *mens rea* is not an essential ingredient of the offence. This has definitely been settled by the Court of Appeal in *Rex* v. *Wong Loon* (1937), 52 B.C. 326.

In the same case the Court of Appeal pointed out that under section 17 of the Act the absence of *mens rea* is a good defence. Section 17, however, only applies to the case of "any person who occupies, controls or is in possession of any building, room," etc. It is clear on the evidence and on the findings that the prisoner was not such a person and, therefore, in my opinion section 17 has no application.

The learned magistrate sets out the circumstances in which the accused was about to place the lid on the small bone box con-

taining the opium when the detectives rushed into the room and forced his hand down upon the box, thereby pressing it into his palm. In my opinion in these circumstances the accused did not have "possession" of the opium. I think that "possession" as used in section 4 (1) (*d*) means actual physical possession. I am satisfied that the accused did not have this type of possession.

S. C. 1941

REX v. LUM HOP

Sidney Smith, J.

But if I should be wrong in this construction and if "possession" as used in the section includes constructive possession (as argued by the Crown) then I am of opinion that neither did the prisoner have constructive possession. I was referred to section 5, subsection 2 of the Criminal Code but I do not think the prisoner can be said to have had constructive possession under this section. He had no knowledge that the box contained opium. The magistrate believed him. In my opinion, therefore, there was no constructive possession within this section of the Code.

The question asked by the learned magistrate as to whether he was right in convicting the prisoner upon the facts as he found them must with respect be answered in the negative.

The case will be remitted to the magistrate so that a verdict of acquittal may be entered.

Conviction quashed.

WESTMINSTER POWER COMPANY LIMITED v. INDIAN RIVER PULP AND POWER COMPANY.

S. C. In Chambers 1941

June 26, 27.

Costs—Security for—Plaintiff a company—Right of defendant to security under section 256 of the Companies Act—R.S.B.C. 1936, Cap. 42, Sec. 256—B.C. Stats. 1939, Cap. 63.

On the defendant's application for security for costs from the plaintiff company under section 256 of the Companies Act, it appearing from the pleadings and material filed that the allegations are grave and throw a serious *onus* upon the defendants to establish them with irrefragable testimony, and the pleadings have the atmosphere and elements which justify the Court in assuming that they will lead to a protracted, expensive trial:—

Held, in the circumstances, that the plaintiff company should furnish security for costs in the sum of $5,000.

S. C.
In Chambers
1941

WEST-MINSTER POWER CO. LTD. v. INDIAN RIVER PULP AND POWER CO.

APPLICATION by defendant for an order that the plaintiff furnish security for the defendant's costs of the action pursuant to section 256 of the Companies Act on the ground that the only assets of the plaintiff company consisted of conditional water licences issued by the Provincial Government under the provisions of the Water Act, and that the same were not exigible. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 26th of June, 1941.

Bull, K.C., for the application.
Nicholson, contra.

Cur. adv. vult.

27th June, 1941.

MORRISON, C.J.S.C.: I have taken time to read the pleadings and material filed herein and I gather, put compendiously, that the plaintiff's *status* in the suit derives from various transactions by Edward J. Young with which he sought to identify his wife and which the defendant alleges were fraudulent. Some of these material alleged fraudulent acts extended to and involved a certain government official. These allegations are grave and throw a serious *onus* upon the defendant to establish them with irrefragable testimony. The pleadings have the atmosphere and elements which justify me in assuming that they will lead to a protracted expensive trial. In this kind of application a judge is to some extent in the hands of counsel who seriously seek security upon the material and submissions made thereon. I do not think Mr. *Bull* is extreme in his request that $5,000 be the amount of security to be furnished. I really think that in the amount suggested by Mr. *Nicholson* he has put the decimal point too far to the left. The numerals are too scanty.

Application granted.

LUDDITT *ET AL.* v. GINGER COOTE AIRWAYS LTD.

S. C.
1941
May 28, 29, 30; *June* 25.

Carrier—Airways company—Carrier of passengers — Negligence — Forced landing—Special conditions limiting liability—Can. Stats. 1938, Cap. 53, Secs. 25 and 33.

The plaintiffs took passage by the defendant's aeroplane from Vancouver to Zeballos. During the passage a fire started on board, forcing the plane to land on the surface of the water near Gabriola Island. The plaintiffs lost their baggage and were severely injured. The tickets issued by the defendant to each of the plaintiffs were expressed to be subject to certain conditions. The conditions were that the defendant should in no case be liable to the passenger for injury, loss or damage to the person or property of such passenger, whether the injury, loss or damage be caused by negligence, default or misconduct of the defendant, its servants or agents or otherwise whatsoever. These conditions were signed by each of the plaintiffs on his respective ticket. In an action for damages:—

Held, that the disaster was due to the negligent operation of the aeroplane. The defendant company could only operate its aircraft under the licence which it obtained under the provisions of The Transport Act, 1938, and at the approved scheduled fare of $25. The fare being established under the statutory regulations the defendant cannot attach conditions to the contract of carriage which abolish its liability, at least not without a new and valuable consideration. There was no such consideration and therefore these conditions are void. The plaintiffs are entitled to recover.

ACTION for damages resulting from the forced landing of the defendant's aeroplane when the plaintiffs were passengers. During the passage from Vancouver to Zeballos a fire broke out on board, due to the alleged negligent operation of the aeroplane. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 28th, 29th and 30th of May, 1941.

Paul Murphy, for plaintiffs.
Tysoe, for defendant.

Cur. adv. vult.

25th June, 1941.

SIDNEY SMITH, J.: This is a hard case and it has been said that hard cases make bad law. I hope this judgment is not a case in point.

S. C.
1941

LUDDITT
v.
GINGER
COOTE
AIRWAYS
LTD.

Sidney Smith, J.

The defendant company was incorporated under the Companies Act of British Columbia. Under the authority of the Aeronautics Act and Part VII. of the Air Regulations, 1938, it obtained a licence to operate a Scheduled Air Transport Service for the period July 31st, 1939, to June 30th, 1940, over the route Vancouver-Zeballos *via* Tofino (Exhibit 16). Pursuant to the provisions of The Transport Act, 1938, it was granted a licence to transport passengers and/or goods by the aircraft in question herein over the same route (Exhibit 17). The schedule of service was tri-weekly between Vancouver and Zeballos with weekly calls at Tofino. Under the approved schedule of charges the passenger fare from Vancouver to Zeballos was $25 (Exhibits 19 and 20).

The plaintiffs booked their passage by the defendant's aeroplane on a trip from Vancouver to Zeballos, leaving Vancouver at 10.30 a.m. on the 29th of November, 1940. During the passage a fire occurred on board forcing it to land on the surface of the water near Gabriola Island. In consequence of the fire and the forced landing the plaintiffs lost their baggage and were severely injured. They were taken to the hospital at Nanaimo and there received attention and in due course were discharged.

The plaintiffs claim that the fire was due to the negligent operation of the said aeroplane. This was not seriously contested by the defendant. I find that the disaster was in fact due to such negligent operation and that the negligence was substantially in accordance with the particulars set out in paragraph 7 of the statement of claim.

The tickets issued by the defendant to each of the plaintiffs were expressed to be subject to certain conditions set out on the backs thereof. These conditions were to the effect that the defendant should in no case be liable to the passenger for injury, loss or damage to the person or property of such passenger, whether the injury, loss or damage be caused by negligence, default or misconduct of the defendant, its servants or agents or otherwise howsoever. These conditions were signed by each of the plaintiffs on his respective ticket. It was not, and indeed could not be, disputed that the plaintiffs were bound thereby unless they were otherwise relieved. But counsel for the plaint-

iffs contends that these conditions are illegal and therefore null and void. He says that this result flows from the provisions of The Transport Act, 1938.

There was a good deal of argument before me as to whether the company was or was not a common carrier of passengers. Whether it was or not, I think it was bound to carry all persons, not in an unfit condition, for whom it had accommodation in its aeroplane, and who tendered the legal fare. I think this is the legal effect of section 25 of The Transport Act, 1938. In these circumstances and whether a common carrier or not the company's duty was to take all due care, and to carry its passengers safely as far as reasonable care and forethought could attain that end—Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 60.

The plaintiffs urge that the defendant company could only operate its aircraft under the licence which it obtained under the provisions of The Transport Act, 1938, and at the approved scheduled fare of $25 from Vancouver to Zeballos. The fare being established under the statutory regulations they say that the defendant cannot attach conditions to the contract of carriage which abolish its liability, at least not without a new and valuable consideration; that there was no such consideration and that therefore these conditions are void.

I think this argument is sound. I cannot distinguish this case from the case of *Clarke* v. *West Ham Corporation,* [1909] 2 K.B. 858. Indeed in some aspects this case is more favourable to the plaintiffs than was the *West Ham* case.

In that case a public body under statutory authority constructed and operated a tramway over which the plaintiff travelled. The maximum fare was fixed by statutory regulations. They sought to charge a reduced fare and in consideration of the reduced fare to limit their liability. It was held by the Court of Appeal that they could not do so, at all events not without giving their passengers the opportunity of travelling at the maximum fare without limitation of liability. That case involved a right of way through the streets. It may be said that the land is held in fee while the sea and the air belong to every man. But I see no substantial distinction between the licence to operate tramways in the case quoted and the licence to operate aircraft in

S. C.
1941

LUDDITT
v.
GINGER
COOTE
AIRWAYS
LTD.

Sidney Smith, J.

the case before me. In each case statutory authority was necessary for the operation in question. In each case the fare was fixed by statutory regulation.

As was stated by Farwell, L.J. in the *West Ham* case, pp. 879-80:

> A common carrier . . . is not at liberty to refuse to carry altogether when he has room and the passenger is unobjectionable and tenders his fare, which in the absence of a statutory maximum is a reasonable sum, for if the carrier were at liberty to exact what sum he pleased the duty would be rendered nugatory. Nor when he is bound by a statutory maximum fare is he at liberty to impose conditions relieving himself from the ordinary consequences of negligence without giving the passenger an option of travelling without such conditions. The maximum fare allowed by the Act entitled the passenger to travel with the benefit of all the liabilities attaching by law to the carrier unless the Act in terms relieves him of them; any condition limiting that benefit is a limitation on the advantages for the full enjoyment of which he has paid all that the carrier is entitled to demand . . . , the carrier is bound to carry any passenger who tenders the maximum rate; he cannot escape from this liability by alleging his willingness to carry on other terms not accepted by the passenger, and he cannot force such terms on the passenger by refusing to carry on any other.

It seems to me that this statement of the law is applicable to the present case.

It was urged by defendant's counsel that Exhibit 19 states that the carriage is to be subject to the terms and conditions of the defendant company's passenger tickets, namely, the terms and conditions now under attack. But there was no evidence before me that these actual terms and conditions were ever placed before the Board of Transport Commissioners. Moreover, even if they were I think that such board under its general authority to make rules and regulations conferred upon it by section 33 of the Act has no power to abolish liability for negligence.

In my opinion, therefore, the plaintiffs are entitled to recover.

As to damages. The plaintiff Parker was the most seriously injured. He is a metallurgical engineer, aged 28 years, and had a salary of $165 per month. He was in hospital from 29th November, 1940, to 2nd February, 1941. When first admitted into hospital the skin was hanging in shreds from his face and both hands. He required constant attention and was unconscious for some time. There will be a permanent malformation of his right ear and a permanent disability in the grip of each hand. His face will carry a disfiguring mark for life. His

hands will always have an ugly appearance. His eyes trouble him. He undoubtedly suffered a great deal of pain and still suffers and may continue to suffer for some time to come. His injuries may prevent his continuance with his profession. I allow him damages as follows:

Special damages:	Loss of belongings.....	$ 215.00
	Doctor and hospital bills, etc.	545.77
General damages		5,000.00

The plaintiff Luddiţt was also seriously injured. He is a miner and prospector, 23 years of age. His skin was hanging in shreds from his left hand. He was in hospital from 29th November to 29th December, 1940. He has not been employed since then. His left hand, face and ears were burned. There will be some permanent scar. He has lost some grip of the left hand and it may never be normal. He suffers from headache. I allow him damages as follows:

Special damages:	Loss of belongings.....	$ 200.00
	Doctor and hospital bills, etc.	458.50
General damages		3,000.00

The plaintiff Steeves suffered the least injuries. He is a druggist but was engaged as a time-keeper at Zeballos at $120 per month. He is 38 years of age. He was in hospital from 29th November to 7th December. He was away from work for two weeks. There is a small scar on his left hand which will be permanent. He suffered from nervous shock. I allow him damages as follows:

Special damages:	Loss of belongings.....	$ 105.00
	Doctor and hospital bills, etc.	104.50
General damages		800.00

There will be judgment accordingly. The plaintiffs are entitled to their costs.

Judgment for plaintiffs.

S. C.
1941
May 15, 16, 17; *July* 4.

CARLSON AND PENDRAY v. HAWKINS AND ELLERY. (No. 2).

Will—Application for probate—Erasures, obliterations and interlineations in will—Not initialled by witnesses—Whether made before execution—Evidence—R.S.B.C. 1936, Cap. 308.

The plaintiffs applied for probate of the will of Lottie Louise Hawkins. The will contained important erasures, obliterations and interlineations that were in the handwriting of the testatrix but were not initialled by the witnesses.

Held, that in the absence of evidence the presumption is that the alterations were made after the will was executed, and the *onus* is on the plaintiffs who propound the will as altered, to prove that the alterations were made before execution. In this case the plaintiffs discharged that *onus* and the will was admitted to probate as altered.

ACTION by two of the executors appointed under the will of Lottie Louise Hawkins, who died on the 15th of January, 1940, the plaintiffs being the children of the testatrix. The plaintiffs aver that certain erasures, obliterations and interlineations appearing on the face of the will existed at the time of its execution. The defendant Hawkins, who was the second husband of the testatrix, filed a *caveat* herein and claims that certain additions, interlineations and alterations were made in the said document by the deceased after the alleged execution thereof, and were not executed in accordance with the provisions of the Wills Act. Charlotte Ellery, an aunt of the testatrix, was added as a defendant as one of the beneficiaries named in the will. The plaintiffs prayed that the claims of the defendant Hawkins be disallowed, and that the Court decree probate of the said will in its altered state. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Victoria on the 15th, 16th and 17th of May, 1941.

Higgins, K.C., for plaintiffs.
Davey, for defendant Hawkins.
Sinnott, for defendant Charlotte Ellery.

Cur. adv. vult.

4th July, 1941.

S. C. 1941

CARLSON AND PENDRAY v. HAWKINS

FISHER, J.: The only question now involved in this action is whether the obliterations, interlineations and other alterations (hereinafter referred to as the "alterations"), which were not initialled by the witnesses, were made before or after the execution of the last will and testament of the deceased Lottie L. Hawkins, who died at Victoria, B.C., on the 15th of January, 1940. The said will is dated the 20th of April, 1928, and it is quite obvious from the evidence that there are important alterations including that made by the lines at the top of page 2, reading as follows:

> Everything I possess is to be divided between my children as they are my heirs only the money in the bank is to be divided between Norma William & Tom.

In the absence of evidence the presumption is that the alterations were made after the will was executed. See Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 71, sec. 95; *Cooper* v. *Bockett* (1846), 4 Moore, P.C. 419, at 449. It is common ground, however, that this presumption may be rebutted though counsel disagree as to the species of evidence sufficient to rebut it. Counsel for the plaintiffs cites Taylor on Evidence, 12th Ed., Vol. I., p. 150, sec. 164 and Tristram & Coote's Probate Practice, 18th Ed., 459 as authorities for the proposition that the presumption may be rebutted by slight affirmative evidence but counsel for the defendant Hawkins points out that in Vol. 34, Halsbury's Laws of England, *supra,* the rule is stated in somewhat different terms as follows:

> Very slight affirmative evidence is, however, sufficient to rebut this presumption unless the alterations are important.

In *Moore* v. *Moore* (1872), Ir. R. 6 Eq. 166 the Court held

> Any evidence which, having regard to all the circumstances, reasonably leads . . . to the conclusion that the alterations were made before execution [is sufficient].

Having considered the authorities referred to as aforesaid I have only to say that it is clear that the *onus* is upon the plaintiffs, who propound the will as altered, to prove that the alterations were made before execution and I must be satisfied that such *onus* has been discharged before I can admit the will to probate as it now stands.

It is common ground that what has been called the body of the

S. C.
1941

CARLSON AND PENDRAY v. HAWKINS

Fisher, J.

will and the alterations are all in the handwriting of the testatrix. Experts in handwriting were called as witnesses. Their evidence was very interesting but contradictory and with all respect I have to say that it has not been of much assistance to me in coming to a conclusion as to when the alterations were made. I have to add, however, that I agree with the opinion of the witness, Mr. Maclean, called by the plaintiffs, that line 24, being the last line on page 1 of the said will, reading as follows: "All cash to be equally divided" was written with a different pen from that used in writing the lines in the body of the will immediately above said line 24. It follows that I disagree with the contrary opinion expressed by the witnesses, Messrs. Wunderling and Beatty, called on behalf of the defendant, and I do not think that the difference in appearance between the said lines was caused by the use of a blotter.

Mrs. Drummond-Hay, one of the witnesses to the will, was called by the plaintiffs and testified that before the execution of the will at her house the large obliteration on page 2 was there. She did not remember whether the other interlineations, alterations or obliterations were there. The other witness to the will, Miss Charlotte Darragh, examined on Commission, says she does not remember any alterations in it. At the time of the execution of the will Miss Darragh was a stenographer with nine years' experience in the office of a legal firm and counsel for the said defendant relies especially on her evidence which reads, in part, as follows:

In or about the month of April, 1928, do you remember where you were? Well, that was the month I went out to Victoria—I went out there for three months.

What was the reason for your going to Victoria? Well, I was in bad health at the time.

And you had taken a holiday from your work? Yes, the office gave me leave of absence.

Who were you staying with in Victoria? I was staying with Mr. Drummond-Hay's mother and sister.

. . . . .

Do you recall signing a document for Mrs. Hawkins? Yes.

I produce what is alleged to be the last will and testament of Lottie Louise Hawkins; is this the document you witnessed? Yes—it is my signature—that is C. Darragh and that is Bank of Hamilton Chambers—that is all my writing.

Would you look at that will, Miss Darragh; could you say as to whether

or not it is now in the same condition and state and plight that it was in when you signed it? No, because I do not remember any alterations in it.

You do not remember whether there were any alterations? No.

Well, would you swear that there were no alterations when you signed it? No, I wouldn't swear there were none but I wouldn't swear there were either—I just don't know—I don't remember.

. . . . .

On the second page of the will there are several lines struck out. Do you recall that those were struck out when you signed? No, I don't recall anything whatever about the appearance of the will at all.

. . . . .

My friend has asked you about the alterations; were you present when Mrs. Hawkins initialled those alterations? I don't remember anything about the alterations whatsoever.

Can you say that you saw her initial the alterations? No, I could not say that.

You did not initial them yourself? No.

. . . . .

Are you able to tell us what was the practice of the firm with which you were working as to alterations and obliterations on wills? Well, we always initialled alterations and obliterations—I don't ever remember any obliterations in any will.

But you undoubtedly remember alterations? Yes.

And the practice was that they should be initialled by the testator and by the witnesses? Yes.

And you knew that practice? Yes.

Did you not notice any alterations whatever in Mrs. Hawkins' will? No, I didn't—but at the time I perhaps wasn't in the condition to be so careful about those things because I had been quite ill and I had not been long enough out there to have pulled together so to speak—there may have been alterations but as I say I don't remember.

Would it be fair to put it this way that if there had been alterations you would have drawn Mrs. Hawkins' attention to the necessity of their having been initialled? If I had noticed them, yes.

It is argued by counsel on behalf of the said defendant that, in view of the experience of Miss Darragh with wills, I should draw the inference from her evidence that the alterations were not in the will at the time she witnessed it. It must be noted, however, that Miss Darragh herself suggests that she had been quite ill and "perhaps wasn't in the condition to be so careful about those things." Counsel for the plaintiffs has also referred to a case *In re Jessop,* [1924] P. 221 in which the only available one of the two witnesses did not remember whether the alterations were made before or after execution and yet the Court declared it was satisfied that they were made before execution.

Upon the evidence before me in the present case, some of which

S. C.
1941

CARLSON AND PENDRAY v. HAWKINS

Fisher, J.

is hereinafter more particularly referred to, I do not think it would be a fair inference that the alterations were not in the will at the time Miss Darragh witnessed it and I refuse to draw such inference.

The plaintiffs called as a witness on their behalf Miss Charlotte Ellery, whose age is 78, and I find her to be a credible witness. I would add that I think any hesitation on her part in answering questions on cross-examination was due to nervousness or lack of understanding of the questions and I also think that her evidence can be relied upon where she testifies positively to certain things even though she admitted that her memory failed her on certain other things. I accept the evidence of Miss Ellery to the effect that she helped the testatrix make the will (Exhibit 3), that it was not all written in one room, that "there was ink and different pens in different rooms," that she suggested the alterations and that all the alterations were made before execution. I also accept her evidence that, when the testatrix returned from Mrs. Drummond-Hay's house, the testatrix handed her the signed will, that she looked through it and handed it back to the testatrix, that the testatrix then immediately put it back in the envelope (Exhibit 5), sealed the envelope and gave it to her for safe-keeping. I find that from that time on Miss Ellery had the sealed envelope with the will in it in her possession in the alligator satchel (Exhibit 6) in the bag (Exhibit 7) till the 1st day of May, 1930, when, at the request of the testatrix, she handed the said envelope, still sealed, to the testatrix in the presence of the plaintiff Mrs. Carlson. I also find that on the said 1st day of May, 1930, the testatrix wrote some memorandum on the envelope as to her bonds, that the seal of the envelope was not broken then, that Miss Ellery put the sealed envelope back where it had been before and that it remained there in her possession with the seal unbroken until Mrs. Carlson took possession of it, upon the request of Miss Ellery, upon her illness in or about the month of July, 1937, and then broke open the end of the envelope and took out the said will which was subsequently filed in Court.

On the whole of the evidence before me I am satisfied that the plaintiffs have discharged the *onus* of proving that the altera-

tions were all made before the execution of the will and I so find. The will, therefore, will be admitted to probate as it now stands.

The parties may speak to the question of costs.

Judgment for plaintiffs.

IN RE DOROTHY MARIAN McGHEE.

Infant—Custody—Motion by aunt as administratrix for custody—Petition by grandmother under Equal Guardianship of Infants Act—Welfare of the child—Choice of infant—R.S.B.C. 1936, Cap. 112, Secs. 6, 14 and 15.

The parents of the infant Dorothy Marian McGhee, who is fourteen years of age, lived in Portland, State of Oregon. The mother died in February, 1940, and the father died in May, 1940. The child's grandmother, Mary McGhee, took her to her home where she remained in her custody until the 11th of March, 1941, when owing to the child's illness and on the advice of the attending physician, she was removed to the home of her aunt, Mrs. Joan Eccleston, where her health steadily improved. Mrs. Eccleston, who was the father's sister, had previously taken out letters of administration of the father's estate. Mrs. Eccleston as administratrix, filed notice of motion on the 8th of April, 1941, for the custody of the child. Mary McGhee, the grandmother, filed a petition on the 25th of April, 1941, under the provisions of the Equal Guardianship of Infants Act, asking for the custody of the child and that she be appointed her guardian.

Held, that it is for the welfare of the child that Mrs. Eccleston should have the custody for the reasons: (1) That the grandmother is now 80 years of age and the child would be better off in the care of a younger woman, as at that great age there is the probability that she will not be able to continue for long to properly supervise the child, and changes in custody are not good for her; (2) that Mrs. Eccleston has a better home for the child; (3) that in a private interview in the judge's Chambers the child said that while she liked her grandmother she would prefer to be with Mrs. Eccleston.

MOTION by Joan Eccleston, aunt of the infant Dorothy Marian McGhee, of the 8th of April, 1941, for the custody of the child, and petition by Mary McGhee, grandmother of said infant, of the 25th of April, 1941, under the provisions of the Equal Guardianship of Infants Act, asking for the custody of the child, and that she be appointed her guardian. The facts

S. C. 1941

IN RE McGHEE

are set out in the reasons for judgment. Heard by ROBERTSON, J. at Victoria on the 27th of June, 1941.

F. C. Elliott, for Joan Eccleston.
McKenna, for Mary McGhee.

Cur. adv. vult.

4th July, 1941.

ROBERTSON, J.: Dorothy Marian McGhee is now 14 years of age. Her mother died in Portland, Oregon, on the 17th of February, 1940, and her father, in the same place, on the 21st of May, 1940. Her father's sister, Joan Eccleston took out letters of administration to his estate. The petitioner, Mary McGhee, Dorothy's grandmother said that she was told by her son, Dorothy's father "to take Dorothy," that she would be better with her. Accordingly at the end of May, 1940, she brought her to Victoria and she remained in her custody until the 11th of March, 1941, when Joan Eccleston took her to her own house. Joan Eccleston as administratrix filed a notice of motion headed "In the Supreme Court of British Columbia. In probate," on the 8th of April, 1941, for the custody of the child. It was objected that Mrs. Eccleston had no *status* as administratrix to make the application; that there was no jurisdiction, in probate, to make the order asked for; and that the application should have been made by petition. Her position as administratrix does not give her any *status* in this matter. The words "In probate" may be rejected as surplusage. The motion is in the Supreme Court which, undoubtedly, has jurisdiction. The ordinary and proper mode of applying is by notice of motion—see *In re Befolchi* (1919), 27 B.C. 460, at 465, which I followed in *Re Ray and Christian* (1936), 50 B.C. 447, at 448.

Mary McGhee filed a petition on the 25th of April, 1941, under the provisions of the Equal Guardianship of Infants Act, asking for the custody of the child and that she be appointed her guardian. No guardian having been hereto appointed the official guardian is the guardian—see section 6. Her application to be appointed guardian is, in effect, one to remove the official guardian. Section 14 of the Act provides that this shall not be done without the consent of the infant, if a female of 12

years of age. As the infant has not consented this part of the petition must fail. This leaves to be decided the question of custody. Section 22 (1) of the Act provides that in questions relating to the custody of infants the rules of equity shall prevail. Subsection (22) of section 2 of the Laws Declaratory Act is exactly the same. These rules are set out in the well-known case of *The Queen* v. *Gyngall,* [1893] 2 Q.B. 232. The dominant matter for the consideration of the Court is the welfare of the child.

It was submitted that until the female infant was 16 years of age she had no right to choose with whom she should remain and that her wishes should not even be enquired into, or considered by the Court. Reference was made to Eversley on Domestic Relations, 5th Ed., 423; *The Queen* v. *Howes* (1860), 30 L.J.M.C. 47; and *Mallinson* v. *Mallinson* (1866), L.R. 1 P. & D. 221, from which it would appear that in England, the age of discretion, that is the right to exercise a choice, is 16 years of age. In fixing this age the Court was "guided" by certain mentioned statutes (practically the same as section 315 of the Criminal Code) which provided for penalties for a person taking an unmarried female child, under 16 years of age, out of the possession, and against the will of, her parents or other persons having the lawful care or charge of her. Under this *ratio decidendi* it would appear that the age of discretion in British Columbia, in matters of this sort in the case of female infants, is twelve years of age, because in addition to section 14, *supra,* section 15 of the Act provides that a parent may with the infant's consent, if a female not under the age of 12 years, constitute by indenture a person to be her guardian. A female cannot be apprenticed without her consent if she is 12 years of age. See sections 8, 9, and 10 of the Infants Act. In England, however, the Court when exercising its equity jurisdiction, always enquired what was the wish of the female infant, under 16 years of age. See *The Queen* v. *Gyngall, supra,* at 251.

The evidence shows that the petitioner's house was at one time a milk dairy. The floors are of cement. The infant's bedroom was on the ground floor. There is no basement. In March, 1940, Dr. Berman saw the infant and the house. He said that the

S. C.
1941

IN RE McGHEE

Robertson, J.

infant was very sick. She was anæmic, had trouble in her chest and fever and other disturbances. He recommended that she be removed to Mrs. Eccleston's house because it had a basement, wooden floors and better heating. Acting upon this advice Mrs. Eccleston took the child to her house, where her health steadily improved and she is now very well.

The petitioner says that if she is given the custody of the child she will have put down in the bedroom which Dorothy in such case would occupy, a proper wooden floor so as to obviate any question of danger to the child's health from that source. I am not sure this would have the desired object as there is no basement in the house. There are three reasons why I think it is for the welfare of the child that Mrs. Eccleston should have the custody: (1) Mary McGhee is now 80 years of age. I think the child would be better off in the care of a younger woman; further at that great age there is the probability that she will not be able to continue for long to properly supervise the child. Changes in the custody of the child are not good for her. (2) I think that Mrs. Eccleston has a better home for the child. (3) In a private interview in my chambers, the registrar also being present, the child said that while she liked her grandmother, she would prefer to be with Mrs. Eccleston; that Mrs. Eccleston's daughter Patricia 15 years of age was going to the school which she will attend this autumn. To the objection that the school is three miles farther from Mrs. Eccleston's place than from the petitioner's she said this did not present an obstacle as she had a bicycle. Under all the circumstances I think her wishes should be given effect to.

Mrs. Eccleston's application is granted. There will be an order that the Canada Trust Company hereafter pay to Mrs. Eccleston $10 per month for the education, maintenance and support of the infant. Mrs. McGhee is to have access to Dorothy at all reasonable times. The petition is dismissed. Mr. *Elliott* has stated he does not wish any costs. Accordingly there will be no order as to costs.

Petition dismissed.

C. A.
In Chambers
1941
July 17, 30.

THE CORPORATION OF THE DISTRICT OF OAK BAY v. THE CORPORATION OF THE CITY OF VICTORIA. (No. 2).

Judgment—Court of Appeal—Settlement of—Costs—Jurisdiction—R.S.B.C. 1936, Cap. 57, Sec. 28—B.C. Stats. 1938, Cap. 47, Secs. 105 and 106.

By the Oak Bay Act, 1910, Amendment Act, 1911, the city of Victoria was obliged to supply water to the municipality of Oak Bay. By agreement Oak Bay paid the city 7½ cents per thousand gallons for the water supplied until its expiration on December 31st, 1937, when the city sought to charge 12.08 cents per thousand gallons. On complaint by Oak Bay under the Public Utilities Act, the Public Utilities Commission, after hearing evidence, fixed the rate at 6.75 cents per thousand gallons. Under section 105 of the said Act the city appealed to the Lieutenant-Governor in Council, and under section 106 of said Act the Lieutenant-Governor in Council referred the appeal to the Court of Appeal. After argument the Court of Appeal held that the Commission failed to take into account certain items in making its estimate, and the matter was referred back to the Commission in order that it might vary its findings by taking said items into consideration. On the application of the city to settle the judgment:—

Held, that the costs of the appeal be awarded to the successful party, even assuming (though not deciding) that it is not an appeal falling within section 28 of the Court of Appeal Act.

APPLICATION for settlement of the judgment of the Court of Appeal of the 12th of June, 1941. Heard by McDONALD, J.A. in Chambers at Victoria on the 17th of July, 1941.

F. L. Shaw, for the city of Victoria.
H. G. Lawson, K.C., for the district of Oak Bay.

Cur. adv. vult.

30th July, 1941.

McDONALD, J.A.: Settlement of the judgment in this case raises the interesting question whether the Court can award costs to the successful appellant. The respondent takes the ground that because the Court did not decide this case under its ordinary jurisdiction, but under the special provisions of the Public Utilities Act, which says nothing of costs, the Court can award none.

This argument is based not so much on the fact that the pro-

C. A.
In Chambers
1941

CORPORATION OF DISTRICT OF OAK BAY
v.
CORPORATION OF CITY OF VICTORIA

McDonald, J.A.

ceedings are statutory as on the inapplicability of section 28 of the Court of Appeal Act which is the section that deals with costs and which enacts that, except in certain immaterial instances,

> the costs of and incident to appeals to the Court of Appeal shall follow the event,

unless the Court for good cause otherwise orders. Any argument based merely on the statutory origin of the proceedings would seem to me untenable. For instance, I could not entertain any doubt of the right to award costs, say, in a mechanic's lien action even though such right would be based entirely on statute, and though the right of appeal is given by a section that says nothing of costs. The reasoning in *In re Evans and McLay* (1913), 18 B.C. 191 would, I think, be an answer on this point. However, the respondent argues that there has been "no appeal to the Court" within section 28 of the Court of Appeal Act, since the appeal was actually taken to the Lieutenant-Governor in Council and was referred by it to this Court under section 106 of the Public Utilities Act. The respondent's argument involves the further contention that the Court has no power over costs except under section 28 and that that section being inapplicable, none could be given here. At first blush the contention that there has been "no appeal to the Court" seems difficult to answer though I think it could be answered if necessary. Is it not arguable that when the Lieutenant-Governor in Council referred the appeal, it merely gave the right to the appellant to go to this Court, and that when the appellant acted on that right by filing appeal books in the Court, appearing before the Court, and otherwise prosecuting its appeal, it "appealed to the Court"? I do not think it necessary to decide this point because I prefer to rely on others; but I would point out that even common-law Courts which had no inherent powers over costs, and needed the authority of statute to award them, felt no difficulty about awarding costs in an action removed from some inferior Court by *certiorari* for trial above, just as they would in an action begun before them, even though no statute dealt with such costs. It is, I take it, this want of inherent power at common law to award costs that the respondent relies on but the prevalence of statutes

touching almost every aspect of costs renders the common-law principle of little importance at this day. The Court of Chancery, in contrast, always claimed inherent power to award costs quite apart from statute and our Laws Declaratory Act, section 2 (34), copying the English Judicature Act, enacts:

> Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

This principle was held in *Rex* v. *Woodhouse,* [1906] 2 K.B. 501 to apply to costs and a careful discussion of the law is to be found in *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566 in the judgment of Middleton, J.

In England some doubt has been felt whether the inherent powers of the Chancery enabled it to award costs of proceedings taken under a statute which said nothing of costs. This doubt arose from the decision of Lord Westbury, L.C. in *In re Cherry's Settled Estates* (1862), 4 De G. F. & J. 332, followed by the Court of Appeal in *In re Mills' Estate. Ex parte Commissioners of Works and Public Buildings* (1886), 34 Ch. D. 24. However, a perusal of those cases satisfies me that the doubts based thereon are misconceived. These were both decisions on the Land Clauses Act, 1840, and they held that neither the Chancery nor the Chancery Division could award costs of an order for payment out of Court of compensation for lands expropriated. The key to these decisions is to be found in Lord Westbury's judgment, *supra,* at p. 336 where he said:

> The commissioners are in the same position as that in which they stood under the former Act, and are unable to divert any of the moneys raised under the later Act, to any purpose to which they could not have been applied under the former Act, and the costs of such applications as the present are not payable out of the moneys so raised.

In other words the *ratio decidendi* was that the statute directed what must be done with the moneys raised and this left no room for applying any to costs. That is, the statute in effect prohibited payment of costs out of these moneys. These decisions, therefore, do not hold that the Chancery's inherent power to award costs did not extend to statutory proceedings. They merely held that this power was curbed by special enactment that prohibited its exercise. I find no authority that goes any farther to derogate from the Chancery's ancient inherent power.

C. A.
In Chambers
1941

CORPORATION OF DISTRICT OF OAK BAY v. CORPORATION OF CITY OF VICTORIA

McDonald, J.A.

However, as we are not dealing with the powers of a Court analogous to a High Court but with an appellate Court I shall not lean too heavily on the English decisions, particularly in view of the considerations raised by local statutes and authorities in point. As I have said, the respondent's case assumes that section 28 of the Court of Appeal Act exhausts this Court's powers. I cannot accept that view. As I pointed out, section 28 does not purport to authorize the Court to award costs—far from it; what it does do is to assume the right and it then proceeds to restrict this right. This in itself implies that the right to award costs has another origin. I think it is settled by authority in this Province that this Court has inherent powers over costs, though, of course, they must be exercised consistently with section 28 in cases to which the section is applicable. In *Dominion Trust Co.* v. *Brydges* (1921), 30 B.C. 264, at p. 268 MACDONALD, C.J.A. (as he then was) and GALLIHER, J.A. held that this Court had inherent jurisdiction (subject to statutory restrictions) over costs; and MARTIN, J.A. (as he then was) gave judgment to the same effect in *Canadian Credit Men's Trust Association* v. *Jang Bow Kee* (1922), 31 B.C. 40, at pp. 48, 49, 50. At p. 49 the learned judge enumerated matters on which the Court had given costs " . . . about all of which not a printed or written word is to be found in rules or statutes, . . ." In this latter case the matter before the Court was brought under the Bankruptcy Act, hence was purely statutory in its origin and the decision was given during the period which lasted a short time after the Bankruptcy Act was passed, when bankruptcy jurisdiction was given to the Supreme Court and Court of Appeal, not as such but as special bankruptcy tribunals. The Bankruptcy Act was later changed on this point; but prior to the change the Court of Appeal did not hear appeals by virtue of the Court of Appeal Act at all but by virtue of the Bankruptcy Act alone, so that the ruling is peculiarly in point here.

I would go further, however, and hold that it is not even necessary to rely on inherent jurisdiction as I think the matter is covered by express statute. The Court of Appeal Act, far from leaving this Court impotent as to matters not covered by particular sections, expressly enacts by section 12 that where

there is no express provision the Court shall exercise its powers "in the same manner as the same might formerly have been exercised by the Full Court." By section 6, moreover, there is vested in the Court of Appeal all appellate jurisdiction and appellate powers held or exercised by the Full Court as at 25th April, 1907. As pointed out by MARTIN, J. (as he then was) in *Hopper* v. *Dunsmuir* (1906), 12 B.C. 18, at p. 22, the Full Court had power over costs extending to "every cause or matter." "Matter" was defined in the Supreme Court Act in 1907, as now, as including "every proceeding in the Court not in a cause"; so that it was an extremely general term which, in my view, would include an appeal such as we have here. Section 100 of the Supreme Court Act in force in 1907 strongly resembled section 28 of the Court of Appeal Act, though section 100 was slightly wider, providing that (with certain exceptions also found in section 28):

> The costs of every appeal to the Full Court and of the trial and hearing of every cause or matter shall follow the event.

I think, therefore, that if the present appeal had come before the Full Court, then, by the express wording of section 100, the costs must have followed the event.

I find confirmation of this view in *V., W. & Y. Ry. Co.* v. *Sam Kee* (1906), 12 B.C. 1. There a case came directly before the Full Court on an appeal from arbitrators by virtue of the Dominion Railway Act and it was held that section 100 of the Supreme Court Act applied to the costs of the appeal. MARTIN, J., it may be noted, added these very important words at p. 5:

> To put it briefly, if there were no section in the Supreme Court Act regarding the costs of this appeal I think it would be open to this Court to award such costs of it as it thought just.

For the reasons given I think the Court of Appeal has equal powers, and can and should therefore award the costs of this appeal to the successful party, even assuming (though not deciding) that it is not an appeal falling within section 28 of the Court of Appeal Act.

Application granted.

C. A.
1941
June 2, 3.

NOLAN v. McCULLOCH AND McCULLOCH.

Practice—Discovery—Examination for—Parties—Examination confined to issues in which defendant examined is involved—Rule 370c.

The plaintiff brought action for damages resulting from a collision between an automobile in which she was a passenger and a car she alleged was driven by the defendant William McCulloch and owned by his father Hugh McCulloch. At the time of the accident William McCulloch told the policeman who was present that he was driving the car, when in fact one Ina McKenzie was driving, he taking the blame in order to protect her. She was not a party to the action. On the examination of William McCulloch for discovery, counsel for the plaintiff sought to put questions as to whether Hugh McCulloch knew that Ina McKenzie had driven the car on previous occasions or that he had given any instructions regarding her being permitted to drive. On refusing to answer, an order was made that he should answer the questions.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., 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. The questions on the pleadings as they stand are irrelevant to the issue and the questions should not be allowed.

Whieldon v. *Morrison* (1934), 48 B.C. 492, applied.

APPEAL by defendants from the order of MORRISON, C.J.S.C. of the 5th of May, 1941, ordering the defendant William A. McCulloch to answer certain questions put to him on his examination for discovery on the 9th of April, 1941. The action was for damages resulting from a collision between a car driven by the plaintiff's husband and a car alleged to have been driven by the defendant William A. McCulloch and owned by his father, the defendant Hugh T. McCulloch. At the time of the accident one Ina McKenzie was in fact driving the McCulloch car, but William McCulloch told the police that he was driving the car with a view to protecting her. The questions which he refused to answer were as to whether his father knew that Ina McKenzie had driven the car or had allowed her to drive the car. She was not a party to the action.

The appeal was argued at Vancouver on the 2nd of June, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

Tysoe, for appellants: The plaintiff was a passenger in the car driven by Nolan. Prior to the collision William McCulloch

was driving the car but Ina McKenzie took the wheel and was driving when the accident took place. William McCulloch told the police he was driving at the time of the accident but he did so in trying to protect her. The only issue on the pleadings is whether William McCulloch was driving. Discovery is limited to the matters in question: see *Whieldon* v. *Morrison* (1934), 48 B.C. 492. Ina McKenzie is not a party to the action.

Scott, for respondent: The questions apply to the issue in this case. We have the fullest latitude in examination for discovery: see *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23. Even if Miss McKenzie was at the wheel, she is an inexperienced driver and he may have been in a position of control to guide her.

Tysoe, replied.

Cur. adv. vult.

3rd June, 1941.

MCQUARRIE, J.A.: I agree that the appeal should be allowed with costs here and below.

O'HALLORAN, J.A.: In my view the four discovery questions as formulated, are aimed to find out if the father consented to Ina McKenzie driving his motor-car. That may be an issue between the plaintiff and the defendant father, but it is not an issue between the plaintiff and the defendant son, who was being examined for discovery.

This Court has held 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: *vide Whieldon* v. *Morrison* (1934), 48 B.C. 492 and *Turner's Dairy Ltd. et al.* v. *Williams et al.* (1940), 55 B.C. 81, at p. 102. In both cases it was said that a person cannot be examined on discovery as a "witness" in general.

In the circumstances I would allow the appeal.

MCDONALD, J.A.: This is an appeal from an order of MORRISON, C.J.S.C., whereby the defendant William McCulloch was required to answer certain questions which he had refused to answer on his examination for discovery. The discussion arises out of an automobile accident. The plaintiff alleges that

C. A.
1941

NOLAN
v.
MCCULLOCH

McDonald, J.A.

the defendant William McCulloch was at the time of the accident driving a motor-car belonging to his father the defendant, Hugh McCulloch. The statement of defence denies this allegation. It is suggested in a rather collateral way by the defendant that William McCulloch was not in fact driving the car at the moment of the accident but that he had given it into the control of one Ina McKenzie, who is not a party to the action.

It was decided by this Court in *Whieldon* v. *Morrison* (1934), 48 B.C. 492 that an examination for discovery must be confined to those things which are relevant to the issue. The questions sought to be put here are as to whether or not Hugh McCulloch knew that Ina McKenzie had driven the car on previous occasions or that he had given any instructions regarding her being permitted to drive.

In my view these questions on the pleadings as they stand are irrelevant to the issue, and I would therefore allow the appeal with costs here and below.

Appeal allowed.

Solicitors for appellants: *Craig & Tysoe.*
Solicitor for respondent: *Gordon W. Scott.*

C. A.
1941

May 29, 30;
June 30.

TRIANGLE STORAGE LIMITED v. PORTER.

Mechanic's lien—Judgment—Debt recovered—Claim for interest disallowed —R.S.B.C. 1936, Cap. 140, Sec. 32; Cap. 170, Secs. 20 and 22.

In 1929 Parfitt Brothers Limited entered into a contract with Victoria Cold Storage & Terminal Warehouse Company Limited for the construction of a cold-storage plant on certain leasehold premises in Victoria held by the company. The Quebec Savings and Trust Company, the predecessor in interest of the defendant Porter, held a mortgage upon said leasehold interest as trustee for the debenture-holders under a debenture deed constituting a charge upon the Cold Storage Company's assets. The Cold Storage Company having made default in payment of the balance due under the said contract, Parfitt Brothers Limited brought action to enforce a mechanic's lien in respect of work done and materials supplied in the erection of the plant. On the 15th of November, 1935, an order was made by LAMPMAN, Co. J. that the plaintiff was entitled to a mechanic's lien for $27,503.64 with costs, and on the 9th of March,

1936, he made another order giving the plaintiff liberty to apply for an order for the sale of the leasehold interest and holding that the defendant, the mortgagee, was not entitled to any priority. Later Parfitt Brothers Limited assigned the mechanic's lien and all their interest to the present plaintiff Triangle Storage Limited. On the 1st of May, 1941, the plaintiff applied for an order for sale to satisfy the lien and that they be entitled to add to the amount of the lien interest at the rate of 5 per cent. on the amount of the lien. The application was granted.

