THE BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME LVIII.

VICTORIA, B. C.
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1943

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. DAVID ALEXANDER McDONALD.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. DAVID ALEXANDER McDONALD.

JUSTICES:

THE HON. WILLIAM GARLAND ERNEST McQUARRIE.
THE HON. GORDON McGREGOR SLOAN.
THE HON. CORNELIUS HAWKINS O'HALLORAN.
THE HON. ALEXANDER INGRAM FISHER.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. WENDELL BURPEE FARRIS.

PUISNE JUDGES:

THE HON. HAROLD BRUCE ROBERTSON.
THE HON. ALEXANDER MALCOLM MANSON.
THE HON. SIDNEY ALEXANDER SMITH.
THE HON. JAMES MOSES COADY.
THE HON. JOSEPH NEALON ELLIS.
THE HON. HENRY IRVINE BIRD.

DISTRICT JUDGE IN ADMIRALTY:

THE HON. SIDNEY ALEXANDER SMITH.

COUNTY COURT JUDGES:

HIS HON. WALTER ALEXANDER NISBET,	West Kootenay
HIS HON. WILLIAM EDWARD FISHER,	Prince Rupert
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
HIS HON. JAMES ROSS ARCHIBALD,	Yale
HIS HON. JAMES BRUCE BOYD,	Vancouver
HIS HON. HARRY WILFRID COLGAN,	East Kootenay
HIS HON. ERIC DONALDSON WOODBURN,	Cariboo
HIS HON. McLEOD MUNRO COLQUHOUN,	Yale

ATTORNEY-GENERAL:

THE HON. ROYAL LETHINGTON MAITLAND, K.C.

MEMORANDA.

On the 12th of January, 1943, McLeod Munro Colquhoun, 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 Wellington Clifton Kelley, resigned.

On the 30th of May, 1943, the Honourable William Garnet Ernest McQuarrie, a Justice of Appeal, died at the City of Vancouver.

On the 5th of July, 1943, the Honourable Harold Bruce Robertson, 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 William Garnet Ernest McQuarrie, deceased.

On the 5th of July, 1943, Arthur Douglas Macfarlane, 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 Harold Bruce Robertson, promoted.

On the 4th of October, 1943, Frederic William Howay, retired Judge of the County Court of Westminster, died at the City of New Westminster.

TABLE OF CASES REPORTED

IN THIS VOLUME.

M

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TABLE OF CASES CITED.

A

B

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F

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T

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to the provisions of the "Court Rules of Practice Act," as amended, the "Divorce Rules, 1943," be amended as follows:—

1. By inserting after the word "affidavit," in Rule 13, the words "or the certificate under Rule 14A."

2. By adding the following as Rule 14A:—

"14A. Where a respondent or co-respondent on active service outside of Canada has been served with a petition by an officer of His Majesty's Canadian forces, proof of service in the form of certificate of service in Appendix II.A, when filed in the Registry, may be accepted in lieu of the affidavit of service and certificate of service required under the above Rules."

3. By adding the following as Appendix II.A:—

APPENDIX II.A.

CERTIFICATE OF SERVICE BY COMMISSIONED OFFICER.

In the Supreme Court of British Columbia.

In Divorce and Matrimonial Causes.

A. B. against *C. B.* and *E. F.*

I, , do hereby certify:—

1. That I am Captain [*or as the case may be*] in His Majesty's Canadian Naval, Military, or Air Force [*as the case may be*], now on active service outside of Canada.

2. That on the day of , 19 , at , I duly served *C. B.*, the respondent [*or E. F., the co-respondent, as the case may be*], a soldier on active service outside of Canada, with the petition of this Honourable Court, which petition is attached hereto, marked Exhibit A to this my certificate, by delivering to the said *C. B.* [*or E. F.*] personally a sealed copy thereof.

3. That I identified the said *C. B.* [*or E. F.*] at the time of service aforesaid by obtaining his address and official number from the proper records, which corresponded with the particulars of the said *C. B.* [*or E. F.*] set out in the petition, and by his admitting he was the person mentioned in the said petition and [*if photograph is available*] by identifying him as the same person whose photograph is attached to this my certificate, marked Exhibit B.

Dated at , the day of , A.D. 19 .

.....

Rank and Unit.

R. L. MAITLAND,
Attorney-General.

Attorney-General's Department,
Victoria, B. C., September 21st, 1943.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

THOMAS v. THOMAS.

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1942
June 5, 15.

Divorce—Evidence of adultery—Admission by respondent to petitioner's solicitor—Uncorroborated—Insufficient.

On the hearing of a petition for divorce, the respondent not appearing, the only evidence of adultery was that of a solicitor who had been consulted by the petitioner's father. The respondent had admitted to the solicitor in his office that he had been guilty of adultery with an unnamed woman about four years previously in a certain hotel in Vancouver. The Court did not question the veracity of the solicitor's testimony.

Held, nevertheless, that the evidence was not sufficient to justify the granting of a decree.