Held, on appeal, varying the order of SHANDLEY, Co. J. (MCDONALD, J.A. dissenting), that the order for sale to satisfy the lien be affirmed but as the contract does not provide for interest and the statute does not permit it, the claim for interest should be eliminated.

APPEAL by defendant from the order of SHANDLEY, Co. J. of the 1st of May, 1941, that the cold-storage plant of the Cold Storage Company near the Outer Wharf in the city of Victoria be sold to satisfy the plaintiff's lien for the sum of $27,503.64, together with the costs of the action, and that the plaintiff is entitled to interest at 5 per cent. on the claim from the 15th of November, 1935, being the date when the order for a lien was made. Two orders were previously made by LAMPMAN, Co. J., one that the then plaintiff Parfitt Brothers Limited was entitled to a mechanic's lien under the Mechanics' Lien Act as aforesaid, and another on the 6th of March, 1936, that the defendant the mortgagee (said G. T. Porter being trustee for the bondholders) was not entitled to any priority. Parfitt Brothers Limited duly assigned the said mechanic's lien and all interest thereunder to the present plaintiff, Triangle Storage Limited.

The appeal was argued at Vancouver on the 29th and 30th of May, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

J. G. A. Hutcheson, for appellant: The defendant Porter is trustee for the bondholders with a claim for about $600,000. The plaintiff's lien is for $27,000. On the 1st of May, 1941, an order for sale was made. The order should not have been made at all and it was an improper order. As to the first, the Triangle Storage Limited was not registered. On the application there was no evidence proving the assignment, and before judgment declaring a lien on buildings they must first ascertain what properties are for sale. As to the second point, there was error in

C. A.
1941

TRIANGLE STORAGE LTD. v. PORTER

ordering us to pay costs and there was error in not considering the value of the property. The lien is an interest in land by reason of section 40 of the Land Registry Act: see *F. C. Richert Co., Ltd.* v. *Registrar of Land Titles,* [1937] 3 W.W.R. 632, at p. 638; 7 C.E.D. p. 165, sec. 56; 33 C.J., 262. The owner of a charge gets an interest in land and that includes a fee: see *Goddard* v. *Slingerland* (1911), 16 B.C. 329, at p. 332. The conveyance not being registered he had no interest in land: see *Levy* v. *Gleason* (1907), 13 B.C. 357; *Entwistle* v. *Lenz & Leiser* (1908), 14 B.C. 51; *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338. Interest from date of judgment should not be allowed, as the question is *res judicata*: see *Winter* v. *J. A. Dewar Co.* (1929), 41 B.C. 336; *Lumber Manufacturers' Yards Ltd.* v. *Weisgerber,* [1925] 1 W.W.R. 1026, at p. 1030. Any right of action for lien is merged in the judgment and they cannot claim interest. The contract itself provides without interest: see *McKinnon* v. *Campbell River Lumber Co.* (1922), 31 B.C. 18; 64 S.C.R. 396; Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 174; *Page* v. *Newman* (1829), 9 B. & C. 378. Only on agreement in writing can interest be claimed: see *McGettigan* v. *Guardian Assurance Co., Ltd.,* [1936] 3 W.W.R. 345. Only the principal is secured by the lien: see *Imperial Lumber Co., Ltd.* v. *Johnson,* [1923] 1 W.W.R. 920. He misdirected himself in not considering the value of the land: see *Standard Trust Co.* v. *Walter,* [1924] 3 D.L.R. 585; *Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472, at p. 474.

McAlpine, K.C., for respondent: He has no interest in land at all. A lien gives the right to have the land sold: see *Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472. All that is said is that the leasehold interest be sold. That we are entitled to interest see *Imperial Lumber Co., Ltd.* v. *Johnson,* [1923] 1 W.W.R. 920, at p. 921; Wallace on Mechanics' Liens, 3rd Ed., 240; *Metallic Roofing Co.* v. *Jamieson* (1903), 2 O.W.R. 316; *Beaver Lumber Co., Ltd.* v. *Curry,* [1926] 3 W.W.R. 404, at p. 407; *Lumber Manufacturers' Yards Ltd.* v. *Weisgerber,* [1925] 1 W.W.R. 1026, at p. 1031. Interest should be added after judgment the same as before judgment. We are entitled to interest under the Interest Act and on the

whole amount due: see *Fitzgerald and Powell* v. *Apperley*, [1926] 2 W.W.R. 689.

Hutcheson, in reply: We are complaining of the non-registration of the assignment. Costs can be added to the judgment but not to the lien. There is no section permitting interest to be awarded.

Cur. adv. vult.

30th June, 1941.

SLOAN, J.A.: The appeal is allowed in part, my brother MCDONALD dissenting. My brother O'HALLORAN and I would allow the appeal in relation to the interest claimed on the lien. My brother MCDONALD would dismiss the appeal.

As far as costs are concerned we have taken it upon ourselves to determine what we think the proper order should be. We direct that both parties tax their costs as if successful, the appellant to receive one-third of his taxed costs and the respondent to receive two-thirds of his taxed costs, with proper set-off.

Our reasons for judgment will be filed shortly and I am authorized by my brother MCDONALD to deliver his judgment and herewith hand his reasons to the registrar, pursuant to the statute.

O'HALLORAN, J.A.: Non-registration in the Land Registry office of the assignment of the mechanic's lien could not deprive the learned judge of jurisdiction to order the lien's enforcement. Even if it were held that section 34 *et seq.* of the Land Registry Act apply to a mechanic's lien, failure to register the assignment would not defeat his jurisdiction, in view of his discretionary powers under section 20 of the Mechanics' Lien Act which reads in part:

> A substantial compliance only with the last preceding section [*viz.*, filing of duplicate affidavit in Land Registry office] shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless, in the opinion of the Judge . . . , the owner, . . . , or some other person is prejudiced thereby, and then only to the extent to which he is prejudiced, . . .

No question arises as to priority of the mechanic's lien and the mortgage, or of the right to enforce the mechanic's lien by sale. That was determined in the issue decided on 9th March, 1936, and no appeal was taken therefrom.

C. A.
1941

TRIANGLE STORAGE LTD. v. PORTER

O'Halloran, J.A.

Although I doubt section 34 of the Land Registry Act has any application at all, yet even if it is referred to, it will be noted it confers not only a right to registration of the unregistered instrument, but

> to use the names of all parties to the instrument in any proceedings incidental or auxiliary to registration.

If this is read with section 20 of the Mechanics' Lien Act already quoted in part, and the further discretionary powers there given and now cited, it must be manifest that the jurisdiction of the learned judge to substitute the respondent as party plaintiff cannot be questioned. For section 20 empowers him to

> . . . allow the addition or substitution of all proper parties to the claim of lien, and the action to enforce the same, although the time for filing the affidavit mentioned in the last preceding section or the time for instituting proceedings under section 23 has expired.

The Mechanics' Lien Act is the master statute. All process for the enforcement of mechanics' liens originate in the county court. The mechanic's lien affidavit and the *lis pendens,* the only two documents required to be filed in the Land Registry office, are received in that office from the county court registry in obedience to the Mechanics' Lien Act. When the sale takes place under the direction of the Court, the conveyance under the seal of the judge passes the interest or estate sold, and must be received in the Land Registry office as a statutory command to pass the title accordingly. No question should arise here in regard to an unregistered instrument under section 34 *et seq.* of the Land Registry Act, since the legal efficacy of the two documents mentioned is governed by the Mechanics' Lien Act and not by the Land Registry Act.

While the Mechanics' Lien Act authorizes the assignment of a mechanic's lien, *vide* section 22 thereof, neither that statute nor the Land Registry Act requires it to be filed or registered anywhere. In fact there is no provision in either statute for filing or registering a mechanic's lien, let alone an assignment thereof. It is difficult to see how it could be done. All the Mechanics' Lien Act requires to be filed in the Land Registry office is a duplicate copy of the affidavit filed in the county court registry, *vide* section 19 (1) in which the deponent swears "he claims a mechanic's lien"; and refer also Schedule B to the statute and section 19 (2). Then when the deponent commences his action

in the county court he is required to file a *lis pendens* in the Land Registry office, *vide* section 23 (2). There is of course no such thing as an assignment of an affidavit or of a *lis pendens*.

Once jurisdiction is found to have existed in the learned judge, to substitute the respondent as party plaintiff, it is no longer open to the appellant to attack the order for sale of 1st May, 1941, on the ground that he erred in making the order of 6th December, 1940, substituting the respondent as party plaintiff. Of course if the learned judge had made the order of 6th December, 1940, without jurisdiction, it would have been a nullity and could have been so attacked in this appeal from the sale order of 1st May, 1941. But as the order of 6th December, 1940, was made by a Court of competent jurisdiction acting within its jurisdiction, that order cannot now be questioned in the Court below or in this Court. The appellant did not move to set it aside or appeal against it, and *vide* rules 14 and 15 of Order XXIII. of the County Court Rules, and *The Queen* v. *Justices of Antrim,* [1895] 2 I.R. 603, at p. 636 cited with approval by the Court of Appeal in *Rex* v. *Simpson* (1913), 83 L.J.K.B. 233.

The appellant next objected to the addition of interest—some $8,000—to the mechanic's lien for $27,503.64, declared on 15th November, 1935, to be enforceable by sale. In my view this objection is well taken. The contract did not provide for it and the statute does not permit it.

A mechanic's lien is created by the statute and not by the order of the Court which is designated in the statute to enforce it. The statute creates a right *in rem* and prescribes the method to enforce it. It becomes enforceable by sale under the authority and supervision of the Court, *vide Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472, at 475 and *Hodgson Lumber Co. Limited* v. *Marshall et al.* (1940), *ib.* 467, at 471. But neither the declaration of 15th November, 1935, that it was enforceable by sale, nor the order of 1st May, 1941, directing the sale and now under appeal, constitutes it a judgment debt within the meaning of the Interest Act, Cap. 102, R.S.C. 1927. An action to enforce a mechanic's lien is not one of debt, and *vide Dillon* v. *Sinclair* (1900), 7 B.C. 328. A personal judg-

C. A. 1941

TRIANGLE STORAGE LTD. v. PORTER

O'Halloran, J.A.

ment for the debt may be obtained under section 34 of the statute quite distinct from the enforcement of the mechanic's lien.

The decision of the Court of Appeal for Saskatchewan in *Lumber Manufacturers' Yards Ltd.* v. *Weisgerber,* [1925] 1 W.W.R. 1026 was relied on by the appellant. But in Saskatchewan and in Ontario, there is Provincial legislation in respect to interest. We have no such legislation in this Province and that decision cannot therefore apply. Interest was refused accordingly by this Court in *McKinnon* v. *Campbell River Lumber Co.* (1922), 31 B.C. 18, followed by FISHER, J. in *McGettigan* v. *Guardian Assurance Co. Ltd.*, [1936] 3 W.W.R. 345.

Lord Tenterden's Act (3 & 4 Wm. 4, c. 42, s. 28) was considered by the House of Lords in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.,* [1893] A.C. 429 with the result stated in Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 175, foot-note (*e*):

> . . . the old principle that interest is payable as of right where there has been long delay, under vexatious and oppressive circumstances, in payment of money due under a contract . . . , is apparently no longer law.

The *London, Chatham and Dover Railway* decision was followed by the Judicial Committee in *Johnson* v. *Regem,* [1904] A.C. 817, an appeal from Sierra Leone; and *vide Duffy* v. *Duffy* (1915), 26 D.L.R. 479, a decision of the Appeal Division of New Brunswick, White, J. at pp. 484-6, and *Sinclair* v. *Preston* (1901), 31 S.C.R. 408.

In *Toronto Railway* v. *Toronto City* (1905), 75 L.J.P.C. 36 interest was allowed under an Ontario statute similar to that considered in *Lumber Manufacturers' Yards Ltd.* v. *Weisgerber, supra,* but Lord Macnaghten who delivered the judgment of their Lordships said at p. 37:

> If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities ending in the case of *London, Chatham and Dover Railway* v. *South-Eastern Railway,* 63 L.J. Ch. 93; [1893] A.C. 429 would probably be a bar to the relief claimed by the corporation.

For the same reason in this Province interest does not attach because payment has been "improperly withheld"; and *vide McKinnon* v. *Campbell River Lumber Co., supra.*

In this Province a mechanic's lien is limited to the amount "actually owing" (section 7) whereas in Saskatchewan it is the

amount "justly due," *vide* the *Weisgerber* case, *supra,* at p. 1027. If interest on a mechanic's lien is permissible by statute in Saskatchewan as the *Weisgerber* case holds it is, then it is conceivable that interest may be included in that Province in the "sum justly due" where it could not be included in this Province in the "amount actually owing."

In any event the matter seems to be *res judicata.* The work was finished on 14th September, 1929, and the mechanic's lien action commenced nearly a year later, but the lien was not declared enforceable until more than six years later on 15th November, 1935. Interest on the mechanic's lien was then refused, but it was allowed on the claim for personal judgment because of a subsequent agreement to pay interest. His Honour the late Judge LAMPMAN said:

> During the argument I said that I did not think there was a lien for interest but as the company agreed to pay interest—see the company's letters of 8th June and 17th July, 1929—I think judgment may be given against them in respect to the claim for interest.

The reasons for the learned judge's refusal to allow interest on the mechanic's lien prior to his declaration of 15th November, 1935, apply with equal force to interest thereon after his declaration, unless it could be said that the declaration itself carried interest as a judgment debt. But for reasons already stated that contention is not tenable.

The appellant also objected to inclusion in the order of sale of certain costs incurred in obtaining the order under appeal. However, section 40 of the Mechanics' Lien Act so provides. That section, after limiting the costs of the action enforcing the lien as therein set out, then provides that such costs "shall be in addition to the amount of the judgment." It is clear, I think, that section 40 has no reference to the personal judgment under section 34, and also that such costs may be realized on the sale in addition to the amount of the lien. This is consistent with the priority in distribution detailed in section 36.

Finally the appellant objected that the property ordered to be sold was not sufficiently identified. The order directs sale of all the interest of the appellant in a leasehold interest therein described, "together with the cold-storage buildings and plant (so far as fixtures) erected thereon," a word for word repetition

C. A. 1941

TRIANGLE STORAGE LTD. v. PORTER

O'Halloran, J.A.

of what was contained in the order of 15th November, 1935. This clearly conforms to the language of the statute (section 6), "erection, building, . . . , or other work, or the appurtenances to any one of them." However, should a question arise as to whether any particular thing is embraced therein, the appellant is not precluded by this judgment from taking proper steps to have it determined.

Several other points were pressed by counsel for the appellant, but the Court intimated during the argument that it would dismiss the appeal unless the points now considered should lead to another conclusion. In the result the order appealed from is varied by elimination of interest, but is sustained otherwise. Accordingly the appeal is allowed in part in that respect.

Costs will be proportioned according to the respective success of the parties. Each party will tax its costs here and below as if successful. The appellant is entitled to one third, and the respondent to two thirds the respective amount each shall so tax with appropriate set-off.

MCDONALD, J.A.: The respondent's predecessor in title Parfitt Brothers Limited, in or about the year 1929 entered into a contract with Victoria Cold Storage and Terminal Warehouse Company Limited for the construction of a cold-storage plant on certain leasehold premises in the city of Victoria. The Quebec Savings and Trust Company, the predecessor in interest of the appellant, held a mortgage upon the said leasehold interest. The Cold Storage Company having made default in payment of the balance due under the said contract, was sued by Parfitt Brothers Limited in the County Court of Victoria and a mechanic's lien was claimed upon the said leasehold interest. By a judgment of the county court the balance owing was fixed and Parfitt Brothers Limited declared entitled to a mechanic's lien upon the premises. Later Parfitt Brothers Limited assigned their rights to respondent, and notice in writing of that assignment was duly served. In the working out of the proceedings under the Mechanics' Lien Act a judgment was entered on 1st May, 1941, by SHANDLEY, Co. J. directing that the leasehold interest be sold, and this appeal is taken from that judgment. Several objections were

raised but it was decided on the hearing that the respondent need speak to only four of these matters:

Firstly, it is objected that the assignment from Parfitt Brothers Limited to respondent was not registered in the Land Registry office, and it is contended that by reason of section 34 of the Land Registry Act the lien constituting an interest in real property, nothing passed to respondent by this assignment until registration had been effected, and that hence this judgment must be set aside. I think this ground is not well taken. The Mechanics' Lien Act and the Land Registry Act should be read together, and reading the two together the whole practice in regard to mechanics' liens is provided for. Proceedings under the Mechanics' Lien Act are commenced by the filing of an affidavit setting forth the claimant's claim; a copy of that affidavit is filed in the Land Registry office; within 31 days thereafter an action must be brought, and thereupon a certificate of *lis pendens* must be filed in the Land Registry office. Failing this, the lien ceases to exist and the certificate of *lis pendens* is cancelled. Nothing further is required to be done so far as the Land Registry Act is concerned, except that after a sale under the Act a conveyance to the purchaser is executed and duly registered. It is not the lien which is registered; it is the claim for a lien, and the purpose of filing the certificate of *lis pendens* is to give notice that a claim has been made for a lien. There is never registered a charge in the usual sense; all that is done in the Land Registry office is to give notice that a claim has been made. The affidavit claiming the lien conveys no interest in land and the certificate of *lis pendens* conveys no interest, and in my opinion the assignment of the claimant's rights was not only not required to be registered, but I gravely doubt that the land registrar had any power to receive the same.

Secondly, it is objected that the learned judge ought to have ordered an issue to be tried in order to ascertain what property comprised in the leasehold interest consisted of personalty and what property consisted of realty. With due respect for contrary views, I find myself unable to understand just what principle of law or practice is contended for. What was ordered to be sold is the leasehold interest, as to which it had been already adjudged

C. A.
1941

TRIANGLE STORAGE LTD. v. PORTER

McDonald, J.A.

that the respondent's claim was prior to that of the appellant. The leasehold interest is to be offered for sale subject to certain conditions which have been fixed by the learned judge, and these may be varied by him from time to time as circumstances may demand. He who chooses to bid on the property knows that he is getting that leasehold interest—nothing more and nothing less. If there are chattels upon the property they do not pass. These proceedings are not concerned with chattels, and any intending purchaser is and must be aware of that fact. In my opinion this was a matter for the learned judge to decide. Section 31 of the Act provides briefly that the judge may

> proceed . . . and . . . may . . . try issues, and in default of payment may direct the sale of the estate or interest charged, and such further proceedings may be taken for the purpose aforesaid as the Judge may think proper in his discretion.

I am very far from thinking that the learned judge erred in principle in the exercise of his discretion in this regard. I think this objection fails.

Thirdly, it is objected that the learned judge was wrong in allowing interest at 5 per cent. on the judgment debt after judgment. It is said that while there is no objection to this in so far as the Cold Storage Company is concerned, it nevertheless was improperly allowed as an addition to respondent's claim as represented by his lien. As I understand the matter, this argument is disposed of by what, with respect, I consider to be sound decisions in the Courts of Appeal of Alberta and Saskatchewan. Reading the judgment of the appellate Court of Alberta in *Imperial Lumber Co., Ltd* v. *Johnson,* [1923] 1 W.W.R. 920, and those of the Saskatchewan Court of Appeal in *Lumber Manufacturers' Yards Ltd.* v. *Weisgerber,* [1925] 1 W.W.R. 1026, I am satisfied that it was the opinion of those Courts following a long line of decisions under similar statutes in other jurisdictions., that in respect of a claim for a mechanic's lien, interest is incidental to the claim and is and ought to be allowed to be added to the claim. I think this is so entirely apart from the Dominion Interest Act, which provides for interest on a judgment debt.

Lastly, it is contended that the learned judge was wrong in allowing costs to be added to the amount of the lien claim. I

C. A.

1941

TRIANGLE STORAGE LTD. v. PORTER

think that the learned judge was right and that sections 40 to 44 clearly contemplate the allowance of such costs.

It follows that I would dismiss the appeal with costs.

Appeal allowed in part.

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

Solicitors for respondent: *Tait & Marchant.*

KAPOOR SAWMILLS LIMITED *ET AL.* v. DELIKO.

S. C.

1940

Jan. 22; *March* 21.

1941

May 29.

Constitutional law — Lands on foreshore of Burrard Inlet — Grant by Dominion Government—Validity — Public harbours — Certificate of indefeasible title—Effect of—R.S.B.C. 1936, Cap. 140—British North America Act, 1867 (30 & 31 Vict., c. 3), Sec. 108.

Kapoor Sawmills Limited purchased certain lands along the foreshore of Burrard Inlet from the corporation of Burnaby. The corporation of Burnaby was successor in title to the North Pacific Lumber Company, said company having obtained a grant from the Crown (Dominion) for said property in 1904. This grant was made on the assumption that Burrard Inlet was a public harbour within the meaning of the Third Schedule to the British North America Act, 1867. In 1924 an agreement was entered into between the Dominion and the Province with a view to the settlement of disputes as to whether Burrard Inlet was a public harbour, and the result was that the Province transferred to the Dominion all its interest in the foreshore lands within the boundaries of the said harbour. This agreement was confirmed by order in council. The corporation of Burnaby as successor to the original grantee, obtained a certificate of indefeasible title under the Land Registry Act in 1939. The defendant who was in occupation of the lands in question and had several buildings thereon (occupation commenced after the Crown grant from the Dominion above referred to), but had no title, disputed the plaintiffs' right on the ground that Burrard Inlet was not a public harbour within the meaning of the British North America Act, 1867, because it was not used as a public harbour prior to the entrance of British Columbia into Confederation, and that therefore the Dominion had no title to these lands and could not make a valid grant of them.

Held, that any defects that may have existed in the Dominion's title were cured by the agreement with the Province which amounted to a conveyance of the Province's interest in the land. The grantees from the Dominion received the benefit of this agreement and their titles were thereby perfected.

S. C.
1940

KAPOOR SAWMILLS LTD. v. DELIKO

Held, further, that the indefeasible title held by the corporation of Burnaby operated as a bar to the defendant's claim under the provisions of the Land Registry Act, the defendant not being a person "adversely in actual possession of and rightly entitled to the land included in the certificate at the time of the application upon which the certificate was granted."

ACTION for possession of certain lands on the foreshore of Burrard Inlet for which the plaintiff, the corporation of the district of Burnaby, holds certificate of indefeasible title issued by the district registrar of titles at New Westminster. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 22nd of January and the 21st of March, 1940.

Donaghy, K.C., for plaintiffs.
Banton, for defendant.

Cur. adv. vult.

29th May, 1941.

MANSON, J.: The plaintiff, the Corporation of the District of Burnaby, holds certificate of indefeasible title No. 129526E (Exhibit 5a) issued by the district registrar of titles at New Westminster on 12th January, 1939, which certificate covers block 14, district lot 213, group one, New Westminster District, plan 3081, which parcel of land is immediately above high-water mark on the south side of Burrard Inlet, an inlet of the sea to the north of the city of Vancouver and the municipality of the district of Burnaby. Under the said certificate (it is not disputed) the said corporation is the owner of the parcel in fee simple.

The said corporation also holds certificate of indefeasible title No. 130332E (Exhibit 6a) issued by the aforementioned district registrar on 14th March, 1939, which certificate covers lot D, the water lot contiguous to and in front of block 14 and a portion of the water lot granted (Exhibit 15) by the Crown in right of the Dominion to The North Pacific Lumber Company Limited, on 16th January, 1904. Ownership in fee simple of lot D is claimed by the said corporation.

The plaintiff, Kapoor Sawmills Limited (formerly Modern Sawmills Limited—*vide* Exhibit 10), agreed in writing on 9th August, 1939 (Exhibits 1 and 2), to purchase the two aforementioned parcels and the agreements were duly registered as

charges in the Land Registry office (Exhibits 3 and 4). Under the said agreements the Kapoor Company entered into possession prior to the commencement of this action.

The limit of the foreshore is the line of the medium high tide between the spring tides and the neap tides. *Attorney-General* v. *Chambers* (1854), 23 L.J. Ch. 662. Coulson & Forbes on Waters and Land Drainage, 5th Ed., at p. 22 states:

> The landward limit of the foreshore is therefore that part of the shore which for four days in every week, or for the most part of the year, is reached and covered by the tides.

The witness McGugan, a British Columbia land surveyor of ripe experience, surveyed the situation upon the ground (Exhibit 9), and, applying the proper rule for the determination of the high-water mark, found that the defendant had three buildings in whole or in part on block 14, and four buildings on lot D, or five if a small smoke-house be counted. I accepted his evidence.

The British North America Act, 1867, Sec. 108, reads as follows:

> 108. The public works and property of each Province, enumerated in the Third Schedule to this Act, shall be the property of Canada.

The schedule referred to in section 108 in its pertinent part reads as follows:

> The THIRD SCHEDULE
>
> PROVINCIAL PUBLIC WORKS AND PROPERTY TO BE THE PROPERTY OF CANADA.
>
> 2. Public harbours.

Clearly all natural harbours did not constitute public harbours under the Third Schedule but only, in this Province, such harbours as were public harbours on the date when the colony of British Columbia was admitted into and became part of the Dominion of Canada, namely, on the 20th day of July, 1871. The Province of British Columbia after its admission into the Dominion never seems to have claimed Burrard Inlet. The Dominion, however, assumed that Burrard Inlet was a public harbour and from time to time from an early date His Majesty The King in right of the Dominion made grants of foreshore and water lots within the inlet. Doubt, however, arose as to what harbours within the Province constituted "public harbours" within the Third Schedule. Negotiations took place between the Dominion and the Province with a view to the settlement of the question. These negotiations culminated in an agreement which

S. C.
1941

KAPOOR SAWMILLS LTD. v. DELIKO

Manson, J.

was ratified by concurrent orders in council of the Dominion and of the Province in 1924. Provincial order in council No. 507 was passed on the 6th day of May, 1924, and will be found at p. 1178 of volume 1 of The British Columbia Gazette, 1925. Dominion Order in Council No. 941 was passed on the 7th day of June, 1924, and will be found at p. 3219 in volume 58 of The Canada Gazette, 1925—*vide* Exhibits 16 and 17. Both orders were gazetted in April, 1925. Each order recites the report made by the responsible minister to the executive head of the Government. The language of paragraphs 1 and 2 of each report is identical. The paragraphs numbered 1 recite section 108, Schedule 3, of the British North America Act, 1867, and the order of Her Late Majesty Queen Victoria in Council of the 16th of May, 1871, admitting British Columbia into the Dominion on the 20th of July, 1871. The paragraphs of the aforementioned reports, numbered 2, read as follows:

> 2. That some doubt has existed as to what is comprised in the expression "public harbours" in Schedule 3 of the British North America Act, and it has been held by the Judicial Committee of the Privy Council that the question whether any harbour or any particular part thereof is included is a question of fact dependent upon the circumstances of each case, but that a natural harbour not actually used for harbour purposes at the date of the Union is not included.

The paragraphs numbered 3 recite that it is desirable in the public interest that the property which belongs to Canada under the designation "public harbours" should be definitely ascertained and that negotiations to that end have taken place. Each report in its paragraph 4 sets forth, *inter alia,* that Burrard Inlet was and is a "public harbour" within the meaning of Schedule 3, and became and is the property of Canada thereunder. Paragraph 13 of the Provincial order recommends:

> 13. That all the right, title and interest (if any) of the Province of, in, and to the foreshore and lands covered with water within the boundaries of the six harbours above mentioned, as defined by the said descriptions and plans, be and the same is hereby transferred to the Dominion.

Burrard Inlet was one of the six harbours referred to. Paragraph 15 of the Provincial order provides, *inter alia,* that a certified copy of the order be filed in the office of the registrar of titles in New Westminster. A similar provision is contained in the Dominion order. Paragraph 12 of the Dominion order recites that the agreement between the two Governments was

ratified and confirmed by the Provincial Government on 6th May, 1924, and that the Province had transferred to the Dominion

> all the right, title and interest, if any, of the Province of, in, and to the foreshore and lands covered with water within the boundaries of the six harbours above mentioned, etc.

The Provincial order in council contained a provision that it would come into full force and effect upon the passing of the Dominion order in council. Both orders became operative on the 7th day of June, 1924. Certified copies of both orders were filed in 1924 in the Land Registry office at New Westminster—the appropriate office in respect of the title to the parcels in question in this action—*vide* evidence witness Marshall.

Although the point was not raised by counsel it would seem that there was no legislative sanction for the agreement entered into by the Province with the Dominion nor was there legislative approval of the agreement. No argument was submitted with respect to the validity of the agreement nor as to the evidentiary value of the declarations contained in the agreement. Indeed, counsel for the defendant in his written argument says:

> Since that date [the date of the agreement] by reason of conveyance from the Province of British Columbia of the foreshore involved, the Dominion of Canada has become and still is the lawful owner.

And again:

> This foreshore is now land of the Crown Federal by reason of the conveyancing agreement embodied in the order in council of 1924.

It is to be noticed that in the case of another agreement between the Dominion and the Province, namely, that with respect to the return to the Province of the Peace River Block, the agreement was confirmed by the Legislature by statute—*vide* 1930, chapter 60. Assuming the agreement as ratified by the Dominion and Provincial orders in council and the orders in council themselves to be valid, it follows that, regardless of whether or not Burrard Inlet was a public harbour on the 20th of July, 1871, and therefore from that date onward the property of the Dominion, it cannot be denied that Burrard Inlet was the property of the Dominion from the 7th day of June, 1924, onwards.

In *Rajapakse* v. *Fernando,* [1920] A.C. 892, at p. 897, the English doctrine with respect to after-acquired title is stated in these words:

S. C.
1941
KAPOOR SAWMILLS LTD. v. DELIKO
Manson, J.

Where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or, as it is usually expressed, "feeds the estoppel."

If, therefore, the Dominion had no title when it made the grant referred to in 1904 to The North Pacific Lumber Co. Ltd., but subsequently acquired title on 7th June, 1924, there can be no doubt that under the above doctrine, which is effective in this Province as well as in England, the conveyance to The North Pacific Company would be a registrable conveyance. I do not say that the Dominion had no title from the 20th of July, 1871, onwards. If the agreement as between the Governments be accepted as of evidentiary value the Dominion did have title.

In 1910 the Provincial Legislature by section 2 of chapter 27 prohibited the registration in Land Registry offices of any title derived from the Crown in right of the Dominion to foreshore or tidal land or land under the sea without the sanction of the Lieutenant-Governor in Council. This section remained upon the statute book until its repeal by 1931, Cap. 32, Sec. 2.

The bar to the registration of a Dominion grant of a water lot having been removed, the grant to The North Pacific Company (Exhibit 15) was registered in the Land Registry office at New Westminster on the 6th day of February, 1939, as is shown by the endorsement on the certified copy of the grant. The corporation of Burnaby is the successor in title to The North Pacific Company, as is shown by the certificate of indefeasible title No. 130332E (Exhibit 6a).

The effect of certificates of indefeasible title is dealt with in section 37 of the Land Registry Act, R.S.B.C. 1936, Cap. 140. The relevant part of the section reads:

37. (1.) Every certificate of indefeasible title issued under this Act shall be received in evidence in all Courts of justice in the Province without proof of the seal or signature thereon, and, so long as it remains in force and uncancelled, shall be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in the certificate is seised of an estate in fee-simple in the land therein described against the whole world, subject to:—

(*a.*) The subsisting exceptions or reservations contained in the original grant from the Crown:

(*b.*) Any condition, exception, reservation, charge, lien, or interest noted or endorsed thereon:

(2.) Every certificate of indefeasible title issued under this Act shall be

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

The conclusive effect of an indefeasible certificate of title under section 37 was considered by the Judicial Committee in *Creelman* v. *Hudson Bay Insurance Company,* 88 L.J.P.C. 197; [1919] 3 W.W.R. 9; [1920] A.C. 194. Lord Buckmaster, after having referred to the provisions of the statute with respect to the issuance of certificates of title and particularly to the provisions of section 37, at p. 197 [of the Appeal Cases] observes:

> . . . the certificate of title referred to in s. 22 of the Land Registry Act [now s. 37, *supra*] is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of a person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.

In that case it was held that when a company has been granted in respect of land in British Columbia a certificate of indefeasible title under the Land Registry Act, purchasers of the land from the company cannot dispute the validity of the title on the ground that the company had no power under its Act of incorporation to hold the land. In the light of that decision there can be no possible doubt as to the conclusive character of a certificate of indefeasible title.

In the case at Bar the certificates are in force and uncancelled and the defendant does not in his pleadings challenge the certificates nor ask for their cancellation. He does with respect to the certificate covering lot D allege that the certificate

> expressly declares itself to be void as against the title of any person adversely in actual possession of and rightly entitled to the hereditaments included in same at the time of the application upon which the said certificate was granted and who continues in possession and that the defendant has occupied and been possessed of a portion of the said land covered with water, or foreshore, in front of said block 14 for many years last past without interruption.

The evidence establishes that the defendant has had several buildings upon the foreshore forming part of lot D for a number of years, none of them, however, at as early a date as 1904. It was not, however, established that he was rightly entitled to the

S. C.
1941

KAPOOR SAWMILLS LTD. v. DELIKO

Manson, J.

land included in the certificate at the time of the application upon which the certificate was granted. The defendant has not, and never had, any title. Neither certificate is void under section 37 (2).

Counsel for the defendant refers to the language of the grant to The North Pacific Company. The grant is of

> all the right, title, interest, claim, property, estate and demand both at law and in equity, and as well in possession as in expectancy, which We or Our Successors have, or may have, for the use of or in the right of Our Dominion of Canada, of, in, and to all and singular that certain parcel or tract of tidal lands, etc.

A clause in the grant saves to the Dominion the right of navigation in and over the navigable waters within the boundaries of the grant and a proviso stipulates that the grantees shall not be absolved from complying with the Navigable Waters' Protection Act (now R.S.C. 1927, Cap. 140). A further proviso stipulates that the grant is accepted by the grantees upon the express condition and understanding that the grant is issued for the purpose of passing to the grantees only such estate, title and interest as the Dominion had the power to convey. A further stipulation is to the effect that the grantee shall have no recourse against the Dominion should the title of the Dominion be found to be defective. I have already disposed of the matter of the title of the Dominion. There is nothing in the stipulations with respect to the right of navigation or the Navigable Waters' Protection Act which helps the defendant in any way. Nor is there anything that assists the defendant in the agreement of The North Pacific Company to take only such title as the Dominion had. In other words there is no subsisting exception or reservation in the grant to The North Pacific Company and no condition, exception, reservation, charge, lien or interest noted or endorsed on the certificate of title which detracts from the conclusive character of that document.

In view of the foregoing conclusions it is not necessary to consider the evidence led at the trial as to the use of the portion of Burrard Inlet within what is now lot D as a public harbour prior to the 20th of July, 1871, nor is it necessary to consider the decisions of our Courts with respect to other portions of Burrard Inlet pronounced prior to the agreement of 1924 and

S. C.
1941

KAPOOR SAWMILLS LTD. v. DELIKO

Manson, J.

prior to the issuing of certificates of indefeasible title to grantees from the Dominion Crown.

The certificates are conclusive as to the title of the corporation of Burnaby as against the defendant and, as against him the plaintiffs are entitled to possession of both parcels and to their costs of this action. The defendant's counterclaim depends upon the same allegations as those put forward in answer to the plaintiff's claim. The counterclaim is dismissed with costs.

Judgment for plaintiffs.

But see Island Cellulose v. Coal Consumers (1944) 60 B.C.R. 114 at p. 116

McDONALD v. YANCHUK *ET AL.* ROYAL BANK OF CANADA, GARNISHEE.

S. C.
In Chambers
1941
June 4.

Garnishee—Registrar's order—Appeal—Sufficiency of affidavit in support of application—R.S.B.C. 1936, Cap. 17, Secs. 3 and 6—Form C in Schedule.

Under section 3 of the Attachment of Debts Act an affidavit in support of an application for a garnishing order must state the nature of the cause of action and that the amount claimed is "justly due and owing." Section 6 of said Act, which provides that "affidavits and orders in the forms in the Schedule shall be held to be sufficient" must be read in the light of the specific requirements of section 3, and although clause 4 of the affidavit in Form C in the Schedule does not include words to the effect that the debt is "justly due and owing" nevertheless words to that effect are necessary.

APPLICATION by defendant Vancouver Broom & Brush Manufacturing Company to set aside a garnishing order made by the deputy district registrar at Vancouver. The facts are set out in the reasons for judgment. Heard by MANSON, J. in Chambers at Vancouver on the 4th of June, 1941.

Bartman, for the application.
E. R. Thomson, contra.

MANSON, J.: Application by defendant Vancouver Broom & Brush Manufacturing Company to set aside the garnishing order made by the deputy district registrar herein on the 28th of May,

S. C.
In Chambers
1941

McDONALD
v.
YANCHUK
ET AL.

Manson, J.

1941, on the ground that the affidavit in support of the said order was insufficient in that it did not state (a) the nature of the cause of action and (b) that the amount claimed was "justly due and owing."

The relevant portion of section 3 of the Attachment of Debts Act, R.S.B.C. 1936, Cap. 17, reads as follows:

3. (1.) A Judge or a Registrar may, upon the *ex parte* application of any plaintiff . . . , upon affidavit by himself or his solicitor, or some other person or persons aware of the facts respectively, stating, . . . , in case a judgment has not been recovered, that an action is pending, the time of its commencement, the nature of the cause of action, and the actual amount of the debt, claim, or demand, and that the same is justly due and owing, after making all just discounts, and stating, . . . , that to the best of the deponent's information and belief any other person is indebted or liable to the defendant . . . , and is within the jurisdiction of the Court, order that all the debts, obligations, and liabilities owing, payable, or accruing due from such third person (hereinafter called the "garnishee") to the defendant . . . , shall be attached to answer the judgment of the plaintiff to be recovered, . . .:

The relevant portions of the affidavit of the plaintiff which was filed in support of the application for the attaching order reads as follows:

3. The cause of action for which this action is brought is to recover from the defendants the sum of $2,052.05, being $410.75 for commission on sale of defendants' business, $1,250 as agreed for remuneration for sale of defendants' machinery, and $1,153.19, being one-third of the defendants' net profits from July 1st, 1940, to time of sale of defendants' business, total $2,813.94, less received on account of profits $761.89, leaving balance payable $2,052.05.

4. In respect of the said cause of action the defendants are justly indebted to the plaintiff in the sum of $2,052.05 after making all just discounts.

Section 6 of the Attachment of Debts Act reads as follows:

6. Affidavits and orders in the forms in the Schedule, or to the like effect, shall be held to be sufficient.

Clauses 3 and 4 of Form C in the Schedule (Affidavit in Support of Garnishing Order before Judgment) read:

(3.) The cause of action for which this action is brought is .

(4.) In respect of the said cause of action the defendant is justly indebted to the plaintiff in the sum of dollars, after making all just discounts.

Paragraph 3 of the plaintiff's affidavit in that portion which reads

and $1,153.19, being one-third of the defendants' net profits from July 1st, 1940, to time of sale of defendants' business

does not disclose the nature of the cause of action as required by section 3 of the statute. There must be strict compliance with

the statute. The affidavit in support is insufficient by reason of the omission mentioned. *Geffen* v. *Lavin,* [1919] 2 W.W.R. 491; *Scott* v. *Chase Creek Lumber Co., Ltd.,* [1921] 2 W.W.R. 773; *Brethour* v. *Taylor,* [1927] 3 W.W.R. 166; *Joncas* v. *Plotkins and Lion Refining Co.,* [1934] 2 W.W.R. 142.

The affidavit of the plaintiff does not verify that the alleged indebtedness of the defendants is "justly due and owing." The right to an attaching order is purely statutory and under section 3 of the statute the affidavit in support of the application for an attaching order must show a debt "justly due and owing."

It was submitted, and rightly, I think, that section 6 must be read in the light of the specific requirements of section 3. Clause 4 of the affidavit in Form C in the Schedule does not include words to the effect that the debt is "justly due and owing." Nevertheless, I think words to that effect are necessary. That was the view taken by LENNOX, Co. J. in *Brown* v. *Strickland,* [1938] 1 W.W.R. 399 and, I am told, by HARPER, Co. J. in a later and unreported case. MACDONALD, C.J.A. (later C.J.B.C.) in *North American Loan Co.* v. *Mah Ten* (1922), 31 B.C. 133, at 135, used language which seemed to indicate that mere compliance with the form in the Schedule would suffice, but regard must be had to the particular facts with which the learned Chief Justice was dealing. He also observed:

> I do not think the Court has a right to fritter away what the Legislature says shall be done.

With that observation I am, with respect, entirely in accord.

The garnishing order will be set aside with costs and the money in Court paid in under the order will be paid out to the defendant the Vancouver Broom & Brush Manufacturing Company.

Application granted.

C. A.
1941
June 11, 30.

REX v. PAVALINI.

Criminal law—In possession of morphine—Accomplice—Evidence of previous criminal acts — Admissibility — Substantial wrong or miscarriage—Criminal Code, Sec. 1014, Subsec. 2.

The appellant and one Patricia Lane were charged jointly with unlawful possession of morphine and were tried together. At the close of the Crown's case the appellant stated he was not calling any evidence. Patricia Lane took the stand in her own defence, and in the course of her evidence disclosed that the appellant and herself had been convicted and sentenced to six months' imprisonment for procuring morphine by the use of a forged prescription. A jury found the appellant guilty, but acquitted Patricia Lane.

Held, on appeal, affirming the conviction by FISHER, J., that the course of the action left the appellant in reality without any defence to the charge, because if the uncontradicted evidence of the police officers was accepted by the jury, as it was, all the elements of proof necessary to convict had been established. If the jury at that stage of the trial had been asked to pass upon the guilt or innocence of the appellant, his conviction, in the absence of an explanation would have been inevitable. In the peculiar and exceptional facts of this case the appellant was not prejudiced by anything that Patricia Lane disclosed to the jury. His defence could not be prejudiced because as pointed out above, he did not attempt to make any answer to the Crown's case. Under the circumstances of this case it is proper to apply subsection 2 of section 1014 of the Criminal Code, and the appeal is dismissed.

Rex v. *Williams and Woodley* (1920), 14 Cr. App. R. 135, followed.

APPEAL by accused from the conviction by FISHER, J. and the verdict of a jury at the Spring Assize at Vancouver on the 18th of April, 1941, on a charge that on the 31st of January, 1941, he had in his possession a drug, to wit, morphine, without first obtaining a licence from the Minister of Pensions and National Health, or without other lawful authority. He was sentenced to imprisonment for four years and six months and to a fine of $500.

The appeal was argued at Vancouver on the 11th of June, 1941, before MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

Smilie, for appellant: The learned judge was in error in allowing in evidence of a previous conviction: see *Rex* v. *Palmer* (1935), 25 Cr. App. R. 97; *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65; *Rex* v. *Wadey* (1935),

25 Cr. App. R. 104. The witness Patricia Lane was an accomplice and the learned judge failed to give the jury the usual warning in regard to her evidence.

Donaghy, K.C., for the Crown: The evidence of Patricia Lane as to a previous conviction was brought out by surprise. The irregularity did not affect accused's case. He made no attempt to answer the charge made against him. As to Patricia Lane being an accomplice, she was not an accomplice and the jury so found. No warning was necessary.

Smilie, replied.

Cur. adv. vult.

30th June, 1941.

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

SLOAN, J.A.: The appellant was convicted at the last Vancouver Spring Assize for unlawful possession of morphine and sentenced by FISHER, J., to imprisonment for a term of four years and six months and to a fine of $500 and in default of payment of the fine to an additional period of six months' imprisonment.

From this conviction and sentence the appeal is taken. The facts briefly stated are that the appellant and one Patricia Lane, a young woman of twenty, occupied a suite in a Vancouver apartment-house in which suite the police found morphine. They were charged jointly with the unlawful possession of the drug and while tried together were defended by separate counsel.