PETITION for divorce. The facts are set out in the reasons for judgment. Heard by FARRIS, C.J.S.C. at New Westminster on the 5th of June, 1942.

F. C. Elliott, for petitioner.

No one for respondent.

Cur. adv. vult.

15th June, 1942.

FARRIS, C.J.S.C.: In this case the husband and wife, in the words of the wife, could not get along together, and the husband

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Farris, C.J.S.C.

left the wife in February of 1932. Since that time they have not lived together, nor has the husband, the respondent, contributed to the support of the petitioner. The respondent is and has been for the past year or so in the ground force of the Royal Canadian Air Force, and is presently located at Sea Island, near the city of Vancouver.

Mr. *Carmichael,* a highly reputable lawyer, practising in the city of Vancouver, was called as a witness for the petitioner. He testified that early in the year he was consulted by the petitioner's father, and endeavoured to locate the respondent, with the idea of instituting criminal proceedings against the respondent for failure to support the petitioner. In March, 1942, he contacted the respondent and had the respondent come to his office. The respondent stated to Mr. *Carmichael* there was no possibility of reconciliation with his wife, and under no circumstances would he resume living with her. Mr. *Carmichael* told the respondent at this interview that the situation as existed was intolerable, and it was known to the petitioner that the respondent had been unfaithful, and Mr. *Carmichael* suggested the respondent should give such facts as would enable the petitioner to prove this unfaithfulness. The respondent at this time denied the imputation of unfaithfulness. A few days later Mr. *Carmichael* again interviewed the respondent at Mr. *Carmichael's* office, and renewed his previous request that the respondent should furnish the petitoner with particulars of the alleged unfaithfulness. The respondent did not do so at that time, but after about two weeks returned to Mr. *Carmichael's* office and stated that he had been unfaithful to his wife about four years previously, with a woman at the Lotus Hotel, in the city of Vancouver. He refused to divulge the woman's name. No further evidence of this adultery on the part of the respondent was adduced by the plaintiff, and on the admissions made to Mr. *Carmichael* I was asked to grant a divorce. The action is undefended.

I accept without qualification the evidence given by Mr. *Carmichael,* but is this sufficient to justify me in acceding to the petitioner's prayer? I am firmly convinced from the evidence of the petitioner and of Mr. *Carmichael* that there is no possibility of reconciliation between the parties, and it would seem a highly

proper case in which a divorce should be granted if there is sufficient evidence of adultery to justify the decree.

In my opinion the uncorroborated admissions of the respondent to Mr. *Carmichael* do not constitute sufficient evidence to entitle the petitioner to succeed. To accept this kind of evidence would, to my mind, defeat the essential requirements laid down by our laws to entitle a petitioner to a divorce, and would to a large extent nullify our laws in respect to divorce.

As I see it, the duty of the judge is not to be controlled by his sympathies or to usurp the functions of the Legislature, but to interpret the laws as now in existence. To accept evidence of this kind would unquestionably lead to abuse of the process of the Courts, and would place lawyers in a position of being requested by clients to do things in divorce actions not in keeping with the dignity of their duties as officers of the Court. If solicited admissions of this type, without the strongest corroboration of the act of adultery itself, were accepted it would mean that to obtain a divorce it would only be necessary for a lawyer to be retained by a petitioner, and such lawyer to contact the proposed respondent and influence him or her to admit having committed adultery with some person unknown, at some time in the past, such admission might be so made as to cause little or no reflection upon the proposed respondent, and upon such admission, not made under oath, and possibly untrue, a divorce would be granted. Adultery itself is the basis of granting a divorce, not the admission thereof, which admission may or may not be true. If an uncorroborated admission is to be accepted it must be made under circumstances that could leave no reason to doubt the truthfulness of the same.

The cases cited by petitioner's counsel are in my opinion not of assistance in this case. I have given written reasons in this action as I feel the practice of lawyers giving evidence of admissions made to them should be clarified.

I would dismiss the action, but with leave to the petitioner to bring a new action.

Petition dismissed.

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June 19, 30.

REX v. MUNEVICH.

Criminal law—Breaking and entering—Notice of calling two Crown witnesses not heard at preliminary hearing given day previous to trial—Witnesses in other trial—Transcript obtained ten minutes before trial—Application for adjournment—Adjournment until the afternoon only—Trial—Evidence of accomplice—Evidence of wife of accomplice in corroboration—No warning to jury.

Expl'd R. v. Stewart Smith 128 C.C.C. 362

Not Fol'd R. v. Plotsky 39 W.W.R. 129 33 C.C.C. 41

Ref'd to R. v. Rogers (No. 1) 6 C.C.C. (2d) 97 (P.E.I.S.C.App.)

Ref'd to R. v. Lanesky 7 C.C.C. (2d) 407 (Man. C.A.)