At the close of the Crown's case appellant's counsel stated he was not calling any evidence. The appellant thus made no attempt on his part to meet the statutory *onus* upon him to prove that the drug was in his apartment

without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof:

(see section 17, The Opium and Narcotic Drug Act, 1929, and *Rex* v. *Wong Loon* (1937), 52 B.C. 326). In my view that course of action left him in reality without any defence to the charge because if the uncontradicted evidence of the police officers was accepted by the jury, as it was, all the elements of proof necessary to convict had been established. If the jury at

C. A. 1941

REX v. PAVALINI

Sloan, J.A.

that stage of the trial had been asked to pass upon the guilt or innocence of the appellant, his conviction in the absence of an explanation would have been inevitable.

Counsel for Patricia Lane adopted a different attitude and called her to the stand in her own defence. In an effort to convince the jury that she knew nothing of the drug and that it was not in the suite with her "authority, knowledge or consent" she told the story of her association with the appellant. In the course of this narrative she disclosed that the appellant and herself had been convicted at Nanaimo and sentenced to six months' imprisonment for procuring morphine by the use of a forged prescription. Upon their release Patricia Lane claimed she and the appellant had an understanding that he would in future use no drugs; that in consequence the appellant "took a cure" and that since then she had never seen him with drugs nor seen any drugs where he was. Some of this evidence is, of course, favourable to the appellant and I presume it is because of that appellant's counsel made no objection thereto nor did he cross-examine the witness on any aspect thereof. The jury apparently believed she knew nothing of the drug and acquitted her.

Counsel for the appellant submitted to us that Pavalini's conviction could not stand, first, because of the introduction by Patricia Lane of evidence of appellant's previous conviction and secondly because Patricia Lane was an accomplice and the learned trial judge failed to give the jury the usual warning in relation to her evidence. *Rex* v. *Nowell* (1938), 54 B.C. 165.

I think the second objection is met by the decision to which I made reference during the hearing: *Rex* v. *Barnes and Richards* (1940), 27 Cr. App. R. 154.

The first objection is more troublesome. Counsel for the Crown conceded that the well-known principle stated in *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57, at 65 is not limited to cases in which evidence of previous criminal acts was adduced by the prosecution and as pointed out in *Allen* v. *Regem* (1911), 44 S.C.R. 331, a new trial may be ordered if evidence improperly admitted may have prejudicially influenced the jury although there is ample evidence properly admitted to

support the conviction. However, on the peculiar and exceptional facts of this case I do not see how the appellant was prejudiced by anything which Lane disclosed to the jury. His defence could not be prejudiced because as pointed out above he did not attempt to make any answer to the Crown's case. No doubt there were good and sufficient reasons for his reticence in this regard but it seems to me that his silence under the circumstances of this case, brings him within *Rex* v. *Williams and Woodley* (1920), 14 Cr. App. R. 135. In that case the appellants were convicted of shop and warehouse breaking and conspiracy to enter a shop and warehouse. They were found in recent possession of the stolen goods and of house-breaking implements and were unable to give any explanation of their possession of the stolen goods. It appeared, however, that evidence of their previous convictions had improperly come to the attention of the jury.

In dismissing an appeal taken upon that ground Lord Reading said at p. 138:

> Without going into any other facts, it is sufficient to say that on the evidence, bearing in mind the fact that they were unable to explain how they obtained possession of the stolen goods, we must come to the conclusion that the jury would inevitably have held, without the information about the previous convictions, that the prisoners were guilty, and that the irregularity did not affect the verdict, and therefore, notwithstanding the irregularity, the appeals must be dismissed.

See also *Regina* v. *Woods* (1897), 5 B.C. 585, and *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1, at p. 10.

Under the circumstances of this case I think it proper to apply subsection 2 of section 1014 of the Code and in consequence I would dismiss the appellant's appeal from his conviction.

That leaves for consideration his appeal from sentence. From a perusal of this man's record I would judge that since 1917 he has been either engaged in some criminal activity or else in gaol paying the penalty therefor. No grounds have been advanced which would justify our interference with his present sentence and I would dismiss his appeal in that regard—see *Rex* v. *Zimmerman* (1925), 37 B.C. 277.

So far as the motion to introduce new evidence is concerned I would refuse to accede thereto. In my view the material does not disclose facts which, if given in evidence, might reasonably

C. A.
1941

REX
v.
PAVALINI

Sloan, J.A.

influence the verdict of the jury in favour of the appellant. In my view the proposed evidence points only to participation by Patricia Lane in the possession of the drug and would not, in the absence of an explanation by him, tend to exculpate the appellant. There is no suggestion that because of this evidence (alleged to have been newly discovered) the appellant would on a new trial brave the rigours of the witness box. The *onus* on him would therefore remain undischarged and in consequence the verdict of the jury could not be influenced by what it is now proposed by the appellant they should hear at a new trial.

Several other grounds of appeal were raised by the appellant and his counsel made the most of them during his argument but, with respect, without convincing me that they merited serious consideration. In the result the appellant fails in his endeavour to disturb the verdict and sentence below.

O'HALLORAN, J.A.: I concur in dismissing the appeal for the reasons given by my learned brother SLOAN.

Appeal dismissed.

Reversed 57 B.C.R. 390 (1944) 1 W.W.R. 726 (1944) 2 D.L.R. 377

S. C.
1941

May 1;
June 28;
July 29.

MAINWARING v. MAINWARING.

Husband and wife—Alimony—Jurisdiction—Order LXXA, r. 1 (a) and (c).

The right to alimony is a civil right, which a wife has, to be supported by her husband, and is not conditional upon a decree of divorce or judicial separation having been granted.

It was found in this case that the defendant, in or about the year 1936, refused to live with the plaintiff when she was willing to live with him, and there is not sufficient evidence to prove that the defendant is now willing to have his wife live with him.

Held, that under such circumstances, the plaintiff is entitled to alimony under Order LXXA, r. 1 (*a*), which has the force and effect of a statute, without the necessity of proving a sincere desire to renew cohabitation.

ACTION for alimony under Order LXXA of the Supreme Court Rules. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 1st of May and 28th of June, 1941.

A. M. Whiteside, K.C., for plaintiff, referred to *Rousseau* v. *Rousseau,* [1920] 3 W.W.R. 384, at 387; *Goodden* v. *Goodden,* [1891] P. 395, at p. 399; *Forth* v. *Forth* (1867), 36 L.J.P. 122, at 123; *Leslie* v. *Leslie,* [1911] P. 203, at p. 205; *Severn* v. *Severn* (1852), 3 Gr. 431; *Torsell* v. *Torsell,* [1921] 1 W.W.R. 905, at p. 910; *Lee* v. *Lee* (1920), 54 D.L.R. 608; *Aldrich* v. *Aldrich* (1891), 21 Ont. 447; *Jackson* v. *Jackson* (1860), 8 Gr. 499; *Gatfield* v. *Gatfield* (1919), 17 O.W.N. 289; *Karch* v. *Karch* (1912), 3 O.W.N. 1446; *Ferris* v. *Ferris* (1883), 7 Ont. 496; *Ney* v. *Ney* (1913), 11 D.L.R. 100; *Holmes* v. *Holmes* (1755), 2 Lee 116; Latey on Divorce, 12th Ed., 168.

Cunliffe, for defendant, referred to *Nelligan* v. *Nelligan* (1894), 26 Ont. 8; *French* v. *French,* [1939] 2 W.W.R. 435; Craies's Statute Law, 2nd Ed., 180; *Torsell* v. *Torsell,* [1921] 1 W.W.R. 905, at 907; *Wilson* v. *Wilson* (1920), 17 O.W.N. 426, at 427; *Quinn* v. *Quinn* (1908), 12 O.W.R. 203; *Peel* v. *Peel* (1918), 42 O.L.R. 165; *Beattie* v. *Beattie* (1923), 24 O.W.N. 494; *Hudson* v. *Hudson* (1914), 26 O.W.R. 688; *Newton* v. *Newton (No. 2),* [1927] 1 W.W.R. 106; *Cromarty* v. *Cromarty* (1917), 38 O.L.R. 481.

Cur. adv. vult.

29th July, 1941.

FISHER, J.: This is an action for alimony under Order LXXA of the Supreme Court Rules and counsel for the plaintiff submits that the plaintiff is entitled to succeed under both rule 1 (*a*) and 1 (*c*) or such Order, reading as follows:

1. Alimony may be recovered in an action brought and prosecuted in the ordinary manner:—

(*a.*) By any wife who would be entitled to alimony by the law of England or of this Province; . . .

(*c.*) By any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony, when decreed or adjudged, shall continue until the further order of the Court.

In the first place I have to say that I find that in or about the month of November, 1933, the defendant deserted the plaintiff without cause and, if an action had been brought by the plaintiff for judicial separation at the time the writ herein was issued, *viz.,* on the 5th of March, 1941, I think a decree of judicial

S. C.
1941

MAIN-WARING v. MAIN-WARING

Fisher, J.

separation would have been granted under section 5 of our Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, which provides that:

> A sentence of judicial separation . . . may be obtained, either by the husband or the wife, on the ground of . . . desertion without cause for two years and upwards.

In answer to the claim under 1 (*a*) counsel for the defendant submits that in England permanent alimony can only be granted where the wife has actually obtained a decree of judicial separation or a divorce and that therefore a plaintiff suing in British Columbia under Order LXXA, r. 1 (*a*) must prove the existence of a decree, which the plaintiff in the present case has not proved. Counsel agree that our Order LXXA had its origin in Ontario and in reply to the submission of counsel for the defendant as aforesaid counsel for the plaintiff contends that alimony has been granted in Ontario, and also in Alberta, under a rule similar to our Order LXXA, r. (1) (*a*) in a multiplicity of cases without a previous decree of divorce or judicial separation. On the other hand counsel for the defendant cites an Ontario case—*Nelligan* v. *Nelligan* (1894), 26 Ont. 8 in which the Court granted alimony but applied rule 1 (*c*) and not rule 1 (*a*) and also a Saskatchewan case—*French* v. *French*, [1939] 2 W.W.R. 435 where the Court applied the counterpart of rule 1 (*c*). It is, therefore, argued by counsel on behalf of defendant that the plaintiff in the present case cannot succeed unless she can recover alimony under rule 1 (*c*), and it is contended that the Court cannot apply such rule here, unless she would be entitled by the law of England to a decree for restitution of conjugal rights, and it is strenuously contended that she would not be entitled to such under the present law of England as she apparently now states that she is unwilling to live with the defendant. See *Harnett* v. *Harnett*, [1924] P. 41 and 126 (C.A.) in which it was decided that a plaintiff claiming a decree for restitution of conjugal rights must satisfy the Court of his or her sincere desire to renew cohabitation. Counsel for the defendant admits that the basis of such decision lies in English statute law passed since 1858 but nevertheless contends that rule 1 (*c*) must be construed as always speaking in the present tense and therefore must be interpreted as referring to the law of England as it stands at the date of the

action and not as it stood at some earlier date. These contentions raise some very interesting questions but I have to say that in the present case I do not find it necessary to consider them as in view of the cases hereinafter referred to I agree with the argument of counsel for the plaintiff that the right to alimony is a civil right, which a wife has, to be supported by her husband and is not conditional upon a decree of divorce or judicial separation having been granted.

In *Rousseau* v. *Rousseau,* [1920] 3 W.W.R. 384, at 387, MARTIN, J.A. (later C.J.B.C.) said as follows:

Upon mature reflection it becomes quite plain that just as there can be divorce without alimony so there can be alimony without divorce, and the Federal Legislature may confer that right as incident to divorce, and the Provincial Legislature as being "Property and Civil Rights" apart therefrom; in other words, the element of divorce does not enter into alimony when it is pure maintenance.

In *Lee* v. *Lee* (1920), 54 D.L.R. 608 the head-note reads as follows:

In Alberta a wife has the right to bring an action for alimony without divorce or judicial separation and the Court has jurisdiction to award alimony in such a case.

Harvey, C.J. says, in part, as follows at pp. 609-613:

The argument, at least in its entirety, is not a new discovery, for we find part of it raised in *Soules* v. *Soules* (1851), 2 Gr. 299, and in *Severn* v. *Severn* (1852), 3 Gr. 431. In the latter case Mr. Mowat (later, for so long, the distinguished Attorney-General and Premier of Ontario), argued at 432, that:

"In England permanent alimony is never assigned, except as incidental to a decree of divorce; that in this case there is neither a decree for a divorce, nor any power to make such a decree and consequently no jurisdiction in relation to alimony."

The argument was rejected by the Court in the judgment delivered by the Chancellor, the Hon. Wm. Hume Blake, one of the ablest of Upper Canada's judges. It was also pointed out that the jurisdiction had been exercised and decrees of alimony granted since 1837 or for 14 years and that it was then too late to question the right to make such decrees.

In 1894, the Dominion Parliament, which had a few years previously established a Supreme Court for the North West Territories and declared its jurisdiction, and a few years later had established a Legislative Assembly for the Territories, by sec. 20 of 57-58 Vic. 1894, ch. 17, enacted that:

"For the removal of doubts, it is hereby declared that subject to the provisions of the North West Territories Act the Legislative Assembly has and shall have power to confer on the territorial Courts jurisdiction in matters of alimony."

In 1895 by Ordinance No. 14 (see Ordinances of the N.W.T. for that year), the Legislative Assembly declared that:

S. C.
1941
MAIN-WARING v. MAIN-WARING
Fisher, J.

"The Supreme Court of the North West Territories shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights: and alimony when granted shall continue until the further order of the Court."

This, except for the last sentence, is in the exact words of the Ontario statute which had been in force for several years.

When the Supreme Court of Alberta was established in 1907 (7 Ed. VII., ch. 3), it was given all the jurisdiction formerly possessed by the Supreme Court of the North West Territories; but the section above quoted was re-enacted in the same words (sec. 16).

Since 1895 until the present, without interruption and without question, decrees for alimony without divorce have been granted by our Courts and if as was thought in *Soules* v. *Soules*, *supra*, 14 years was long enough to firmly establish a right and practice, certainly 25 years ought to be at least equally effective.

But I do not think the establishment of the right needs to be rested upon acquiescence.

. . . . .

We then have to consider what is alimony. MacQueen's Husband & Wife, 4th Ed., at 213, defines alimony as "an allowance made to a wife out of her husband's means for her support either during a matrimonial suit or after its termination."

If we were forced to apply this meaning to the word in our statutes we might find ourselves left where we started and it appears to me that it is the application of this narrow meaning which largely supports the argument advanced against the right of action.

The Encyclopædia of the Laws of England (Vol. 1, p. 300), however gives no such narrow meaning, defining it as "a pecuniary allowance payable upon a separation by one of the parties to a subsisting marriage to or on behalf of the other party to the marriage," and Murray's New English Dictionary defines it as "1. Nourishment; supply of the means of living, maintenance" and "2. esp. The allowance which a wife is entitled to from her husband's estate, for her maintenance on separation from him for certain causes."

Neither of these interpreters defines alimony as conditional upon a divorce or other judicial separation or a decree for restitution of conjugal rights, and even if that were the usual acceptation of the word and we find it used in a statute where such a meaning is clearly not intended, we must give it a meaning appropriate to the intention.

. . . . .

It is in my opinion nothing more or less than a matter of civil rights arising out of a particular relationship and quite clearly therefore within the jurisdiction of a Province if not included within the express words of "marriage and divorce" which for the reasons I have stated in my opinion is not the case.

In *Torsell* v. *Torsell,* [1921] 1 W.W.R. 905, part of the headnote reads as follows:

Unsubstantiated charges of unfaithfulness made by a husband publicly against his wife is not sufficient ground to enable the Court to decree alimony; *Russell* v. *Russell,* [1897] A.C. 395 applied; the right of a wife to alimony in Alberta exists only under conditions which in England would entitle her to it and these would not include such case; legal cruelty to support a claim to alimony must be such as to cause danger to life, limb or health present or future (*per* Harvey, C.J. and Stuart, J.; Beck, J. dissenting).

Harvey, C.J. says, in part, as follows at pp. 905-906:

I think this appeal must be allowed. As pointed out in *Lee* v. *Lee,* [1920] 3 W.W.R. 530, the right to alimony in Alberta exists only under conditions, which in England would entitle a wife to alimony.

. . . . .

We must, I think, take the English decisions as authoritative of what the law of England is and has been and in *Russell* v. *Russell,* [1897] A.C 395, 66 L.J.P. 122, 75 L.T. 249, 61 J.P. 756, the House of Lords declared that a charge of, in some respects, an even more grievous character than the one in this case was not legal cruelty upon which to found a claim by the spouse charged.

. . . . .

In Ontario, where the statutory right to alimony is in exactly the same terms as with us, that decision has been accepted as conclusive by the highest Court. . . .

Beck, J., while holding that the decision in *Russell* v. *Russell* was "not applicable as declaratory of the limits of this Court," said as follows at pp. 910-11:

Our Supreme Court Act, 1907, ch. 3, says that the Court shall have jurisdiction to grant alimony to any wife: (1) Who would be entitled to alimony by the law of England; or (2) Who would be entitled by the law of England to a divorce and to alimony as incident thereto; or (3) Whose husband lives separate from her without any sufficient excuse and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights.

In *Lee* v. *Lee,* [1920] 3 W.W.R. 530, this Court held that it had jurisdiction to grant alimony in an action for alimony alone, that is, when alimony is not asked merely as incidental to other relief asked by the wife.

Then abandoning the order taken in the Supreme Court Act it may be said the Court may grant alimony to a wife:

(1) Where the facts necessary in England under the Act of 1857 to entitle her to a decree for divorce are established, namely, incestuous adultery or bigamy with adultery or rape or sodomy or bestiality or adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro,* or adultery coupled with desertion, without reasonable excuse, for two years or upwards (sec. 27).

(2) Where the husband lives separate from his wife without any sufficient excuse and under circumstances entitling the wife, by the law of

S. C.
1941
MAIN-WARING v. MAIN-WARING
Fisher, J.

England, to a decree for restitution of conjugal rights. See for instance: *Ferris* v. *Ferris* (1883), 7 Ont. 496; *Howey* v. *Howey* [(1879)], 27 Gr. 57; *Weir* v. *Weir* [(1864)], 10 Gr. 565; *Edwards* v. *Edwards* [(1873)], 20 Gr. 392; *Rae* v. *Rae* [(1900)], 31 Ont. 321; *Nelligan* v. *Nelligan* (1894), 26 Ont. 8.

(3) Where the wife would be entitled to alimony by the law of England.

As will appear from the authorities I have referred to above, there are several other cases than those falling under clauses (1) and (2) in which a wife is entitled to alimony, even where she herself is not without fault. But the ordinary case would doubtless be where grounds exist justifying a decree for judicial separation, which took the place of divorce *a mensa et thoro*, and the grounds for which are stated in sec. 16 of the Act of 1857 (open both to husband and wife) as: adultery or cruelty or desertion without cause for two years or upwards.

In addition to the foregoing authorities reference may be made to several Ontario cases in which alimony has been granted without a previous decree of divorce or judicial separation and without any reference to rule 1 (*c*). See *Aldrich* v. *Aldrich* (1891), 21 Ont. 447 and *Jackson* v. *Jackson* (1860), 8 Gr. 499. In the former case proof of adultery was held sufficient upon which to award alimony and in the latter case proof of cruelty was held sufficient.

My conclusion on the whole matter, therefore, is that although in the *Nelligan* and *French* cases, *supra*, rule 1 (*c*) was invoked such cases do not overrule the decisions hereinbefore referred to, in which rule 1 (*a*) was invoked, or support the argument of counsel on behalf of the defendant that the plaintiff in the present case cannot succeed unless she can recover alimony under rule 1 (*c*). It would appear that there may be cases in which rule 1 (*c*) only could be relied upon, *e.g.*, where the desertion had not existed for two years or upwards. In the present case, however, I find, as already indicated, that the desertion has existed for more than two years. I also find that the defendant in or about the end of the year 1936 refused to live with the plaintiff when she was willing to live with him. There is no plea on the record and, in any event, no sufficient evidence to prove that the defendant is now willing to have his wife live with him. Under such circumstances I hold that the plaintiff is entitled to alimony beyond a doubt under Order LXXA, r. 1 (*a*) as aforesaid, which has the force of a statute (see MARTIN, J.A. in the *Rousseau* case, *supra*, at p. 385) without the necessity of proving a sincere desire to renew cohabitation.

S. C.
1941
MAIN-WARING v. MAIN-WARING
Fisher, J.

I now come to deal with the question of the amount of alimony. I think I have sufficient evidence before me as to the circumstances and means of both parties to make an order with liberty to apply after a certain time. Having regard to such circumstances and means I order that until further order the defendant shall pay the plaintiff alimony at the rate of $60 per month payable monthly with liberty to either party to apply to vary this amount after the 1st day of November, 1941. Permanent alimony is payable from the date of the judgment. See *Cromarty* v. *Cromarty* (1917), 38 O.L.R. 481 where Middleton, J. says at pp. 486-7:

"Permanent alimony" is claimed to run from the date of the writ of summons—less any sums paid for *interim* alimony.

I can find nothing to justify this claim. *Interim* alimony has been ordered, and this runs from the date of the writ (unless it has been otherwise directed) until the judgment. Permanent alimony runs from the date of the judgment. In England this is regulated by a rule. We have followed the English practice.

Reversed on appeal

Judgment for plaintiff.

BELLHOUSE v. MAH F. GORE.

C. A.
1941
April 23; *May* 20.

Sale of goods—Goods insured by purchaser—Sale of goods set aside as fraudulent—Goods left in purchaser's possession pending sale—Goods destroyed by fire—Right to insurance money.

Mah F. Gore acquired title to certain goods and machinery by bill of sale from Paramount Knitting Mills and placed thereon a policy of fire insurance. Later one Bellhouse suing on his own behalf and on behalf of all other creditors of Paramount Knitting Mills, obtained judgment setting aside the transfer to Gore as having been fraudulent. An order was then made that subject to a prior interest of Gore in the amount of $1,686.79, the goods in question, pending sale, should be taken by Gore to a certain premises and kept there for all parties interested. Shortly after the removal the premises and goods were burned, and the insurance moneys were paid over to Gore. An order was then made compelling Gore to disclose on discovery the amount of insurance moneys received, and to account for the surplus of such moneys over and above his own prior claim.

Held, on appeal, reversing the decision of FISHER, J., that at the time the insurance was effected there was no contractual or fiduciary relation

C. A.
1941

BELLHOUSE
v.
MAH F. GORE

between the respondent and appellant, nor did the appellant insure as the former's agent, or for his benefit, or intend to insure any interest regarded as belonging to the respondent.

APPEAL by defendant from that part of the order of FISHER, J. of the 22nd of March, 1941, whereby it was ordered that the moneys received for insurance on the goods and chattels referred to in the pleadings in this action and in the order of the 10th of January, 1941, should be available instead of the goods which have been burned, and that the defendant should bring into Court all moneys received by him on account of insurance upon said goods, and that said defendant should attend for discovery and disclose the amount received. In 1938 the Paramount Knitting Mills, owner of the plant and goods in question, sold out to one Harford, and in January, 1939, Harford sold to the defendant who went into possession and insured the plant and goods. In an action by one Bellhouse on behalf of himself and the other creditors of Paramount Knitting Mills, judgment was given on the 10th of June, 1940, declaring said bills of sale null and void as against the plaintiff and other creditors of said company. On the 15th of February, 1941, a fire broke out on the premises in question and the said goods and chattels were damaged.

The appeal was argued at Victoria on the 23rd of April, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

O'Dell, for appellant: In July, 1940, the learned trial judge made an order giving Gore priority over all other creditors of the company in the sum of $1,461.79. When Gore had the property he insured it and paid the premiums himself. We submit that the insurance is a matter between Gore and the insurance company, and the other parties to the action have no interest in it whatever. The goods were in Gore's possession under directions of the Court as custodian. He continued to operate. As to his right to the insurance see *Dalgleish* v. *Buchanan* (1854), 16 D. 332, at p. 338; *Rayner* v. *Preston* (1881), 18 Ch. D. 1; *Gillespie* v. *Miller, Son and Co.* (1874), 1 R. 423; *Phœnix Assurance Company* v. *Spooner*, [1905] 2 K.B. 753.

Murray, for respondent: Gore had priority against the creditors for over $1,600. The insurance extinguished Gore's loss and the creditors are entitled to the balance: see *Castellain* v. *Preston* (1883), 49 L.T. 29, at p. 33; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 751, sec. 1234; Wyman's Laws of Insurance, 79-80; *Keefer* v. *The Phœnix Insurance Co. of Hartford* (1901), 31 S.C.R. 144; *Macdonald* v. *McCall* (1887), 7 C.L.T. Occ. N. 83; *In re McRea. Norden* v. *McRea* (1886), 32 Ch. D. 613, at p. 615.

O'Dell, replied.

Cur. adv. vult.

20th May, 1941.

MACDONALD, C.J.B.C.: I would allow the appeal for the reasons given by MCDONALD, J.

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

SLOAN, J.A.: I would allow the appeal for the reasons given by my brother MCDONALD.

O'HALLORAN, J.A.: I would allow the appeal for the reasons given by my learned brother MCDONALD.

MCDONALD, J.A.: The appellant had by bill of sale acquired title to certain goods and machinery and thereupon placed thereon a policy of fire insurance, the amount of which is not disclosed. Later the respondent, suing on behalf of himself and all other creditors of Paramount Knitting Mills, succeeded before FISHER, J. in setting aside the transfer to the appellant as having been fraudulent. In the working out of this judgment various orders were made, one effect of which was that subject to an interest of the appellant in the amount of $1,686.79, the goods in question, pending sale, should be taken by the appellant to certain named premises and there kept for the benefit of all parties interested. No order was made, nor does it appear that any discussion took place as to insurance. Shortly after the removal of the goods to the premises in question they were burned and under the policy of insurance theretofore placed by the appellant as owner, the insurance moneys were paid over to him. He declined and still declines to disclose the amount so received, contending that these

C. A.
1941

BELLHOUSE
v.
MAH F. GORE

McDonald, J.A.

moneys are his own, received by him pursuant to a policy placed for his own sole benefit at a time when he was *de facto* the owner of the goods. Upon appellant taking this position a successful motion was made before FISHER, J. for an order compelling him to disclose on discovery the amount of insurance moneys received, and to account for the surplus of such moneys over and above his own claim of $1,686.79. From this last-mentioned order this appeal is taken.

I am forced to the conclusion that the appellant should succeed because I can discover no principle on which the respondent's judgment can be supported.

Admittedly, at the time when the insurance was effected, there was no contractual or fiduciary relation between the respondent and appellant, nor did appellant insure as the former's agent, or for his benefit, or intend to insure any interest regarded as belonging to the respondent. No case has been cited which holds that under such circumstances the respondent has any claim to the insurance moneys, and the appellant's right as against the insurance company does not arise in this action. Such cases as *Rayner* v. *Preston* (1881), 18 Ch. D. 1; *Warwicker* v. *Bretnall* (1882), 23 Ch. D. 188, and *Leeds* v. *Cheetham* (1827), 1 Sim. 146, seem to be decisive against the respondent. The Scotch cases cited by counsel agree with the English cases, but I need not discuss them as the English cases are the clearer cut.

The respondent is forced to rely on cases in which the owner of an interest has been held entitled to the benefit of insurance effected by the owner of another interest, the policy covering the entire property.

But in all these cases it will be found that not only did both interests exist when the policy was taken out, but the person who took out the policy did so with the intention of protecting the other's interest, and so practically as his agent, his intention being either expressed or readily to be inferred from their contractual or fiduciary relationship. In *Keefer* v. *The Phœnix Insurance Co. of Hartford* (1900), 31 S.C.R. 144 there was a contractual obligation to insure. In other cases such as *Waters* v. *Assurance Co.* (1856), 5 El. & Bl. 870 there was a *quasi*-fiduciary relation of bailor and bailee at the time the policy was

effected. Insurance taken out by a mortgagee is affected by the fact that a mortgagee has the right to insure at the mortgagor's expense, so naturally the latter is entitled to the benefit of the insurance, once the mortgage is satisfied. If the insurance in this case had been effected after the judgment establishing the respondent's interest, the matter might be doubtful. But the mere fact that both parties have an interest in the same property is not in itself decisive, as shown by *Leeds* v. *Cheetham, supra.*

In this case there was also the added factor that before the goods were destroyed FISHER, J. had ordered the appellant to deliver them to and retain them on the premises of a third party, pending sale. I doubt whether this order made him a custodian or imposed any duty other than to leave the goods unmolested, but even if it had made him a custodian, I think this would not be material. If this order had imposed on him a duty to insure as custodian, then conceivably he might be estopped from denying that the insurance effected was not that which his duty required. But it seems to me clear that on no view of the facts here did he have any duty to insure.

The result of the judgment appealed from is to allow the respondent, who could have insured his own interest but was too careless of his own good to do so, to take the benefit of the appellant's diligence, in a matter in which the appellant owed him no duty, and to which the respondent was at the material time a complete stranger. I do not think such a result can be justified, and I would allow the appeal with costs.

Appeal allowed.

Solicitor for appellant: *M. B. O'Dell.*
Solicitor for respondent: *Whitley Murray.*

S. C. 1941

June 18, 24.

TERRY v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER.

MORROW *ET AL.* v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER.

Automobile—Negligence of driver—Statutory liability of owner—"Consent express or implied" to driver's possession—Driver acquires car through false representation—R.S.B.C. 1936, Cap. 195, Sec. 74A.

The plaintiffs were injured owing to the negligence of the defendant Walker when driving an automobile which he had rented from the defendant company. Walker rented a car from the defendant company, but he brought it back owing to engine trouble a few hours later and another car was given to him in substitution. He had no driver's licence, and was given the first car by falsely representing that he was one Hindle, whose licence he had in his possession and in whose name he signed the rental contract. On bringing the car back, the company's employee then on duty (not the same employee who carried out the original transaction) looked up the hire contract and asked Walker if his name was Hindle, to which Walker replied "Yes." The employee, being then satisfied as to Walker's identity, delivered him the second car.

Held, that possession of the car which injured the plaintiffs had been acquired by Walker with the "consent express or implied" of the defendant company within the meaning of section 74A of the Motor-vehicle Act, and this is so even if the proper view was that in determining this question the original transaction between Walker and the company, as well as the second transaction, must be examined.

ACTIONS for damages resulting from the alleged negligence of the defendant Walker in driving an automobile rented by him from the defendant Vancouver Motors U Drive Limited. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 18th of June, 1941.

Bull, K.C., for plaintiff Terry.

G. Roy Long, for plaintiff Morrow.

L. St. M. Du Moulin, and *D. McK. Brown*, for Vancouver Motors U Drive Limited.

Cur. adv. vult.

24th June, 1941.

MURPHY, J.: I find that the accident was caused by the sole negligence of the defendant Walker.

In the Terry case I assess damages of plaintiff at $1,242.50. There will be judgment for that amount and costs against Walker.

In the Morrow case I assess the damages of the male plaintiff at $2,783.33. The female plaintiff suffered serious injuries. In addition she has a very disfiguring scar on her forehead. This scar will probably in time lose its present angry red appearance but it will remain a permanent disfigurement. I assess her damages at $4,000.

There will be judgment against defendant Walker for these amounts and costs.

There remains the question of the liability of the defendant Vancouver Motors U Drive Limited, hereinafter referred to as the company. The relevant facts are not in dispute and are as follow:

In the early part of this year defendant Walker was a member of the Air Force. He did not have a licence to drive a motor-car. James G. Hindle was also a member of the Air Force and had a driver's licence. On or about February 5th, 1941, Walker in some way got possession of Hindle's driver's licence, probably by theft.

The company operates the business of renting cars to individuals to be driven by the individuals to whom they are rented. On February 5th, 1941, at about 3 o'clock in the afternoon, Walker went to the company's business premises and asked to rent a car. He saw Jardine, a company service man, who had authority to rent cars on behalf of the company. Jardine asked him his name and he replied "J. G. Hindle." Jardine asked for his driver's licence and he produced the licence in the name of Hindle of which he had got possession. Jardine then made out the usual rental contract used by the company and had Walker sign it. Walker signed "J. G. Hindle." Jardine compared the signature on the driver's licence with the signature to the contract and they looked alike to him. He then asked Walker if he (Walker) had ever rented a car from the company before. Walker replied that he had. Jardine checked up the index to the company's contracts and found that a car had previously been rented from the company by J. G. Hindle. He

S. C.
1941

TERRY
v.
VANCOUVER
MOTORS
U DRIVE
LTD.

MORROW
v.
THE SAME

Murphy, J.

thereupon took a deposit of $10 from Walker and delivered to him a company car with licence No. 91-006 which Walker drove away. The company conducts an extensive business and has a number of employees who work in shifts, as the company operates on a day and night basis, and who have authority to rent the company's cars. Tkatch is another of such employees. He was on duty at the company's business premises in the early morning of February 6th. About 1 o'clock a.m. Walker drove the car he had rented—licence No. 91-006—into the company's premises and reported to an employee of the company that the car was giving him mechanical trouble and asked for a better one. The rule of the company is that if a hirer has mechanical trouble with a car which he has hired from the company and brings it in and requests that he be given another car this is done unless the mechanical trouble has been caused by some act of the hirer. The employee, who apparently had not authority to deal with the matter himself, reported Walker's request to Tkatch, who did have such authority. The latter then looked up the hire contract, which Walker had signed in the name of Hindle, and went out of the office to see what car had come in, after sending the reporting employee upstairs to get another car. He saw that the car which had come in bore licence No. 91-006. He asked Walker if his name was Hindle and Walker replied "Yes." Walker wore an Air Force uniform and Tkatch observed that the address on the card in the company's records recording the rental to Walker of car licence No. 91-006 was Jericho Beach. In the meantime another car, a Ford Mercury, the property of the company, was brought down from the floor above. Tkatch, according to the custom prevailing in the company's business, altered the contract for car No. 91-006 by putting in the licence number of the Ford Mercury car which he then delivered to Walker who drove away with it. Walker was driving this Ford Mercury when he injured the plaintiffs.

Section 74A of the Motor-vehicle Act provides, *inter alia*, that:

> 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; . . .

Plaintiff's counsel in each of the cases at Bar contend that the company is liable for Walker's negligence under this provision. Company's counsel argues on the facts as set out that Walker did not acquire possession of the Ford Mercury car with the consent, express or implied, of the company. In my opinion, in construing this section, no assistance can be obtained by considering decisions which deal with questions of contract or no contract or voidable contracts and contracts void *ab initio* or cases dealing with whether or not title to property has passed. Such consideration in my view merely tends to befog the real issue. Since the facts are not in dispute that issue in my opinion can be summed up in a single question, *viz.*: Did Tkatch, when he delivered the Ford Mercury car to Walker, consent that Walker should have possession of it? The answer involves an enquiry into the state of Tkatch's mind at the time of the transaction. It was his duty under rules governing the conduct of the company's business to give the hirer of a company car, who brought it in complaining of mechanical trouble, another car in good condition, subject only to two provisoes (a) that the mechanical trouble in the rented car had not been caused by any act of the hirer and (b) that Tkatch must be satisfied that the person bringing in the car complained of was the identical person who had rented the car from the company. These were the only two considerations which Tkatch had to keep in mind when deciding whether or not he would give Walker another car in substitution for car licence No. 91-006. His evidence shows that he was satisfied as to proviso (a) for he raises no question about it in his testimony. It does not enter into the matter since nothing bearing upon it appears in evidence. Proviso (b) was in fact fulfilled for there can be no question on the evidence that Walker who received from Tkatch the Ford Mercury car was the identical person who had rented car licence No. 91-006 from Jardine on the previous afternoon. This being so Tkatch's mind went along with his act in delivering to Walker the Ford Mercury car and assented to it. He was merely carrying out his duty as an employee of the company. It is true he would not have delivered the Ford Mercury car to Walker had he known of the deception which Walker had practised on Jardine but it was no part of

S. C.
1941

TERRY
v.
VANCOUVER
MOTORS
U DRIVE
LTD.

MORROW
v.
THE SAME

Murphy, J.

Tkatch's duty to consider whether or not Walker had a driver's licence. That was a matter to be passed upon by the company's service man Jardine who rented to Walker car licence No. 91-006. Tkatch's mind, therefore, would never advert to the question when he was deciding whether or not to give Walker the Ford Mercury car. The contention of company's counsel could only be sound if some person other than Walker had brought in car licence No. 91-006 and represented to Tkatch that he was the person who had hired it from the company. It follows that in my opinion the company is liable for the consequences of Walker's negligence. But if it be said that this is too narrow a view and that the transaction between Jardine and Walker must also be examined, my opinion is that the company would still be liable. Such an examination likewise involves an enquiry into Jardine's state of mind when he delivered possession of car licence No. 91-006 to Walker. Did his mind go along with the act and assent to it? I hold that it did. Jardine intended to give possession of car licence No. 91-006 to the individual with whom he was dealing. That individual was Walker and he did deliver possession to Walker. True he would not have done so but for his mistaken belief caused by Walker's fraudulent misrepresentation that Walker had a driver's licence. Nevertheless his consent to Walker's possession of car licence No. 91-006 was an existent fact at the time he handed it over to Walker. His mind went along with his act in delivering possession of car licence No. 91-006 to Walker and assented to that act. Section 74A makes the liability of the owner of a motor-vehicle dependent upon possession by the wrong-doer with the consent, expressed or implied, of the owner *simpliciter*. To give effect to the argument on behalf of the company on this phase it would in my opinion be necessary to introduce into section 74A of the Motor-vehicle Act after the words "with the consent, express or implied, of the owner of the motor-vehicle" some such phrase as "unless such consent is obtained by fraudulent misrepresentation."

I give judgment in each case for the amounts and in favour of the parties hereinbefore set out with costs against the defendant company as well as against defendant Walker.

Judgment for plaintiffs.

IN RE WILLIAM STEWART HERRON, DECEASED.

C. A.
1941
May 20.
April 2;

Testator's Family Maintenance Act—Petition by daughter of deceased—Testator's domicil in Alberta—Shares in mining companies in British Columbia—No claim for specific relief in petition—"Mobilia" rule—"Lex domicilii"—Service of petition—Rule 130—R.S.B.C. 1936, Cap. 285.

The testator died domiciled in the Province of Alberta. He left a large estate, including 1,000 shares of Pioneer Gold Mines of B.C. Limited (N.P.L.), a company having its head office in British Columbia, and a block of shares in Antler Gold Mines Limited, a Dominion company holding 26 leases on Antler Creek in British Columbia. By his will his widow (his second wife) took an annuity of $3,000; a grandson a legacy of $5,000, and his two sons (by his second wife) the residue of the estate. The testator included in his will a "request" that his widow should bequeath $1,000 to the petitioner herein. The petitioner, the daughter of the testator, sole surviving issue of the testator's first wife, and a resident of California, filed a petition in British Columbia under the Testator's Family Maintenance Act for relief. The testator appointed one Fred Whittaker, his wife and two sons as executors under his will. The petitioner obtained an order in the Supreme Court that notice of the hearing upon Fred Whittaker and upon the widow as executors of deceased should be good and sufficient service upon the personal representatives of the deceased, and they were duly served. The style of cause in the petition concludes "and in the matter of a claim by Laura Elsie Elliott under the said Act for maintenance." In the body of the petition paragraphs 1 to 22 inclusive contain a recital of the facts and immediately following paragraph 22 are the words "Wherefore your petitioner as in duty bound will ever pray." No claim for specific relief nor for any relief is made. It was held on the hearing of the petition that the omission was fatal, and it was further held that the "*mobilia sequuntur personam*" doctrine applied, that the Court had no jurisdiction to entertain the petition, and even if it had, the testator having had at his death an Alberta domicil, this Court would not make an order in favour of the petitioner against movables.

Held, on appeal, affirming the decision of MANSON, J., that the "*mobilia*" rule applies and the learned judge below reached the right conclusion upon the merits.

Held, further, that the petition fails for the reason that the parties concerned in the application were not served with the notice of the hearing. Reliance was placed on an order of the Court that the notice of the hearing served on two of the executors should be good service upon the personal representatives of the deceased under rule 130. This rule was not intended to cover a case where the rights of the beneficiaries *inter se* are to be affected by any order which might be made. The rule does not apply to the two sons and the grandson, who had no notice of the hearing.

C. A. 1941

IN RE HERRON, DECEASED

APPEAL by the petitioner from the decision of MANSON, J. of the 16th of December, 1940, dismissing her petition under the Testator's Family Maintenance Act. Her father, William S. Herron, in his lifetime was domiciled in the Province of Alberta and died on the 21st of July, 1939. The petitioner is his daughter by his first wife. He left a large estate. By his will he left the estate to his second wife, one grandson and two sons, with a request to his wife that if he predeceased her, she should bequeath $1,000 each to the petitioner and his step-daughter. Letters probate were issued in Calgary, Alberta, in February, 1940. The letters have not been resealed in this Province nor have ancillary letters been granted in this jurisdiction. The petitioner is a resident of California. Leave was granted to serve the petition and affidavit in support upon Fred Whittaker, one of the executors in Calgary. The net value of the estate was $251,000. Part of the estate, namely 1,000 shares of Pioneer Gold Mines of B.C. Limited, of the value of over $2,000, is situate in the Province of British Columbia within this jurisdiction, also a block of shares of the Antler Gold Mines Limited, a Dominion company holding 26 placer leases on Antler Creek in British Columbia.

The appeal was argued at Vancouver on the 2nd of April, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

J. A. MacInnes, for appellant.

Locke, K.C., for respondent executors, Fred Whittaker and Mrs. Herron: I am acting for two of the executors who were served. There were four executors, the two others being the sons of deceased. These two executors claim there is no jurisdiction in British Columbia to deal with the estate. That is all we say, as we do not want to submit to the jurisdiction of the Court.

MacInnes: The omission from the petition of any prayer for specific relief is not fatal to the petition. The Act becomes operative on the death of a testator, and the remedy is in the discretion of the Court. The applicant need not specify the relief desired. In any event, the omission is an irregularity that is subject to amendment. The head office of the Pioneer Company

is in British Columbia. It was held there was no jurisdiction because deceased was domiciled in Alberta, that the only asset here is mining stock, which was governed by the law of the domicil, the stock being movable property: see *In re Rattenbury Estate and Testator's Family Maintenance Act* (1936), 51 B.C. 321; *Re Butchart, Butchart* v. *Butchart,* [1932] N.Z.L.R. 125, at p. 131. The Legislature by statutory enactment has abrogated the common law with regard to stock in the Succession Duty Act and the Companies Act. By these statutes the so-called movable property is brought under regulation of local law and the Testator's Family Maintenance Act must apply in the same way as immovables: see *New York Breweries Company* v. *Attorney-General,* [1899] A.C. 62; *Munt* v. *Findlay* (1905), 25 N.Z.L.R. 488; *Re Found, Found* v. *Semmens,* [1924] S.A.S.R. 236. As the shares in question can be effectively dealt with only at Vancouver, the only *situs* or location of the shares is at Vancouver. There is, therefore, jurisdiction to entertain the petition. The appearance of the respondent herein constitutes a submission to the jurisdiction that any order made herein will be binding upon them: see *Norris* v. *Chambers* (1861), 3 De G. F. & J. 583; *McLaren* v. *Ryan* (1878), 36 U.C.Q.B. 307; *Buenos Ayres and Ensenada Port Railway Co.* v. *Northern Railway Co. of Buenos Ayres* (1877), 2 Q.B.D. 210; *Deschamps* v. *Miller,* [1908] 1 Ch. 856; *Guiard* v. *De Clermont & Donner,* [1914] 3 K.B. 145; *Harris* v. *Taylor,* [1915] 2 K.B. 580; *Pope* v. *Pope* (1940), 55 B.C. 27.

Cur. adv. vult.

20th May, 1941.

MACDONALD, C.J.B.C.: I would dismiss the appeal.

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

SLOAN, J.A.: I agree in dismissing the appeal.

O'HALLORAN, J.A.: Review of the authorities cited by counsel for the appellant does not satisfy me that there is jurisdiction to entertain the petition. I would dismiss the appeal.