On the Saturday prior to the trial on the following Monday, Crown counsel notified counsel for accused that he intended to call two witnesses who were not called at the preliminary hearing. Just before the case was called on the Monday, Crown counsel gave accused's counsel extracts from examinations where these witnesses gave evidence on previous trials. Counsel for accused then asked for an adjournment as he was not in a position to go on, not having the cross-examinations of these witnesses. The case was adjourned until the afternoon. On the case being called in the afternoon, counsel for accused renewed his application for adjournment, as it was only ten minutes previously that he had received the said cross-examinations. The application for adjournment was refused.

Held, on appeal, affirming the decision of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), that the learned judge having, in the exercise of his judicial discretion, refused the adjournment, there can be no review of his decision by this Court. The question of adjournment does not constitute a question of law within section 1014 of the Criminal Code.

Mulvihill v. *Regem* (1914), 49 S.C.R. 587, followed.

The accused was charged with breaking and entering. A safe was blown on the premises in question and a large sum of money was taken therefrom. One Reid, who was admitted to be an accomplice, gave evidence that he had received a certain sum of money from the accused, which was identified as part of the money that was taken from the safe. His wife then gave evidence in corroboration. The learned judge gave the usual warning as to the evidence of an accomplice when Reid was called, but when the wife was called he did not give the same or any warning as to the evidence of the wife of an accomplice. The accused was convicted.

Held, on appeal, reversing the decision of SIDNEY SMITH, J. (MCDONALD, C.J.B.C. dissenting), that the rule laid down in *Attorney-General* v. *Durnan*, [1934] I.R. 308, is "Where at a criminal trial the wife of an accomplice gives evidence to corroborate the evidence of her husband, it is necessary to warn the jury as to the nature of her evidence as in the case of an accomplice." In the present case the learned trial judge did give the usual warning as to the evidence of an accomplice but did not give the same or any warning as to the evidence of the wife of an accomplice. The rule referred to in the *Durnan* case should have been applied and as the warning required by such rule was not given, the appeal must be allowed and a new trial ordered. It cannot be said

under all the circumstances of this case that the jury, if properly directed, must inevitably have found the appellant guilty.

APPEAL by accused from his conviction on the 24th of March, 1942, on a charge of breaking and entering a shop and stealing a sum exceeding $378. The appeal falls into two parts. The first involves the objection that the learned judge refused defendant's counsel a postponement, as Crown counsel had just notified defendant's counsel of his intention to call two witnesses who had not been called at the preliminary hearing. The second is with relation to the judge's charge on the question of accomplices and corroboration. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 19th of June, 1942, before MCDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for appellant: This case was called on Monday, the 23rd of March last. On the previous Saturday Crown counsel notified counsel for accused he intended to call two witnesses who were not called at the preliminary hearing, and gave him extracts from examinations where they gave evidence in other trials. On the hearing counsel for accused asked for an adjournment so he could get a full report of what was said at the previous trials, as he was taken by surprise. The learned judge adjourned the case until 2.30 in the afternoon. On resuming the hearing in the afternoon counsel for accused again asked for an adjournment as he only ten minutes previously had received the cross-examination of the two witnesses in the previous cases, and had not had time not only to read the evidence but consider it and confer with his client. It is submitted the refusal of an adjournment prejudiced the appellant's case: see *Rex* v. *Farrell* (1907), 12 Can. C.C. 524, at pp. 531-2; *Rex* v. *Lorenzo* (1909), 16 Can. C.C. 19; *Rex* v. *Roach* (1914), 23 Can. C.C. 28, at p. 30; *Rex* v. *Lee Sow* (1922), 37 Can. C.C. 196; *Martin* v. *Mackonochie* (1878), 3 Q.B.D. 730, at pp. 775-6; *Rex* v. *Sussex Justices*, [1924] 1 K.B. 256.

Bull, K.C., for the Crown: An application for adjournment is not a question of law. It is in the discretion of the learned trial judge to decide whether an adjournment should be granted: see *Rex* v. *Mulvihill* (1914), 19 B.C. 197.

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McAlpine, on the merits: A store was broken into and all the evidence is circumstantial. Reid who was an accomplice gave evidence. He was followed by his wife who gave evidence to corroborate his evidence. The learned judge should have given the jury the same warning as to her as in the case of an actual accomplice: see *Rex* v. *Payne* (1913), 8 Cr. App. R. 171; *Rex* v. *Willis* (1916), 12 Cr. App. R. 44; *Attorney-General* v. *Durnan,* [1934] I.R. 308; *Rex* v. *Galsky* (1936), 67 Can. C.C. 108; Phipson on Evidence, 7th Ed., 469; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 223; *Vigeant* v. *Regem,* [1930] S.C.R. 396; *Rex* v. *Parker* (1924), 18 Cr. App. R. 103; *Rex* v. *Phillips* (1924), *ib.* 115; *Rex* v. *Ellerton* (1927), 49 Can. C.C. 94; *Rex* v. *Susanbaum* (1914), 14 Cr. App. R. 1; *Rex* v. *Beauchesne* (1933), 60 Can. C.C. 25, at p. 31.