MCDONALD, J.A.: The deceased died domiciled in the Province of Alberta where probate of his will was granted. By the

C. A. 1941

IN RE HERRON, DECEASED

McDonald, J.A.

will his widow took an annuity of $3,000; a grandson a legacy of $5,000 and his two sons resident in Alberta the residue. The estate amounted to some $250,000. A daughter resident in California, Mrs. Laura E. Elliott, who received nothing under the will except that the widow had been requested to make her a gift of $1,000, filed a petition under the Testator's Family Maintenance Act for relief. This petition was dismissed by MANSON, J., on the ground that there was no jurisdiction to entertain it. This appeal is from that decision.

Counsel for the appellant bases his argument upon the ground that the property of the deceased included 1,000 shares of Pioneer Gold Mines of B.C. Limited, a company having its head office in British Columbia, and contends that the *mobilia sequuntur personam* rule does not apply. He founded his argument upon the decision in *In re Rattenbury Estate and Testator's Family Maintenance Act* (1936), 51 B.C. 321, wherein ROBERTSON, J., applying the decision of the New Zealand Court of Appeal in *Re Butchart, Butchart* v. *Butchart,* [1932] N.Z.L.R. 125 held that though the testator had been domiciled outside the Province nevertheless there was jurisdiction to hear the application under the Act for the reason that the testator was possessed of real property within the Province. In the present case counsel wishes to go a step farther and would have us hold that because the head office of the Pioneer Company is within this Province jurisdiction lies in our Courts to deal with this petition. His chief argument in this connection is that our Administration Act abolishes the distinction between realty and personalty and that hence the decision in *In re Rattenbury Estate and Testator's Family Maintenance Act* may be made to apply to the present case. I think this contention cannot be sustained. The Administration Act has no such effect, in any event not for the purpose which we are now considering. The *mobilia* rule still applies and the decision in *Provincial Treasurer of Alberta* v. *Kerr,* [1933] A.C. 710 relied upon by counsel does not, I think, assist him for it affirms the rule for determining succession of property. I think, therefore, the learned judge below reached the right conclusion upon the merits.

I have dealt with the merits because the matter is of some importance, though in any event I think the petitioner is out of

C. A.
1941

IN RE HERRON, DECEASED

McDonald, J.A.

Court for the reason that the parties concerned in the application were not served with notice of the hearing. Appellant relies upon an order made in the Supreme Court to the effect that notice of the hearing upon Fred Whittaker and Edith Isabel Herron (the widow) as executors of the deceased should be good and sufficient service upon the personal representatives of the said deceased. No other service was attempted and the order is said to have been made under rule 130. This rule in my opinion was never intended to cover such a case as this but only a case where the personal representative is concerned in conserving the assets of the estate as a whole, as for instance in pursuing or defending a foreclosure action. It was not intended to cover a case where the rights of the beneficiaries *inter se* are to be affected by any order which might be made. Probably in this case service on the widow although in her representative capacity would be held to be sufficient to bind her also in her personal capacity inasmuch as she had actual notice of the hearing. In my opinion, however, this does not apply to the two sons or the grandson who had no notice of the hearing whatsoever. For these reasons I would dismiss the appeal with costs here and below.

Appeal dismissed.

Solicitor for appellant: *E. J. Grant.*

Solicitors for respondents: *Locke, Lane, Nicholson & Sheppard.*

IN RE REMBLER PAUL, DECEASED. THE ROYAL TRUST COMPANY v. ROWBOTHAM *ET AL.*

S. C.
In Chambers
1941

June 20;
Sept. 4.

Will—Construction of—Vesting—Disposition of the residue of the estate.

By paragraphs 3 and 4 of his will the testator made a gift absolute of realty to his grand-daughter, Susan McAinsh Paul. Paragraph 6 directs the trustee "subject to the aforesaid provisions" to convert the whole of the testator's estate into money and invest same. Paragraphs 7, 8 and 9 provide for bequests of life annuities to six persons. Paragraph 12 reads "Subject to the other provisions of these presents, I give devise and bequeath all the residue of my estate, real and personal, to the said

S. C.
In Chambers
1941

IN RE PAUL, DECEASED.

THE ROYAL TRUST CO. *v.* ROWBOTHAM ET AL.

Susan. My trustee shall pay the income from the same to her from the time that she is of age, but shall not hand over the principal until all the annuitants herein mentioned have died and she is thirty years of age." Paragraph 14 reads "In order that the said Susan may receive any of the benefits herein, she must use the Christian name of Susan and the surname of Paul; and if she shall at any time make her home in the United States of America, her income hereunder shall be suspended while she does so; but this shall not prevent her travelling in that country, or being temporarily there for any purpose." Paragraph 2 of a codicil reads "In case of the death without issue of Susan the annuity of each of my four grandsons mentioned in clause 9 of my said will shall be increased to $1,000 a year as long as he shall live." Susan was seven years of age when the testator died and was 30 years of age on July 31st, 1939. She is a widow and has two infant children. Of the six annuitants, three of the grandsons only are living.

Held, that the question arises as to the effect of the language used by the testator in paragraph 12. A gift absolute of realty was made to Susan by paragraphs 3 and 4 upon her attaining 30 years of age. It is clear that the testator intended to deal with the residue of his estate in a manner different from that in which he had dealt with the realty. Paragraphs 12 and 14 of the will and paragraph 2 of the codicil negative the possibility of the residue vesting in possession in Susan until the last of the annuitants shall have died and until she shall have attained the age of 30 years. Only if she survives the annuitants, having attained the age of 30 years, shall she have the *corpus*, and then only a life estate therein.

ORIGINATING SUMMONS to construe the will of the late Rembler Paul. The facts are set out in the reasons for judgment. Heard by MANSON, J. in Chambers at Vancouver on the 20th of June, 1941.

A. Bruce Robertson, for The Royal Trust Company.

Norris, K.C., for Kelowna General Hospital and three annuitants.

G. Roy Long, for Mrs. Rowbotham.

Gill, for the Official Guardian.

Cur. adv. vult.

4th September, 1941.

MANSON, J.: Originating summons to construe portions of the will of the late Rembler Paul. Will dated 15th July, 1916, codicil 9th September, 1916. Date of death 18th November, 1916. Probate to The Royal Trust Company, the executor and trustee named in the will, issued out of this Court 31st October, 1917.

Paragraph 1 of the will—a devise and bequest of all the testator's real and personal estate to the trustee upon trust "for the following uses and purposes."

Paragraph 4 provides that the trustee shall hold a specified parcel of land as a family burying-ground, for the expenditure of the annual sum of $100 on its upkeep in perpetuity and for the setting aside by the trustee before finally dividing the estate of a capital sum to take care of the aforementioned annual expenditure.

Paragraph 6 directs the trustee "subject to the aforesaid provisions" to convert the whole of the testator's estate into money and invest the same.

Paragraphs 7, 8 and 9 provide for bequests of life annuities to six persons.

Paragraph 12 reads as follows:

12. Subject to the other provisions of these presents I give, devise, and bequeath all the residue of my estate, real and personal, to the said Susan McAinsh Paul. My trustee shall pay the income from the same to her from the time that she is of age, but shall not hand over the principal until all the annuitants herein mentioned have died, and she is thirty years of age.

Paragraph 14 reads as follows:

14. In order that the said Susan McAinsh Paul may receive any of the benefits herein, she must use the Christian name of Susan and the surname of Paul; and if she shall at any time make her home in the United States of America her income hereunder shall be suspended while she does so; but this shall not prevent her travelling in that country, or being temporarily there for any purpose.

Paragraph 15 reads as follows:

15. Should Susan McAinsh Paul die leaving issue, her issue shall receive all the benefits under these presents which she would have had if alive, and she may distribute these benefits as she pleases among her issue by will. Should the said Susan McAinsh Paul die without leaving issue, the General Hospital at Kelowna shall receive all the benefits, and all the estate real and personal, which she would have received hereunder if alive.

Paragraph 2 of the codicil reads as follows:

2. In case of the death without issue of Susan McAinsh Paul, the annuity of each of my four grandsons mentioned in clause 9 of my said will shall be increased to One thousand dollars ($1,000) a year as long as he shall live.

The annuitants named in paragraphs 7 and 8 are dead. Of the four annuitants (grandsons) named in paragraph 9 one, Robert, is dead. Susan McAinsh Rowbotham (*nee* Paul) is a widow with two infant children aged 6 and 7 respectively. She and her two children are citizens of the United States of America

S. C. In Chambers 1941

IN RE PAUL, DECEASED.

THE ROYAL TRUST CO. v. ROWBOTHAM ET AL.

Manson, J.

and are said by counsel to be residing in that country. Mrs. Rowbotham was seven years of age at the time of the death of the testator and attained 30 years of age on 31st July, 1939.

In *Auger* v. *Beaudry,* [1920] A.C. 1010, at 1014, Lord Buckmaster observed that:

> . . . the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will.

And in *In re Browne,* [1934] S.C.R. 324, at 328, Rinfret, J., speaking for the Court, said at pp. 330-1:

> . . . the golden rule, the fundamental principle whereby the Courts must be guided in the interpretation of testamentary documents, is that effect must be given to the testator's intention ascertainable from the expressed language of the instrument. So far as possible, the will itself must speak. If, after consideration of the language used, in the particular passage immediately under examination and consistently with the context of the document, the intention remains doubtful, then resort may be had to certain rules which have been generally adopted.

The above decision was reversed in the Privy Council *sub nom. Browne* v. *Moody,* [1936] A.C. 635, but, as one would expect, the above-quoted passage was approved—*vide* Lord McMillan at p. 644. In *Comiskey* v. *Bowring-Hanbury,* [1905] A.C. 84, at 88, the Earl of Halsbury, L.C., after examining the words of the will and giving to them their ordinary meaning, observed:

> That, to my mind, is the meaning of the language. I do not stop to bring in any rules of law or canons of construction. I look at the words merely as they stand in the will, and I think the natural and ordinary meaning of those words is what I have suggested.

The substance of what has been said in the passages above quoted has been said times without number by learned judges. It is only when a testator's words do not bear a clear meaning, when they are ambiguous or when there are inescapable contradictions that recourse must be had to rules of law or canons of construction.

In *Aspden* v. *Seddon* (1875), 10 Chy. App. 394, at 397*n*, Sir G. Jessel, M.R., reiterated a fundamental rule which applies in the construction of all instruments. He used this language:

> I think it is the duty of a judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another judge upon an instrument, perhaps similar, but not the same.

Middleton, J.A., in *Re Walker* (1925), 56 O.L.R. 517, at 522 prefaced his quotation of the words of Sir G. Jessel, M.R., above

quoted with this very useful and sound observation, a particularly useful observation when examining decisions upon the construction of wills:

> Speaking generally, no aid can be derived from reported decisions which do not establish a principle but simply seek to apply an established principle to a particular document.

The unfortunate results that ensue when the aforementioned principles are departed from are well illustrated by Middleton, J. in *Re Walker, supra,* at p. 523.

It is profitable to bear in mind also another general principle enunciated by Lord Selborne, L.C., in *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, at 719 in these words:

> It is better to effectuate than to destroy the intention,

or, as was said by Joyce, J., in *In re Sanford. Sanford* v. *Sanford,* [1901] 1 Ch. 939, at 944:

> There is not wanting authority to show that in case of obscurity or ambiguity, even when the question is one of invalidity on the ground of remoteness, repugnancy, or the like, weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention.

Question arises as to the effect of the language used by the testator in paragraph 12. A gift absolute of realty was made to Susan by paragraphs 3 and 4 upon her attaining 30 years of age. It is clear beyond argument that the testator intended to deal with the residue of his estate in a manner different from that in which he had dealt with the realty mentioned in paragraphs 3 and 4.

Having made a clear and absolute provision for Susan in prior paragraphs of his will he said in effect in paragraph 12:

> Now, as to the residue, upon certain contingencies and subject to certain limitations Susan shall have it.

There is neither occasion nor justification for the deletion by the Court of the words "Subject to the other provisions of these presents" contained in paragraph 12. To delete the words would be to ignore an explicit limitation by the testator on his disposition of the residue of his estate.

Paragraph 4 speaks of the "final dividing" of the estate. There can be no "final dividing" of the estate if under paragraph 12 there be an absolute gift of the residue to a single beneficiary. The phrase suggests that the testator had in contemplation the division of the residue among the children of Susan—overlooking the fact that he was providing that the

S. C.
In Chambers
1941

IN RE PAUL, DECEASED.

THE ROYAL TRUST CO. v. ROWBOTHAM ET AL.

Manson, J.

residue should go to the Kelowna General Hospital if Susan should die without issue. The phrase is not consistent with a construction of the language of paragraph 12 as an absolute gift.

The provisions of paragraph 12 negative the possibility of the residue vesting in possession in Susan until the last of the annuitants shall have died and until she shall have attained the age of 30 years. Susan may not outlive the annuitants and in that event the *corpus* of the residue will not vest in possession in her. So, too, she might not have lived to attain 30 years of age, in which event there would have been no vesting in her, even though the annuitants had predeceased her.

The provisions of paragraph 14 indicate that the testator did not intend an unconditional and absolute gift to Susan. The paragraph is probably inoperative as against the direction to the trustee in paragraph 3 to convey to Susan when she attains age 30 certain specifically enumerated parcels of land but, be that as it may, the provisions none the less do suggest that the testator did not contemplate that Susan should take an absolute estate.

In paragraph 15 two contingencies are dealt with, the death of Susan leaving issue and the death of Susan leaving no issue. In dealing with each contingency the testator uses significantly the word "benefits," not the phrase, "the residue of my estate." He obviously had in mind that he was not making an absolute gift of the residue to her but only a gift subject to limitations and contingencies. The use of the word "benefits" is consistent with the provisions of paragraphs 12 and 14. If Susan die leaving issue the paragraph provides that her issue will receive the benefits "which she would have had if alive." The phrase, "which she would have had if alive" can only mean those benefits which will have accrued to her prior to her death. The gift over is in favour of her issue with power to her to distribute the benefits referred to among her issue as she pleases. The limitation of the gift over to the issue negatives the suggestion that a gift absolute was intended in the first instance. The paragraph further provides that if Susan die without issue the gift over of the benefits shall go to the General Hospital at Kelowna, that is to the Kelowna Hospital Society, a society incorporated in 1906 under the Benevolent Societies Act, R.S.B.C. 1897, Cap. 13.

S. C.
In Chambers
1941

IN RE PAUL, DECEASED.

THE ROYAL TRUST CO. v. ROWBOTHAM ET AL.

Manson, J.

That society owned and operated, at the time of the making of the will, and still owns and operates the only General Hospital at the city of Kelowna.

Some two months after the execution of the will the testator executed a codicil thereto. Paragraph 2 of the codicil is inconsistent with an intent on the part of the testator to make an absolute gift of the residue to Susan.

We have not here a case of giving and attempting to withhold, of conferring an absolute estate upon the donee and attempting in certain circumstances to resume ownership, nor yet of giving and attempting to dispose of what may remain in the hands of the donee at death. The testator has done no more than to give contingently and not even then absolutely. The "other provisions of these presents" are conditions precedent to the gift of the residue to Susan and these conditions include the stipulation that she is not to have the *corpus* of the residue until all the annuitants have died and she has attained age 30. Only if she survives the annuitants having attained age 30 shall she have the *corpus,* and then only a life estate therein. It is unnecessary to discuss what the result would have been had the words "Subject to the other provisions of these presents" been omitted from paragraph 12. They have not been omitted. They must be given effect—the Court effectuates rather than frustrates.

The twelve questions in the submission have been sufficiently answered in the foregoing. An answer *seriatim* is unnecessary.

Costs to all parties out of the estate.

Order accordingly.

REX v. McMYN.

C. A.
1941
Sept. 10, 11, 23.

Natural Products Marketing (British Columbia) Act—Scheme to control marketing vegetables—Order of B.C. Coast Vegetable Marketing Board —Transporting potatoes without a licence—R.S.B.C. 1936, Cap. 165, Sec. 4.

On the morning of the 5th of March, 1941, the accused left his farm on Lulu Island in his car, and when near the corner of Parker and Venables Streets, in the city of Vancouver, he was stopped by two inspectors of the B.C. Coast Vegetable Marketing Board, who asked him to open the

C. A.
1941

REX
v.
MCMYN

rear compartment of his car, which was locked. Accused stated he did not have the key to the lock, and it was decided that he with the inspectors should go back to his farm for the key. On reaching the farm the rear compartment of the car was opened and five sacks of potatoes were taken out. He was convicted by the deputy police magistrate at Vancouver on a charge that he unlawfully did transport potatoes without first having obtained a licence to do so. On appeal to the county court the conviction was quashed.

Held, on appeal, affirming the decision of ELLIS, Co. J. (MCDONALD, J.A. dissenting), that transportation implies the "taking up of persons or property at some point and putting them down at another." It is a proper conclusion that McMyn was not "transporting" potatoes within the meaning of the marketing scheme.

Rex v. *Lee Sha Fong* (1940), 55 B.C. 129, distinguished.

APPEAL by the Crown from the decision of ELLIS, Co. J., quashing the conviction of the accused by the deputy police magistrate at Vancouver on a charge that he

unlawfully did transport a regulated product, to wit, potatoes, without the written authority of the B.C. Coast Vegetable Marketing Board, contrary to the provisions of order No. 1 of the said board made pursuant to the provisions of the B.C. Coast Vegetable Scheme, and as authorized by the Natural Products Marketing (British Columbia) Act.

The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Victoria on the 10th and 11th of September, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

Gilbert P. Hogg, for appellant: The charge is under sub-order 12 (g) of order No. 1 of the B.C. Coast Vegetable Marketing Board, under which "No person shall transport, . . . the regulated product without . . . authority." Accused was arrested on the street, the back of his car was locked, and he with the officers went back to his farm where the key was produced and potatoes were found in the back of his car. He comes within the definition of "transport" which means "carriage of passengers or property." He had taken the potatoes away from his farm. The case of *Rex* v. *Lee Sha Fong* (1940), 55 B.C. 129, is the same as this case, and should be followed.

Fleishman, for respondent: This is a question of law only: see *Rex* v. *Turner* (1938), 70 Can. C.C. 404; *Gauthier* v. *Regem* (1931), 56 Can. C.C. 113; *Lancaster Motor Co. (London), Ltd.* v. *Bremuth, Ltd.* (1941), 110 L.J.K.B. 398. The word "transport" means carrying persons or property from one place to

another: see *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U.S. 196, at p. 203; *Novotny* v. *State* (1923), 196 N.W. 232; Maxwell on Statutes, 6th Ed., 501 and 504; *In re North; Ex parte Hasluck* (1895), 64 L.J.Q.B. 694, at p. 697; *Rex* v. *Miller,* [1940] 2 W.W.R. 505, at p. 509; *Rex* v. *Young* (1917), 24 B.C. 482. The car was not proven to belong to the accused: see *Rex* v. *Regina Cold Storage, Etc. Co., Ltd.,* [1923] 3 W.W.R. 1387; *Rex* v. *Hoare,* [1932] 1 W.W.R. 470.

Hogg, replied.

Cur. adv. vult.

23rd September, 1941.

MCQUARRIE, J.A.: This is an appeal from ELLIS, Co. J., allowing an appeal from a conviction by George McQueen, deputy police magistrate, Vancouver City. By agreement of counsel evidence given in the police court was accepted as evidence given on that appeal. The charge was as follows: [already set out in statement.]

The evidence against the respondent herein was that of two inspectors of the B.C. Coast Vegetable Board, Bloomfield and McKay, together with the documents which they produced and which went in as exhibits.

Inspector Bloomfield stated that on March 5th, 1941, at approximately 11.15 (whether a.m. or p.m. does not appear) he, accompanied by inspector McKay, was driving his car down Commercial Drive in the city of Vancouver and he saw a coupe at the corner of Parker Street and Commercial Drive, parked on the right-hand side of the road. He did not state whether there were any buildings at this point, such as a vegetable shop. a potato warehouse, or in any way describe the surroundings. The licence number of the coupe was B.C. 73083. He did not say who or if anyone was in the coupe. He went on to state, however, that:

> We came around the block, and, as we came around, we pulled over to stop the driver and stopped him on the corner of Parker and Venables Streets.

Whether the car referred to was the coupe B.C. 73083, or not does not appear, and whether the "driver" was on foot or in a car when he was stopped is not very clear. Anyway they spoke to the respondent who was "driving the car" and they had to move over to Venables Street and "asked him to open the rear com-

C. A.
1941

REX
v.
MCMYN

McQuarrie, J.A.

partment of the car, which was locked." He asked them why and then the evidence continues:

> We said because we thought there were potatoes in it. We asked him to open it, as our regulations called for, to search the car. After some conversation he suggested going down town and opening it, and he finally offered to go back to the farm and open it. Inspector McKay got in his car and drove with him, and I followed, and we went to his farm.

Inspector McKay merely corroborated the evidence of Bloomfield. Up to this stage I agree with the learned county court judge that the evidence was not very satisfactory or conclusive. I would go further and say that there is not the least evidence of transportation. Inspector Bloomfield then went on to state:

> We drove to the farm on Lulu Island, number 5 road and 9, into a barnyard, and he was still undecided as to whether he would open the rear door, and he said if he opened the door it would cost him twenty-five dollars, and finally he got the key and opened it, and we took five sacks of potatoes out of it, and there were no tags on them.

It is common ground that the respondent had no permit. The exhibits were the "scheme" and orders of the B.C. Coast Vegetable Marketing Board. Counsel for the appellant and respondent respectively vouchsafed certain explanations of the meaning of the statement of the respondent that if he opened the rear compartment it would cost him $25, but as far as I can see no reasonable solution was suggested to us. In my opinion the additional evidence does not furnish the necessary proof to convict the respondent as there was still no evidence of transportation.

A great deal of discussion took place at the hearing before us as to the meaning of "transportation" and counsel for the appellant, by permission of the Court, filed a written statement in regard thereto which I have read. Counsel for the appellant relied on *Rex* v. *Lee Sha Fong* (1940), 55 B.C. 129, a decision of this Court, and submitted that the facts in the case at Bar were even more conclusive than in that case. Although I dissented from the majority of the Court in the *Lee Sha Fong* case I am, of course, bound by it. I cannot see that the facts on which that decision was based are at all similar to the facts of the case which we have before us. In the *Lee Sha Fong* case there was some kind of evidence of transportation, but in the case before us, as I have previously stated, I do not consider there was any such evidence. I would, therefore, dismiss the appeal.

O'HALLORAN, J.A.: Two inspectors of the Vegetable Marketing Board halted the respondent McMyn while he was driving a coupe on Commercial Drive near Parker Street in the city of Vancouver. They asked him to open the rear compartment of the coupe. He asked why. They said they wished to search the car for potatoes. McMyn told them the rear compartment was locked, and that he did not have the key. After some conversation, he suggested going to the city to have it opened, but finally he offered to drive back to his mother's farm on Lulu Island and get the key. They drove to the farm, he got the key and opened the rear compartment; the inspectors found in it five sacks of potatoes without tags. McMyn did not have the written authority of the board to transport potatoes.

Upon that evidence, he was convicted in the city of Vancouver police court, that he did unlawfully "transport" potatoes without the written authority of the Marketing Board contrary to its order No. 1, paragraph 12 (g) whereof reads:

> No person shall transport, store, buy, sell or offer for sale the regulated product without the written authority of the board first had and obtained.

On appeal ELLIS, Co. J. gave him the benefit of the doubt and quashed the conviction. His Honour described the evidence as "not very satisfactory and conclusive." and said:

> As the accused did not have the key to the back of his car in his possession at the time of his arrest and produced it to the two inspectors at his farm I conclude he was not transporting the potatoes within the meaning of the scheme.

Before us counsel for the appellant relied on the decision of this Court in *Rex* v. *Lee Sha Fong* (1940), 55 B.C. 129. But counsel for the respondent argued it was not applicable, since the "transportation" there under consideration was from one place to another, *viz.*, from the farm at which the potatoes were purchased to Lee Sha Fong's own home for consumption; whereas in the case at Bar McMyn drove to Vancouver and back home again with the potatoes in a locked compartment of the car, which he could not open until he returned home.

As no objective facts appear in the evidence from which it may be inferred McMyn was selling or delivering the potatoes to anyone, or that he was on his way to do so, or to do anything in the nature of what has been interpreted as illegal marketing, such as occurred for example in the *Lee Sha Fong* case, the latter

C. A.
1941

REX
v.
MCMYN

O'Halloran, J.A.

decision is distinguishable, and it is a proper conclusion that McMyn was not "transporting" potatoes within the meaning of the marketing scheme. In *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U.S. 196, at 203, it was said by the Supreme Court of the United States that transportation implies the "taking up of persons or property at some point and putting them down at another."

In *Novotny* v. *State* (1923), 196 N.W. 232, the Supreme Court of Wisconsin found "transportation" occurred when intoxicating liquor was carried from the premises of one person to the premises of another to be left there. Manifestly that is the meaning of the term in the regulation in this case, since taking up potatoes at one place to leave them at another place without a permit may be interpreted as an interference with the supervised marketing of potatoes. As indicated in the *Lee Sha Fong* case, supervised marketing is the purpose of the marketing statute, which is given control of transportation only to that extent.

"Transport" may have many shades of meaning subjective and objective. But its meaning in a statute for supervised marketing and in regulations thereunder, must necessarily be objective and related to acts interfering with supervised marketing. The transportation in the *Lee Sha Fong* case was of that nature. But in this case the "transportation" cannot be so described, unless it is first assumed that it was an interference with supervised marketing, *viz.*, by selling or delivering potatoes to some one in Vancouver. But that assumption is excluded, since as already stated, there is no evidence to support it.

There may be suspicion, but in the absence of evidence verifying that suspicion, the conviction of the respondent was properly quashed. I would dismiss the appeal.

MCDONALD, J.A.: In my opinion this case is concluded by the majority decision of this Court in *Rex* v. *Lee Sha Fong* (1940), 55 B.C. 129. If there is any distinction then I should say the facts in that case pointed more strongly to a presumption of innocence than do those in the present case.

I would, therefore, allow the appeal.

Appeal dismissed, McDonald, J.A. dissenting.

QUERCETTI v. TRANQUILLI.

C. A.
1941
Mar. 26, 27; *April* 8.

Practice—Attachment of debts—Service of garnishee order—Weekly salary not yet due—"Due or accruing due"—R.S.B.C. 1936, Cap. 17, Sec. 3.

A judgment debtor was employed on a weekly salary. His work for one week ceased at 4.30 p.m. on Thursday, the 5th of December, 1940, but he was not entitled to payment of his weekly salary until Friday, the 6th of December, this arrangement for payment being part of the terms of his employment. A garnishing order was served on the judgment debtor's employer on Thursday, the 5th of December, 1940, at 4 o'clock in the afternoon. An application by the judgment debtor to set aside the garnishing order was dismissed.

Held, on appeal, reversing the decision of LENNOX, Co. J., that the test to be applied is whether or not the judgment debtor himself could have brought action against the garnishee for the money in question at the moment when the attaching order was served. On the evidence no such action could have been successfully brought.

APPEAL by defendant from the order of LENNOX, Co. J. of the 7th of January, 1941, dismissing the defendant's application to set aside the garnishing order issued on the 5th of December, 1940. On the 29th of April, 1940, the plaintiff obtained judgment against the defendant for $401.80. A garnishee order issued on Thursday, the 5th of December, 1940, was served on the garnishee, the O'Neil Company Limited at 4 o'clock in the afternoon of the same day. The defendant is employed as a decorator by the O'Neil Company Limited and his salary for the week ending on the 5th of December at 4.30 o'clock in the afternoon was not payable until Friday the 6th of December, 1940, and the arrangements for payment were part of the terms of his employment.

The appeal was argued at Vancouver on the 26th and 27th of March, 1941, before MACDONALD, C.J.B.C., SLOAN and MCDONALD, JJ.A.

Crux, for appellant: When the order was served there was no money owing that was attachable. The debtor actually quits work at 4.30 o'clock in the afternoon: see *Donohoe* v. *Hull Bros. & Co.* (1895), 24 S.C.R. 683; *Main Bros.* v. *McInnis* (1901), 4 Terr. L.R. 517. At the time of service the debtor's salary was not accruing due: see *Stump* v. *Batzold*, [1931] 2 W.W.R. 784.

C. A. 1941

QUERCETTI v. TRANQUILLI

As to when a garnishee order should be served see *Vater* v. *Styles* (1930), 42 B.C. 463. The order is bad on its face: see *Richards* v. *Wood* (1906), 12 B.C. 182. The order does not comply with the material in the affidavit in support of the application.

Christy Anne Sutherland, for respondent: The affidavit in support of the application was sufficient: see *De Pass* v. *Capital and Industries Corporation,* [1891] 1 Q.B. 216. This application was made in Chambers, but it should have been by motion.

Crux, replied.

Cur. adv. vult.

On the 8th of April, 1941, the judgment of the Court was delivered by

MCDONALD, J.A.: This is an appeal from an order made by LENNOX, Co. J. dismissing an application by the judgment debtor to set aside a garnishing order, dated 5th December, 1940, and served on the garnishee at 4 o'clock on that day. The garnishee and judgment debtor filed affidavits to the effect that the salary of the judgment debtor (who was employed by the garnishee as a floor-worker), for the week ending at midnight Thursday, December 5th, 1940, was not payable to him until Friday, December 6th 1940, and that the said judgment debtor was not entitled to payment of his said salary until said Friday, December 6th, 1940, and that the said arrangements for payment were a part of the terms of his employment.

Under the Attachment of Debts Act all debts owing, payable, or accruing due from the garnishee to the judgment debtor may be attached. The point for decision is whether or not the salary of the judgment debtor under the circumstances above mentioned was effectually attached by the order which was served. On the authorities I think the question must be answered in the negative. The words "or accruing due" are to be found originally in the Common Law Procedure Act. They were carried into the Ontario Common Law Procedure Act and later into other Ontario statutes. These words were the subject of many decisions in Ontario, the result of such decisions I think being that the test to be applied is whether or not the judgment debtor himself could have brought action against the garnishee for the money in question at the moment when the attaching order was served. Apply-

ing that test to the present case I think it is clear on the evidence which was before the learned judge below and which appears in the appeal book that no such action could have been successfully brought. In *Shanly et al.* v. *Corporation of London* (1863), 3 Pr. 223 it was held that a salary payable to the physician of a municipal corporation who held his appointment at the will of the corporation at an annual salary of $400, payable quarterly, was neither a debt due nor accruing within the meaning of the Common Law Procedure Act and therefore could not be attached. In *McCraney et al.* v. *McLeod et al.* (1885), 10 Pr. 539 a contractor had contracted to erect a house for the price of $1,225, of which $600 was paid during the progress of construction and the remainder was payable on completion and it was held by the Master in Chambers, whose judgment was affirmed by Rose, J., that at the time of the serving of the attaching order on 15th March, 1884, the house not having been finished, no debt existed according to the terms of the contract, and though the owner had actually taken possession on 1st April, no promise to pay had arisen by implication and therefore there was nothing upon which the attaching order could operate. So also in *Central Bank* v. *Ellis* (1893), 20 A.R. 364 it was held by the Court of Appeal that the salary of a judgment debtor not actually due or accruing due at the time of service of the attaching order, but which might thereafter become due, could not be attached to answer the judgment debt, and it was so held even although it was argued that consolidated rule 935, then in force, had very much extended the powers of attachment of debts.

Several other technical objections were taken to the form of the affidavit and of the order but as the above in my opinion disposes of the case it is not necessary to deal with these matters.

I would allow the appeal with costs here and below.

Appeal allowed.

Solicitors for appellant: *Crux & Kennedy.*
Solicitors for respondent: *Sutherland & Sutherland.*

C. A. 1941

ELK RIVER TIMBER COMPANY LIMITED v. BLOEDEL, STEWART & WELCH LIMITED.

Feb. 17, 18, 19, 20, 21, 24, 25, 26, 27, 28; *March* 4, 5, 6, 7, 10, 11, 12; *June* 12.

Negligence—Nuisance—Forest fire—Sparks from locomotive—Failure to take reasonable care—Operating under hazardous conditions—Failure to prevent fire escaping—Judge's charge—Jury's findings—R.S.B.C. 1936, Cap. 56, Sec. 60.

On the 5th of July, 1938, shortly after 4 o'clock in the afternoon, a fire started on the defendant's logging premises between Boot Lake and Bosling Lake, and about four miles north of Campbell Lake. It was about 50 yards east of a logging-railway of the defendant company and close to a large cold-deck (pile of logs) of said company. The fire spread rapidly southerly and easterly. Gosling Lake was about one-quarter of a mile to the east and the fire jumped the lake during the night and spread easterly and southerly on the east side of the lake. The fire spreading south was stopped and the fire on the east side of Gosling Lake stopped spreading on the 7th of July but spot fires remained smouldering, and on the 13th of July a strong wind sprang up and the fire east of Gosling Lake spread rapidly in a south-easterly direction, jumped the east end of Campbell Lake and spread to the plaintiff's timber limits to the south of the lake, causing great loss and damage. Prior and up to the starting of the fire the defendant company was carrying on logging operations in the vicinity of the place where the fire broke out, and at about 2.30 on the afternoon of the 5th of July an oil-burning locomotive of the defendant on the logging-railway passed the spot where the fire started. For several weeks prior to the fire the weather was excessively dry and hot, and the timber, undergrowth and forest products, whether growing or cut upon the lands were in a highly inflammable condition. A large number of the defendant's employees fought the fire, and on the 7th of July when the fire appeared to be under control and the spread of the fire had ceased, the men went back to their logging operations. In an action for damages the plaintiff claimed the fire originated through the defendant's negligence, in that there was failure to take reasonable care and that it was negligent in operating under the highly inflammable conditions prevailing at the time, constituting a nuisance, and further that the fire having started it did not make reasonable efforts to prevent its escaping. The jury answered questions and found that the fire started by reason of logging operations owing to the negligence of defendant in using steam equipment in the woods under extremely hazardous conditions without extraordinary precautions being taken. That the fire escaped owing to the negligence of the defendant in not bringing all available men and equipment to the scene of the fire on July 5th and 6th, 1938. That the fire spread to the plaintiff's property owing to the negligence of the defendant in sending men back to work and failing to take adequate precautions against the possibility of the wind springing up and spreading the existing spot fires, and that the operations carried on prior and

C. A.

1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

subsequently to July 5th constituted a nuisance and continuing nuisance. The registrar assessed the damages at $92,594.54, and judgment was entered for said amount.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (SLOAN, J.A. dissenting), that there was sufficient evidence to justify the jury's answers and in law they connote liability. There was no misdirection or non-direction so prejudicial to the defendant as to warrant a new trial and the judgment must stand.

Per SLOAN, J.A.: There was misdirection by the learned trial judge wherein he in error, instructed the jury upon the rule "*res ipsa loquitur*." That the rule has no application herein is conceded. The erroneous passage in question was substantial in effect and "dominated the reasoning upon which that portion of the charge was founded." Once substantial misdirection is demonstrated the *prima facie* presumption is that it resulted in a substantial wrong or miscarriage of justice. The *onus* is then on the respondent to make it clear that the misdirection did not affect the result—a burden which the respondent did not discharge. The fact that counsel for the appellant took no objection below does not debar him, under the circumstances, from raising the objection to the charge in this Court. The function of an appellate Court to determine the law cannot be sterilized by agreement thereon by counsel below, either express or implied from conduct.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 30th of August, 1940, in an action for damages caused by a forest fire which originated on the defendant's premises and spread to those of the plaintiff. Both parties are large logging operators on Vancouver Island. The defendant was operating in a large area north and north-west of Campbell River and Campbell Lake, and the timber area and logging-premises of the plaintiff were south of the river and lake. The fire in question started shortly after 4 o'clock in the afternoon of the 5th of July, 1938. It began close to a cold-deck numbered 114 D, situated west of the south end of Gosling Lake and about four miles north of the westerly end of Campbell Lake. A "cold-deck" is the name used for a large pile of logs. This cold-deck was alongside and 180 feet east of the defendant's branch railway line named 21-C, and between that line and Gosling Lake. It had been placed there for subsequent loading on to cars on this branch line. The only operations of the defendant in the vicinity at the time of the fire were further along on spur line 21-C and nearer to the west end of Campbell Lake. The nearest operation being over 1,200 feet from cold-deck 114 B where mer

C. A. 1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

were operating a donkey for the piling of another cold-deck. The men working at the nearest cold-deck and two others further away had been brought to their work at 4 o'clock that morning. Their shift was from 4 a.m. to 12.30 p.m. The weather was very dry and for purposes of safety this was the only shift working. The men were transported from the company's camp about five miles away by a logging-locomotive called a "locie." The locie hauled a car carrying the men. There were about 60 men in the three groups. At noon the locie No. 2 came from the camp to bring back the men. It travelled along spur 21-C, passing cold-deck 114 D and picked up the three crews. The locie with its passengers immediately returned again, passing cold-deck 114 D. There was no sign of fire at this time. Three young men were left at the site of these operations. These boys were called spark-chasers. Their duties were to watch around the donkeys and to guard against fires. Their duties required them to remain in the vicinity—each at his donkey—until 4 p.m. At this time they met on the track of 21-C and proceeded along the track until they reached cold-deck 114 D. They then turned to the right through the brush to Gosling Lake. The distance from the cold-deck to the lake is about 440 yards. There was no sign of fire near the cold-deck at this time. The path led down a steep incline to the lake. Here was a boat which the boys entered and started to row to the north end of the lake. They had only gone a short distance when they saw a black column of smoke going straight up from the vicinity of cold-deck 114 D. About ten or fifteen minutes had elapsed since they had passed this spot. They returned immediately to find the cold-deck in flames and the fire spreading in the slash and brush between the cold-deck and the track. The fire jumped the track and spread rapidly. The plaintiff claims that the fire was started by the defendant company in the course of its operations by sparks from the donkey or the locomotive engine. That the defendant was negligent in operating at all in the excessively dry season, in not having spark-arresters on their donkeys and a better-equipped locomotive, also in negligently allowing the fire to escape from their own premises and from the adjoining government property to which it had spread. The plaintiff further claimed there was violation of the Forest Act.

C. A.

1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

The appeal was argued at Victoria from the 17th to the 28th of February, 1941, and at Vancouver from the 4th to the 13th of March, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: The jury found that logging operations started the fire which caused damage to the defendant's property, and the starting of the fire was due to the defendant's negligence in using steam equipment in the woods under extremely hazardous conditions without extraordinary precautions being taken. The verdict was the result of misdirection. Two issues were raised: (1) The fire was caused by the defendant's negligence in operating at all in the dangerous fire season; (2) the defendant's locie was defective and out of repair and such negligence caused the fire. As to the first, the humidity is the governing factor and it is proved the humidity records showed that the humidity was well above the recognized margins of safety. As to the second, the spark-arrester on the locie was of standard design and sparks small enough to pass through would not remain alive long enough to start a fire. The defendant denies that the fire was started by its operations, and suggests there are other reasonable possibilities such as incendiary fires, hunters and berry-pickers. There was misdirection as to the doctrine of *"res ipsa loquitur."* The plaintiff had assumed the burden of proving that the fire was caused by the defendant's negligence and the evidence was given on that basis: see *Field* v. *Spencer,* [1939] S.C.R. 36; *McAuliffe* v. *Hubbell,* [1931] 1 D.L.R. 835, at p. 837; *Neal* v. *T. Eaton Co.,* [1933] 3 D.L.R. 306; *Penman* v. *Winnipeg Elec. R. Co.,* [1925] 1 D.L.R. 497; *Drew* v. *Mack,* [1931] 4 D.L.R. 395, at p. 397; *Stephen* v. *McNeill* (1928), 40 B.C. 209, at p. 215. The circumstances of the fire in question were not such as to permit the application of the rule of *res ipsa loquitur* to prove that the defendant caused the fire or was negligent: see *Bryne* v. *Boadle* (1863), 2 H. & C. 722. The rule only applies where it is established that the defendant was in charge of the instrument by which the accident happened: see *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; *Wing* v. *London General Omnibus Co.* (1909), 78 L.J.K.B. 1063; *United Motors Service, Inc.* v. *Hutson et al.,* [1937]

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

S.C.R. 294, at p. 300. The jury's answers indicate how effective was the application of *"res ipsa loquitur."* Incendiarism and other possibilities as to the starting of a fire are not defences that the defendant had to prove: see *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, at p. 509. The plaintiff undertook to prove the fire originated by the negligent act of the defendant and attempted to satisfy the burden by circumstantial evidence. This involved consideration of other possible causes, and the burden was on the plaintiff to show that the only reasonable explanation was that the fire was caused by the act of the defendant. The learned judge left it as if the burden was on the defendant to support by evidence some other cause as his defence. The seriousness of this misdirection appears when considered along with the charge *"res ipsa loquitur."* The finding that extraordinary precautions should have been taken is an admission that the defendant took ordinary precautions and conformed with statutory requirements. The standard of care required is that a reasonably safe and proper system be used: see *McEachen* v. *Grand Trunk Railway Co.* (1912), 2 D.L.R. 588; *Higgins* v. *Comox Logging & Ry. Co.*, [1927] S.C.R. 359. The facts here support the judgment in the *Higgins* case. The dry weather conditions were more than offset by high humidity, no wind, early morning operations and geographical conditions of river and lakes. As to the escape of the fire, at common law one was liable for damage done by fire originating on his own property, but section 83 of the Fires Prevention (Metropolis) Act, 1774, gave protection in certain cases as to liability: see *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. They say the fire was not accidental but wilful, and we have not the protection of the Statute of Anne, and the jury found the fire started from the use of steam-logging operations. This overlooks the distinction in identity between the fire in the locie and the burning in the cold-deck: see *Musgrove* v. *Pandelis* (1919), 88 L.J.K.B. 915, at p. 917. This case is the governing authority here. The spark escaped accidentally and the defendant is not liable for its escape in virtue of the Statute of Anne. It is submitted the defendant does not come within the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330: see *Higgins* v. *Comox Logging & Ry. Co.*,

[1927] S.C.R. 359; *Stephen* v. *McNeill* (1928), 40 B.C. 209, at pp. 215 and 218; *Rickards* v. *Lothian* (1913), 82 L.J.P.C. 42, at 51; *Sedleigh-Denfield* v. *St. Joseph's Mission Society* (1940), 109 L.J.K.B. 893; *Job Edwards, Lim.* v. *Birmingham Canal Navigations* (1923), 93 L.J.K.B. 261. The jury did not find that the fire which escaped was a nuisance, and assuming it was, the defendant is not liable for its escape and the finding of the jury does not bring the case within *Sedleigh-Denfield* v. *St. Joseph's Mission Society, supra.* Sections 117 and 118 of the Forest Act have no relation to civil liability: see Beven on Negligence, 4th Ed., Vol. 1, pp. 398-9. There was misdirection in instructing the jury that to control and prevent escape of the fire is absolute and of the very highest order. The jury's findings as to the escape were perverse. Every reasonable effort was made to check the fire on July 5th, when 159 men were working that night and 178 the next day. The bulldozer was five miles away and there was no highway over which it could be brought to the scene of the fire: see *Cole* v. *De Trafford (No. 2),* [1918] 2 K.B. 523. The answers to questions by the jury were inconsistent: see *The Montreal Locomotive Works, Limited* v. *McDonnaugh. In re Public Utilities Act* (1920), 61 S.C.R. 232; *Fredericton Motor Sales Limited* v. *The Earl of Ashburnham* (1920), 48 N.B.R. 171; *Le Blanc* v. *Moncton Tramway, Electricity & Gas Company, Limited* (1920), 47 N.B.R. 291; *Ball* v. *Wabash R.R. Co.* (1915), 35 O.L.R. 84; *St. Denis* v. *Baxter* (1887), 13 Ont. 41; *Australasian Steam Navigation Company* v. *Smith & Sons* (1889), 14 App. Cas. 321; *Kerry* v. *England,* [1898] A.C. 742; *Higgins* v. *Hamilton Electric Light and Cataract Power Co.* (1905), 5 O.W.R. 136. The fire which caused the damage escaped from the defendant's land before the logging operations were resumed, and the provisions of sections 117 and 118 of the Forest Act have no application thereto. The recital in the judgment that the jury had in addition to answering questions, returned a general verdict, is incorrect, as his Lordship's directions as to the basis of the defendant's liability were not such as to enable the jury to render a general verdict. The misdirection of *"res ipsa loquitur"* vitiated the answers given by the jury as to nuisance. Cases coming under the prin-

C.A. 1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

ciple of *Higgins* v. *Comox Logging & Ry. Co.*, [1927] S.C.R. 359, do not constitute a nuisance, and the operations of the locie did not directly harm the neighbouring premises and were not a nuisance. On how far the occupier of land is liable for damages caused by "escape" there was misdirection, and on the doctrine of *Rylands* v. *Fletcher, supra,* see *Barker* v. *Herbert* (1911), 80 L.J.K.B. 1329, at 1336; *Collingwood* v. *Home and Colonial Stores, Limited* (1936), 53 T.L.R. 53. The Fires Prevention (Metropolis) Act, 1774, is no protection if the fire did not accidentally begin, that is by negligence or wilful act. The second fire which spread and caused the damage was accidental.

John L. Farris, on the same side, on question of damages: Sixteen items of damages were allowed, but the appeal is confined to four items: First, supervision and overhead. We say this included salaries of three men who were hired on a yearly basis, and the company would have had to pay them anyway. Second, felled and bucked timber. The plaintiff lost in the fire timber it valued at $35,000 odd. The dispute arose as to the price to be allowed for these logs. They were allowed as to prices in August, 1938, and this is wrong, as it is the month in which the logs were burned and not the month in which the logs would have been produced and sold had there been no fire. The third item is logs partially burned, and the plaintiff's estimate was accepted and the difference between the two estimates arises as to the price they would have received if the logs had not been burned. The same reasoning was adopted as to item number two. The fourth item in dispute is standing timber that was burned. We say the registrar erred in accepting the respondent's estimate as to the quantity of timber destroyed. The appellant's estimate is based on a cruise of the burned area made immediately after the fire. The respondent's estimate is based on a cruise made ten years before the fire and does not give accurately the quantity of standing timber at the time of the fire. The respondent's estimate was $22,671, whereas the appellant's was $3,477.

Locke, K.C. (*Housser,* and *Lundell,* with him), for respondent: The respondent makes specific charges of negligence, that the actions of the appellant in carrying on its operations under the conditions then existing constituted a nuisance, and the

respondent thereby suffered damage, and the respondent claimed to recover from the appellant all its fire-fighting costs under section 118 of the Forest Act. Further, the appellant without the consent of the forest branch continued to carry on operations before the fire was wholly extinguished. There was negligence (a) in setting the fire of July 5th, 1938; (b) in permitting the fire to escape, and failing to extinguish it; (c) in failing to take adequate measures to control and extinguish the fire. The jury found a general verdict for damages in favour of the respondent. There was a long period of drought from April until the fire on the 5th of July, 1938, which started between Gosling and Boot Lakes. The fire started shortly after 4 o'clock in the afternoon of the 5th of July on or near cold-deck 114 D, which was close to branch line 21-C. The appellant's locie No. 2 passed said cold-deck at about 12.30 that day on branch line 21-C. The evidence showed it was highly dangerous to operate oil-burning locomotives at the time in question. Locie No. 2 was equipped with a spark-arrester, but spark-arresters do not stop all sparks that are blown through the stack of a locomotive. They were negligent in permitting the fire to escape from their own premises. Assuming the fire started without negligence, there still was imposed a duty to use reasonable efforts to prevent its spreading off its own property. The appellant had the equipment required by the regulations, but it was inadequate to prevent the rapid spread of the fire between Gosling and Boot Lakes. Special care must be taken in such conditions: see *Port Coquitlam* v. *Wilson*, [1923] S.C.R. 235, at 244; *Ellerman Lines, Ld.* v. *H. & G. Grayson, Ld.*, [1919] 2 K.B. 514, at 530-31 and 534-35; *Crewe* v. *Mottershaw* (1902), 9 B.C. 246. The jury found there was negligence in not having all available men and equipment on the scene of the fire. The appellant having started the fire its duty was not restricted to preventing its escape from its own property. It allowed the fire to spread from lots 51, 99 and 100, that were outside its own property, and the jury found it was negligent in regard to this. There was also the duty imposed by sections 117 and 118 of the Forest Act that rendered it liable for all expenses incurred by others in controlling the fire. It is submitted that the actions of the appellant in carrying on logging

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

operations using steam equipment under the circumstances existing prior to July 5th, 1938, constituted a public nuisance: see Halsbury's Laws of England, 2nd Ed., Vol. 24, p. 22 *et seq.*; *The Saint Helens Smelting Company (Limited)* v. *Tipping* (1865), 35 L.J.Q.B. 66. The question is one of fact and the jury found the plaintiff suffered damage in consequence. The evidence shows the spark-arrester was in bad condition, and this constituted a nuisance: see Halsbury's Laws of England, 2nd Ed., Vol. 24, pp. 23, and 83-4; *The Queen* v. *Isaac Solley Lister and Others* (1857), 26 L.J.M.C. 196; *Hepburn* v. *Lordan* (1865), 34 L.J. Ch. 293; *Sedleigh-Denfield* v. *St. Joseph's Mission Society* (1940), 109 L.J.K.B. 893. By continuing its logging operations and failing to extinguish the fires constituted a maintenance of a nuisance and a commission of a nuisance from day to day: see *Attorney-General* v. *Tod-Heatley* (1897), 66 L.J. Ch. 275, at 278; *Job Edwards, Lim.* v. *Birmingham Canal Navigations* (1923), 93 L.J.K.B. 261, at 265; *Musgrove* v. *Pandelis* (1919), 88 L.J.K.B. 915. The respondent claims it is entitled to the expenses incurred by it in controlling and extinguishing the fire when it spread to its property under sections 117 and 118 of the Forest Act. The appellant claims the judgment is wrong in reciting that the jury found a general verdict for the plaintiff. After discussion before the Court as to this, the foreman of the jury said that "our final verdict was for the plaintiff." The learned judge was right in directing judgment in the terms of the judgment entered: see *Harper* v. *Cameron* (1893), 2 B.C. 365; *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221; *Newberry* v. *British Tramways and Carriage Company (Limited)* (1912), 29 T.L.R. 177; *Ellis* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 43; *Balfour* v. *Toronto R.W. Co.* (1901), 5 O.L.R. 735. As to the contention that the verdict was against the evidence and the weight of evidence, the respondent has summarized the evidence and the general verdict given in favour of the respondent was amply supported. As to the principle applicable see *Sershall* v. *Toronto Transportation Commission*, [1939] S.C.R. 287. On the functions of a jury see *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *Windsor Hotel Co.* v. *Odell* (1907), 39 S.C.R. 336; *Danley* v. *Canadian Pacific Ry. Co.*, [1940]

S.C.R. 290, at 295; [1940] 2 D.L.R. 145; *Staley* v. *British Columbia Electric Railway Company, Limited* (1937), 51 B.C. 499, at 505, and on appeal [1938] S.C.R. 387. They complain that if the jury's verdict does constitute a general verdict it should be set aside, as before the jury could validly return a general verdict his Lordship must have correctly instructed the jury on the defendant's liability on each of the issues. As to this, attention must first be called to the course of the trial: see *Nevill* v. *Fine Art and General Insurance Company,* [1897] A.C. 68, at p. 75; *Scott* v. *Fernie* (1904), 11 B.C. 91, at p. 96; *Spencer* v. *Field,* [1939] S.C.R. 36, at p. 42; *McDonald* v. *Owen,* [1924] 1 D.L.R. 85. The Court will not interfere on the ground of misdirection of a jury, where the judge's charge was not objected to at the trial, unless satisfied that the jury have been led to a wrong conclusion. The appellant is bound by the conduct of its counsel at the trial. The learned judge considered it was unnecessary to review the evidence at length: see *Jefferson* v. *Paskell* (1915), 85 L.J.K.B. 398, at p. 409; *Blue & Deschamps* v. *Red Mountain Railway* (1909), 78 L.J.P.C. 107; *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106. There is no quarrel with the judge's definition as to what constitutes negligence in law, and the statement of the law is correct. Where the fire has been started by the negligence of the defendant it is not an accidental fire, and the Statute of Anne does not apply: see *Filliter* v. *Phippard* (1847), 17 L.J.Q.B. 89; *Musgrove* v. *Pandelis* (1919), 88 L.J.K.B. 915, at p. 917; *Sedleigh-Denfield* v. *St. Joseph's Mission Society* (1940), 109 L.J.K.B. 893, at p. 899; *Job Edwards, Lim.* v. *Birmingham Canal Navigations* (1923), 93 L.J.K.B. 261. The case against the appellant both for negligence, in nuisance, and under the statute was clearly proven. The whole verdict must be taken together and construed reasonably: see *Marshall* v. *Cates* (1903), 10 B.C. 153; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263; *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221; *Kerr & Begg* v. *Cotton* (1892), 2 B.C. 246; *LeBlanc* v. *Moncton Tramway, Electricity & Gas Company, Limited* (1920), 47 N.B.R. 291; *McDermid* v. *Bowen* (1938), 53 B.C. 98, at p. 105. Section 126 of the Forest Act states that a right of

C. A. 1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

action is not to be interfered with by the provisions of the Act. That there was ample evidence upon which the jury could properly find as they did see *Richard Evans & Co., Limited* v. *Astley*, [1911] A.C. 674, at p. 678; *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380, at pp. 386-7; *Danley* v. *Canadian Pacific Ry. Co.*, [1940] S.C.R. 290, at p. 296; *Staley* v. *British Columbia Electric Railway Company, Limited* (1937), 51 B.C. 499; *Landels* v. *Christie*, [1923] S.C.R. 39, at p. 40. Appellant relies on the decision in *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81, but that case is confined to a very narrow margin: see MacMurchy & Denison's Railway Law of Canada, 3rd Ed., 381. See also *Craig* v. *Glasgow Corporation*, [1919] S.C. (H.L.) 1; *Jones* v. *Great Western Railway Co.* (1930), 47 T.L.R. 39. Each case should be decided on its own particular facts: see *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506. That the verdict should not be set aside see *Sershall* v. *Toronto Transportation Commission*, [1939] S.C.R. 287, at p. 304; *Newberry* v. *Bristol Tramway and Carriage Company (Limited)* (1912), 29 T.L.R. 177; *The Saint Helens Smelting Company (Limited)* v. *Tipping* (1865), 35 L.J.Q.B. 66; *Dimmock* v. *North Staffordshire Railway Company* (1866), 4 F. & F. 1058.

J. W. deB. Farris, replied.

Cur. adv. vult.

12th June, 1941.

MACDONALD, C.J.B.C.: Although otherwise prepared, I was unable when judgment was delivered on June 12th, 1941, to place my reasons in writing; I now proceed to do so. I confine my judgment dismissing the appeal to one branch of the case in itself conclusive; it is disclosed in the answers of the jury to the following questions:

1. Did the defendant carry on logging and lumbering operations on properties in its possession and control, namely, at the time of the start of the fire July 5th, 1938? Block B only. Yes.

2. Did the plaintiff at the time material to this action, own timber limits, and other properties as described in paragraph 16 of the statement of claim, in the vicinity of the said property occupied by the defendant? Admitted by plaintiff and defendant.

3. Did a fire start on the said block B of lot 145, Sayward District on the 5th day of July, 1938? Yes.

4. If so, where on the said premises did the fire start? Between track 21-C and cold-deck pile 114 D.

5. What caused the said fire to start? Logging operations.

6. Did the said fire extend to and cause damage to the plaintiff and its property? Yes.

7. Was the starting of the fire due to the negligence of the defendant? Yes.

8. If so, in what did that negligence consist? Using steam equipment in the woods under extremely hazardous conditions, without extraordinary precautions being taken.

For purposes of discussion we may disregard (1) and (2), leaving for consideration three findings grouped as follows: (1) The start of the fire, its location, cause and origin (numbers 3, 4 and 5); (2) its spread to respondent's property, causing damage thereto (number 6); (3) fire started by appellant's negligence; defining it (numbers 7 and 8).

We are not permitted by law to retry the case or to give effect to our own view of the evidence. The facts are exclusively for the jury; subject to reservations presently referred to; as the verdict falls so it must lie. If there was enough evidence to justify the foregoing answers and in law they connote liability and in addition no misdirection or non-direction of a nature so prejudicial to appellant as to warrant a new trial the judgment must stand.

The questions and answers must be interpreted in the light of the evidence; for example, in the answer to question 5, *viz.*, "Logging operations," the jury found that a spark or sparks in the form of live carbon were ejected from appellant's oil-burning locomotive. It was originally constructed as a wood-burner, later converted to consume oil, and on the day in question carried behind it on track 21-C a "crummy" to move workmen from one point to another. There was an adverse grade at this point of over 2 per cent. Running the locomotive on this track was the "logging operations" referred to in answer to question 5. From the wording of the question it was not possible to answer "by sparks emitted from the smoke-stack"—an opportunity to say so was not given. The answer, however, is wholly responsive to the question: it disclosed the "cause." The jury found therefore that the fire caused by carrying on operations with this steam equipment started between two specified points, *viz.*, the moving

C. A. 1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

locomotive and the cold-deck of logs 200 feet or less east of the track.

To avoid repetition I direct attention to the reasons for judgment of my brother MCDONALD in so far as they relate to the findings in the foregoing questions and answers. I adopt his reasons and confine myself, as far as practicable, to additional facts and elements in the case leading me to reach the same conclusion. The only feature calling for discussion, although, for my part, I intimated at the hearing that there should not be a new trial because of it, and still adhere to that view—concerns what may be called the *res ipsa loquitur* episode. I now give more extended reasons for my opinion on this point, more particularly as it was seriously advanced by an able counsel, and my brother SLOAN, whose opinions I respect but in this instance do not share, supports it. It will also, as a necessary aspect of the discussion, disclose that there was abundant evidence to support the answers referred to.

The part of the charge dealing with the maxim referred to is given in full in the judgment of my brother MCDONALD. We are asked to find that a carefully conducted trial (apart from this feature) where evidence was adduced for several weeks strictly on the proper basis in respect to *onus* of proof, and where too the trial judge repeatedly charged the jury properly on the question as to where the burden of proof lay, should be treated as abortive, because, against the protest of respondent's counsel and without objection by his opponent supposed to be injured thereby, the trial judge declined to withdraw this part of the charge from the jury's consideration, although it was not part of the respondent's case. If the jury for reasons later referred to, were not deflected from considering the whole case on a proper basis, the incident at least served the purpose of raising a ground of appeal, albeit not a good one.

I propose to discuss the point apart from and without reference to that part of my brother MCDONALD'S judgment concerning the legal position where counsel stands by at the trial and takes the point for the first time on appeal. My brother's view is that even if mischief ensued the point cannot be given effect to at this stage. I propose to deal with it on the merits, apart from tech-

nical rules, confining my inquiry to whether or not on the whole record, including the charge, it can reasonably be said that appellant's case was so prejudicially affected that a miscarriage of justice occurred. It is probably more satisfactory to litigants if the outcome of a lawsuit does not depend upon whether or not their own counsel said this, or omitted to say that. Appellant's counsel is astute and experienced. The truth is he showed astuteness in allowing the error to stand: it gave him a ground of appeal in the event of an adverse verdict and did not injure the appellant's chance of avoiding it. I do not offer any criticism; he must not, however, impose upon my credulity.

Nor can I accept the submission that counsel's failure to object to an obvious misdirection, detrimental if at all, to him alone, is excused because the trial judge after being urged by Mr. *Locke* to strike it from the charge, used these words: "No, I think I will leave the charge as it is." It is absurd to say that a ruling so expressed, not necessarily indicating finality (it would not matter if it did—he should insist upon reopening it), prevented counsel from supporting Mr. *Locke's* objection now considered of such tremendous importance that a long and costly trial ought to be repeated because of this incident. Mr. *Locke* was not in reality hurt but he wanted to keep the record clean to avoid a new trial: he received no assistance. However, I only refer to it for one purpose: for what it is worth counsel's attitude confirms my own view that appellant was not prejudiced in the slightest degree.

I propose to deal fully with the evidence supporting the findings of the jury in respect to the three groups of decisive answers above outlined, and after doing so will inquire if there is any reason to doubt that these answers were based wholly on the evidence adduced by respondent, all of it affirmative and *onus*-discharging without the adventitious aid said to be secured by the use of the maxim *res ipsa loquitur*. I would not refer to it at length if only concerned with showing that there was sufficient evidence to support the answers; of that there is no doubt. Clearly, however, the greater the volume of evidence directed to discharging the burden of proof on respondent, the less the likelihood that the jury were misled.

C. A.
1941

ELK RIVER TIMBER CO. LTD. *v.* BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

First I give the evidence coupled with such comments as may be pertinent relating to the first group of answers, *viz.*, (1) the start of the fire, its location, cause and origin covered by answers 3, 4 and 5. I do not propose to quote evidence *in extenso;* general statements to be made, however, are fully supported by evidence.

The jury must be taken to have found that the fire started between track 21-C over which appellant's locomotive number 2 passed at 12.30 or shortly after, on July 5th, 1938, and the cold-deck pile of logs 114 D close to it, *viz.*, 200 feet or less east of the track; it then spread to the cold-deck. They also found as already explained that it was started by a spark or sparks from the locomotive running on track 21-C. The fire was first observed blazing in the pile of logs—it contained 800,000 feet—three or four hours afterwards. To cover that interval of quiescence many witnesses for respondent testified that live carbon ejected from a smoke-stack coming to rest on *debris* or punk found in that area might smoulder for some hours under the conditions then prevailing, and finally burst into flame. These sparks are burning particles of carbon brought to a red or white glow by the intense heat of the oil fire; they are caused by imperfect combustion of the oil fuel. It is deposited on the walls of the fire-box of the engine, on the tube sheet, in the smoke-box and the stack of the locomotive; it also forms upon the outside of the spark-arrester fastened to the stack. In addition slag and red hot particles of sand and brick are ejected from the stack. Brick fire-clay also is used and it falls out in chips; it is caught by the draft and carried through the fire-box, through tubes into the stack and out through the arrester. Material thrown out may be hot sand, carbon and slag coming from brick in the fire-box and carbon forming in the smoke-box and in the tubes. The carbon becomes hot more particularly when the locomotive is pulling hard as it would be on the upgrade.

Many witnesses testified from observation that sparks will carry 200 to 250 feet and start a major fire. No one, of course, saw a live spark or sparks leave the smoke-stack and fall to the ground. A fireman, however (Nelson), who operated this locomotive number 2 within a few days of the fire, testified that it

did throw sparks; he saw it doing so. I received the impression from perusal of his evidence that he was over-anxious to give damaging evidence; however, that was a question of weight for the jury. There was also a great deal of evidence given by laymen and experts showing that a spark will float or be carried (it will make its own wind) a considerable distance and not break into flame for several hours later.

Sparks can only be readily seen at night. One witness testified that he frequently stood some distance from a track where logging-locomotives passed and had hot pieces of carbon or sand light upon him and burn holes in his hat and clothing, often at a considerable distance from the track. The master mechanic in charge of maintenance of engine and equipment in the Comox Logging and Railway Company, said that the hot material thrown out originates in the fire-box. When the locomotive is in motion everything, he said, is in vibration and the material crumbles as it moves. It is incandescent—red hot—and small particles will become detached and ejected from the top. In the spark-arrester, too, there are heavy deposits of carbon, oil and soot.

Appellant's locomotive No. 2 was what is called the "straight-geared engine." This according to several witnesses, was more liable to throw sparks than the geared engines; that was their experience. There is no locomotive from which sparks or slag or burning material are not thrown, but more would escape from this type.

The evidence of many witnesses—it was not disputed by anyone—was that all these oil-burning steam locomotives will throw sparks. In fact his Lordship intervened at one stage to say it was not disputed that they throw sparks, and suggested curtailing the evidence.

Then there was much evidence to show that the type of appellant's locomotive No. 2 was more dangerous in this respect than other types. Considerable expert evidence also was given to show that the spark-arrester used was defective and badly designed, thereby not only permitting, but facilitating the escape of sparks. There is no finding that the spark-arrester was defective—as the jury were not asked the question there could not be such a finding—it does not follow that this evidence was not

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

considered by them in determining whether or not sparks escaped at the time and place referred to. Even in answer to question 8 the jury could not say "using steam equipment with a defective spark-arrester, *et cetera,*" because that would exclude the view, so fully supported by the evidence that whether defective or not, sparks would escape. It was therefore open to the jury to conclude that a defect in the arrester in construction or in design would greatly add to the danger.

Mr. Filberg of the Comox Company testified that in his own logging operations he used 12 oil-burning locomotives; all, he said, equipped with spark-arresters much superior to that of appellant, and yet sparks would be ejected, sometimes carried a distance of 100 yards. He saw many fires in the past 30 years started in that way. That sort of evidence too was repeated by many witnesses. He also said that during periods when the hazard was greater because of weather conditions his company in addition to the spark-arrester used, had a contrivance added, enabling water to be sprayed through the sparks as they came out of the top of the stack. It was operated with a pump. "A thick kind of fog which is all around the spark-arrester and any sparks" he said "which come through would have to go through this fog or fine spray of water." Mr. Harding, inventor of the spray, said he found it cut down the fire hazard very much, but did not make it perfect. This was not used on appellant's locomotive. Even with this equipment Mr. Filberg did not permit any of the locomotives owned by his company to operate after the 21st of June of the year in question. Logging operations were closed down and not resumed till August. It was considered too hazardous because of the danger from sparks or fire from any other equipment. Another company testified that they closed down for a period embracing July 5th, 1938, for the same reason. Evidence too that other companies, when conditions were not sufficiently alarming to cause them to shut down but yet to exercise care, provided track-walkers to watch for any sparks that might be thrown by locomotives; they followed the locomotives. Appellant had no such patrols. All the foregoing was affirmative evidence from which the jury could draw an inference, and did so. Mr. Cobb, a civil engineer and general manager of respondent company for sixteen years, using oil-

burning locomotives, testified that the principal source of fire was from sparks from donkeys and locomotives. He examined the arrester on appellant's locomotive and considered it inefficient. His company shut down their main operations on June 13th, 1938, far beyond the period when the fire occurred. He did not allow locomotives to operate in the timber. They also kept one locomotive constantly under steam at this exceptionally dry season ready for action should a fire occur.

Another witness said sparks from locomotives are responsible for from 90 to 95 per cent. of all fires. It is obvious that the carbon formed, as earlier described, will be ignited by the heat of the fire and thrown out by the force of the exhaust. I referred to the grade; it was disclosed that the locomotive moving along track 21-C at 12.30 on the day in question immediately preceding the point where the fire occurred, encountered a grade of approximately 2 per cent. Because of the grade the locomotive would take more throttle, more draft through the smoke-stack, thus causing more sparks to be ejected. Proceeding northerly from a point some distance south of this point the up-grade (profile map exhibit 35) is approximately 2 per cent. for about 500 feet; as shown, too, on exhibit 7, there is a curve on the track as it approached the scene of the fire; its effect is equivalent to an increase in the adverse grade, making it a total of about 2.64 per cent.

Mr. McQueen, assistant forester employed in the forest service since 1926, said there was great risk in carrying on logging operations and in using oil-burning locomotives in that area during late June and early July, 1938. Even Mr. Daly, appellant's superintendent, did not deny that sparks would escape. When asked if he agreed with the evidence of many witnesses dealing with fires started by sparks he was only able to say "I disagree with some of their statements"; pressed further however, he would not disagree with the evidence that fires do start in that manner.

Mr. Osborne, an expert who will be referred to again, informed of prevailing conditions on July 5th, 1938, and prior thereto, gave this evidence:

What is your opinion, Mr. Osborne, as to whether burning carbon, or cinders from a railway locomotive, falling on critical fuel, or particularly

C. A. 1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

rotten wood in the vicinity of the cold-deck pile, would start a fire under the conditions which have been described? Yes, a spark could readily set it. Finally, there was evidence that the position of the fire in the cold-deck when first observed was consistent with its inception between it and the track. I would also add that evidence discussed later when considering the answer to question 8 would assist the jury in answering questions 3, 4 and 5. I shall ask, therefore, that we assume in the meantime extremely hazardous conditions as there found; that is important; if it were otherwise, a spark although falling, might not ignite. I would add further that the jury negatived incendiarism. Evidence was given suggesting it and it was put to the jury. It was not likely with no suspicious characters observed and with other employees near by (some within 1,200 feet) who should have noticed loiterers during the day if any were present, that the fire could have been started by a criminal.

I have now sketched the evidence upon which I suggest the jury based their answers to the first group of questions 3, 4 and 5, *viz.*, that sparks from locomotive No. 2 started the fire at the point mentioned and did so without calling the maxim to their aid. It was shown directly that this locomotive actually threw sparks in the form of live carbon; that its spark-arrester was defective—without protective appliances, and in any event that all oil-burning locomotives do so. It was the only agent carrying fire that passed this point, and incendiarism was negatived; it had to contend with an adverse grade. Further evidence was adduced that 90 per cent. or 95 per cent. of forest fires originate from locomotives and that knowledge of these facts led two large neighbouring companies to close operations in this dry period. This was the mass of evidence given in the greatest detail, from which the jury could make the findings referred to. Had they any difficulty in doing so or any need to resort to a spurious method of procedure?

I repeat the inquiry is this: Were these three answers based upon that affirmative *onus*-discharging evidence just outlined, without resort to the erroneous doctrine promulgated by the trial judge to the jury? To ask that question is to answer it. I shall deal later with all the answers taken as a whole, but in the meantime the jury had to proceed step by step, question by question.

When they found where the fire started it could only be by drawing an inference from this evidence. It was the evidence pointing to it given by a score of witnesses that led them to imply it originated from sparks from the smoke-stack. Where else could they get these answers? Management and control had nothing to do with sparks escaping; nor was it a starting point for the inquiry. Further, the maxim is concerned exclusively with negligence. It is a rule of evidence respecting negligence, and the trial judge so indicated. Negligence is left for question 8. That is why I divided the answers into groups. We can say at least that so far the maxim was not used. It is obvious, too, that it does not and cannot apply to these three findings, and the jury if they understood it at all—and that is doubtful—would know it. I quote from the trial judge's statement as follows:

> Where the thing is shown to be [that is to say by evidence] under the management of the defendant or its servants [also by evidence] and the accident [proved by plaintiff] is such as in the ordinary course of things does not happen if those who have the management used proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose through want of care.

The maxim, therefore, only comes into play on proof by the plaintiff that an unexplained injury actually occurred. If a sack of sugar fell on a pedestrian from an upper storey of a warehouse and injured him he would not, on action brought, come into Court and ask the defendant to begin. First he must name the defendant who had the management and control, prove that the sack fell from his premises and that it injured him. It was corresponding facts that were found by the answers to questions 3, 4 and 5, and I would add 6 as it relates to the injury sustained. I suppose everyone knows, unless *non compos,* that anyone injured by someone else would at least have to prove how he was injured and by whom; at least tell the story that far before his adversary would be called upon for an explanation under any set of circumstances. The trial judge did not say otherwise. It follows that the maxim, even if applicable at some stage, could not operate on the minds of the jury while they were answering questions 3, 4 and 5 (also 6) relating to preliminary findings of physical facts. The respondent had to prove (1) that he was injured; (2) how he was injured (by fire) and (3) who injured him, and in what manner. If, therefore, the plaintiff in *Scott* v.

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

London Dock Co. (1865), 3 H. & C. 596 had to first prove affirmatively that he was injured by sugar-sacks falling from the defendant's property our respondent, even if the maxim applied would have to prove that he was in fact injured and in a certain manner, *viz.*, by sparks from a locomotive owned or controlled by appellant. It appears therefore that the trial judge told the jury that these physical facts had first to be "shown" or in other words proven by respondent before the maxim could be relied upon. It would follow that whatever difficulty arises, if any, when we reach the answers to questions 7 and 8 (particularly the latter) relating to negligence, there is no difficulty so far; it at least is postponed.

I refer briefly to group 2, the answer to question 6 where the jury found another physical fact already alluded to, quite apart from negligence, *viz.*, that the fire extended to and caused damage to the property of the respondent. It was necessary to have such a finding. This physical fact was detailed by many witnesses describing the course of the fire. I shall say no more than this: that answer was given without the use of the *res ipsa loquitur* crutch; if that is not apparent to anyone, reasoning will not elucidate it. So far then, in respect to four vital answers it cannot be said that the jury made use of this rule of evidence. The jury could not apply it if they tried to do so.

It remains to consider questions and answers numbers 7 and 8 as the third and last group, particularly 8. This answer defining negligence is basic in the case. The negligence was this—continuing to operate with steam equipment in the woods under prevailing extremely hazardous conditions without taking "extraordinary," or, as I would put it, more than ordinary precautions; that was the "head and front of the offending." That is negligence if there is evidence to support it. Were the jury aided in returning that answer because of the trial judge's obvious misdirection or was it, too, based solely upon affirmative *onus*-discharging evidence? I would point out first that three points were covered by the answer, all, too, concerning physical facts: (1) steam equipment used; (2) conditions "extremely hazardous"; (3) no extraordinary or special precautions taken (*e.g.*, absence of track-walkers or patrols, no spray in spark-arrester,

absence of equipment, *et cetera*—the jury were not asked to define it). It is the juxtaposition of these physical facts (1), (2) and (3) that creates the negligence.

I will deal with the evidence supporting this three-fold answer spelling negligence when related, for the same reason as hitherto, *viz.*, to ascertain whether or not with some facts admitted and a mass of evidence supporting others, there can be any doubt that the answers were based solely upon that evidence without recourse to the maxim.

As to using steam equipment, *viz.*, locomotive No. 2, there is no question. The second is a finding that conditions were "extremely hazardous." The evidence is clear that the 1938 midsummer season was driest and most hazardous in respect to fire since 25 or 30 years. That type of evidence was given by farmers, game guides and fire wardens, lumbermen and expert witnesses. Mr. Smith, a game guide, with 52 years' experience in the district, said May, June and July, 1938, were "exceptionally dry, drier than I ever remember." Mr. Harvey, local game warden, said June and July were "the driest that I have ever known in the ten years I have been game warden." Mr. Crockett, a local farmer, deposed that in the 40 years he lived there "it was one of the driest that I can remember; quite a north-west wind was blowing all the time." That had a drying effect; hay and roots were seriously affected. Even appellant, because of conditions, would not risk operating in the later afternoon. The danger would be less in the morning hours, progressively more hazardous as the day advanced. The jury had to decide whether or not it was hazardous for appellant to work not all day but until 12.30 p.m., and did so. It will be found later that if the reasons given by defence witnesses for operating, *viz.*, no wind and high humidity, were good reasons, it would justify their continuing work in the afternoon.

The jury were told that for two days in early May for the first time in its experience the Comox Logging and Railway Company closed its logging operations; also on May 21st. On June 8th that company pulled the crews out of the woods and quit logging because "we thought it was too dry and too dangerous to work." They resumed on the 10th for part of the day and continued until

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

the 21st. They then quit because it was so extremely dry and the wind was high. "We stopped all operations" and remained closed until long after the fire. The Comox operations were 12 or 15 miles south of appellant's. These conditions were general on Vancouver Island. The Comox Company also closed down a Ladysmith operation probably 100 miles away. For the same reasons on June 13th respondent company closed its main logging operations. It was said they ceased operations because of a surfeited market. That would not account for closing down early in May and part of June.

The jury did not accept appellant's submission that mainly if not entirely the important element to consider was the condition of wind and humidity on the 5th of July, 1938. Attention could not be confined to that date. The cumulative effect of high winds and general conditions for several weeks was reflected in conditions on that date.

All the foregoing facts were so generally known and the evidence in reference thereto repeated so often that without doubt the jury had before them all the affirmative evidence of hazardous conditions they required, unless it was neutralized or destroyed by other aspects in respect to wind and humidity later discussed.

This lay evidence was confirmed by expert witnesses, Mr. McQueen, already referred to, who lived on the coast 22 years, said the period was "characterized by extremely dry conditions right from the beginning of the season." He was there the whole summer and said "to my knowledge it was the driest year we have had"; he added that from the beginning of the season prevailing winds had been generally from the north and that these were very dry winds, bringing on fire conditions. That this condition, too, was dangerous, was conceded by Mr. Daly, appellant's superintendent. He first said "it was fairly dry"; pressed further "I would say it was very dry"; so dry that any fire would be extremely dangerous. He knew this he said; all were aware of it. When the fire started he said it spread with great rapidity "owing to the fact that everything around there was like tinder." On cross-examination he agreed that "there was an extremely hazardous condition in the forest."

Referring further to the evidence of experts, records were kept by the Provincial Government at Campbell River nearby. "Hazard-sticks" made of Douglas fir sap wood were kept at the forest ranger's station about 10 miles from the fire scene; their uses were described by Mr. McQueen and Mr. Playfair, the former a Bachelor of Applied Science in Forestry; he took a *post*-graduate course in fire control research work. The wood, very absorbent to moisture, is kiln-dried at a forest products laboratory at the university until all moisture is removed. Several hundreds are out, weighing 20 grams when dried, and placed in the field for observation. Their function is to measure the inflammability of the forest cover. When the contents of the sticks show 9 per cent. or less of moisture the forest cover is "very inflammable and fires are exceedingly liable to originate." "The condition of the forest cover" it was said "when the content is 9 per cent. or less is very dry and the risk of fire from industrial operations quite hazardous." The prevailing conditions as thus revealed were shown at the trial by charts and graphs for the period May, June and July. Weighing them at intervals determines the dryness of the forest fuel. For the greater part of May it was 9 per cent or less. This meant that the fuel contained 9 per cent. or less of water. They showed 9 per cent. or less of moisture for sixteen days in May, 25 days in June and in respect to the last sixteen days in June fourteen of them showed 9 per cent. or less. As to early July on the first five days the percentage was 9 per cent. or less, except for the 3rd when it was from 9 to 11 per cent. Subsequently, from the 5th to the 15th of July, nine days, showed 9 per cent. or less. Appellant's counsel submitted that too much was proved by these hazard-sticks; it showed dangerous conditions over so long a period. The fact is it was hazardous throughout nearly all of that period; it does not help appellant to establish that fact.

Appellant submitted that wind and humidity determine the danger. If no wind, or I assume a low wind, and high humidity presumably on the 5th of July, 1938, a fire would not readily start; in other words, because of conditions on that day appellant was justified in operating; the fire, therefore, must have been of an incendiary origin or due to some other cause. Appellant

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

considered (Daly) that with the humidity 30 or lower it would be dangerous to operate. Counsel complained that the evidence of many of respondent's witnesses did not deal with the essential factor, *viz.*, the fire hazard in the early afternoon of July 5th, in view of the high humidity and lack of wind that day. The evidence was not and could not be so limited. I pause here to add to my brother MCDONALD'S comments on *Higgins* v. *Comox Logging Co.* (1926), 37 B.C. 525; [1927] S.C.R. 359. It is erroneous to suggest—only such a contention would assist appellant—that unless the humidity falls to 30 or lower (sometimes it was put at 35) it would be lawful to operate. The Supreme Court of Canada were not deciding that in a case such as this in order to determine fire-hazard humidity only need be considered; much less on the day in question. If that were so, the trial should have been a short one.

Mr. Osborne, presumably a noted authority, was an expert witness for respondent. Appellant's counsel urged that this witness supported their submission, *viz.*, that with a relative humidity of approximately 30, as on July 5th, and little or no wind, it was not hazardous to operate. I will examine this claim; by relative humidity is meant the percentage of saturation in the air at any given temperature. If 100 per cent. it is completely saturated; if 50 per cent. the moisture is reduced one-half. At 100 per cent. the air holds all the moisture it can contain at the prevailing temperature; it is practically on the turning point of fog, rain or dew. High temperature alone does not necessarily mean a high hazard, as a very high humidity may accompany it.

As indicated, the relative humidity was at 50 per cent. or possibly 51 around 12.30 p.m. on July 5th. The submission was that with little wind on that date conditions would not be hazardous until it fell to 30 or 35 per cent.; if that is so it was not necessary to stop work at 12.30 p.m. This answer was made by Mr. Osborne to a question asked, and it was relied upon to support their theory. Mr. Osborne said "with your conditions of drought as it were, and a humidity of 50, I would not call your critical fuels extremely inflammable." That answer it was said justified appellant's statement that it was not a negligent

act to operate on July 5th. Even if that is the proper interpretation, the evidence of one witness would not compel the jury to so find; but it is not so. He defined "critical fuels," such as existed in this area, as dead vegetation, finely divided materials on the forest floor, exposed to free circulation of air. They are, he said, susceptible to easy ignition and rapid combustion. It is like the kindling for a fire; it burns very rapidly when ignited. All of Mr. Osborne's evidence must be read—not this answer alone—for an exposition of his views. He used the words "extremely inflammable." He also said these "critical fuels" are susceptible to ignition, and fires will start in them from sparks, under conditions of drought and with a humidity of 50. Critical fuel, therefore, at that humidity was "susceptible to ignition," but would "spread rather slowly with a very high humidity." Fires in slash he pointed out would "burn with the humidity up to 70 or 80 or more." Any doubt that in his opinion a spark under the conditions prevailing including a humidity of 50 would account for the fire is set at rest by the following question and answer (I referred to it before but in another connection):

> What is your opinion, Mr. Osborne, as to whether burning carbon, or cinders from a railway locomotive, falling on critical fuel, or particularly rotten wood in the vicinity of that cold-deck pile, would start a fire under the conditions which have been described? Yes, a spark could readily set it.

When asked what is considered the degree of humidity at which it becomes "really dangerous to operate" he said "no definite figure can be set"; it is largely a matter of relativity; "it all hinges on conditions"; in other words, humidity is not the only factor. In a good many logging-camps he said by a rule of thumb sometimes followed, humidity of 30 to 35 was considered extremely dangerous, indicating that operations should cease; also that higher humidity combined with a strong wind will create just as hazardous a condition. He added, too, that "even extreme droughts will have a bearing on it." Again he said that one cannot take a humidity reading alone to determine the hazard. It was "extremely important" to take your fuel into account and "seasonal conditions," that is to say, the effect of a protracted drought over a long period. "In other words," he said, "any time you consider humidity you have to take into

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

account your preceding weather for a considerable period." This, too, answers the suggestion that attention ought to be confined to conditions of wind and humidity on the day of the fire. Another witness referred to the "cumulative effect" of a long drought in creating fire-hazard.

Mr. Osborne further testified that burning carbon or cinders from a railway locomotive falling on critical fuel or particularly rotten wood around the cold-deck would start a fire, meaning, of course, under all the conditions prevailing as to humidity, temperature and seasonal drought. He also said, after examination of records during the period in question, upon being asked his opinion as to the condition of the forest cover from a forest fire hazard standpoint:

> Well, I think you have a dangerous condition there. There is no doubt about it. You have a very dangerous condition. It indicates a very dangerous seasonal condition.

The foregoing evidence clearly reveals that the answer quoted and relied upon by appellant cannot be read in the narrow sense assigned to it.

I refer again to the evidence of Mr. McQueen to further answer the suggestion that we are only concerned with wind and humidity on July 5th. To describe the hazard he pointed out that during June the prevailing wind was generally from the north. It is what is known in meteorological terms "as a northern continental wind"—a very dry wind, one which brings on fire conditions on the coast. The effect of it was to take the moisture out of the forest cover. Then, after discussing these aspects, based upon evidence adduced as to conditions not only prior to but on the day of the fire, he said, upon being asked whether or not there was risk in carrying on logging operations in this area with oil-burning locomotives "I would say there was quite a great risk in operations by a company." In view of this summation of the evidence by him and by others, Mr. Osborne included, it is idle to suggest that because the humidity was around 50 and very little wind prevailed on July 5th a fire would not start from a spark alighting on critical fuels or punk.

The last finding in the answer of the jury to question 8 was absence of precautions; extraordinary, or as I put it, more than ordinary care, it was found, was not taken. I need not dwell on

the evidence supporting this finding: it was not disputed. Operations, as my brother McDONALD stated, were continued through June and July without other precautions than those taken in normal years. Appellant did not employ track-walkers or other patrols to follow locomotives in order to detect incipient fires and to extinguish them when discovered, with suitable equipment. That practice was customarily followed by other operators, even in normal seasons. Mr. Daly conceded that appellant had no one following its locomotives or patrolling the woods along the track where sparks would fall. Mr. Filberg of the Comox Company, said it was their practice to provide track-walkers. "We have," he said, "watchers on the track, watching for any sparks that may be thrown along the railway. They follow the locomotives and watch for sparks that might be thrown." Mr. Cobb, manager of the plaintiff company, also gave evidence on that point.

The foregoing covers in the main the evidence upon which the jury based their answers to questions 7 and 8. I need not refer to 7. It was all affirmative evidence adduced by respondent and secured from appellant's witnesses and fully discharged the *onus* of proof. Can there be the slightest question that the answer to 8 was based solely on that evidence, exclusively referable to it and to nothing else? On asking that question before when dealing with the evidence supporting the answers to 3, 4 and 5, I said that to ask it was to answer it; here the answer runs to meet the question. Did the jury require other aid apart from that evidence to decide that steam equipment was used, that conditions were hazardous, and that they had no patrols? In truth I am discussing the obvious, with deference to other views. I treat the point fully, however, as it is virtually the only point in the case; also in justice to litigants who have large interests involved; it will at least disclose my reasons for not interfering with this verdict.

The whole answer to question 8 defined the negligence as found by the jury. As already intimated the doctrine *res ipsa loquitur* is a rule concerning evidence of negligence in certain cases. If the jury did not cast this part of the charge aside, as I am sure they did if it was understood, they would know that it related

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Macdonald, C.J.B.C.

only to negligence; in other words, the question was—must respondent prove negligence throughout its whole case or may it stop when half way through?

One can best show that the jury were not deflected from their obvious duty as outlined repeatedly by the trial judge by analyzing the answer to 8. As intimated, it contains three findings all taken separately, concerned with findings of physical facts; read as a whole it discloses the negligence assigned. It is the co-relation of these facts, *viz.*, steam equipment, dry weather and lack of patrols that caused the mischief. Let us examine each finding. First "steam equipment" used. Was there any need to resort to the *res ipsa* rule to decide that? It was not a concealed fact known only to appellant; it was in fact admitted—common ground—known to the whole neighbourhood. Second, "extremely hazardous [weather] conditions"; scores of witnesses proved that unconcealed fact; it too was largely admitted, or too obvious to be denied. I hope it will not be suggested that the jury were led to believe that the weather was under the management and control of the appellant: hence it was not necessary to prove that it was hazardous. Of course the jury found hazardous conditions; farmers, game wardens, lumbermen, officials and experts, a cloud of witnesses—the whole countryside knew it—and many testified in respect to it. That fact did not lie "solely within the knowledge of the defendant." Third and finally a finding of absence of precautions the circumstances required—track-walkers, patrols, appliances and equipment. That, too, was not a secret known only to appellant; it was all admitted, or at all events, there was no denial. We have, therefore, three separate findings in 8, which placed together, mean negligence; all of them either admitted or overwhelmingly established by respondent without assistance from a non-applicable rule.

I said I would consider the answer to 8 and all answers from 3 to 8 inclusive as a whole instead of separately, as hitherto. It does not, however, alter the situation. The maxim could not be invoked in respect to 3, 4, 5 and 6 for reasons shown, and the trial judge did not say so; quite the contrary. As for 8, if the first finding were omitted, *viz.*, steam equipment,

there would be no negligence. Each fact constituting it must be separately established.

Finally, the jury were not asked to apply the maxim nor were they even told it did apply; they were therefore free to follow the proper advice given elswhere. If they started to apply it on their own volition they would soon find either that it did not fit the case or that it was not necessary to use it. They would find that all the facts were proven by respondent and that to call upon the appellant to explain would be unnecessary and absurd. As my brother McDONALD stated, the jury could have dismissed this part of the charge from their minds after the first sentence was uttered. The plaintiff did not invoke the rule as categorically stated. The jury should at least have been recalled to correct that statement.

I need not refer to cases: it is enough to say that appellant was not prejudiced; there was no miscarriage of justice; in other words, the jury were not led to a wrong conclusion. I would add—on all the facts and circumstances, it would be a serious miscarriage of justice to treat the trial as abortive because of this strange interlude.

I would dismiss the appeal; also confirm assessment of damages.

McQUARRIE, J.A.: I agree that the appeal should be dismissed and the assessment of damages confirmed.