Bull: Irrespective of the wife's evidence there is ample evidence corroborating the evidence of Reid. The case of *Attorney-General* v. *Durnan,* [1934] I.R. 308, does not apply.

McAlpine, replied.

Cur. adv. vult.

30th June, 1942.

MCDONALD, C.J.B.C.: The appellant was convicted by a jury, sitting with SIDNEY SMITH, J. of breaking and entering a shop and stealing a sum exceeding $378.

The appeal falls into two parts, and we have before us two appeal books. The first involves the objection that the learned judge refused defendant's counsel a postponement, which was asked for (though not for any definite period), upon the ground that on the morning of the trial Crown counsel had notified defence counsel of his intention to call two witnesses who had not been called at the preliminary hearing. These witnesses were Elgin Reid and Miss Turnbull, and the notice set forth the evidence which they were expected to give.

In my opinion the propriety of the learned judge's exercise of discretion is not a question of law, and is not reviewable by this Court. The matter I think is concluded by the decision in *Mulvihill* v. *Regem* (1914), 49 S.C.R. 587. At the conclusion of the argument of appellant's counsel on this question I so expressed myself. My colleagues Mr. Justice O'HALLORAN and Mr. Justice

FISHER wished further time to consider. This made it necessary to proceed to hear the appeal *in toto*. I have now re-read the above decision, and if I can understand the English language the appellant cannot escape from its effect. I am now prepared to go further, and to hold after a careful examination of the record of the proceedings on the application to postpone, that even had I the right to review the learned judge's decision, I should hold that his decision was right. The learned judge did not treat the application arbitrarily or lightly, but considered it discreetly, and with due regard to the principles of law and justice.

I must now proceed to deal with what may be called the main appeal. Only one question of importance arises on the main appeal, and that relates to the learned judge's charge upon the question of accomplices and corroboration. In order to appreciate just what we are considering, it is necessary to consider a question of law and then to examine with some particularity the evidence in this case.

The point of law arises out of the decision in *Attorney-General* v. *Durnan,* [1934] I.R. 308. In that case Farnan, an accomplice in the conspiracy charged, pleaded guilty, and gave evidence for the prosecution. His wife also gave evidence to corroborate Farnan's evidence. The question as put in the statement of the facts of the case was whether the judge should have given the same warning as to her as in the case of an actual accomplice. In the judgment of Murnaghan, J., however, the question was put more clearly and it was this: The principal evidence against the appellant being that of Farnan, was it necessary when the evidence of Mrs. Farnan was brought forward to corroborate the evidence of her husband, to give the jury practically the same warning as that which would have been given in the case of an accomplice? It is important I think to note that the evidence given by Mrs. Farnan was the only evidence offered to corroborate that of her husband, an accomplice. The learned judge examined the authorities and the Court ordered a new trial for the reason that the usual warning had not been given with regard to Mrs. Farnan's evidence. The principle on which the decision is based seems to be well established, but the decision is applicable only to a case where the facts are similar. In *Durnan's* case the prob-

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McDonald, C.J.B.C.

lem was put to the jury as if the only corroboration present in the evidence against Durnan was that of Mrs. Farnan. The usual warning not having been given as to Mrs. Farnan and there being no other corroborative evidence, it was necessary to direct a new trial.

Now let us examine the facts in the present case. Sometime during the evening of January 24th, 1942, a Safeway Store in Vancouver was entered through a skylight; the safe in the store was moved from one end to the other and then blown open and a large sum of money stolen. The person who moved the safe used for that purpose certain blue-enamelled broomhandles which he sawed from their brushes to make rollers on which to roll the safe. The robbery was discovered by a police officer about 12.25 a.m. of January 25th. Sometime shortly after 1 a.m. of January 25th we find the appellant along with the said Elgin Reid at the apartment of one Alice Anderson and a little later, on a telephone call from the appellant, one Flora Turnbull arrived. To state the matter briefly, after the appellant and others were taken into custody early in the morning of January 25th, certain of the money taken from that safe that night was found in the possession of Elgin Reid and of Flora Turnbull and was received by them from appellant; and Alice Anderson was found in possession of a ten-dollar bill hidden in her hair, and received by her from the appellant, though I do not understand that it is identified as coming from the safe. What the Crown considered another strong bit of evidence against the appellant was that a certain pair of trousers (Exhibit 7) belonging to Elgin Reid, were sworn by Reid to have been worn by the appellant when Reid met him at or about 1 a.m. on the 25th. A short time later two police officers found these same trousers in the appellant's car while it was parked on the street, and unoccupied. On examination by inspector Vance it was found that the left cuff of these trousers contained particles of sawdust which Vance states were identical in every characteristic with the sawdust which would be produced by sawing the handles off the brooms in the Safeway store.

The learned judge instructed the jury, as I think correctly, on the law relating to accomplices and the necessity of corroboration, and he left it to them to ascertain whether or not any of the

witnesses came under the definition which he gave. Without reviewing the whole of the evidence, I think the jury could very properly hold that Elgin Reid was an accomplice, and that it therefore became necessary to look for corroborative evidence implicating the appellant in the crime. I think they were quite right in holding, as they must have done, that the evidence which I have mentioned afforded corroboration of the very strongest kind, and that on that evidence the conviction was amply justified.

There remains only to consider the question of Mrs. Reid. It is common ground that she was not an accomplice. The only relevant evidence she gave was that early in the evening of January 24th, pursuant to a previous arrangement, the appellant came to her house and borrowed the pair of trousers above mentioned (Exhibit 7). That evidence was clearly admissible and it may well have been considered by the jury as corroborative of the evidence of Reid. But the matter does not end there; there was plenty of other evidence by way of corroboration, and we are not troubled with the question involved in *Allen* v. *Regem* (1911), 44 S.C.R. 331, where the Court was dealing with inadmissible evidence which might (not must) have influenced the jury.

In my opinion, for the reasons I have stated, we have no right to set aside this conviction, but even if I were wrong in that conclusion, I would hold that there was no substantial wrong or miscarriage of justice, and I would apply the provisions of section 1014, subsection 2 of the Criminal Code.

I would dismiss the appeal.

O'HALLORAN, J.A.: The appellant was convicted of breaking and entering. Two appeals were taken. The first relates to the learned judge's refusal to grant an adjournment of the trial. The second is founded on non-direction of the jury amounting to misdirection. The Court reserved judgment on the first appeal on the 19th of June, and immediately heard the second appeal and also reserved judgment upon it. In the absence of objection, I make no present comment upon the fact that different grounds of appeal were presented as separate appeals.

I find myself unable to join in the view of the majority (the

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learned Chief Justice and Mr. Justice Fisher), that no appeal lies from the learned judge's refusal to grant an adjournment of the trial. The majority view is founded on *Rex* v. *Mulvihill* (1914), 19 B.C. 197; 49 S.C.R. 587. The latter refused an application to extend the time for giving notice of appeal from this Court's decision. Those decisions are now accepted by the majority as concluding the matter against the appellant. But on examination it is found that section 1012 and the following sections of the Criminal Code at that time, gave no jurisdiction to entertain an appeal on any question reserved under section 1014 (as it then read) for the opinion of the Court of Appeal, unless it was a question of law.

In the *Mulvihill* case the trial judge under section 1014 had reserved several questions for the opinion of the Court of Appeal, one of which concerned the accused's right to a postponement of the trial. A majority of this Court held that in the circumstances there existing, postponement of the trial being a matter of discretion, it was not a question of law alone, and therefore could not be the subject-matter of a reserved or case stated under section 1014. Some of the judges in the Supreme Court of Canada expressed the same view. But apart from the fact we are not now concerned with the proper subject-matter of a reserved case, all that was changed by the 1923 amendments to the Criminal Code, chapter 41 of that year, which extended the appeal jurisdiction and changed the form of procedure. Section 1014 was then radically changed. The section 1014 which governed the *Mulvihill* decisions does not bear any resemblance to the present section 1014.

By subsection 1 (*b*) of section 1013 then enacted in its present form, an appeal lies

> with leave of the Court of Appeal, . . . , on any ground . . . which involves a question of fact alone or a question of mixed law and fact.

Vide also subsection 1 (*c*) of the same section. Unfortunately, the effect of the 1923 amendments upon the present force of the *Mulvihill* decisions, was not called to the Court's attention during the argument. For with deference, it seems obvious to me, the 1923 amendments deprived the *Mulvihill* decisions of any application whatever to the present appeal. Assuming refusal to grant adjournment of a trial is not a question of law, it cannot affect

the Court's jurisdiction to entertain the present appeal. For the notice of appeal gave notice of application for leave to appeal upon the specific question; and the Court heard the appeal according to our usual practice in such matters and thus exercised its appeal jurisdiction under the present section 1013, subsection 1 (*b*), which did not exist at the time of the *Mulvihill* decisions.

It follows therefore that the objections which prevailed in the *Mulvihill* decisions, do not now prevent an appeal to this Court on a ground which may not be a question of law. That being so, it need hardly be said that discretionary orders may be reviewed by an appellate Court. This latter question received extended consideration by the House of Lords in *Evans* v. *Bartlam* (1937), 106 L.J.K.B. 568, and in *Charles Osenton and Co.* v. *Johnston* (1941), 57 T.L.R. 515. Lord Wright's speech on the former occasion was described in the latter decision as an authoritative exposition of the applicable law. A quotation therefrom at p. 574 is now given:

> It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle.