SLOAN, J.A.: I confine myself to the consideration of the legal consequences flowing from the misdirection of the learned trial judge wherein he (with respect) in error, instructed the jury upon the rule *"res ipsa loquitur."* That the rule has no application herein is conceded. Counsel for the respondent seeking to escape the consequence of this misdirection made the following submissions: (1) That counsel for the appellant was bound by the position he took below; (2) that in the absence of an objection below no complaint could be made to this Court, and (3) that in any event the misdirection was not substantial and did not result in a miscarriage of justice.

I propose to treat each heading in order. With reference to the first submission I am unable to agree therewith. And for

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

Sloan, J.A.

several reasons. In the first place appellant's counsel did not deliberately assume any position below. It was not common ground that *"res ipsa loquitur"* applied, there was no issue agreed upon, no express stipulation and no conduct below which would preclude appellant's counsel from contending that *"res ipsa loquitur"* was foreign to the trial.

Scott v. *Fernie* (1904), 11 B.C. 91 can have no application under these circumstances. Neither does the principle of that decision extend to pure questions of law. I have yet to read a considered authority which holds that counsel can tie the hands of an appellate Court on a question of law because of his conduct below. The Supreme Court of Canada felt quite free to find for a respondent on a point of law raised for the first time in that Court—*Margolius* v. *Diesbourg,* [1937] S.C.R. 183. In *Attorney-General of British Columbia* v. *Salter* (1938), 53 B.C. 338, at 352 *et seq.,* this Court refused to be bound on a question of law by the agreed position of opposing counsel taken both below and before us. The function of an appellate Court to determine the law cannot be sterilized by agreement thereon by counsel below, either express or implied from conduct.

Under the second heading it was submitted that if appellant's counsel took no position below he was wrong too in that event. It was said that he ought to have joined in with the objection of plaintiff's counsel to the charge and that by remaining silent he is now precluded from raising any objection before us. In support of this proposition *Nevill* v. *Fine Art and General Insurance Company,* [1897] A.C. 68; *Seaton* v. *Burnand, Burnand* v. *Seaton,* [1900] A.C. 143; *Johnston & Ward* v. *McCartney,* [1934] S.C.R. 494, and cases of a like nature were cited to us. The obvious difficulty is that these authorities do not apply in this Province, under the circumstances of this case, because of the proviso to section 60 of the Supreme Court Act. As MARTIN, J.A. said 37 years ago in *Alaska* v. *Spencer* (1904), 10 B.C. 473, at 490:

> The proviso changes . . . the existing salutary rule requiring objections to a charge to be taken at the time.

It is apparent that in *British Columbia Electric Ry. Co.* v. *Key,* [1932] S.C.R. 106, the said section was not brought to the attention of the Court.

Then, too, it must be remembered that after plaintiff's counsel had objected to the charge of the learned trial judge in the relevant particular, the ruling was made that the charge would stand uncorrected. Can it justly be said that because experienced senior counsel for the defendant in obedience to the forensic amenities did not immediately quarrel with the adjudication of the Court given on the objection of opposing counsel and seek another ruling on this point, that he is forever bound to hold his peace, and be penalized for his good manners? I for one do not think so. Both because of the statute and apart from it I am of the opinion that the objection to the charge is open to appellant's counsel in this Court.

That brings me to the consideration of the third heading, *i.e.*, the contention that the misdirection was not substantial and did not result in a miscarriage of justice. In my view the erroneous passage in question was substantial in effect and "dominated the reasoning upon which that portion of the charge was founded." *Blue & Deschamps* v. *Red Mountain Railway* (1909), 78 L.J.P.C. 107.

The learned trial judge herein after properly directing the jury the long road home said in effect: "If you have trouble on that road then take the short-cut." Who can say which road they travelled? If they took the short-cut then there certainly was substantial wrong done the defendant. I can see no escape from holding that because the jury was invited to take the easy but illegal way out of a difficult situation there was substantial misdirection. The proper and precise appreciation by the jury of upon which side lay the burden of proof was of basic importance because the dividing line between what is pure conjecture, and what is reasonable inference from the evidence adduced in this case is difficult to define. Having concluded that the misdirection was substantial I turn now to the second aspect in the submission under this heading.

In the language of Duff, J. (as he then was) in *Leech* v. *The City of Lethbridge* (1921), 62 S.C.R. 123, at p. 129 (wherein he dissented in fact but not on the principle involved):

> The point to be considered is whether it is clear that there has been no substantial wrong or miscarriage of justice.

That test is embodied in the English Rules as Order XXXIX.,

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

SLOAN, J.A.

r. 6. That rule has no counterpart in the Rules of this Province as our Court of Appeal Rule 6 gives this Court a wide and unfettered discretionary power to grant a new trial as we "think fit."

Oddly enough the English rule appeared here at least as far back as rule 287 of 1880, and again as rule 436 of 1890, but it disappeared in the 1906 rule revision and the present Appeal Rule 6 was adopted in lieu thereof as rule 869. Although the English rule is no longer in our book nevertheless, as pointed out in *Perry* v. *Woodward's Ltd.* (1929), 41 B.C. 404, at 417 its influence remains as a guiding rule of practice and see *e.g.*, *McDermid* v. *Bowen* (1938), 53 B.C. 98, at p. 107.

Misdirection may be in some cases so unsubstantial that it manifestly could not influence the verdict or be of such a character that the complainant could not suffer prejudice thereby. In that case the Court would grant no relief—*McDermid* v. *Bowen, supra.* But once substantial misdirection is demonstrated the *prima facie* presumption is that it resulted in a substantial wrong or miscarriage of justice—*Bray* v. *Ford,* [1896] A.C. 44; *Hobbs* v. *Tinling. Hobbs* v. *Nottingham Journal,* [1929] 2 K.B. 1. The *onus* is then upon the opposing side to make it "clear"—*Leech's* case, *supra*—that the misdirection is of such a character that it did not affect the result—*Anthony* v. *Halstead* (1877), 37 L.T. 433; *White* v. *Barnes,* [1914] W.N. 74; *Harnett* v. *Bond* (1924), 40 T.L.R. 653. In spite of the persuasive arguments of counsel for the respondent he failed in his task and did not discharge the burden upon him of clearly convincing me that there had been no substantial wrong or miscarriage of justice occasioned by the misdirection in question.

Counsel for the respondent contended in addition, that even if there was fatal misdirection on one limb of his case he could succeed on issues other than negligence and in consequence a new trial ought not to be directed. In my view this submission under the circumstances of this case cannot succeed. A litigant is entitled to a fair trial on all matters in issue. In my opinion the present infection cannot be localized in that manner. The issues and very lengthy evidence thereupon are so interwoven that they cannot be completely severed and prejudice on the one

must be of necessity imported by the jury into and prejudice the other. The question of costs alone is one of substance and on a proper direction on negligence the defendant may well have won on that primary issue carrying perhaps the general costs of the action. Either the very long and expensive trial was, in the legal sense, in its entirety fair or unfair. It cannot be said to be sustainable because it was fair on one only of its main issues.

To hold otherwise and to deprive the defendants of a large sum of money without obedience to the salutary provision laid down in section 60 of the Supreme Court Act, is, in my opinion, with deference, to do a substantial wrong to this litigant. That is to say there has been, in this case, because of misdirection a miscarriage of justice, and I would in consequence, and with respect, order a new trial.

O'HALLORAN, J.A.: The appellant seeks a new trial. The facts and submissions of counsel are reviewed in the reasons for judgment of my learned brother MCDONALD. I am in general agreement with the conclusions he has reached. I am not satisfied that a new trial is justified by anything which took place below. I would dismiss the appeal in all its branches.

MCDONALD, J.A.: This is an appeal from a judgment entered for $92,594.54 in an action tried before MORRISON, C.J.S.C. with a special jury. The action arose in respect of a disastrous fire originating about 4 p.m. on 5th July, 1938, between appellant's railway-track, branch 21-C, and its cold-deck 114 D situate upon block B of lot 145 Sayward District on Vancouver Island, and later spreading over the countryside and destroying property belonging to the respondent and other logging operators in the area.

In the statement of claim respondent alleged that appellant was negligent in carrying on logging operations under the hazardous conditions then existing and in causing the said fire to start. It was further alleged that the defendant was negligent in allowing said fire on or about the 13th of July, 1938, to escape from its premises, being said block B of lot 145 on to certain unoccupied logged-off land known as lot 51, and thence on to respondent's lands; thirdly, it was alleged that the carrying on of logging operations under the conditions existing constituted a nuisance;

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

McDonald, J.A.

the continuing operations after the fire started constituted a continuing nuisance; and, fourthly, that the appellant, through failure to do its "utmost" to prevent the spreading of the fire was under a statutory obligation to reimburse respondent for money spent in trying to bring it under control.

The trial of the action continued for some weeks: questions were put to the jury, all of which were answered favourably to respondent, and, in addition, as the respondent contends, a general verdict was given in its favour. The questions put to the jury were finally fixed by the learned trial judge after many lengthy discussions between judge and counsel. They were not put in the form asked for by respondent's counsel but, as I say, in a form fixed by the learned trial judge. Briefly it may be stated that the jury made the following findings:

(1) That the fire started at the place and time above mentioned. (2) That the fire started by reason of logging operations owing to the negligence of appellant in "using steam equipment in the woods under extremely hazardous conditions without extraordinary precautions being taken." (3) That the fire escaped from said block B of lot 145 owing to the negligence of the appellant in not bringing all available men and equipment to the scene of the fire on the night of July 5th, 1938, and the day of July 6th, 1938. (4) That the fire spread to the south and east (*i.e.*, on to the respondent's property) owing to the negligence of the defendant in sending men back to other work and failing to take adequate precautions "against the possibility of the wind springing up and spreading the existing 'spot' fires." (5) That the operation carried on by appellant prior to and on 5th July, 1938, constituted a nuisance in that appellant was "operating steam equipment under extremely hazardous conditions, thereby endangering adjoining properties" and causing substantial injury to the respondent. (6) That the activities of the defendant between 6th July, 1938, and 14th July, 1938, constituted a continuing nuisance. (7) That appellant did not do its "utmost" to prevent the spread of the fire which started as aforesaid on 5th July, 1938. (8) That respondent without the written consent of an officer of the forest branch continued logging operations while said fire was burning.

By agreement between the parties the assessment of damages

was referred to the registrar of the Supreme Court and on the findings of the jury judgment was later entered for the amount found by him to be due, *viz.*, as stated, $92,594.54.

Many grounds of appeal are raised and I have found it somewhat difficult in preparing a judgment, as counsel did in presenting argument, to clearly segregate and apply the legal principles involved, for the reason that there has been, as there was bound to be, a certain amount of overlapping.

The first finding of the jury above mentioned is of prime importance for aside from the statutory obligation, if this finding is to stand, there is an end to this appeal. The respondent's case, as it went to the jury on this branch, was based upon an allegation that the appellant was negligent in operating its oil-burning steam locomotive No. 2 on the day in question under the extraordinarily hazardous conditions then prevailing in the area. While there is no definite finding that there was any defect in the locomotive or in its spark-arrester such a finding is not directly negatived and in any event there was ample evidence, if the jury chose to accept it, that no spark-arrester ever made will prevent all live sparks from escaping from the smoke-stack of an oil-burning locomotive, and that such live sparks may fly through the air for a distance of 200 to 300 feet. There was further evidence that a spark may alight in punk, *i.e.*, dead dry wood and may smoulder there for a long time before bursting into flame. The jury, therefore, when seeking to ascertain the origin of the fire, were entitled to find as a fact that the fire originated from a spark thrown out by locomotive No. 2 at or about 12.30 p.m. on July 5th, 1938. I think (and I do not understand counsel seriously to contend otherwise) that the finding that the fire was caused by logging operations means just that. Having regard to the evidence, the course of the trial, and the learned judge's charge, this was a reasonable inference for the jury to draw and their finding ought not to be disturbed. There was, of course, a volume of evidence that nothing of the sort could have happened and that the fire might have originated in any one of many other different ways. Nevertheless all these matters were before the jury and were fully argued and discussed, and I am far from being able to hold that this finding was a mere conjecture. It was, on the contrary, quite a reasonable conclu-

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

McDonald, J.A.

sion to reach and the inferences drawn by juries, under like or similar circumstances, have not been in the past lightly disturbed by appellate Courts. One or two cases are very enlightening when one is considering the present finding. In *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380, Duff, J. (as he then was) cited the older authorities and at p. 387 quoted the rule laid down by Lord Loreburn, L.C. in *Richard Evans & Co., Limited* v. *Astley*, [1911] A.C. 674, at p. 678. This rule, I think, is applicable here though the learned trial judge, when requested to do so by counsel for the respondent, declined so to put the matter to the jury. The learned judge appears to have thought this was putting the matter in too favourable a light for the respondent. In any event, appellant's counsel cannot complain that on this branch, at least, the matter was put unfavourably to him. The rule mentioned would seem to settle the question as to the right of juries to draw inferences upon a balance of probabilities, but the difficulty seems to have been for learned judges to apply the rule to the facts of individual cases. The problem was recently fully dealt with by Davis, J. in *Danley* v. *Canadian Pacific Ry. Co.*, [1940] S.C.R. 290, at pp. 296-7 where his Lordship said:

> The case before us was tried with a jury and it is not for an appellate Court to treat the case as one for a fresh decision even though the jury's verdict may not commend itself to the judgment of the Court. . . . It is neither our duty nor our right in this appeal to draw any inference—that was for the tribunal of fact, the jury in this case.

If the jury was entitled to conclude that locomotive No. 2 started the fire, we must next consider whether there is sound ground for their finding that this was due to the negligence of appellant in "using steam equipment in the woods under extremely hazardous conditions without extraordinary precautions being taken." As to this, appellant's counsel pins his faith on the decision of the Supreme Court of Canada in *Higgins* v. *Comox Logging & Ry. Co.*, [1927] S.C.R. 359 and the remarks of Mignault, J. at p. 363 where he quotes with approval what was said by GALLIHER, J.A. in this Court, which is to be found in (1926), 37 B.C. 525, at p. 531. An analysis of the evidence in these two cases convinces me that while at first blush they seem to have much in common, the *Higgins* case was decided upon an entirely different set of facts and hence could be no guide to the

jury in the case at Bar. The effect of the decision in the *Higgins* case was simply that under the facts there in evidence it was not negligence *per se* to carry on logging operations in British Columbia in a dry season even when the humidity is low, particularly in view of the fact that the defendant there had supplied the fire-fighting equipment required by the Legislature. The case can be of authority only in respect to its own facts, which are quite different from those which the jury were considering here. The one outstanding and decisive difference is that in the *Higgins* case the breaking of the line and the consequent spark from friction were things unheard of in such operations theretofore and not to be expected, while in the present case the jury had ample evidence from which to conclude that what happened here was precisely what any reasonable man might expect would happen under the prevailing conditions.

Many other matters, of which I shall mention but a few arose in this case which were not present in the *Higgins* case. The area in question was covered with slash which was in a highly inflammable state, as one witness put it, as dry as tinder, prior to and at the time of the starting of the fire; the spring and summer of 1938 constituted one of the driest seasons in the memory of the oldest inhabitant; the weather had been and was extremely hot and strong drying winds from the north-west and west had been unduly prevalent; even the evergreen trees were withered and dry; and the moss had curled up on the rocks; other operators, including the respondent, had closed down their operations on account of the danger from fire. True they were also influenced by the state of the market, but that does not alter the main fact; strangers were forbidden by the forest branch to enter the area at all. Notwithstanding the hazardous conditions appellant took no extra precautions whatever to prevent the starting or the spreading of fire. Further there is a volume of evidence that steam locomotives constitute the most frequent cause of fire in the forest, and that appellant did not follow what is the usual practice, *viz.*, to have patrol men in dry weather to follow these locomotives shortly after they pass.

It is objected that the jury had no right under any circumstances to impose upon the appellant an obligation to use "extra-

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

McDonald, J.A.

ordinary" care and that such finding is invalid. Having in mind that the jury were dealing with so dangerous an element as fire under all the circumstances above mentioned I think the jury did no more than to impose an obligation to use special care. After all the word "extraordinary" is not in itself objectionable if one keeps in mind just what the jury were considering and if they had in mind, as I think they had, principles such as were laid down by Duff, J. (as he then was) in *Wilson* v. *Port Coquitlam,* [1923] 1 W.W.R. 1025, what HUNTER, C.J. had said in *Crewe* v. *Mottershaw* (1902), 9 B.C. 246 and what was said in the Supreme Court of Canada in *The Lake Erie and Detroit River Railway Company* v. *Barclay* (1900), 30 S.C.R. 360. Pollock, on Torts, 14th Ed., at p. 399 discusses the duty in regard to such a dangerous thing as fire and suggests that the word "consummate" might not be quite strong enough to define the duty to take care of so dangerous an element. There is nothing magic in the word "extraordinary" itself. In my opinion, having regard to the course of the trial and the evidence adduced, the finding was amply justified and it amounts to nothing more than that, having regard to all the circumstances, appellant failed to take that special care which the situation demanded. When all has been said, "the amount of caution required of a citizen in his conduct is proportioned to the amount of apparent danger." I think this attack fails and that cases such as *Grand Trunk Rway Co.* v. *McKay* (1903), 34 S.C.R. 81 have no application.

An attack also is made upon the learned judge's charge to the jury upon the ground of misdirection in that the learned judge is said to have told the jury that the rule *res ipsa loquitur* applied and the following paragraph in the charge is said to throw the *onus* upon appellant:

> But the plaintiff invokes a rule that if the thing speaks for itself then the *onus* is shifted. The rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it is in some cases one of considerable hardship to the plaintiff, because it may be that the true cause of the accident lies solely within the knowledge of the defendant who is alleged to have caused it. The plaintiff can prove the accident, but it cannot prove how it happened so as to show its origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the rule to which I have referred. It is, as lawyers call it, *res ipsa loquitur*—the thing speaks for itself. There must be reasonable evidence of negligence but where the thing is shown to be under the management of the defendant or

its servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose through want of care. On the other hand, if the defendant produces a reasonable explanation equally consistent with negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains on the plaintiff.

In the first place it may be noted that the learned judge did not say that the rule *res ipsa loquitur* applied. What he said was that the plaintiff invoked the rule. As a matter of fact, if I may say so with respect, this was a mere vagary of fancy. There was no such invocation from the beginning to the end of the case. This, I think, ought to dispose of the objection, but so much has been said on the subject that I shall discuss the matter further. The respondent pleaded negligence, and pursuant to an order of this Court gave the most minute particulars of the negligence relied on: counsel in opening charged negligence and proceeded by calling witness after witness to prove negligence; appellant's counsel met the challenge on that basis, in his opening declared himself prepared to do so and offered a great volume of evidence to controvert the charges in every particular: the final addresses of counsel appear in the appeal book and it is clear to demonstration that, except in so far as the words quoted may affect the matter, the case went to the jury on that basis. It is trite law that a judge's charge must be looked at as a whole and not in segregated utterances torn from their context. Even at the risk of being too lengthy I shall quote some things which appear in the charge, some before and some after the above remarks:

> The *onus* being on the plaintiff to prove the truth as alleged in the statement of claim— . . . Nothing is proved until you say so . . . : That the proof of such facts lies on the party who first put it forward—not on him who denies it. The *onus* of proof is on him who affirms not on him who denies. A party who comes into Court and seeks a remedy at the hands of a Court or jury, must show that he stands on a firm footing. He must establish the specific allegation set out in the statement of claim. You must not arrive at a verdict by any process of guessing, let your guess be never so accurate. . . . The plaintiff alleges that owing to the negligence of the defendant, it received damage to its property, and that the alleged negligence on the defendant's part was as between it and the defendant the sole cause of that damage. It is not enough for it to prove that damage has occurred, and therefore *prima facie* the defendant is liable. It must establish circumstances from which it may be fairly inferred that there is reasonable probability that the damage resulted from the

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

McDonald, J.A.

absence of such precaution on the defendant's part. It is not enough to prove it might have been caused by the defendant. It must prove it was caused by the defendant. . . . If you can determine from the evidence where and how it started, you will proceed to find whether the defendant, if you identify it with the origin of the fire, was negligent, and in what respect. And [now speaking of the escape of the fire] you will go further and say whether its escape was owing to the negligence of the defendant; and still further, when it got beyond its boundaries was it through the defendant's negligence it got beyond its control, and did it then extend to and destroy the plaintiff's property. . . . The plaintiff alleges that the engine discharged sparks of that kind and that it was sparks from the engine that alighted on the inflammable material lying along and in close proximity to the railway-track that started the fire that destroyed this property. Was it? That is the question. Was it? . . . The allegation of negligence is repeated in different forms, and amplified by particulars and answers to particulars. . . . The facts alleged as the basis of any legal inference must be clearly proved. The burden of proof is always on the party who asserts the existence of any fact which infers legal responsibility. . . . You take the statement of claim of the plaintiff, and I am sure counsel do not mind my saying that there are only certain paragraphs that contain the specific allegations.

The jury did in fact have before them all the pleadings and the exhibits and a complete transcript of the evidence and they spent some two days arriving at their verdict.

After the jury had retired and before the questions had been submitted to them counsel for respondent asked the learned judge to correct his statement regarding *res ipsa loquitur* stating that he had not in fact invoked the rule. The learned judge declined to alter his charge. What then became the duty of appellant's counsel? Surely if that part of the charge, to which objection is now taken, bore so heavily upon him as he now strenuously contends that it did, it was his duty to say so then. Though he did complain to the learned judge of two other matters in the charge, as to this he said not a word. His reason given before us for such silence is that the learned judge having declined to accede to the request of respondent's counsel could not be expected to heed a complaint from appellant's counsel on the same matter. This does not strike me as being sound. I think the contrary might very reasonably be assumed. In any event I cannot think that counsel may now be heard to ask us to order a new trial after having taken his chance with that jury without a word of protest. If we should make any such order on this ground, we would, I think, be lending countenance to a breach

of that very salutary rule laid down by DUFF, J. (as he then was) in *Scott* v. *Fernie* (1904), 11 B.C. 91, at p. 96. There that learned judge used words which have now become classic in our jurisprudence:

> The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

This is not said in criticism of counsel: it is merely saying that having in the interests of his client, as he saw them, once taken a stand at what he now contends was a vital moment in the trial he cannot now take a different position. Surely nothing more need be said on this branch of the case except to say that the maxim has been applied by the House of Lords in *Nevill* v. *Fine Art and General Insurance Company*, [1897] A.C. 68, at p. 75; in *McDonald* v. *Owen*, [1924] 1 D.L.R. 85; *British Columbia Electric Ry. Co.* v. *Key*, [1932] S.C.R. 106 and in the recent case of *Spencer* v. *Field*, [1939] S.C.R. 36 *per* Davis, J. at p. 42.

The whole question of the effect of misdirection and non-direction (as to both of which the appellant complains) is discussed in the opinion of Lord Shaw in *Blue & Deschamps* v. *Red Mountain Railway*, [1909] A.C. 361 and in *Jones* v. *Canadian Pacific Railway* (1913), 83 L.J.P.C. 13. Many other cases were cited before us but I shall not labour the matter further except to express the view that if there was any misdirection in this or in any other part of the charge it was of a very minor nature and did not affect the result reached by the jury; and there has been no miscarriage of justice. As to any non-direction it did not cause a finding or verdict against the weight of the evidence. Is this 30-day trial before what was obviously a careful and intelligent jury to go by the board because of a slight slip, not (be it noted) on a question of law but on a question of fact? I cannot think so.

I am strengthened, at least to my own satisfaction, in the above opinion by the fact that as I view the matter the respondent had on the whole case a general verdict in its favour.

The learned trial judge told the jury they might, if they saw fit, bring in a general verdict but that he was putting questions to them at the request of counsel. When the jury came in they

C. A.
1941

ELK RIVER TIMBER CO. LTD. *v.* BLOEDEL, STEWART & WELCH LTD.

McDonald, J.A.

were asked if they had agreed upon a verdict to which the foreman replied: "We have, your Lordship. Do you want the questions [meaning, of course, the answers] or the verdict?" The answers were then received and read. Certain discussion followed in the presence of the jury ending with a statement from the foreman during which he said:

> I might make the statement that they were unanimous as near as they could possibly be on all the questions, when they discussed them, before they made the final answer, and that our final verdict was for the plaintiff.

The learned judge certainly so understood this to be the result of their answers for he said:

> The jury has now handed down their verdict, which is a verdict for the plaintiff, I take it, subject to what Mr. *Farris* has to say.

In my opinion there is nothing in any of the answers inconsistent with or repugnant to this general verdict and upon the principles enunciated in *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263, I think this general verdict in favour of the plaintiff must stand.

If I should happen to be right in these conclusions it would not be necessary to deal with the claims respecting the escape of the fire and nuisance. However, having regard to the persuasive arguments of counsel and the time occupied before the Court on these matters, I think I should deal with them as briefly as may be. As to the escape of the fire from appellant's premises on to the waste land known as lots 51, 99, 100 and 101 and later from lot 51 on to respondent's property, appellant's contention is that, on the assumption that it was not negligent in starting the fire, it was under no obligation to attempt to control the fire once it had escaped from its own premises. I think appellant's duty in that regard cannot be so lightly viewed. On the night of 5th July, 1938, almost instantly after the fire was first seen it burst into a conflagration. Cold-deck pile 114 D, containing some 800,000 feet of timber became a raging furnace and the fire shortly spread to other cold-deck piles in the immediate vicinity. On that evening the fire leaped toward the east across Gosling Lake and raged through the dry slash for several days. Some efforts were made by appellant in the way of building fire trails and sending out men with mattocks and shovels to bring the fire under control. In the first instance the greater part of these efforts were exerted to keep the fire from

spreading to the south and west where the appellant itself was the owner of a very valuable stand of timber. These latter efforts were successful, but in the course of a week, while the fire burning to the south and east through dry slash had to a great extent burned itself out, nevertheless on 13th July there were scores of small isolated fires still burning both on lot 145 B and on lot 51. It is true that during that week appellant had from 80 to 105 men working with picks and shovels but a great number of their men had gone back to their usual occupations and some 43 men who had been engaged in fire-fighting had been discharged. On the afternoon of 13th July there happened what any reasonable man, knowing Vancouver Island, should naturally expect. A north-west wind sprang up and the small isolated fires, referred to in the evidence as "spot" fires immediately sprang into flame. As 14th July came on, the wind increased in strength and the fire spread to the south-east and caused the unnumbered dead standing trees known as "snags" to come ablaze. Later the fire spread into standing timber and created what is known as a "crown" fire burning through the tops of the tall trees. On the evening of 14th July it leaped Deep Bay toward the south-east and thence on to the respondent's lands. No one can say just to what extent the "spot" fires burning on 145 B and those burning on lot 51 respectively contributed to the latter conflagration. There was in this case only one fire and that fire originated between cold-deck 114 D and the railway-track and it never was put out and it did destroy the plaintiff's property. There was a volume of evidence on both sides as to whether appellant had used reasonable efforts to bring that fire under control and the jury by their answers to questions 9 to 12 found for the respondent. That finding I think we have no right to disturb. The liability of appellant under such circumstances, I think, is clear having regard to the decision of Bankes, Warrington and Duke, L.JJ., affirming Lush, J. in *Musgrove* v. *Pandelis* (1919), 88 L.J.K.B. 915, and this altogether apart from the obligations imposed by sections 117 and 118 of the Forest Act. See further the decision in *Ball* v. *Grand Trunk Railway Company* (1866), 16 U.C.C.P. 252.

There is next to be considered the question whether or not under all the circumstances the appellant was on and prior to

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

McDonald, J.A.

5th July, 1938, maintaining a nuisance on its premises. The law relating to nuisance was clearly explained to the jury and by their answers to question 13 to 15 I think it is clear that the jury understood the issue and that upon the evidence they were entitled to make the finding which they did, *viz.*, that the operations of the appellant did constitute a nuisance.

Questions 16 to 18 have to do with appellant's failure to abate the nuisance and the answers are in respondent's favour. The whole law relating to nuisance is fully dealt with in *Sedleigh-Denfield* v. *St. Joseph's Mission Society* (1940), 109 L.J.K.B. 893 and as I view the matter a greater obligation was thrown upon the defendant in that case than need be thrown upon the present appellant in order to support the jury's verdict and the judgment entered thereon. Appellant's counsel seeks by a hair-line distinction to bring himself outside the decision in *Hepburn* v. *Lordan* (1865), 34 L.J. Ch. 293 and the authorities mentioned in Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 22 *et seq.* I am unable to follow him and think he has failed. The recent case of *Dollman* v. *Hillman, Ltd.*, [1941] 1 All E.R. 355, though not dealing with fire, is helpful, I think, to respondent and shows, as counsel contended, that it is immaterial whether the present case be considered as one of negligence or of nuisance—the same facts may give rise to liability on either ground.

There remains only to consider what has been called the statutory liability under section 118 of the Forest Act which provides, to put it briefly, that any person who, in the case of a fire burning on land on which he is conducting any lumbering operation, no matter how, where or by whom the fire may have been set, fails to do his utmost to prevent the spread of the fire is under an obligation to reimburse any other person who has incurred expenses in controlling and extinguishing the fire should it spread beyond the boundaries of such first-mentioned person, or should it threaten so to do. The evidence is practically all one way on this and comes largely from the mouths of appellant's own witnesses. The only attack made upon the charge to the jury is that the learned judge, when requested to do so, declined to define to the jury the meaning of the word "utmost." With respect I think the learned judge was quite right, and that the

jury knew very well the meaning of this word which is in common everyday use.

To sum up it is my opinion that we ought not on the question of liability to interfere with the answers, the verdict or the judgment based thereon.

Coming to the question of damages it is admitted that we ought not to interfere unless the learned registrar proceeded without evidence or upon a wrong principle. I have followed carefully the argument of counsel as they appeared before us and in their factums and I have reached the conclusion that not in any instance has the appellant made out a case. I can see nothing to be gained by reviewing the evidence which was before the learned registrar as he pursued his tedious task over many months. I was considerably impressed by the argument of Mr. *John Farris* in this regard but having heard the argument on the other side I am not prepared to say that the registrar was wrong in his conclusion on any item; on the contrary I think he was right.

There was, I think, a fallacy in appellant's argument as to what is meant by a mistake in "principle." What is meant surely is a principle of law. One typical instance would serve as an illustration. One of the most important things the learned registrar had to ascertain was the quantity of standing timber on the ground at the time of the fire. On one side was a cruiser's actual count of the various species of trees, made in 1928, from which total there was deducted what was considered a fair allowance for trees which would have fallen and become unmerchantable in the interval. This was supported by a considered estimate made by respondent's logging foreman after a purposeful survey made by him in 1934 and another in June, 1938. On the other side was an estimate made by an employee of the appellant after the fire. So far as cedar timber was concerned this estimate was fairly clearly shown to be radically wrong. When the registrar chose the former as a guide, was he applying any principle of law? I think not. Rather he was, as Mr. *Housser,* counsel for the respondent put it, adopting one method of computation in preference to the other. This, I think, was for him and not for this Court to decide.

C. A.
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

It follows from what I have said that I am for dismissing the appeal.

Appeal dismissed, Sloan, J.A. dissenting.

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

Solicitors for respondent: *Lawson, Clark & Lundell.*

C. A.
In Chambers
1941

July 4, 11.

ELK RIVER TIMBER COMPANY LIMITED v. BLOEDEL, STEWART & WELCH LIMITED.

Practice—Costs—Taxation—Examining proofs of print of appeal books—Appendix N, tariff items 38 and 39.

On the taxation of the respondent's costs of the appeal the registrar allowed $948.90 for examining proofs of print of appeal books at 10 cents per folio under tariff item 38 (*b*) (1) of Appendix N of the Rules of Court.

Held, on appeal, that tariff item 38, as far as appeal books are concerned, is exclusively for the benefit of the party preparing the appeal books. The fact that the respondent was given a copy of the proof and actually checked it does not affect the situation as far as party and party costs are concerned. Respondent only has recourse in this connection to tariff item 39. The item in question is disallowed.

APPEAL by defendant from the registrar at Victoria on the taxation of the plaintiff's costs in allowing $948.90 for examining proofs of print of appeal books at 10 cents per folio. Argued before MCQUARRIE, J.A. in Chambers at Vancouver on the 4th of July, 1941.

J. L. Farris, for appellant.
Lundell, for respondent.

Cur. adv. vult.

11th July, 1941.

MCQUARRIE, J.A.: This is an appeal by the defendant (appellant) from the allowance by the registrar at Victoria on taxation of the costs of the plaintiff (respondent) of $1,037.10

(less $88.20 taxed off) for examining proofs of print of appeal books, 10,371 folios at 10 cents per folio, the taxation being under Column 4.

Mr. *John L. Farris,* who appeared for the defendant (appellant), contended that the plaintiff (respondent) should not have been allowed the item in question because tariff item 38 (*b*) (1) did not apply to respondent who had no duty to check the proofs of the appeal books, even in a case like this where the respondent was given a copy of the proofs and actually checked same. He referred also to item 39 and submitted that that is the only item which the respondent could tax in this connection. He had no authorities to cite.

Mr. *O. F. Lundell* opposed the appeal on behalf of the plaintiff (respondent) and supported the registrar's ruling. He was in the same position as Mr. *Farris* regarding authorities and stated that he had not been able to find any, the point involved having never previously come up.

After consideration I have come to the conclusion that the appeal should be allowed and the said item disallowed. There should be a reference back to the registrar for that purpose.

In my opinion the tariff item 38, so far as appeal books are concerned, is exclusively for the benefit of the party preparing the appeal book. The fact that the respondent was given a copy of the proof and actually checked it does not affect the situation as far as party and party costs are concerned. Reference to previous tariffs, I think, makes this clear. Respondent only has recourse in this connection to tariff item 39. It is to be noted that under tariff item 38 factums are linked up with appeal books. It could hardly be suggested that a respondent should be allowed a fee for examining proofs of print of appellant's factum and *vice versa.* It is also to be noted that in the maximum allowance provisions covering Columns 1, 2 and 3 item 38 is treated in the same manner as disbursements which, of course, are only chargeable by the party preparing the document. Finally, if the respondent were allowed to tax the disputed item he would receive the same fee as would have the

C. A.
In Chambers
1941

ELK RIVER TIMBER CO. LTD. v. BLOEDEL, STEWART & WELCH LTD.

appellant who prepared the appeal books and who has only this item to look to for his remuneration in regard to the appeal books apart from actual disbursements.

Appeal allowed.

C. A.
1941

Sept. 17, 23.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF ADRIANNE DUPAUL, DECEASED.

Testator's Family Maintenance Act—Petition by husband—Will—Four daughters of testatrix by former marriage—Estate of $9,400—Ten dollars left to husband and residue to daughters—Husband's contribution to estate—R.S.B.C. 1936, Cap. 285.

A husband and wife were married in August, 1919. They were engaged jointly at different times in operating an hotel, a shingle mill and a farm, also in running rooming-houses. The husband claims he contributed about $4,600 to their joint enterprises in addition to his work. The wife, who was survived by four daughters by a former marriage, died in December, 1940, leaving an estate of about $9,400. By her will she left $10 to her husband and the balance of the estate to her four daughters. In 1938 the wife gave her husband $1,000, and the daughters claim that their mother stated this was all she intended him to have out of her estate. The husband, who was 66 years of age, had very little means at the time of his wife's death, and all four daughters were in very poor circumstances. The husband petitioned for relief under the Testator's Family Maintenance Act and was awarded $2,000.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that in the circumstances there was no ground for reducing the compensation allowed in the Court below.

APPEAL by the executors and beneficiaries of the estate of Adrianne Dupaul, from the order of MORRISON, C.J.S.C. of the 13th of June, 1941, on the petition of Joseph Ludger Dupaul, the widower of deceased, for relief under the Testator's Family Maintenance Act. The petitioner is the second husband of deceased and the four beneficiaries under the will are her daughters by her first husband. By her will she appointed two of the daughters, Lila and Rose, executrices of the will, and left

$10 to her husband and the balance of her estate to the four daughters, to be divided equally among them. The net value of the estate is about $9,400. In 1938 the deceased gave her husband $1,000. She is alleged to have told her daughters that this sum was given to him as his share of the estate. All the daughters are in poor circumstances, three of them being on relief. On the hearing of the petition $2,000 was allotted to the petitioner.

The appeal was argued at Victoria on the 17th of September, 1941, before McQUARRIE, O'HALLORAN and McDONALD, JJ.A.

Burton, for appellant: The evidence shows that petitioner was cruel to his wife continuing up to shortly before her death. When he received $1,000 from his wife he accepted it as his share of the estate. There were five persons interested, and he received about one-third of the estate. He is not entitled to relief, first on account of the position of the beneficiaries who are all very poor, and secondly, he accepted the $1,000 given him as his share. Proper consideration was not given to section 4 of the Act: see *Walker* v. *McDermott,* [1931] S.C.R. 94; *In re Sylvester. Sylvester* v. *Public Trustee,* [1941] 1 Ch. 87.

C. C. Bell, for respondent: The will was drawn before the $1,000 was given the petitioner. The testator's two sisters and a niece gave evidence in favour of the petitioner. They are French Canadians. He contributed largely to the testator's estate, so the *Sylvester* case [*supra*] does not apply: see *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11. As to the solicitor's duty to have the evidence before the Court see *Dockendorff* v. *Johnston* (1924), 34 B.C. 97; *Robertson* v. *Latta* (1915), 21 B.C. 597; *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 17 B.C. 629.

Burton, replied.

Cur. adv. vult.

23rd September, 1941.

McQUARRIE, J.A.: I would not interfere with the decision of the learned judge below. He had the advantage of seeing and hearing certain witnesses whose evidence does not appear in the appeal book and, I think, came to a reasonable conclusion.

C. A. 1941

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF ADRIANNE DUPAUL, DECEASED

I give much weight, as no doubt he did, to the fact that at least a substantial part of the estate left by the deceased was derived from joint undertakings of the deceased and her husband. The learned Chief Justice of the Supreme Court of British Columbia apparently also considered the allegations of cruelty made against the husband.

O'HALLORAN, J.A.: Adrianne Dupaul died in December, 1940. She was survived by her husband the respondent aged 66, and by the four appellants aged 41 to 48, her daughters by a prior marriage. By her will, made nearly three years before her death, the deceased gave her husband $10 and divided her net estate of some $9,000 equally among her four daughters.

The husband invoked the provisions of the Testator's Family Maintenance Act, Cap. 285, R.S.B.C. 1936. The Court ordered $2,000 paid to a trustee which was directed to pay the husband thereout

> such sums from time to time not exceeding $30 per month as the trustee in its absolute discretion shall deem necessary and adequate. . . .

It was also provided that if he died before the said sum was exhausted, the balance remaining after payment of his "medical, funeral and testamentary" expenses should be paid back to his wife's estate.

The four daughters now appeal against this provision for their stepfather. The deceased and the respondent were married in 1919. They engaged jointly in operating an hotel, a shingle mill and a farm. They were interested also in several rooming-houses, but whether jointly or severally it is not necessary to find. The husband avers in the petition under oath that (1) he contributed some $4,600 in cash to their joint enterprises, in addition to his work; (2) his total assets at the time of application to the Court in January, 1941, consisted only of $220 in cash and his personal belongings. Neither of these statements is denied.

However, no question of resulting trust was raised before us. It is not disputed the husband received $1,000 from his wife in 1938. That sum together with the $2,000 awarded him constitutes about one-third of her estate. The combined sum so nearly approximates the share of the estate the husband would

have received if the wife had died intestate (*vide* section 112 (2) of the Administration Act, Cap. 5, R.S.B.C. 1936), it is not difficult to believe, that in his search for a standard of public policy to guide his discretion in the difficult decision he had to make, the learned judge turned to the intestacy provision as a generally accepted indication of what was "adequate, just, and equitable in the circumstances."

It was contended under section 4 of the Testator's Family Maintenance Act, *supra,* the husband should be refused relief because of acts of cruelty to the deceased which are put forward in the affidavits of the four appellants. In the absence of reasons for judgment in the record, counsel informed this Court that the learned judge in making the order he did, specifically mentioned he had taken the evidence of cruelty into consideration. Furthermore it also appears from what counsel said, that the learned judge had certain oral evidence before him which is not before this Court.

In the circumstances I would not reduce the provision made in the Court below. The appeal should be dismissed.

McDONALD, J.A. The testatrix left her surviving her husband, the respondent herein, whom she, then being a widow, married in 1919. Under her will she bequeathed to her husband $10 and to her four daughters, the appellants herein, the residue of her estate in equal shares.

The matter was heard in Chambers before MORRISON, C.J.S.C. who had before him not only the affidavits sworn by each of the parties but also heard the parties orally examined. The learned judge had therefore that advantage over us, who have not seen the parties. The order below was that out of a net estate of approximately $9,000, the sum of $2,000 should be paid to a trust company and of capital and interest thereout $30 per month to the respondent so long as that sum might extend. If at the death of the respondent any sum should remain, such remainder to fall into the residue of the estate. It is complained by the daughters that this allowance ought not to have been made, and that in any event not more than $1,000 ought to have been allowed, for the reason that the testatrix a year or so before her death and before drawing her last will had stated to her daughters

C. A.
1941

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF ADRIANNE DUPAUL, DECEASED

O'Halloran, J.A.

that she was then paying $1,000 to her husband which was all she intended him to have out of her estate. That $1,000 was in fact paid to the respondent, but through an unfortunate adventure has been largely lost.

While it may be that had I been considering the matter in the first instance I might have made an order less generous to the respondent, I am not, on consideration, prepared to say that the learned judge was wrong, and I would therefore dismiss the appeal. Under all the circumstances I think the costs of all parties should be paid out of the estate.

Appeal dismissed.

Solicitor for appellant: *J. S. Burton.*
Solicitor for respondent: *C. C. Bell.*

S. C.
In Chambers
1941

June 16, 17, 27; *Oct.* 20.

IN RE ESTATE OF JOHN MORTON, DECEASED. THE YORKSHIRE & CANADIAN TRUST LIMITED v. ATHERTON *ET AL.*

Will—Interpretation—Surrounding circumstances—Gift for "educational and religious objects"—Charitable gift—Validity—Rule 765.

A testator made the following provision in his will: "Upon the death of my said wife Ruth Morton I direct my said trustees to set aside and transfer and pay to the trustee or trustees for the time being of a fund to be known as The Morton Fund the sum of One hundred thousand Dollars ($100,000) to be held upon such trusts as shall from time to time be declared by the trustee or trustees of the said Morton Fund in favour of educational and religious objects in connection with the Baptist Denomination in the Province of British Columbia and I declare that my said wife Ruth Morton shall name and appoint the first trustee of the said Morton Fund." On originating summons by the trustee under the will as to whether the above provision is a good and valid bequest or legacy:—

Held, that where a testator makes a bequest in his will in favour of educational and religious objects, by the use of the word "religious" it is *prima facie* for purposes which are charitable in the legal sense of the word, and a bequest for "educational objects" is also *prima facie* a bequest for charitable purposes. According to the intention of the testator, as expressed in his will, the trusts to be declared by the

trustees would necessarily be trusts in favour of educational and religious objects in connection with one or more of the institutions "which administer religion and give spiritual edification" to members of the Baptist Denomination in British Columbia, and would thus be charitable trusts. The testator has by the words used specified the objects of his intended bounty, or the particular purposes for which he intended the money to be applied in such a way that the trustees could not devote the whole or any part of the fund to purposes not charitable. It follows that the gift is a good charitable gift and a good and valid bequest or legacy.

ORIGINATING SUMMONS taken out by the plaintiff as trustee to answer a certain question arising in connection with the will of John Morton, deceased. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 16th, 17th and 27th of June, 1941.

J. A. Grimmett, for plaintiff.

J. A. MacInnes, for J. E. Thornton, Edna R. Rennie, Lizzie Thornton and Viola H. Gleig.

G. Roy Long, for W. C. Atherton.

McAlpine, K.C., for A. Grieve.

Joseph Oliver, for H. H. Phillips.

Cur. adv. vult.

20th October, 1941.

FISHER, J.: In this matter the Court is asked upon the application by way of originating summons, taken out by the plaintiff as trustee, to answer a certain question arising in connection with the will of the late John Morton, deceased, who died at Vancouver, B.C. on or about the 18th of April, 1912, the question reading as follows:

1. Is the bequest or legacy provided for by the following words in the last will and testament of the said John Morton, deceased, a good and valid bequest or legacy?

[Already set out in head-note].

In a previous case of *In re* [*Ruth*] *Morton Estate,* [1941] 1 W.W.R. 310 I was required to determine certain questions arising in connection with the estate of the late Ruth Morton, who was the widow of the said John Morton, and in such case I had to consider a great many authorities which have been referred to in the present case and with which, therefore, I will not deal now so fully as I might otherwise have done. In approaching

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

the problem of construction of the will before me I, of course, have to remember that I must construe the will as a whole and not take the vital and crucial words out of the will and make up my mind as to its meaning without them and then ask myself whether their presence makes any difference. See Sir Wilfred Greene, M.R. in the recent case of *Re Diplock, Wintle* v. *Diplock,* [1941] 1 All E.R. 193, at p. 203. In considering the many decisions hereinafter referred to I have also tried to keep in mind what was said by Middleton, J.A. in *Re Walker* (1925), 56 O.L.R. 517, at 522 (quoted with approval by my brother MANSON in the case of *In re Paul, Deceased. The Royal Trust Co.* v. *Rowbotham et al.,* [*ante,* 469, at p. 473]; [1941] 3 W.W.R. 178, at 181):

> Speaking generally, no aid can be derived from reported decisions which do not establish a principle but simply seek to apply an established principle to a particular document.

In dealing with question 5 in the [*Ruth*] *Morton Estate* case I had to consider the expression "religious and/or charitable work" used in the will of the late Ruth Morton and here I have to consider the expression "educational and religious objects" used in the will of the late John Morton, as above set out. In both cases the expressions used involve consideration of the authorities dealing particularly with the question as to what are charitable gifts or charitable trusts and the rules applicable thereto. In the present case, however, the context is different from what it was in the Ruth Morton will and such difference in itself makes a different, if not more difficult, problem for me here.

In the first place I have to consider whether the words of the gift "educational and religious objects" must be construed conjunctively or disjunctively. Counsel supporting the validity of the bequest and the conjunctive construction rely especially upon the following cases: *Re Huyck* (1905), 10 O.L.R. (C.A.) 480, especially at p. 486; *In re Sutton. Stone* v. *Attorney-General* (1885), 28 Ch. D. 464, especially at p. 465; *In re Best. Jarvis* v. *Birmingham Corporation,* [1904] 2 Ch. 354; *Re Lloyd Greame* v. *Attorney-General* (1893), 10 T.L.R. 66; *Caldwell* v. *Caldwell* (1921), 91 L.J.P.C. 95. In the *Huyck* case Boyd, J. says at pp. 486-7:

> The case relied upon by the appellant is a decision of Lord Cottenham,

when Master of the Rolls, in *Williams* v. *Kershaw*, [(1835)] which is not found in the regular series of reports, though it appears in 5 L.J. Ch. 84 and in note printed 5 Cl. & F. 111. That case has been much criticized in the text books, and it is said to be the first case in which "and" of the testator has been construed "or" by the Court in order to work the destruction of the gift. See Boyle on Charities, p. 290, and also Perry on Trusts, who contends that the whole context of the will showed a charitable use was intended: sec. 712. Altogether this case is one which, though not overruled, may be safely disregarded as of present authority. It was contrasted with the decision in *In re Sutton* by the Scotch judges in *Cobb* v. *Cobb* (1894), 21 Rettie 638, with preference for the conjunctive construction of Mr. Justice Pearson as contrasted with the distributive construction adopted by the Master of the Rolls. In *In re Macduff*, [1896] 2 Ch. 451, the words used were "charitable or philanthropic," and that was held to be in the alternative and so inherently uncertain. Had the phrase used been as in this will, the result, I venture to think, would have been different: see *per* Rigby, L.J., in that case, and what is said by Lord Davey in *Blair* v. *Duncan*, [1902] A.C. 37, at p. 44: "If the words used were 'charitable and public purposes,' . . . effect might be given to them, the words being construed to mean charitable purposes of a public character."

In the case of *In re Sutton*. *Stone* v. *Attorney-General, supra*, Pearson, J. says at pp. 465-7:

To my mind the words "charitable and deserving objects" mean only one class of objects, and the word "charitable" governs the whole sentence. It means objects which are at once charitable and deserving. . . . Undoubtedly, if I am obliged to say that the proper construction of the present gift is "in charitable or deserving objects" the case would fall entirely within the reasoning of the Master of the Rolls in *Williams* v. *Kershaw*, and I should be compelled to hold that the gift was bad. But, to my mind, there is an entire difference between a gift to the three purposes, "benevolent, charitable, and religious," without any conjunction, copulative or disjunctive, between the first two adjectives, as in *Williams* v. *Kershaw*, and the gift in the present case to "charitable and deserving objects." I agree with the Master of the Rolls that "benevolent, charitable, and religious" means that the gift may be applied in any one of those three ways. But when, as in the present case, the copulative conjunction connects the words "charitable" and "deserving," to my mind it changes the grammatical meaning altogether. The objects are to be at once charitable and deserving, and the testatrix shows that the class of objects which she wished to be chosen was to include those which should be both charitable and deserving, and in that way the gift will be good. . . .

The *Best* case followed the *Sutton* case and a bequest of residue upon trust for "such charitable and benevolent institutions" as the trustees shall in their discretion determine was held to be a good charitable gift. In the *Lloyd Greame* case, at p. 67, Stirling, J. says:

It was not disputed that if the will of the testatrix properly construed

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

authorizes the application of the legacy for a purpose which is not recognized by the law as charitable, then the bequest is invalid—see *Morice* v. *Bishop of Durham* [(1805)], 10 Ves. 522, *Ellis* v. *Selby* [(1836)], 1 Myl. & Cr. 286, nor was it disputed that a gift for "religious societies or objects" is a valid charitable gift. *Re White—White* v. *White*, 9 The Times L.R. 261, and [1893] 2 Ch. 41. The matters in controversy were whether the will, according to its true construction, authorizes the application of the legacy for "benevolent societies or objects," such societies or objects not being religious, and whether the word "benevolent" is used in the wide sense which (as was held in *James* v. *Allen* [(1817)], 3 Mer. 17) would render the trust void as being too indefinite. These questions, as was truly said by the Solicitor-General, are simply questions of the meaning of the English language as used by the testatrix. It was contended that the testatrix making a provision for "religious and benevolent societies or objects" must be taken to mean *prima facie* that the societies or objects which are to share in her bounty must be both religious and benevolent. It would not be difficult to frame a combination of adjectives to which such a meaning could not *prima facie* be given, but as there may be objects which, though according to the ordinary use of language as religious they may be fairly described as "religious," would not according to the like use be termed "benevolent." I think that this contention in the present case is well founded. At the same time it is to be borne in mind that the testatrix may have used the expression she did instead of that which to many writers would appear more cumbrous—*viz.*, "religious societies or objects and benevolent societies or objects," and consequently that which I treat as the *prima facie* meaning of the expression would readily give way to indications of a different intention derived from the context of the will. Regard to this consideration seems to reconcile some reported decisions which at first sight seem to conflict, as, for example, *Williams* v. *Kershaw* [(1835)], 5 Cl. & F., 111*n*, and *In re Sutton* [(1885)] 28 Ch. D. 464. I entirely agree with the argument that neither of these cases nor any other reported case can govern my decision in the present. . . .

In *Caldwell* v. *Caldwell, supra*, the head-note reads as follows:

A testator by his will left the residue of his estate to trustees upon trust to divide the said residue "among such charitable and benevolent institutions in Glasgow and Paisley and in such sums . . . as in their discretion may seem best":—Held, that the word "and" should be read in its natural meaning, not as "or," and that the institutions intended were such as were both charitable and benevolent, and that the bequest was not bad for uncertainty.

Jarvis v. *Birmingham Corporation*, 73 L.J. Ch. 808; [1904] 2 Ch. 354 approved and followed.

On the other hand, counsel for the residuary beneficiaries, supporting the disjunctive construction, relies especially upon *Williams* v. *Kershaw* (1835), 5 L.J. Ch. 84; *In re Eades. Eades* v. *Eades*, [1920] 2 Ch. 353; *Attorney-General for New Zealand* v. *Brown*, [1917] A.C. 393; *Attorney-General* v.

National Provincial Bank, [1924] A.C. 262. In the *Williams* case the bequest was for such "benevolent, charitable and religious purposes" as the trustees should select. Lord Langdale, M.R. held that the gift might be devoted to "benevolent purposes" and was therefore void. The *Williams* case was followed in the *Eades* case and it may be noted that it is stated in Tudor on Charities, 5th Ed., 69, that in the latter case Sargant, J. gives a very lucid statement of the law but the writer adds on p. 70:

> The principle of construction applicable to this class of cases enunciated by Sargant, J., in *In re Eades*, appears to be founded upon reason and authority, and it is to be regretted that it cannot at present be regarded as the final word upon the vexed question of the conjunctive or disjunctive reading of gifts involving charitable objects.

In *Attorney-General for New Zealand* v. *Brown* a gift "for such charitable, benevolent, religious and educational institutions, societies, associations and objects" as trustees should select was held not a good charitable gift.

In the *Attorney-General* v. *National Provincial Bank* case a testator directed his trustees to apply one-fifth of his residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire" as they in their absolute discretion should select. It was held by the House of Lords, affirming the decision of the Court of Appeal,

> that the words of the gift must be read disjunctively, that "patriotic purposes" were not necessarily charitable, and that the gift was void for uncertainty.

After a perusal of the cases, as hereinbefore set out, upon the conjunctive or disjunctive construction one might at first incline to the view that they are contradictory but I think that upon further consideration they can be reconciled, as suggested in the *Sutton* and *Greame* cases, *supra,* and that counsel supporting the conjunctive construction are right when they suggest that there is a difference between cases such as the present one, where there are only two words of qualification, and cases where there are more than two words of qualification or epithets and that the cases relied upon as aforesaid to support the disjunctive construction are all cases of the latter kind. In this connection reference might be made to what was said by Sargant, J. in the *Eades* case, *supra,* at p. 357:

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

Further, the greater the number of the qualifications or characteristics enumerated, the more probable, as it seems to me, is a construction which regards them as multiplying the kinds or classes of objects within the area of selection, rather than as multiplying the number of qualifications to be complied with, and so diminishing the objects within the area of selection. In the present case the ordinary careful student of English language and literature would, I think, almost certainly come to the conclusion that the three epithets here are epithets creating conjunctive or cumulative classes of objects, not epithets creating conjunctive or cumulative qualifications for each object.

The conclusion at which I thus arrive is entirely in accordance with the decision in *Williams* v. *Kershaw* [(1835)] 5 Cl. & F. 111*n*; and is not necessarily at variance with the decision of Farwell, J. in *In re Best*, [1904] 2 Ch. 354, where the words of qualification were two only.

It is contended by counsel on behalf of the residuary beneficiaries that this suggestion of a difference is answered by the *Attorney-General* v. *National Provincial Bank* decision. The contention is that in the latter case there were only two categories though both of these categories were subdivided into two subdivisions. Counsel argues that the words "such patriotic purposes or objects" constituted one category and the words "such charitable institution or institutions or charitable object or objects in the British Empire" constituted the second category. This argument may be ingenious but is not sound as it is quite apparent from what Viscount Cave, L.C. said at p. 264 that he held that there were four categories:

> Now the general rule is clear that if you are making a will you must declare your wishes, not leave it in wide and uncertain terms to some one else to make a will for you. Special treatment is meted out to a gift for charitable purposes, and in that case the Courts have recognized that it is open to a testator who declares a charitable purpose to leave it to his trustees to select the particular charities for whose benefit his fund is to be applied. But that does not apply to cases not coming within the description of charity. Therefore the whole contest in this case has been to bring this trust within the description of a charitable trust.
>
> That object has been pursued in two ways. First it is said that you ought to read the words of the trust conjunctively—that is to say, that you are to read this as a trust for purposes which are both patriotic and charitable, such purposes to be selected by the trustees. Like the learned judge of first instance, Russell J., and the learned judges in the Court of Appeal, I am totally unable to read the trust in that way. It appears to me to be plain that the testator has, as Russell J. said, given to his trustees four categories out of which they may select the objects of his benevolence; they may be either patriotic purposes, or patriotic objects, or charitable institutions or charitable objects—they may make a selection of objects from any one or more of those four categories. In short the words are to be read, not conjunctively, but disjunctively. That argument therefore cannot prevail.

I am satisfied, therefore, upon the authorities cited that the cases relied upon by counsel for the residuary beneficiaries are distinguishable along the lines suggested and that the words of the gift here "educational and religious objects" must be construed conjunctively, that is, in such a way that the trust property can only be applied to objects to which both qualifications mentioned by the testator apply. If, therefore, either of the qualifications requires the object to be charitable the gift may be supported as a gift to charity. I come, therefore, now to deal with the question as to whether either of them does and will deal first with the word "religious."

Counsel for parties interested in supporting the legacy have referred to statements in Tudor, *supra,* and Halsbury to the effect that gifts for "religious purposes are *prima facie* charitable" and to Lord Macnaghten's definition (as they call it) or classification (as opposing counsel calls it) of the various charities enumerated in the preamble to the Statute of Elizabeth, and set out in Halsbury's Laws of England, 2nd Ed., Vol. 4, at pp. 109-110. In the case of *In re* [*Ruth*] *Morton Estate, supra,* at pp. 323 and 324, I referred to the well-known *White* case and said, in part, as follows:

In *In re White; White* v. *White,* [1893] 2 Ch. 41; 62 L.J. Ch. 342, the head-note reads as follows:

A bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a 'charitable' purpose; and the law applicable to 'charitable' bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose.

"A testator gave this property 'to the following religious societies, *viz.*, to be divided in equal shares among them,' the particular objects not being named:

"*Held* (reversing Kekewich, J.), that the testator's personal estate was subject to a trust for 'charitable' purposes; and a scheme was directed as to such part of it as was purely personalty at the testator's death."

. . . As was said by Lindley, L.J. in the *White* case, *supra,* the authorities show that in our law a bequest for a religious purpose is *prima facie* a bequest for a "charitable" purpose in the legal sense of the word but in a particular case a religious purpose may be shown not to be a charitable purpose. . . .

On the other hand counsel for the residuary beneficiaries, in reply to these authorities, makes, in effect, the following submission:

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

The starting-point and basis for determination of any question of legal charity is the Statute of Elizabeth (quoted at p. 319, [*Ruth*] *Morton*). This is not a hard and fast set of definitions, but has been treated as a basis and the Courts have by analogy extended same to objects and purposes of the kind and nature specified in the statute. Lord Macnaghten's now famous analysis of the statute (paraphrased at p. 320, [*Ruth*] *Morton*) was not intended to and does not add anything to the Statute of Elizabeth, but simply classifies into four groups or categories the charitable objects enumerated in the statute. It is not in any way intended to be used in substitution for the statute or to be any extension of the statute. The four categories, headings or divisions specified by Lord Macnaghten are merely descriptive of the four classes of charities set out with particularity in the statute. A particular object or purpose is not determinable as being within the legal meaning of charity because it can be said to be: (a) for relief of poverty; or (b) for advancement of education; or (c) for advancement of religion; or (d) for other purposes beneficial to the community not falling within (a), (b), or (c). See Lindley, L.J. in *In re Macduff. Macduff* v. *Macduff*, [1896] 2 Ch. 451, at 466. The purpose or object can be determined to be charitable if literally or by reasonable analogy it comes within the Statute of Elizabeth. . . . The term "religious purposes" like "charitable purposes" has two different meanings, and is used in two different senses. First: "religious purposes" as defined or enumerated in the Statute of Elizabeth and its analogous applications, *i.e.*, its technical meaning or sense, and, Second: in the broader and more extended meaning and sense, in ordinary every-day use, *i.e.*, its popular sense and meaning. The only true view which can reconcile the conflicting judgments when the statement appears in either judgments or text-books, that "religious purposes are charitable" or that "religious purposes are *prima facie* charitable" is that "religious purposes" is used in the sense comprising only those objects or purposes which at first sight appear to come within the statute either literally or by fair analogy. When the text-writers and the judges say that "religious purposes" comprise matters not technically charitable then the term is being used in its wider or popular sense. The same explanation applies to public utility purposes and to educational purposes. As Lindley, L.J. says in *In re Macduff. Macduff* v. *Macduff*, [1896], 2 Ch. 451, at 466, " 'There are four objects within one of which all charity, to be administered in the Court, must fall'— . . . , within one of which they must come; but he does not say everything which comes within any one of them must be a charity; that may be so, or may not be so, but they must all come within one of these four heads." Bearing this in mind, one has the explanation of what would otherwise be a very confusing use of the term. In this way the language of Lord Macnaghten in *Dunne* v. *Byrne*, [1912] A.C. 407, at 411 when discussing the *White* case can be given its proper effect. It also explains the remarks of Lindley, L.J. referred to in [*Ruth*] *Morton* case at bottom of p. 324. . . . When Lord Wrenbury in the Privy Council case—*Chesterman* v. *Federal Commissioner of Taxation* (1925), 42 T.L.R. 121, at 122 says: "It is not all religious purposes that are charitable" and when the Supreme Court of Canada says the same thing in *Cameron* v. *Church of Christ, Scientist* the reference clearly is to "religious purposes"

in the popular or wider sense. When the same term "religious purposes" is used in *Pemsel's* case, *White's* case or in *Dunne* v. *Byrne*, it is used in the narrower or technical sense imposed upon it by the application of the Statute of Elizabeth. . . . When a will says generally "religious purposes" or "educational purposes" there is no way to apply the Statute of Elizabeth to such a gift either directly or by analogy. "The statute . . . must always be the starting-point," as Lord Wrenbury said in *Verge* v. *Somerville*, [1924] A.C. 496, at 502. "It is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be . . . charitable" said Viscount Cave, L.C. in *Attorney-General* v. *National Provincial Bank*, [1924] A.C. 262, at 265. You can show it to be charitable *prima facie* by showing it apparently to be within the Statute of Elizabeth or its analogies—in which event an opponent, when the statute apparently applies, then can show that the particular object or objects designated do not really comprise legal charity which can be done only where a "particular case" or particular cases are specified by the testator. Inasmuch as religious purposes and educational purposes do compromise matters and things non-charitable in the legal sense, the use of such terms can only involve that uncertainty which voids the intended gift. There is no "particular" here which a party opposing could lay hold on. That the trustees cannot make good by confining the exercise of their powers to strictly charitable purposes has been stated many times. . . .

I have set out this submission of counsel almost *verbatim* from his written argument, because it seems to me a very interesting as well as novel one and I desire that it may be clear what the submission is. I do not recall noting any authority for such submission in my consideration of the cases cited at the time of my decision in the [*Ruth*] *Morton Estate* case but I propose now to consider whether the authorities, including the additional ones now cited, support such a submission. Reference might first be made to the case of *Cameron* v. *Church of Christ, Scientist* (1918), 57 S.C.R. 298, where the head-note reads as follows:

The will of a Christian Scientist left the whole estate of the testatrix to trustees and contained several bequests for purposes connected with Christian Science doctrine and practice. One of such bequests was "fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor Houses, Gaols and Penitentiaries or any place that is maintained for the uplifting of humanity."

Held, reversing the judgment of the Appellate Division (40 O.L.R. 567), Idington, J. *dubitante*, that the terms of this bequest are so vague and impracticable, and the objects to be benefited and the time for the benefit to

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

accrue so uncertain that no reasonable or intelligible construction can be given to it and this sum of $50,000 must fall into the residue of the estate.

The will contained no formal disposition of the residue of the estate, but the final bequest ended with the sentence, "the whole of my estate must be used for God only."

Held, also, reversing the judgment appealed against, that even if the testatrix intended this expression to be a disposal of the residue the words are too broad, indefinite and controversial to be capable of being carried out and there is an intestacy as to said residue.

At pp. 306-7 Sir Charles Fitzpatrick, C.J. said:

Again, whilst in *In re White*, [1893] 2 Ch. 41, it was held that in accordance with the authorities a bequest for religious purposes must be considered as a good charitable gift, the cases all treat these purposes as necessarily of a public nature as was shewn by the Vice-Chancellor Wickens in *Cocks* v. *Manners* [(1871)], L.R. 12 Eq. 574; there may well be religious purposes which are not of such a nature and consequently not charitable. . . .

At p. 320 Cassels, J. said:

In the case of *Dunne* v. *Byrne*, [1912] A.C. 407, decided by the Privy Council it was held "that a residuary bequest to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge conducive to the good of religion in this diocese" is not a good charitable bequest and is void.

In delivering the judgment of the Board, Lord Macnaghten, at page 411, uses the following language:

"In the present case their Lordships think that they are not bound to treat the expression used by the testator as identical with the expression "for religious purposes," and therefore, not without reluctance, they are compelled to concur in the conclusion at which the High Court arrived."

To my mind there is great similarity between this case last referred to, *Dunne* v. *Byrne*, [1912] A.C. 407, and the present case. . . .

In the *Cocks* v. *Manners* case there were gifts to four "religious institutions" specifically named and the Court considered the nature of each of the institutions in coming to a conclusion as to whether the gift to it was a charitable gift. At p. 585 Sir John Wickens, V.C. said, in part, as follows:

A charitable gift in English law is a gift such as is described in the preamble of the statute 43 Eliz. c. 4, or as can be considered as analogous to the gifts there described. The preamble has received a very wide construction, but it is difficult to help feeling that such a gift as that to the Dominican convent in the present case is not only not within the words of the statute, but probably, and without reference to the faith professed, one of the last gifts which the Legislature which passed the Act would have thought of including in it. On the Act unaffected by authority I should certainly hold that the gift to the Dominican convent is neither within the letter nor the spirit of it; and no decision has been referred to which compels me to adopt a different conclusion. A voluntary association of women for the purpose of working out their own salvation by religious

exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word "charitable" is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust. . . .

In the *White* case, [1893] 2 Ch. 41, at pp. 52-53, Lindley, L.J. said:

It is, however, impossible, we think, seriously to deny that the testator intended his property to be given to some religious societies for religious purposes. His property was to be divided amongst certain societies; but what for? The only rational answer to this question must, we think, be "for the purposes of those societies;" and, the societies being themselves described as "religious societies," the purpose for which the testator gave his property must be treated as religious purposes. It is true that these are not necessarily "charitable" purposes, and in a particular case a "religious" society may be shown not to be a "charitable" society. This was the case in *Cocks* v. *Manners* [(1871)] L.R. 12 Eq. 574. But the authorities shew that a bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a "charitable" purpose, and that the law applicable to "charitable" bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose. The leading cases on this head are as follows: *Baker* v. *Sutton* (1836), 1 Keen 224, where the bequest was to such religious and charitable institutions and purposes as in the opinion of the trustees might be fit and proper. Lord Langdale, M.R. in that case (1 Keen 233) said: "All the cases, with one exception, go to support the proposition, that a religious purpose is a charitable purpose." *Townsend* v. *Carus* (1843), 3 Hare 257 is to the same effect. Vice-Chancellor Wigram there said: "If this is a bequest for religious purposes, I think I am bound to hold it a charity within the decided cases." . . . In *Wilkinson* v. *Lindgren* (1870), 5 Chy. App. 570, where the bequest was to certain charitable institutions previously named, "or any other religious institution or purposes," as the trustees might think proper, religious purposes were treated as clearly "charitable."

We can find no authority which really conflicts with these, or which is opposed to the principle on which they proceed; and we cannot, without splitting straws, distinguish this case from them. We come, therefore, to the conclusion—first, that the gift is for religious purposes; and, secondly, that, being for religious purposes, it must be treated as a gift for "charitable" purposes, unless the contrary can be shown. If once this conclusion is arrived at, the rest is plain. A charitable bequest never fails for uncertainty. . . .

In the case of *In re Ward—Public Trustee* v. *Berry* (1941),

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

57 T.L.R. 473, at p. 474, Clauson, L.J. says, in part, as follows:

In my judgment it must be taken to be settled law, at all events in this Court, since the delivery of the judgment in *In re White*, 9 T.L.R. 261; [1893] 2 Ch. 41, that in the absence of a context enabling the Court to place some more extended meaning on the words "religious purposes," the phrase must be taken to mean "purposes conducive to the advancement of religion" and accordingly purposes which, as stated by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel*, [1891] A.C. 531, at p. 583, the law recognizes as charitable.

No doubt with a proper context it might be found that a testator used the phrase in a wider sense so as to cover purposes which though not conducive to the advancement of religion are connected with religion or based on religious convictions. *Cocks* v. *Manners* (L.R. 12 Eq. 574), is an instance of a case in which it was held that the purpose of self-sanctification by the observance of various religious practices and rules, though no doubt connected with religious conviction, was not a purpose conducive to the advancement of religion. The testator may no doubt indicate that he uses such a phrase as "religious purposes" in a special sense so as to cover a purpose which though connected with religion is not a purpose conducive to the advancement of religion. The judge appears to find an indication of the use of the phrase in that extended sense in the words "for Roman Catholics in the British Empire." I fear that I cannot agree that these words supply the necessary context. They seem to me to indicate merely that the beneficiaries of the particular charitable purposes (including educational and religious and other charitable purposes) for the advancement of which the fund is to be applicable are to be members of the Roman Catholic community.

In the same case at pp. 475-6 Luxmoore, L.J. said in part as follows:

Further, it has been frequently stated both in text books and in reported cases that gifts for religious purposes are *prima facie* valid charitable gifts. It is stated in Tudor's Charities (5th Ed., p. 31) that "the proposition that 'religious purposes' are objects of charity would seem to be established by authority" and (later on): "In England and Ireland religious purposes are *prima facie* charitable." While in *Dunne* v. *Byrne* (28 T.L.R. 257, at p. 258; [1912] A.C. 407, at p. 411) Lord Macnaghten said: "The Court has held over and over again that a gift for religious purposes is a good charitable gift. That is true." Lord Atkin in *Farley* v. *Westminster Bank, Limited*, 55 T.L.R. 943, at p. 944; [1939] A.C. 430, at p. 435 said: "'Parish work' seems to me to be of such vague import as to go far beyond the ordinary meaning of charity in the sense of being a religious purpose."

It is true that in a number of cases it has been said the words "religious purposes" are wide enough to embrace purposes which are not charitable within the legal meaning of the word. . . .

It is the fact that in the majority of cases dealing with the question whether a gift for religious purposes constitutes a charitable gift the actual words "religious purposes" are not present in the document under consideration. . . .

In view of these authorities I am satisfied that this Court is bound to

hold that a gift for "religious purposes," if in these words and there is no other context, is a good charitable gift.

Is there any context in the will before the Court in the present case which is sufficient to compel the Court to hold that the words "religious purposes" are used in some restricted sense? . . . I can see no sufficient reason for adopting the restricted construction: it is plain that both "educational purposes" and "religious purposes" are *prima facie* apt words for constituting valid charitable gifts.

In the *Verge* v. *Somerville* case, *supra,* Lord Wrenbury did say in 1924 that one must start with the Statute of Elizabeth but it must be noted that in *Cocks* v. *Manners, supra,* Sir John Wickens, V.C., in 1871 had said the preamble in such statute had received a very wide construction and Lord Wrenbury himself in 1925 in *Chesterman* v. *Federal Commissioner of Taxation* (1925), 42 T.L.R. 121, said that "the starting point is found in *Pemsel's* case." It is quite obvious that in the passage above set out from the *White* case Lindley, L.J. stated that religious purposes are not necessarily "charitable" purposes and in a particular case a religious purpose or society may be shown not to be a "charitable" one but he added at the same time that the authorities show that a bequest for a "religious purpose" is *prima facie* a request for a "charitable" purpose. What Lindley, L.J. thus said has been cited again and again in the text-books and judgments as still a correct statement of the law but counsel for the residuary beneficiaries apparently now submits that the statement requires explanation and that the words "religious purposes" are being used in the two different senses suggested by him in his submission as aforesaid and that if not there is an irreconcilable conflict. In my view the proper reply to such submission is that, if one excludes the cases which are distinguishable as based on Scottish law, the text-books and judgments are not in conflict at all. They do distinguish between different uses of the words "religious purposes" but in my view they all agree that it is settled law that if a bequest is "in terms a gift for religious purposes," as Lord Macnaghten says in *Dunne* v. *Byrne, supra,* at p. 411, it is a bequest for "charitable" purposes in the legal sense of the word "charitable," unless there is a context "enabling the Court to place some more extended meaning on the words 'religious purposes,' " as Clauson, L.J. says in the *Ward* case, *supra,* or "sufficient to compel the Court to hold that

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

the words 'religious purposes' are used in some restricted sense," as Luxmoore, L.J. says in the same case, so as to embrace purposes that are not within the strict legal sense charitable. If any explanation is required it may be said that the text-books and judgments agree in stating that in a particular case there may be a context showing that the phrase "religious purposes" is used in a special sense but in the absence of such a context the phrase must be taken to mean purposes which the law recognizes as charitable or, in other words, that a bequest for "religious purposes" in these words is *prima facie* a bequest for "charitable" purposes in the legal sense of the word.

My conclusion, therefore, is that the submission of counsel on behalf of the residuary beneficiaries on this phase of the matter is not sound. Where a testator makes a bequest in his will in favour of educational and religious objects, as in the present case, the use of the term "religious" does not necessarily involve that uncertainty which voids the intended gift as suggested by counsel on behalf of the residuary beneficiaries. On the contrary such a bequest for "religious objects" in these words is *prima facie* for purposes which are charitable in the legal sense of the word but it may still be shown that the religious object is not a charitable one. I pause here to add that in my view the cases also definitely hold that a bequest for "educational objects" in these words is *prima facie* also a bequest for charitable purposes. See especially the final decision on both words "religious" and "educational" in the case of *In re Ward—Public Trustee* v. *Berry, supra.* Both of the qualifications here, therefore, *prima facie* require the object to be charitable.

If I understand correctly the submission of counsel for the residuary beneficiaries he argues that, if I hold that the bequest here, being in the words as aforesaid, is *prima facie* charitable and that the *onus* is on him in this particular case to show that the religious purposes are not charitable it will be very difficult, if not impossible, for him to show this as he contends that "there is no particular here which a party opposing could lay hold on," the gift being bestowed in terms so general according to his contention as to deprive those opposing the gift of the right to show that it may not be charitable. This argument, however, does not

convince me that I should not apply to the will before me the principles I have already held to be established by a long line of cases referred to particularly by Lindley, L.J. in the passage from the *White* case, hereinbefore set out, *viz.*, that a gift for religious purposes must be treated as a gift for charitable purposes, unless the contrary can be shown. The application of this principle, however, still makes it necessary for me to consider the context of the will before the Court in the present case, and to note that there may well be religious purposes which are not of a public nature and consequently not charitable and also that only those purposes are charitable in the legal sense of the word which are capable of administration by the Court. I have also to note that counsel for the residuary beneficiaries still contends that in any event the gift here is made in such

wide, vague and uncertain terms that the Court could not control or administer the fund and that, therefore, it must be declared null and void.

I come, therefore, now to deal with these possibilities.

Dealing first with the question as to whether the bequest here is for purposes of a public nature I have to say that I am satisfied that a bequest in the words of the will as aforesaid is distinguishable from the gift held by Sir John Wickens, V.C. in *Cocks* v. *Manners, supra,* to be not a charitable trust and also from the other gifts suggested by him as not charitable in the passage hereinbefore set out, apparently because in his view the purposes were not of a public nature. An examination of the other gift in the *Cocks* v. *Manners* case, which was held a good charitable gift, and also of the gift in some of the hereinbefore mentioned cases where the Court apparently had difficulty but finally reached the conclusion that the gifts were good charitable gifts, will show that the gifts were to certain individuals or institutions and it was strenuously but unsuccessfully contended by those opposing the gift in each case that it had been shown that the gift was not for religious purposes tending to the edification or instruction of the public and was therefore not charitable. In addition reference might be made to the cases of *In re Barnes. Simpson* v. *Barnes,* [1930] 2 Ch. 80*n.* and in *In re Schoales. Schoales* v. *Schoales, ib.* 75, more particularly referred to hereinafter. On the question now being discussed I think also it should be noted that in *In re Delany. Conoley* v. *Quick,* [1902]

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

2 Ch. 642, at pp. 648-9 Farwell, J., after referring to what Sir John Wickens, V.C. had said in the *Cocks* v. *Manners* case in the passage hereinbefore set out, says:

> There is, in truth, no "charity" in attempting to improve one's own mind or save one's own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others; but, given the latter, the motive impelling it is immaterial.

In the present case I think the idea of aid or benefit to others is involved in the carrying out of the bequest and that its carrying out would tend towards the edification or instruction of the public. In my view the object of the gift was to benefit the community or some part of it and not merely private individuals pointed out by the donor. My conclusion, therefore, on this question is that the purposes of the gift here are of a public nature.

I come now to deal with the question as to whether the trust is of such a nature that it is capable of control or administration by the Court. In this connection reference might first be made to *Morice* v. *The Bishop of Durham* (1805), 10 Ves. 522, especially at 539 and 542, where it was held that the trust cannot be supported as charitable unless the Court has authority to compel the trustees to apply the whole fund, or to see that it is applied, to purposes which are charitable in the legal sense of the word or itself execute the trust. The question resolves itself into whether by the words used the testator specified the particular purposes, for which he intended the money to be applied, in such a way that the trustees could not, according to the intention, devote the whole or any part of the fund to purposes not charitable in the legal sense as understood by the Court without the Court being able to reform the maladministration or direct a due administration. It is argued by counsel for the residuary beneficiaries that, if there had been a particular institution specified or a list of institutions suggested from which the trustees could select, the bequest might perhaps be supported, as was done in the [*Ruth*] *Morton* case, on the assumption for a moment that I was right in holding in such case, as already intimated, that a bequest for religious purposes is *prima facie* "charitable." It is contended here, however, that the wide open nature of the field within which the trustees are given unfettered discretion to select, coupled with the failure of the testator to designate the

object of his intended bounty, renders this gift invalid and void on both grounds. It is argued that there must be a beneficiary and reference is made to the *Diplock* case, *supra,* at p. 198, where Sir Wilfrid Greene, M.R. said that, in order that a trust may be properly constituted, there must be a beneficiary and the beneficiary must be ascertained or ascertainable. Reliance is also placed upon what was said by the Earl of Halsbury, L.C. in *Grimond (or Macintyre)* v. *Grimond,* [1905] A.C. 124, especially at 126 where he said as follows:

> In my opinion the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow.

It must be noted, however, that at p. 127 the Earl of Halsbury also said:

> It seems to me that the judgment of Lord Moncreiff really disposes of the question quite satisfactorily. I do not wish to add anything to his Lordship's view. It appears to me that he has satisfactorily answered the whole argument which has now been presented by the respondents.

It is necessary, therefore, to consider the judgment of Lord Moncreiff in the Court below. In the *Grimond* case (1904), as reported in 6 F. 285, at p. 292 Lord Moncreiff said:

> The words to be construed are—"such charitable or religious institutions and societies as my trustees, or the survivors or survivor of them, may select."

I omit reference to a great deal of what Lord Moncreiff said, as in the [*Ruth*] *Morton Estate* case, *supra,* I referred to such and held that the *Grimond* case and *Blair* v. *Duncan* case, referred to therein, were distinguishable as based upon Scottish law, but I would like to set out certain passages which I think should be noted, especially since in the present case reliance is still placed upon the *Grimond* case. At p. 292 Lord Moncreiff also said:

> . . . I apprehend that it would be within the powers of the trustees to apply the fund for the maintenance of a Unitarian or a Theistic chapel or a Jewish synagogue. Such latitude of selection seems to me to exceed the limits of delegation to which the law will give effect. There is no limit either as to locality or as to creed.
>
> But even if the Lord Ordinary were right in holding that the selection must be confined to societies professing the Christian religion, I should not

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

be prepared to hold that such a bequest is sufficiently specific to admit of being enforced. The distinctions between different Churches and denominations professing the Christian religion are sharply defined and strictly enforced. The deed gives us no clue to the truster's religious belief. He may have been a Presbyterian, yet under this power the trustees would be entitled to apply the bequest for the support of an Episcopal or Roman Catholic church. Again, he may have shared the views of the minority of the Free Church and yet a Court of law could not prevent his trustees from applying the bequest to the Sustentation Fund of the United Free Church. In short, there is not only no local limit, but no specific selection, among a number of Christian Churches and denominations differing widely not only as to Church government and ritual but as to the importance and authority of fundamental articles of faith.

Having in mind this passage from the *Grimond* case I would say that the present case is clearly distinguishable as it cannot be said here that

there is not only no local limit, but no specific selection, among a number of Christian Churches and denominations.

In other words it can be said here that there is a limit as to locality and there is a limit also as to creed.

I still have to deal, however, with the further submission that the term "Baptist denomination" must be read in its natural and ordinary sense, that in the dictionary (Webster's 20th Century Dictionary, being specially referred to) the word "Baptist" is defined as a member of one of the branches of the Baptist church or denomination and that at least eight different branches of the Baptist denomination are mentioned. It is argued that no extrinsic evidence is admissible to show that, at the time the will was made, the term as aforesaid meant to the testator some particular branch or branches or what it meant to him. Counsel for the defendants, the residuary beneficiaries, calls attention to the fact that the other defendants, *viz.,* the three trustees of the Morton Fund, as aforesaid, are represented by three different counsel, each really appearing on behalf of a branch of the Baptist Denomination in British Columbia. It is argued that the term "Baptist Denomination" includes so many different branches or persons that might come forward to ask for a share and the trustees are given such a broad field of selection that there arises an uncertainty making it impossible for the Court to control the matter and thus voiding the bequest. In support of this argument counsel at first relied especially upon the decision of Farwell, J. in the *Ward* case, *supra,* as reported in

[1941] 1 All E.R. 315; 57 T.L.R. 326, but before the arguments were completed counsel became aware that such decision had been reversed by the Court of Appeal in England. See [1941] 2 All E.R. 125; 57 T.L.R. 473. Counsel, however, still relies upon a great many of the decisions to which reference has already been made and now submits that the final decision in the *Ward* case is not in accordance with such decisions. On the other hand, counsel supporting the validity of the bequest rely especially upon such decision; upon *In re Barnes, supra,* where a bequest to the Church of England was held a good charitable gift and *In re Schoales. Schoales* v. *Schoales, supra,* where a gift to "The Roman Catholic Church" was held a good charitable gift. In addition, authorities are cited to support the submission that in any case the extrinsic evidence admitted at the trial, subject to objection, is admissible to show what the words "the Baptist Denomination in the Province of British Columbia" meant to Mr. Morton at the date of the making of his will. In this connection I might take the liberty of referring again to my own decision in the [*Ruth*] *Morton Estate* case upon the admissibility of extrinsic evidence (see p. 312). In the present case, however, I do not consider it necessary to settle the point for I have to say that on the one question now before me I would reach the same conclusion with or without such extrinsic evidence. As I have already indicated I hold that the gift here is for charitable purposes unless the contrary is shown. It is or may be argued that the contrary is shown by the context, *viz.,* the words "in connection with the Baptist Denomination," when it is shown that the word "Baptist" is defined in the dictionary as aforesaid as a member of one of the branches of the Baptist Denomination and that there are at least three and possibly more branches of the Baptist Denomination in British Columbia. Having in mind, however, the final decision in the *Ward* case, *supra,* I hold that even under such circumstances the words relied upon do not supply the necessary context to show that the testator used the phrase "educational and religious objects" in such a special sense as to embrace purposes which are not within the strict legal sense charitable. Counsel on behalf of the residuary beneficiaries submits, as I have already pointed out, that the final decision in

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

the *Ward* case is not in accordance with the trend of the previous decisions but I cannot agree. I have hereinbefore discussed many of the previous decisions relied upon and will now make further reference to some of them. As I have already intimated I think the present case is distinguishable from the *Grimond* case. It cannot be said here, as was said in the *Grimond* case by Lord Moncreiff, that the will gives no clue as to the testator's religious belief. It is a fair inference from the will itself that he belonged to the "Baptist Denomination in the Province of British Columbia." I think the present case is also distinguishable from other cases including *Dunne* v. *Byrne,* [1912] A.C. 407 relied upon by counsel as aforesaid. It may be noted that Tudor on Charities, 5th Ed., referring to such case said at p. 33:

> It is for the Court to decide whether the effect of a gift will be to benefit religion or not; therefore, where money was left to a Roman Catholic Archbishop to use as he might "judge most conducive to the good of religion," the gift was held to be not necessarily for the advancement of religion. *Dunne* v. *Byrne,* [1912] A.C. 407.

In the present case the gift is not left to the trustees to use as they may judge most conducive to "educational and religious objects" but is left to them to be used in favour of educational and religious objects as aforesaid. It is true that the gift here is not expressly stated to be to a particular church, as it was in the case of *In re Barnes, supra,* and in the case of *In re Schoales. Schoales* v. *Schoales, supra,* but in such cases the Court had to answer the question as to who were the persons or what was the institution or body meant by the words "the Roman Catholic Church" or "the Church of England." It is clear from the arguments and the judgments that in each of these cases such question was first considered and answered in order to determine whether the meaning of the words used by the testator was that the gift was made to be an operative institution "which ministers religion and gives spiritual edification to its members" and, if so, thus to determine that it was for those very purposes and therefore a good charitable gift. In the *Barnes* case Romer, J. at pp. 80*n*-82 said, in part, as follows:

> In this case the testator gave all his estate and property to the Church of England absolutely, and the first question that has to be determined is: "What does the testator mean in that will by 'the Church of England'?" The first question in the summons is this: "Who are the persons or what

is the institution or body meant and intended by the words 'Church of England' in the gift contained in the said will of all the testator's estate and property to the Church of England?" Now Mr. Beebee, who appears for the next of kin, has contended that this is a gift to all the persons who at the time of the death of the testator can say: "I am a member of the Church of England." He says that, being a gift to a body of persons whom it is impossible to identify, the gift fails and the testator has died intestate." . . . Then there is a statement for which *MacLaughlin* v. *Campbell*, [1906] 1 I.R. 588, 597 is given as authority . . . It appears to be quite impossible to suppose that the testator here intended to benefit each and every member of the Church of England in the wide sense contended for by Mr. Beebee. It appears to be quite obvious that he refers to the operative institution which has, in one passage which I have read, been referred to as a *quasi* corporation, the operative institution which ministers to religion and gives spiritual edification to its members. In the case to which I have referred Fitz Gibbon, L.J., in a case in which he had to consider the effect of a gift "for such Roman Catholic purposes" as the trustees might deem fit and proper, where the counsel arguing in support of the validity of the gift had said that that was equivalent to a gift to the Roman Catholic Church, says this: "If the gift were made to 'the Church,' *e.g.*, the 'Church of Rome,' or the 'Church of Ireland,' I should think that it would import"—at least, *prima facie*—"the operative institution which ministered religion and gave spiritual edification to its members." Now in my opinion that is the meaning in which the testator has used the words "Church of England," and I hold that this is a gift to the institution which ministers religion and gives spiritual edification to the members of the Church of England. If that be so, for what purposes is it given to the Church of England? It appears to me that it is obviously given for these very purposes which I have just mentioned—namely, for the purposes of religion and for giving spiritual edification, and so forth. That being so, I think without any question that the gift is a good charitable gift.

In the *Schoales* case Bennett, J. said, in part, as follows at pp. 77-8:

In this case the residuary estate of the testatrix after the death of her sisters is given to the Roman Catholic Church for the use thereof. The first question to be decided is who takes the gift after the death of the sisters, and there are three suggestions, the first being that the gift was intended to be taken by the particular church which the testatrix had attended for some years. The second suggestion is that the gift is intended for the *quasi*-corporate institution consisting of those persons who carry on the Roman Catholic religion. If the Court, adopting a third possible meaning of the expression "Roman Catholic Church," were to take the view that the gift was intended for the individual members of the Roman Catholic Church, the gift would in that case fail for uncertainty.

In my judgment, when the testatrix gave her property on the death of her sisters to the Roman Catholic Church, she had in mind the *quasi*-corporate institution consisting of those individuals who carry on the Roman Catholic religion, and the only question is whether a gift to that body for the use

S. C.
In Chambers
1941

IN RE ESTATE OF JOHN MORTON, DECEASED

Fisher, J.

thereof is a good charitable gift. It is a good charitable gift if it can be used only for purposes which the law regards as charitable purposes, otherwise it is void on the principles stated in *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522.