I interrupt the quotation to observe it is emphasized that an appeal from a discretionary order does not fall into a separate category. Nor is it necessary to show the judge below acted on a wrong principle as the Court of Appeal in *Evans* v. *Bartlam* had thought it was. It is enough if the Court of Appeal is satisfied the decision was not justified on the facts, or that the circumstances do not justify the order. To continue the quotation from Lord Wright's speech:

> The Court must, if necessary, examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal.

If the refusal to adjourn the trial is to be regarded as a matter of discretion, nevertheless a new trial should be granted, for in my view at least, the circumstances did not justify the refusal

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and an injustice resulted to the appellant, in that his defence was prejudiced thereby.

But in my view the real question raised by counsel for the appellant, is not error or mistake in the exercise of discretion, but quite another thing, *viz.*, failure to exercise discretion. For so it must be described when the judge denies defence counsel the opportunity of consulting with the accused to obtain instructions counsel considers necessary in order to make a full answer and defence to the charge. That deprives the accused of a fair trial and in consequence it is a violation of an essential of justice. *Vide Rex* v. *Farrell* (1907), 12 Can. C.C. 524, at pp. 531-2 (Anglin, J., later C.J.), and two decisions of distinguished trial judges in our own Province, HUNTER, C.J.B.C., in *Rex* v. *Chow Chin* (1921), 29 B.C. 445, and MACDONALD, J. in *Rex* v. *Lee Sow* (1922), 31 B.C. 161.

At the opening of the trial Monday morning, counsel for the defence asked for an adjournment on the ground he had just received from counsel for the prosecution, extracts from evidence given in other trials by two prosecution witnesses who had not been called at the preliminary hearing. He said he was taken by surprise and could not go on until he had obtained from the Court reporter a transcript of the cross-examination of these witnesses. The learned judge over his protest, empanelled the jury and adjourned the case until 2.30 p.m. At 2.30 p.m. counsel for the defence renewed his application for an adjournment stating to the Court:

> I just ten minutes ago got the cross-examination I referred to this morning. Of course I haven't had time, not only to read it, but I have not had time to confer with my client, and I am not prepared to go on . . . and I have not yet received what I think I should a precis of the evidence that my learned friend intends to adduce from those witnesses. . . . I want an opportunity to prepare my defence.

It seemed to him the two prosecution witnesses were to be put forward as accomplices of the accused. In reply to the Court as to how he was prejudiced, counsel for the defence said to answer that fully would be to disclose his defence in advance, which he submitted he should not be asked to do. He said further, however, that the evidence of these witnesses would likely necessitate the calling of *alibi* evidence, which was not necessary

before. That in itself would clearly indicate the reasonableness of the application for an adjournment. Plainly the defence needed more time to obtain evidence in answer to that which would be given by the two alleged accomplices now brought forward by the prosecution for the first time. I would regard that as self-evident. These two witnesses were not merely additional witnesses, or brought forward to prove formal matters.

As accomplices their evidence would be basic and fundamental. The case for the prosecution would take on an entirely new aspect. What may have been a weak case would become a strong case. The answer of the defence sufficient as it may have been to the original case of the prosecution, might now be no answer at all, and opportunity was needed to prepare a new answer. However, no adjournment was allowed, and counsel for the defence felt it his duty to retire from the case. The trial then proceeded, the appellant being without counsel. One would think that at least a short adjournment to permit counsel to study the cross-examination evidence and consult with the accused, would have been granted as of course. Counsel would very likely then have been able to inform the Court of his considered position that same afternoon.

And if he could not proceed the next morning, and desired an adjournment for a day or two, I fail to see why it should not have been granted. It should have been plain to the learned judge as well as to prosecution counsel, that defence counsel had no real opportunity to consider his position, and that until he had, he could not say how long an adjournment was reasonably necessary. In the circumstances it should have been apparent, defence counsel was being prejudiced by forcing him on without giving him an opportunity to recast and plan his defence under the new conditions he had to meet. It seems also to have been overlooked that the cause of his predicament originated with the prosecution and not with the defence. The defence should not be made to suffer because the prosecution experienced delay in the preparation of its case.

Discretion is not discretion, if it is not exercised according to reason and justice, *vide Sharp* v. *Wakefield,* [1891] A.C. 172, at p. 179. A judge has not jurisdiction to deny full answer and

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defence. If he does so he cannot fall back upon discretion as an answer, for there can be no discretion if there is no jurisdiction. As said by Martin, J. who delivered the majority judgment in the Quebec Court of King's Bench in *Rex* v. *Prosko and Genousky* (1921), 40 Can. C.C. 109, at p. 112 on the question of discretion as it bears on the granting of separate trials:

> The question of separate trials of two or more accused . . . is largely, if not wholly, one of discretion for the trial judge, and ordinarily we should not interfere with that discretion, but where it is made to appear that such joinder operates a manifest prejudice and injustice towards one of the accused, I think such case is taken out of the realm governed by discretion, and the right to a fair trial with full defence untrammelled by prejudice exists, and that by way of a separate trial, and that we not only may but must say so.