Mr. Freeman, on behalf of the next of kin, has argued that the gift is void, because it is not necessary to confine its use to charitable purposes. . . .

If on the true construction of the present question the gift is one which can be applied for purposes not strictly charitable the gift must fail. The question is whether it can be so applied.

Bennett, J. then refers to one of the cases cited by counsel on behalf of the next of kin, *viz.*, *MacLaughlin* v. *Campbell,* [1906] 1 I.R. 588, sets out certain statements made by Fitz Gibbon, L.J. and Holmes, L.J. in such case and also part of the passage from the judgment of Romer, J., as hereinbefore set out, and then concludes as follows (pp. 79-80):

> Those *dicta,* in my judgment, clearly cover this case. Of course, they are but *dicta.* Romer, J., however, had to consider them in the case of *In re Barnes.* . . .
>
> It seems to me that I ought to follow the decision of Romer, J. in *In re Barnes* and to hold that the gift of residue is a gift to the institution which "ministers religion and gives spiritual edification" to members of the Roman Catholic Church, for those purposes. I therefore hold that the gift is a good charitable gift.

I have set out at some length portions from the judgments in the *Barnes* and *Schoales* cases as I think they are helpful in solving my present problem. The Court in such cases first considered the question propounded as to who were the persons or body of persons entitled to receive the gift, decided in each case that the gift was to an operative institution "which ministers religion and gives spiritual edification to its members" and then held that it obviously followed from such decision that the gift was given for those very purposes and was, therefore, a good charitable gift. After careful comparison of these two cases with the cases already referred to I would take the liberty of saying that, if the bequest in each of such cases had been to trustees to be held upon trusts to be declared in favour of educational and religious objects, in connection with the Church of England in one case and in connection with the Roman Catholic Church in the other case, it seems to me the Court would not have had much difficulty and in each case would have held without any question that the gift was a good charitable gift. In the present case I have the bequest in such words referring specifically to the

"Baptist Denomination in the Province of British Columbia" instead of to the Church of England or the Roman Catholic Church and, following the *Barnes* and the *Schoales* cases I hold that according to the intention of the testator, as expressed in his will, the trusts to be declared by the trustees would necessarily be trusts in favour of educational and religious objects in connection with one or more of the institutions "which minister religion and give spiritual edification" to members of the Baptist Denomination in British Columbia and would thus be not only *prima facie* but conclusively charitable trusts. I would also say without hesitation that it is quite impossible to hold, as contended by counsel for the residuary beneficiaries, that the testator has failed to designate the objects of his intended bounty or intended to benefit so many persons or bodies of persons that so many might come forward to ask for a share that there arises an uncertainty making it impossible for the Court to control the matter and thus voiding the bequest. On the contrary, I hold, as contended by counsel supporting the validity of the bequest, that the testator has by the words used specified the objects of his intended bounty, or the particular purposes for which he intended the money to be applied, in such a way that the trustees could not, according to the intention, devote the whole or any part of the fund to purposes not charitable in the legal sense as understood by the Court without the Court being able to reform the maladministration or direct a due administration. It follows, therefore, that the gift is a good charitable gift.

My answer to the question, as above set out, therefore is: It is a good and valid bequest or legacy.

As to costs there will be an order similar to the order I made in the [*Ruth*] *Morton Estate* case, *supra*.

Question answered in the affirmative.

KOVACK v. KOVACK AND RATHBURN.

Divorce—Practice—Examination of petitioner for discovery—Application by co-respondent—Claim by petitioner for damages.

In a petition by a husband for dissolution of marriage, the co-respondent applied for an order for examination for discovery of the petitioner.

Held, that the petitioner may be examined for discovery upon the matters in issue in the cause.

S. C.
In Chambers
1941

KOVACK
v.
KOVACK AND
RATHBURN

APPLICATION by the co-respondent in a divorce action for an order for examination for discovery of the petitioner. Heard by SIDNEY SMITH, J. in Chambers at Vancouver on the 14th of November, 1941.

Schultz, for the application.
Pratt, contra.

Cur. adv. vult.

4th December, 1941.

SIDNEY SMITH, J.: This is an application by the co-respondent for an order for examination for discovery of the petitioner. The petitioner seeks dissolution of marriage and damages against the co-respondent. He opposes the order upon two grounds: (1) That there is no provision under the Divorce Rules for examination for discovery; (2) that in any event discovery will not be ordered when the issue or one of the issues is adultery.

I am of opinion that by virtue of Divorce Rules 38 and 97 the practice and procedure of the Supreme Court with reference to examination for discovery is available in Divorce and Matrimonial Causes. I am confirmed in this view by noting that MANSON, J. in *Mattock* v. *Mattock* (1937), 52 B.C. 298, apparently did not doubt the jurisdiction to make the order in a proper case.

It is settled practice in this Court that examination for discovery of a respondent, co-respondent or intervener will not be granted when the sole purpose of the examination is to prove his or her adultery. *Brammall* v. *Brammall* (1929), 41 B.C. 224; *Mattock* v. *Mattock, supra.* But here the purpose of the examination is very different. It is to ascertain the facts upon which the petitioner alleges the adultery of the co-respondent. In other words it is not to prove adultery but to disprove adultery. Moreover, there is here a separate and distinct claim for damages, against the co-respondent, and as to such claim an order may clearly be made. Latey on Divorce, 12th Ed., pp. 383 and 653.

The order will go, and the petitioner may be examined for discovery upon the matters in issue in this cause. Costs reserved to trial judge.

Application granted.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

DES BRISAY *et al.* v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED AND CANADIAN NATIONAL STEAMSHIP COMPANY LIMITED (p. 161).—Affirmed by Supreme Court of Canada, 4th February, 1941. See [1941] S.C.R. 230; [1941] 2 D.L.R. 209; 52 C.R.T.C. 251.

LEVI AND LEVI v. MACDOUGALL, TRITES AND PACIFIC COAST DISTILLERS LIMITED (p. 81).—Reversed by Supreme Court of Canada, 7th October, 1941. See [1941] 4 D.L.R. 340.

MINES, LIMITED v. WOODWORTH (p. 219).—Affirmed by Supreme Court of Canada, 8th December, 1941. See [1942] 1 D.L.R. 135.

REX v. KRAWCHUK (p. 7).—Affirmed by Supreme Court of Canada, 21st February, 1941. See [1941] 2 D.L.R. 353; 75 Can. C.C. 219.

REX v. KRAWCHUK (No. 2) (p. 382).—Leave to appeal refused by Supreme Court of Canada, 23rd July, 1941. See [1941] S.C.R. 537; [1942] 1 D.L.R. 315.

REX v. SAYERS AND HALL (p. 241).—Affirmed by Supreme Court of Canada, 30th May, 1941. See [1941] S.C.R. 362; [1941] 3 D.L.R. 483; 76 Can. C.C. 1; 11 F.L.J. 67.

TURNER'S DAIRY LIMITED *et al.* v. LOWER MAINLAND DAIRY PRODUCTS BOARD *et al.* (p. 103).—Affirmed by Supreme Court of Canada, 7th October, 1941. See [1941] S.C.R. 573; [1941] 4 D.L.R. 209; 11 F.L.J. 115.

Cases reported in 55 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

ATTORNEY-GENERAL FOR BRITISH COLUMBIA, THE, *ex rel.* THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COWEN AND NEWS PUBLISHING COMPANY LIMITED (p. 506).—Affirmed by Supreme Court of Canada, 22nd April, 1941. See [1941] S.C.R. 321; [1941] 2 D.L.R. 687.

DUMONT v. COMMISSIONER OF PROVINCIAL POLICE (p. 298).—Affirmed by Supreme Court of Canada, 22nd April, 1941. See [1941] S.C.R. 317; [1941] 3 D.L.R. 204; 76 Can. C.C. 148.

GONZY AND BACEDA v. LEES (p. 350).—Reversed by Supreme Court of Canada, 22nd April, 1941. See [1941] S.C.R. 262; [1941] 3 D.L.R. 1.

NATIONAL TRUST COMPANY LIMITED v. THE CHRISTIAN COMMUNITY OF UNIVERSAL BROTHERHOOD LIMITED AND THE BOARD OF REVIEW FOR THE PROVINCE OF BRITISH COLUMBIA (p. 516).—Reversed by Supreme Court of Canada, 24th June, 1941. See [1941] S.C.R. 601; [1941] 3 D.L.R. 529; 23 C.B.R. 1.

REX v. MCLEOD (p. 439).—Reversed by Supreme Court of Canada, 21st February, 1941. See [1941] S.C.R. 228; 75 Can. C.C. 305; 11 F.L.J. 3.

INDEX.

CONTRACT—*Continued.*

Patricia Bay, ordered from the plaintiff, manufacturer of steel split ring connectors used in timber construction work, a large quanity of split rings. A lot of the rings were delivered in October, 1939, and the defendant used some of them in a trial assembly of a truss at its North Vancouver plant. On November 17th it purported to reject this lot on certain grounds, one of which was that the rings were not bevelled rings. The specifications did not call for bevelled rings. On November 29th, 1939, the plaintiff notified the defendant he had ready for delivery another lot of the rings, but the defendant rejected acceptance of them. The specifications provided in part: "The split-ring connectors of dimensions shown shall be made of galvanized mild steel. Each ring to be cut through at one point in its circumference in such a way as to form a tongue and slot. They shall be true circles and shall spring shut. The faces of metal smooth and free from rust." The defendant claims the rings were not true circles and did not spring shut. The plaintiff claims the trial assembly was to test the defendant's own work and not to test the rings. *Held*, that the defendant makes too close a reading of the specifications. There should be reasonable resiliency. It is not necessary for the split ring to grip the core in order to function satisfactorily. The rings would fit into their grooves without damage to the wood and can be taken as "true circles" making allowance for reasonable tolerance, and that they come within the practical intent of the specifications. The strength and efficiency of a hangar would not be prejudicially affected if the rings had been used. HAMILTON v. CANADA CREOSOTING COMPANY LIMITED. - - **316**

2.——*Installing tile floors—Construction of floor beneath under separate contract—Buckling of tiles owing to escape of moisture from below — Reflooring necessary — Liability.*] The defendant had under construction a large concrete mercantile building in Vancouver, with basement. He employed an architect to prepare the plans and specifications but had neither a supervising architect nor a master of works. The contract for the concrete shell of the building was given to one Vistaunet and independent contracts were let for plumbing, heating, etc. The original specifications called for a laminated main floor and laminated second floor in each case, covered with shiplap and masonite (laminated consists of planks two inches by six inches on edge). When the laminated portion was completed the defendant decided

CONTRACT—*Continued.*

to surface the main and second floors with an asphalt floor tile instead of masonite. He then entered into a contract with the plaintiff company to put in the tiling. One Christie, manager of the defendant company, and one Watt, manager of the plaintiff company, then had discussions as to the proper installation between the laminated and the tiling. It was necessary to sand the laminated in order to have a smooth surface. Watt offered to put in three-ply with waterproof installation beneath, as there was some moisture in the laminated, but he thought this should be done by Vistaunet. The contract was then given to Vistaunet, who did the sanding of the laminated and put in the 3-ply but he did not put waterproof installation beneath the 3-ply. Watt then laid the tiles, and he was paid $1,000 on account of the purchase price. The balance of $3,243.88 remained unpaid because within two months of completion, owing to the moisture from the laminated, the tile surface was very badly buckled and cracked, so badly that the whole floor had to be scraped down to the laminated and resurfaced. In an action for the balance due on the contract:—*Held*, that no evidence was led suggesting that the plaintiff's work was in itself unworkmanlike or unsatisfactory. The situation did not arise through fault in the plaintiff's conduct or workmanship. The defendant chose to rely upon persons other than the plaintiff in the matter of the installation of the foundation floors. He chose to supersede the plaintiff in this important matter. The plaintiff is entitled to judgment. SANSAN FLOOR COMPANY v. FORST'S LIMITED. - **391**

3.——*Option to purchase stock — First payment tendered and refused—Action for specific performance—Alternative claim for damages.*] On the 20th of August, 1938, the defendant gave an option for the sale of 893,435 shares in the capital of Surf Inlet Consolidated Gold Mines Limited to one Petley, who assigned the option to one Phillips. Phillips then assigned the option to the plaintiff, Mines, Limited. The shares were in escrow with the superintendent of brokers. The option provided that on or before the 1st of August, 1939, or within five days after such earlier date as the consent of the superintendent of brokers shall be secured for the release from escrow of the shares covered by the option in such manner as to make them available for delivery in the amounts and by the dates respectively set forth, 5,000 shares at 20 cents per share, amounting to $1,000, and the remaining

CRIMINAL LAW—*Continued.*

motion was made to quash the conviction for lack of evidence. The judge, after hearing argument and references to the depositions, although they were not proved, quashed the conviction. The Crown obtained an order in the Supreme Court under section 130 of the County Courts Act, calling on the judge and the accused to show cause why the trial should not be proceeded with. *Held*, that the hearing and granting of an application to quash is a hearing and determination upon the merits. The judge did not refuse to exercise his jurisdiction: the mistake, if any, was made while he was exercising it. The application must therefore be dismissed. REX v. MCLEAN. - **273**

6.——*Defence of Canada Regulations (Consolidation) 1940—Conviction—Habeas corpus—Conviction in absence of accused—Regulations 39C and 62 (2).* Accused was acquitted by the police magistrate at Penticton on a charge of being a member of an illegal organization, to wit, Jehovah's Witnesses, contrary to regulation 39C of the Defence of Canada Regulations (Consolidation) 1940. On appeal to the County Court of Yale, the hearing before the learned county court judge was in public and judgment was reserved. Later in the day, in the absence of both the accused and his counsel, the learned judge noted in his book: "The appeal will be allowed and the respondent fined $100 and in default . . ." On *habeas corpus* proceedings:—*Held*, that accused and his counsel should have been present when sentence was passed. Regulation 62 (2) of the said regulations prescribes: "The passing of sentence shall in any case take place in public." The applicant was not convicted nor sentenced in public. The prisoner will be discharged. REX v. STONE. - - - - **321**

7.——*Defence of Canada Regulations (Consolidation) 1940 — Conviction under regulation 39C—Seizure and destruction on forfeiture of articles—Legality of order under regulation 58(4).*] Upon a conviction under regulation 39C of the Defence of Canada Regulations (Consolidation) 1940, there must be a seizure under subsection (1) of regulation 58 before subsection (4) of regulation 58, which provides for the destruction or forfeiture of seized articles, can be put into force. REX *ex rel.* NELSON v. SAPORITO. - - - - - **277**

8.——*Disorderly house—Tenant in possession — Agent of landlord—Duty to terminate tenancy—Criminal Code, Sec. 229, Subsec. 5.*] The defendant, who was in the real-estate business, acted as agent for one Mrs. Charman, who owned a house on Keefer Street in Vancouver, and collected her rents. The premises were rented to a Chinaman on a monthly tenancy. On July 3rd, 1940, Mrs. Charman received a letter from the police advising her that the said premises had been operating as a common bawdy house and two women had been convicted in connection therewith, and the letter then quoted section 229, subsection 2 of the Criminal Code. She gave the letter to the defendant, who on the 15th of July following gave the tenant written notice to quit and deliver up possession of the premises on the 31st of August, 1940. On November 18th, 1940, the premises were again raided and there was a further conviction against the inmates for keeping a common bawdy house. On the next day the police notified the defendant of this, when he stated that owing to press of business the matter had been forgotten, and he had not followed up the July notice to quit. Defendant then notified the tenant again and the house was vacated in December. The defendant was convicted on a charge of being the keeper of a disorderly house, to wit, a common bawdy house, under section 229, subsection 5 of the Criminal Code. *Held*, on appeal, reversing the decision of police magistrate Wood, that under the above subsection the only right the defendant had was to determine the tenancy or right of occupancy by giving a notice to quit. That right he exercised pursuant to the instructions he received from his principal. In view of the findings of fact, the learned police magistrate erred in law in convicting the defendant, and the conviction should be quashed. REX v. JACOBS. - **228**

9.——*Evidence—Confession of accused—Admissibility—Trial within a trial—Refusal of — Prejudice to accused — Recent possession.*] On the trial of an accused for unlawfully retaining in his possession stolen goods knowing the same to have been stolen, the question of the admissibility of certain statements made by the accused to police officers was raised and counsel both for accused and for the Crown desired the learned judge to follow the practice of having "a trial within a trial" as to the admissibility of the evidence, but he refused to do so. The police officers were then called for the Crown, and accused's parents were called for the defence. The learned judge held that the statements made by the accused were inadmissible as they had been induced by

CRIMINAL LAW—*Continued.*

hope of reward, but he expressed the view that he was entitled to hear the evidence as to the finding of the goods in question and so much of the confession as strictly related thereto. Accused was convicted. *Held*, on appeal, reversing the decision of ELLIS, Co. J., that when a statement alleged to have been made by an accused person is sought to be put in evidence, then an issue as to its admissibility should be immediately tried, and all witnesses having any knowledge of the facts relating to the making of the statement should be immediately called. The failure to follow this practice may work a great injustice to the accused, and assuming so much of accused's statement with relation to the finding of the stolen goods was admissible (without so deciding), even on this evidence the accused could not be properly convicted, and the conviction is quashed. REX v. PAIS. . - - - **232**

10.——*Husband and wife — Divorce—Child under sixteen years of age—Non-support — "Destitute and necessitous circumstances"—Wife and child on relief—Criminal Code, Sec. 242, Subsec. 3 (b).*] The accused was charged with "being a parent and under a legal duty to provide necessaries for his child under the age of sixteen years, did without lawful excuse fail to provide such necessaries, the child being in necessitous circumstances." The accused's wife obtained a divorce from her husband twelve years previously with the custody of the child who is now fifteen years of age. Prior to the birth of the son the wife got relief from the municipality of South Vancouver and for some years she got and is still getting $40 a month from the Mothers' Pensions. This, with what she is able to do herself with a small amount earned by the boy after school hours, is her only income. The accused is director-general of an organization known as The World Fellowship of Faith and Service. He gets no salary but is remunerated through collections and love gifts in money from individual members and friends of the movement. He travels extensively for the Fellowship, gives lectures, and it was proved that for some considerable time and as recently as 1939 he obtained $200 a month from the organization in Toronto. Accused was convicted and sentenced to six months' imprisonment. *Held*, on appeal, affirming the conviction by police magistrate Wood, that the section under which the charge is laid does not create the duty, it only provides the penalty if such duty exists and has not been performed by the person charged. This duty arises under the English statute, 43 Eliz., Cap. 2, The Poor Relief Act, 1601, which is in force in British Columbia. The Crown has made the necessary proof for conviction, and the appeal is dismissed. REX v. HALL. - **309**

CRIMINAL LAW—*Continued.*

11.——*In possession of morphine — Accomplice—Evidence of previous criminal acts —Admissibility—Substantial wrong or miscarriage—Criminal Code, Sec. 1014, Subsec. 2.*] The appellant and one Patricia Lane were charged jointly with unlawful possession of morphine and were tried together. At the close of the Crown's case the appellant stated he was not calling any evidence. Patricia Lane took the stand in her own defence, and in the course of her evidence disclosed that the appellant and herself had been convicted and sentenced to six months' imprisonment for procuring morphine by the use of a forged prescription. A jury found the appellant guilty, but acquitted Patricia Lane. *Held*, on appeal, affirming the conviction by FISHER, J., that the course of the action left the appellant in reality without any defence to the charge, because if the uncontradicted evidence of the police officers was accepted by the jury, as it was, all the elements of proof necessary to convict had been established. If the jury at that stage of the trial had been asked to pass upon the guilt or innocence of the appellant, his conviction, in the absence of an explanation would have been inevitable. In the peculiar and exceptional facts of this case the appellant was not prejudiced by anything that Patricia Lane disclosed to the jury. His defence could not be prejudiced because as pointed out above, he did not attempt to make any answer to the Crown's case. Under the circumstances of this case it is proper to apply subsection 2 of section 1014 of the Criminal Code, and the appeal is dismissed. *Rex* v. *Williams and Woodley* (1920), 14 Cr. App. R. 135, followed. REX v. PAVALINI. - - - - - - - **444**

12.——*Invitation for subscribers for book including guessing competition — Ten branches of army, navy and air force services —Popularity race as to—Awards in money—"Contest"—Interpretation — Criminal Code, Sec. 235, Subsec. 1 (h).*] Section 235, subsection 1 (*h*) of the Criminal Code makes a person liable for an offence who "advertises, . . . any offer, invitation or inducement to bet on, to guess or to foretell the result of any contest, or any result or contingency of or relating to any contest." Accused

appointed agents for the purpose of obtaining subscriptions for a book called "The War of 1940." Persons subscribing paid one dollar and filled out an order form and were given a receipt. The order form contained ten blank squares and read in part: "Please forward me the Souvenir Book 'The War of 1940.' I have filled out the Popularity Race Blank and agree to accept your decisions as final." The receipt stated that there would be awards estimated at $40,000, divided 60 per cent. to the winner, and so on. It contained a list of ten branches of the army, navy and air forces, each marked with one number from one to ten, followed by instructions: "Place these TEN services in the order of their popularity—to indicate your preferences simply put the numbers 1 to 10 in the above squares. Fill out in full using each number only once." On the back of the receipt are rules governing the awards. The accused was convicted on a charge that he did unlawfully aid and assist in giving notice of an invitation to guess or to foretell the result or contingency of or relating to a contest, contrary to the Criminal Code. *Held*, on appeal, reversing the decision of police magistrate Hall (MCQUARRIE, J.A. dissenting), that there is no contest, or any contingency relating thereto upon the result of which the subscribers are invited to bet. What we have here is an invitation to join with other subscribers in a guessing competition among themselves. Section 235, subsection 1 (*h*) of the Criminal Code under which the charge is laid does not prohibit any such competition. REX v. HAMM. - **66**

13.——*Murder—Manslaughter—Provocation—Evidence of—Not adequately put to jury—Criminal Code, Sec. 261.*] The accused and his wife (Ukrainians) lived on a farm about one mile from Prince George. He was a section-hand on the Grand Trunk Pacific Railway and his duties took him away from home periodically. One Terachuk (also a Ukrainian) had known accused and his wife for some years and lived in their house, but after being there for some time, accused, thinking he was too intimate with his wife, drove him out on two or three occasions, then Terachuk would come back when accused was away, and when accused came home he would find him there. This caused trouble between accused and his wife, who thought that Terachuk was unfairly treated. On September 14th, 1940, Terachuk came to the house in the morning, and early in the afternoon he and Mrs. Krawchuk went to Prince George. Accused, who was home

at the time, then told a farm-hand who was there that he was going to make trouble, as his wife had purchased a property in Vancouver without his knowledge. He then left his house and walked to Prince George. At about 6 o'clock in the evening Mrs. Krawchuk and Terachuk returned to the house, and Terachuk and the farm-hand went to look after the cattle. When they were returning to the house about half an hour later, they heard a shot, and looking up they saw Krawchuk and his wife close together. Then they saw Krawchuk fire two more shots from a revolver at his wife, and she fell. About six days later accused wrote a letter to his brother which was allowed in evidence, in which he stated "She had ticket in her hands to Vancouver and I thought she was going right away to Vancouver and going to buy for herself property: that's the way I heard, and going to leave me alone." Accused was convicted on a charge of murder. *Held*, on appeal (SLOAN and MCDONALD, JJ.A. dissenting), that one question only arises, *viz.*, whether or not the learned trial judge erred in omitting to instruct the jury, not on the law relating to provocation—it was accurately stated—but rather in respect to the evidence relating thereto. While section 261 of the Criminal Code was explained to the jury, the learned judge not only failed to place before them certain material evidence on the question of provocation, but also stated erroneously, that "there was no evidence fit to be submitted to them on that point." The jury, after being out for two hours, returned and asked his Lordship to repeat instructions on the law in respect to murder and manslaughter, and after pointing out that a wrongful act amounting to provocation must be of such a nature as to deprive an ordinary person of the power of self-control, he said "Now so far as you know here, I do not recollect any evidence of that sort" and previously in his charge he had said "There is no evidence so far as I know of any insult or anything of that sort." If there was such evidence an error was committed and the jury evidently desirous of considering the question of manslaughter, was deprived of the opportunity of doing so. While events long preceding the actual commission of the crime would not support a plea of provocation, they must nevertheless be kept in view as a background for their bearing on accused's state of mind on the day the crime was committed. An ordinary man, suffering a long series of wrongful acts and insults, would more readily lose self-control by fur-

CRIMINAL LAW—*Continued.*

ther wrongful acts committed immediately before the fatal event. Terachuk was living at his home against his will while he was away working. An improper relationship existed for a long time. The jury were entitled to believe every statement in the letter written by the accused to his brother bearing on the question of provocation. While Terachuk broke up his home in one way by living there against his will, the deceased threatened to break it up in another way by leaving him. There was sufficient evidence to justify the jury if they accepted a certain view of the facts and circumstances to find a verdict of manslaughter. The appeal was allowed and a new trial ordered. REX v. KRAWCHUK. - - - **7**

14.——*Murder—Manslaughter—Provocation—Evidence of—Sufficiency of charge to jury—Criminal Code, Sec. 261.*] Accused and his wife lived on a farm about one mile from Prince George. He was a section-hand on the Grand Trunk Pacific Railway, and his duties took him away from home from time to time. One Terachuk, who was an old friend of Krawchuk, lived at their house, but after he had been there for some time accused, thinking he was too intimate with his wife, drove him away from the house on two or three occasions, but Terachuk would come back when accused was away, and accused would find him there when he returned from his railway work. This caused trouble between accused and his wife, who thought Terachuk was unfairly treated. On September 14th, 1940, Terachuk came to the house in the morning, and early in the afternoon he and Mrs. Krawchuk went into Prince George. Accused, who was home at the time, then told one Stowoa, a farm-hand on the farm, that he was going to make trouble, as his wife had purchased property in Vancouver without telling him about it and he was afraid she was going to leave him. He then went into Prince George, but he did not see Terachuk or his wife. At about 6 o'clock in the evening Terachuk and Mrs. Krawchuk returned to the house and Terachuk and the farm-hand went to look after the cattle. When they were returning to the house about a half-hour later they heard a shot, and looking up they saw Krawchuk facing his wife who was close to him. They then saw Krawchuk fire two shots from a revolver at his wife, and she fell. Terachuk then grappled with the accused, two more shots were fired, one hitting Terachuk in the hand. Accused was convicted on a charge of murder. *Held*, on appeal, affirming the decision of SIDNEY SMITH, J., that the accused gave evidence in his own defence and his story was a direct contradiction of the evidence given by Terachuk and Stowoa. He denied the conversation with Stowoa, and set up what would have been a complete defence, had the jury accepted his evidence. He said that when he came to the barn he saw Terachuk and his wife in a compromising position and that Terachuk attacked him; that Terachuk had a revolver in his hand, and in the struggle that ensued between them the revolver was discharged. It is contended that the learned judge ought to have told the jury that they might disbelieve substantially the whole of the evidence tendered by the Crown and also disbelieve Krawchuk's story of his struggle with Terachuk, and yet might find that Krawchuk unlawfully and intentionally shot his wife but did so under such provocation as is defined by section 261 of the Criminal Code. The verdict of manslaughter which is now contended might have been found had the question been left open by the learned judge, was excluded by the evidence given by the appellant himself. REX v. KRAWCHUK. (No. 2). - **382**

15.——*Offering to sell opium—Evidence—Duty of prosecution as to calling of witnesses—Can. Stats. 1929, Cap. 49, Sec. 4 (f).*] One Murton, a constable in plain clothes, hired two adjoining rooms at the Dunsmuir Hotel in Vancouver which were connected by a dictaphone. Murton occupied one room and another constable occupied the other. One Hong Wong, who was in the employ of the police and could not speak English, brought the accused to Murton's room where he and Murton conversed as to the sale of a can of opium to Murton, including the price to be charged for it. The accused then left, saying he would be back the next morning. He came back, and after further conversation he left saying he would bring the can of opium in the afternoon, but he did not come back. Hong Wong was in the room with them on both occasions. Accused was convicted on a charge of offering to sell to Murton one can of opium for $475. On appeal, the main objection taken on behalf of the accused was that the prosecution failed to call or produce at the trial Hong Wong, who brought the accused to the police officer's room and was present throughout the interviews upon which the charge was founded. *Held*, affirming the decision of MANSON, J., that on the facts of this case the Crown was not obliged to call Hong Wong as a witness. REX v. HOP LEE. - - - - - - - **151**

and killed by a north bound passenger train of the defendant about 750 feet north of Sunbury crossing. Just north of the crossing there is a curve in the track to the right that limits the vision of the track to about 220 feet. The train went around this curve at about 38 miles per hour and the engineer blew his whistle and rang his bell while on the curve. The engineer saw the deceased woman on the track and facing the train when about 220 feet away. He immediately put on the brakes but did not stop until the rear car was a car length and one-half past the point of impact. It was held on the trial that the engineer was negligent in operating the train at too great a rate of speed under the circumstances, and that the deceased woman was negligent in not keeping a proper look-out and not seeing and hearing what could be seen and heard at the time and place of the accident, and they were equally guilty of negligence causing the accident. *Held,* on appeal, reversing the decision of FISHER, J., that assuming negligence of both, namely, excessive speed of the train and failure to look by deceased, deceased alone could have averted the accident. When each had, or should have had, a clear view of the other, the engineer could only mitigate the force of the blow; the deceased, on the other hand, had time to avoid the accident, and having failed to do so was solely responsible. JACOBSON v. VANCOUVER VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY. - **207**

4.——*Goods stored on dock for shipment —Destroyed by fire—"Accidentally begun" —Spread of fire—Duty of warehouseman—Onus of proof—Costs—14 Geo. III. (Imp.), Cap. 78, Sec. 86.*] The plaintiffs stored 1,588 cases of canned salmon on the dock of the Canadian National Steamship Company Limited in Vancouver, pending shipment. While so stored the dock and contents were destroyed by fire. In an action for damages against the owners and operators of the dock, it was held on the trial that as to the origin of the fire no evidence of negligence had been adduced and no facts proved warranting an inference of negligence, and the cause of the fire was incapable of being traced. It was one which had "accidentally begun" within the meaning of section 86, 14 Geo. III. (Imp.), Cap. 78, and the defendants were not liable in respect of the commencement of the fire, there being no proof of negligence in respect of the construction of the warehouse or its management or in the fact that it was not equipped with cer-

tain means of fire-control which the plaintiffs contended should have been installed. *Held,* on appeal, affirming the decision of MANSON, J., except as to costs (O'HALLORAN, J.A. dissenting in part), that the appeal should be dismissed. *Per* O'HALLORAN, J.A.: The Fires Prevention (Metropolis) Act, 1774, does not apply in this case of bailment. The respondent Canadian National Steamship Company Limited in its capacity as warehouseman and wharfinger was a bailee of appellants' goods, and it must follow, apart from special contract, that the *onus* was on the bailee to prove it did take that care of the appellants' goods prescribed in *Brabant & Co.* v. *King,* [1895] A.C. 632, at p. 640. This *onus* has not been discharged, and the appeal should be allowed as against the Canadian National Steamship Company Limited. *Held,* further, as to the costs, that the adjudication thereon cannot be severed from the main judgment and therefore taxation will proceed on the basis of the existing tariff at the time the main judgment was pronounced. DES BRISAY *et al.* v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED AND CANADIAN NATIONAL STEAMSHIP COMPANY LIMITED. - **161**

5.——*Highway—Horse drawn milk-wagon —Attempting U turn in middle of block—Collision.* - - - - **342**

See AUTOMOBILE. 1.

6.——*Nuisance — Forest fire — Sparks from locomotive—Failure to take reasonable care—Operating under hazardous conditions —Failure to prevent fire escaping—Judge's charge—Jury's findings—R.S.B.C. 1936, Cap. 56, Sec. 60.*] On the 5th of July, 1938, shortly after 4 o'clock in the afternoon, a fire started on the defendant's logging premises between Boot Lake and Gosling Lake, and about four miles north of Campbell Lake. It was about 50 yards east of a logging-railway of the defendant company and close to a large cold-deck (pile of logs) of said company. The fire spread rapidly southerly and easterly. Gosling Lake was about one-quarter of a mile to the east and the fire jumped the lake during the night and spread easterly and southerly on the east side of the lake The fire spreading south was stopped and the fire on the east side of Gosling Lake stopped spreading on the 7th of July but spot fires remained smouldering, and on the 13th of July a strong wind sprang up and the fire east of Gosling Lake spread rapidly in a south-easterly direction, jumped the east end of Campbell Lake and spread to the plaintiff's

timber limits to the south of the lake, causing great loss and damage. Prior and up to the starting of the fire the defendant company was carrying on logging operations in the vicinity of the place where the fire broke out, and at about 2.30 on the afternoon of the 5th of July an oil-burning locomotive of the defendant on the logging-railway passed the spot where the fire started. For several weeks prior to the fire the weather was excessively dry and hot, and the timber, undergrowth and forest products, whether growing or cut upon the lands were in a highly inflammable condition. A large number of the defendant's employees fought the fire, and on the 7th of July when the fire appeared to be under control and the spread of the fire had ceased, the men went back to their logging operations. In an action for damages the plaintiff claimed the fire originated through the defendant's negligence, in that there was failure to take reasonable care and that it was negligent in operating under the highly inflammable conditions prevailing at the time, constituting a nuisance, and further that the fire having started it did not make reasonable efforts to prevent its escaping. The jury answered questions and found that the fire started by reason of logging operations owing to the negligence of defendant in using steam equipment in the woods under extremely hazardous conditions without extraordinary precautions being taken. That the fire escaped owing to the negligence of the defendant in not bringing all available men and equipment to the scene of the fire on July 5th and 6th, 1938. That the fire spread to the plaintiff's property owing to the negligence of the defendant in sending men back to work and failing to take adequate precautions against the possibility of the wind springing up and spreading the existing spot fires, and that the operations carried on prior and subsequent to July 5th constituted a nuisance and continuing nuisance. The registrar assessed the damages at $92,594.54, and judgment was entered for said amount. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C. (SLOAN, J.A. dissenting), that there was sufficient evidence to justify the jury's answers and in law they connote liability. There was no misdirection or non-direction so prejudicial to the defendant as to warrant a new trial and the judgment must stand. *Per* SLOAN, J.A.: There was misdirection by the learned trial judge wherein he in error, instructed the jury upon the rule "*res ipsa loquitur*." That the rule has no

application herein is conceded. The erroneous passage in question was substantial in effect and "dominated the reasoning upon which that portion of the charge was founded." Once substantial misdirection is demonstrated the *prima facie* presumption is that it resulted in a substantial wrong or miscarriage of justice. The *onus* is then on the respondent to make it clear that the misdirection did not affect the result—a burden which the respondent did not discharge. The fact that counsel for the appellant took no objection below does not debar him, under the circumstances, from raising the objection to the charge in this Court. The function of an appellate Court to determine the law cannot be sterilized by agreement thereon by counsel below, either express or implied from conduct. ELK RIVER TIMBER COMPANY LIMITED v. BLOEDEL, STEWART & WELCH LIMITED. - - **484**

7.——*Of driver of automobile—Statutory liability of owner—"Consent express or implied" to driver's possession — Driver acquires car through false representation.* - - - - - - **460**

See AUTOMOBILE. 2.

8.——*Parent — Dangerous weapon—Spring-gun left in unlocked cupboard—Child warned not to use gun in parents' absence—Child shoots at and injures plaintiff—Damages.*] The defendant purchased a spring-gun for the amusement of his two boys, ten and eleven years of age. The gun contained a magazine that carried many small pellets of lead. To prepare the gun for firing, a lever is pulled and this places one pellet in the barrel in front of the spring. A target could be hit with the gun at a distance of 40 feet. The defendant gave the boys specific instructions not to use the gun except in the presence of himself or his wife. Shortly after the noon hour on the 24th of August, 1939, the defendant and his wife went to town and left the two boys and a small girl in charge of the plaintiff, a girl twenty years of age who was employed as a domestic servant. Before leaving, the defendant put the gun in an unlocked cupboard in the kitchen. The gun was not loaded, but it contained pellets in the magazine. Shortly after, the older boy took the gun from the cupboard and he and his brother were shooting at a target. At this time the plaintiff with the little girl was going out at the back of the house when the boy called to her, and as she turned her head the gun want off and the pellet hit her on the left eye. She lost the sight of her

domiciled outside Province—Estate includes shares in British Columbia mining companies —Movables—R.S.B.C. 1936, Cap. 285.] In a petition under the Testator's Family Maintenance Act, the style of cause concludes "and in the matter of a claim by Laura Elsie Elliott under the said Act for maintenance." In the body of the petition paragraphs 1 to 22 inclusive contain a recital of alleged facts. Immediately following paragraph 22 are the words "Wherefore your petitioner as in duty bound will ever pray." No claim for specific relief is made. *Held,* that to imply a claim on the part of the petitioner by reason of the fact that there is mention in the style of cause of a claim on her part under the Testator's Family Maintenance Act is not permissible. The omission is fatal to the petition. The petitioner is the daughter of the testator, who in his lifetime was domiciled in the Province of Alberta. The estate included blocks of shares in two mining companies, one incorporated under the Dominion Companies Act and holding leases in mining properties in British Columbia, and the other incorporated and operating in British Columbia. *Held,* that this Court has no jurisdiction to entertain the petition, and even if it had, the testator having had at his death an Alberta domicil, this Court would not make an order in favour of the petitioner against movables. *In re* TESTATOR'S FAMILY MAINTENANCE ACT AND *In re* PETITION OF LAURA ELSIE ELLIOTT. - - - **178**

2.——*Petition by daughter of deceased—Testator's domicil in Alberta — Shares in mining companies in British Columbia—No claim for specific relief in petition—"Mobilia" rule—"Lex domicilii"—Service of petition — Rule 130 — R.S.B.C. 1936, Cap. 285.*] The testator died domiciled in the Province of Alberta. He left a large estate, including 1,000 shares of Pioneer Gold Mines of B.C. Limited (N.P.L.), a company having its head office in British Columbia, and a block of shares in Antler Gold Mines Limited, a Dominion company holding 26 leases on Antler Creek in British Columbia. By his will his widow (his second wife) took an annuity of $3,000; a grandson a legacy of $5,000, and his two sons (by his second wife) the residue of the estate. The testator included in his will a "request" that his widow should bequeath $1,000 to the petitioner herein. The petitioner, the daughter of the testator, sole surviving issue of the testator's first wife, and a resident of California, filed a petition in British Columbia

under the Testator's Family Maintenance Act for relief. The testator appointed one Fred Whittaker, his wife and two sons as executors under his will. The petitioner obtained an order in the Supreme Court that notice of the hearing upon Fred Whittaker and upon the widow as executors of deceased should be good and sufficient service upon the personal representatives of the deceased, and they were duly served. The style of cause in the petition concludes "and in the matter of a claim by Laura Elsie Elliott under the said Act for maintenance." In the body of the petition paragraphs 1 to 22 inclusive contain a recital of the facts and immediately following paragraph 22 are the words "Wherefore your petitioner as in duty bound will ever pray." No claim for specific relief nor for any relief is made. It was held on the hearing of the petition that the omission was fatal, and it was further held that the *"mobilia sequuntur personam"* doctrine applied, that the Court had no jurisdiction to entertain the petition, and even if it had, the testator having had at his death an Alberta domicil, this Court would not make an order in favour of the petitioner against movables. *Held,* on appeal, affirming the decision of MANSON, J., that the *"mobilia"* rule applies and the learned judge below reached the right conclusion upon the merits. *Held,* further, that the petition fails for the reason that the parties concerned in the application were not served with the notice of the hearing. Reliance was placed on an order of the Court that the notice of the hearing served on two of the executors should be good service upon the personal representatives of the deceased under rule 130. This rule was not intended to cover a case where the rights of the beneficiaries *inter se* are to be affected by any order which might be made. The rule does not apply to the two sons and the grandson, who had no notice of the hearing. *In re* WILLIAM STEWART HERRON, DECEASED. - - **465**

3.——*Petition by husband—Will—Four daughters of testatrix by former marriage —Estate of $9,400—Ten dollars left to husband and residue to daughters—Husband's contribution to estate—R.S.B.C. 1936, Cap. 285.*] A husband and wife were married in August, 1919. They were engaged jointly at different times in operating an hotel, a shingle mill and a farm, also in running rooming-houses. The husband claims he contributed about $4,600 to their joint enterprises in addition to his work. The

trustee or trustees of the said Morton Fund in favour of educational and religious objects in connection with the Baptist Denomination in the Province of British Columbia and I declare that my said wife Ruth Morton shall name and appoint the first trustee of the said Morton Fund." On originating summons by the trustee under the will as to whether the above provision is a good and valid bequest or legacy:—*Held*, that where a testator makes a bequest in his will in favour of educational and religious objects, by the use of the word "religious" it is *prima facie* for purposes which are charitable in the legal sense of the word, and a bequest for "educational objects" is also *prima facie* a bequest for charitable purposes. According to the intention of the testator, as expressed in his will, the trusts to be declared by the trustees would necessarily be trusts in favour of educational and religious objects in connection with one or more of the institutions "which administer religion and give spiritual edification" to members of the Baptist Denomination in British Columbia, and would thus be charitable trusts. The testator has by the words used specified the objects of his intended bounty, or the particular purposes for which he intended the money to be applied in such a way that the trustees could not devote the whole or any part of the fund to purposes not charitable. It follows that the gift is a good charitable gift and a good and valid bequest or legacy. *In re* ESTATE OF JOHN MORTON, DECEASED. THE YORKSHIRE & CANADIAN TRUST LIMITED v. ATHERTON *et al.* - - - - - - **536**

5.——*Petition by husband — Husband's contribution to estate.* - - **532**
See TESTATOR'S FAMILY MAINTENANCE ACT. 3.

6.——*Validity — Alterations and interlineations—Initialled by testatrix but not by witnesses — Whether made before or after execution—Evidence on discovery—Whether admissible — Rules 370r and 370c.*] The plaintiffs, the son and daughter of the testatrix by her first husband, seek probate of her will. The defendant Hawkins is the second husband of the testatrix and the defendant Ellery is an aunt of the testatrix. The will was executed on the 20th of April, 1928, in the presence of Miss Ellery, who was given charge of the will, and she testified that she kept it until the testator's death in January, 1940. Certain additions, interlineations and alterations were made in the will that were initialled by the testatrix

but not by the witnesses. Miss Ellery, in her statement of defence admits all the allegations of fact in the statement of claim and further says that the will in question was duly and properly executed by the deceased. At the instance of the defendant Hawkins she was examined for discovery, and on the trial portions of her said examination at the instance of the plaintiffs was admitted in evidence. She was not called as a witness on the trial. It was held on the trial that the will, after its completion, was handed to Miss Ellery by the executrix in a sealed envelope, which remained sealed until 1937 (the testatrix having had a severe stroke in 1935) and the inference should be drawn that the obliterations and alterations were made prior to the execution of the will. *Held*, on appeal, reversing the decision of ROBERTSON, J. ,that Miss Ellery was really on the side of the plaintiffs, though named a defendant, and Hawkins alone contested the action. This evidence taken on discovery should not be looked at at all, and on this ground alone the appellant is entitled to a new trial. *Held*, further, that the inference was drawn that the alterations must have been made before execution, as the will was sealed in an envelope immediately after execution and retained by Miss Ellery in that envelope until 1937. There is in fact no evidence that the envelope in which the will was found in 1937 was the same envelope in which it was placed in 1928, and there is undisputed evidence that the testatrix had possession of the will sometime as late as 1930, and made some notations upon the envelope in which the will was later found. The premise being ill founded, the inference falls. CARLSON AND PENDRAY v. HAWKINS AND ELLERY. - - - - - - - **198**

WITNESSES—Changes in will not initialled by. - - - - - **406**
See WILL. 1.

2.——*Duty of prosecution as to calling of.* - - - - - - - **151**
See CRIMINAL LAW. 15.

3.——*Examination of de bene esse — Refusal to read on trial.* - - **156**
See ADMIRALTY LAW. 1.

WORDS AND PHRASES — "Accidentally begun"—Fire. - - **161**
See NEGLIGENCE. 4.

2.——*"Consent express or implied"—Interpretation.* - - - **460**
See AUTOMOBILE. 2.