As to the first portion of this quotation, it is well to note that decision was rendered prior to the 1923 amendments to the Criminal Code previously referred to. It is equally significant that the latter part of the quotation was written before the 1923 amendments and after the *Mulvihill* decisions. In the language of Lord Birkenhead, L.C. in *Dunlop Rubber Company* v. *Dunlop,* [1921] 1 A.C. 367, at p. 373, the complained of refusal was not a defensible exercise of discretion. It was not in reality a mistake in the exercise of discretion, but in truth a failure to exercise discretion at all. As such it must be regarded as a violation of an essential of justice, which this Court not only may, but must remedy in the proper exercise of its jurisdiction.

Although a trial judge has wide powers of granting and refusing adjournments under section 901, subsection 2 of the Code, he is given no discretion to deny full answer and defence. As Lord Wright said in *Evans* v. *Bartlam, supra,* at p. 575:

> Discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitæ* once the facts are ascertained.

Viewed realistically and not mechanically, the application for an adjournment to enable defence counsel to consult his client in the dock, for the purpose of recasting and planning the defence anew to meet the evidence of alleged accomplices brought forward then for the first time, should have been granted *ex debito justitiæ.* So regarded it could not be a question of discretion at all.

I also think it appropriate to repeat once again what Lord Hewart, C.J. said in *Rex* v. *Sussex Justices* (1923), 93 L.J.K.B. 129, at p. 131:

> There is no doubt that it is not merely of some importance, but of fundamental importance, that justice should not only be done but manifestly and undoubtedly seem to be done.

I have adopted Avory, J.'s correction of the text in *Rex* v. *Essex Justices* (1927), 96 L.J.K.B. 530, at p. 532. The essence of a criminal trial is to see that justice is done. It is not the function of counsel for the prosecution to spring surprises on the defence at the last moment, and then to object to the defence seeking time to meet this new attack. And *vide Rex* v. *Flannagan and Higgins* (1884), 15 Cox, C.C. 403, at pp. 406-7.

From what has been said it follows: (1)Refusal to adjourn a trial is not necessarily a matter of discretion; for example, if that refusal deprives the accused of a fair trial it cannot be an exercise of discretion; (2) a matter of discretion may involve a question of law, for example if its exercise proceeded on the application of a wrong principle. I read the *Mulvihill* decisions in the light of circumstances there present and the statute law then existing, and therefore not in conflict with what is said herein, even should such decisions have any remote bearing upon any aspect of the subject-matter of this judgment.

Counsel for the defence was not given the opportunity of even a short adjournment to consult his client. In the *Mulvihill* case defence counsel sought a postponement until the next Assize, a delay of six or seven months. That was vigorously opposed by prosecution counsel as unnecessary delay, and because material witnesses might not then be available. The learned trial judge in that case did, however, express his willingness to adjourn for two weeks, but defence counsel maintained that was insufficient. In the *Mulvihill* case there was no refusal to adjourn at all, as regrettably I must so regard what took place here in the afternoon as previously described. In the circumstances there should be a new trial and the appeal allowed accordingly.

As the majority of the Court take a different view, it is necessary that I also consider what was described as the second appeal. In that respect, I do not find it necessary for me to say more than that I have had the advantage of reading the judgment of

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my brother FISHER and concur in his conclusions and supporting reasons in so far as they relate to the second appeal, or perhaps I should say what should have been presented and argued as the second branch of one appeal.

In the result I would therefore allow the appeal and direct a new trial accordingly.

FISHER, J.A.: In this matter it should be noted that the conviction is not one for receiving or retaining but for breaking and entering a shop and stealing money therein. It should also be noted that it is or must be common ground that the conviction rests solely upon circumstantial evidence and that at least one of the witnesses, *viz.*, Elgin Stuart Reid, was an accomplice. Under such circumstances it would seem to me necessary, upon the authorities hereinafter mentioned, first to consider and determine whether this is a case where the wife of an accomplice was brought forward to corroborate the evidence of her husband.

The prosecution adduced evidence to show that trousers belonging to the said Elgin Stuart Reid had been found in the car of the appellant about 2 o'clock in the early morning of the 25th of January last, but other evidence of the prosecution disclosed that such car had been in the possession of the said Reid for some four or five hours before and that about 4 o'clock of the same morning a parcel containing some of the stolen money was found on the person of Reid underneath his work shirt at the back. The prosecution also adduced evidence to show that in the left cuff of the said trousers were found fragments of wood and sawdust coloured with blue enamel paint, the wood and the paint being similar to the wood and paint of three blue broomhandles found "sawed off" on the premises that had been broken into and entered by someone on the night of January 24th, 1942. At the trial the said Elgin Stuart Reid admitted that the said trousers were his but also stated that he saw the appellant about 1 o'clock in the morning of January 25th "just about in front of the Martinique," and that at that time the appellant had on the said trousers and two or three hours later gave him the said parcel just prior to their leaving a place known as Miss Anderson's place. Elgin Stuart Reid was apparently unable to give any

evidence as to how the appellant had got his trousers but his wife Eva Reid was called and gave evidence that she had loaned the appellant the trousers on the said 24th of January about 7 o'clock in the evening. There can be no doubt that under the circumstances the evidence given by the wife was very important evidence for the consideration of the jury and I am satisfied and have no hesitation in concluding, after careful consideration of all the evidence, that the said Eva Reid was brought forward to corroborate the evidence of her husband, whose evidence required corroboration in some material particular implicating the accused according to what has been so long a rule of practice at common law that it has become virtually equivalent to a rule of law. See *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81, especially at pp. 87-91, *per* Lord Reading, C.J.

I therefore come now to consider the authorities cited to support the submission of counsel for the appellant that under the circumstances the learned trial judge erred in his charge to the jury. Counsel for the appellant cited *Rex* v. *Payne* (1913), 8 Cr. App. R. 171; *Rex* v. *Willis* (1916), 12 Cr. App. R. 44; *Attorney-General* v. *Durnan*, [1934] I.R. 308 and *Rex* v. *Galsky* (1936), 67 Can. C.C. 108. In the *Durnan* case the head-note reads as follows:

> Where at a criminal trial the wife of an accomplice gives evidence to corroborate the evidence of her husband, it is necessary to warn the jury as to the nature of her evidence as in the case of an accomplice; and, accordingly, where the wife of an accomplice had given such evidence and no such warning had been given, a conviction for conspiracy to steal and for receiving was set aside, and a new trial directed.
>
> *R.* v. *Willis*, [1916] 1 K.B. 933, distinguished.

At p. 310 Murnaghan, J., delivering the judgment of the Court said as follows:

> The rule was not adverted to that, under the long settled authorities, where the wife of an accomplice is brought forward to corroborate the evidence of her husband it is necessary to give the jury practically the same warning as that which would have been given in the case of an accomplice.

In the present case the learned trial judge did give the usual warning as to the evidence of an accomplice, but did not give the same or any warning as to the evidence of the wife of an accomplice. With all deference I have to say that the rule referred to in the *Durnan* case should have been applied and, as the warning required by such rule was not given, I would allow the appeal

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and order a new trial. I cannot say under all the circumstances of this case that the jury if properly directed must inevitably have found the appellant guilty.

Before parting with this case I would like to make a short reference to another submission made by counsel on behalf of the appellant to the effect that the trial judge erred in refusing to grant an adjournment of the trial. With reference to this submission I have only to say that, having carefully considered the judgments given in the case of *Rex* v. *Mulvihill* as reported in (1914), 26 W.L.R. 955 and 49 S.C.R. 587, I have come to the conclusion that the learned trial judge having, in the exercise of judicial discretion, refused an adjournment, there can be no review of his decision by this Court and the question raised in connection with the adjournment does not constitute a question of law within section 1014 of the Criminal Code. I have to add that I have not overlooked the fact that said section is not the same now as when the *Mulvihill* case was decided.

Appeal allowed; new trial ordered, McDonald, C.J.B.C. dissenting.

S. C.
In Chambers
1942
June 30;
July 3.

CONSOLIDATED TUNGSTEN TIN MINES LIMITED v. MACCULLOCH AND THE LONDON & WESTERN TRUSTS COMPANY LIMITED.

Costs—Taxation—Trust company bare trustee—No interest in matters in issue—Action against trust company dismissed with costs—Taxed under column 2 of Appendix N—Appeal dismissed.

In an action for a mandatory injunction to compel the defendants to transfer certain property and mining claims to the plaintiff, the defendant Trust Company pleaded it was a bare trustee and had no interest in the matters at issue. The action against the Trust Company was dismissed with costs. The registrar taxed the costs under column 2 of Appendix N. On review at the instance of the Trust Company on the ground that the amount involved in the action exceeded $25,000:—

Held, that the registrar properly taxed the costs under column 2 as there was no "amount involved" as between the plaintiff and the Trust Company.

REVIEW of taxation of costs of the defendant, The London & Western Trusts Company Limited. The action was for a mandatory injunction, *inter alia,* to compel the defendants to transfer to the plaintiff company certain premises and certain mineral claims alleged for certain reasons to form part of the mining property in question. The Trust Company pleaded that it was a bare trustee and had no interest in any of the matters in issue. The action against the Trust Company was dismissed with costs. The registrar taxed its costs under column 2 of Appendix N. Heard by ROBERTSON, J. in Chambers at Victoria on the 30th of June, 1942.

McAlpine, K.C., for defendant company.
F. C. Elliott, for plaintiff.

Cur. adv. vult.

3rd July, 1942.

ROBERTSON, J.: The facts in this case are set out in my reasons for judgment dated the 11th of February, 1942. The Trust Company pleaded that it was a bare trustee and had no interest in any of the matters in issue and had been and was at all times ready and willing to abide by any judgment made by the Court.

The action was dismissed as against the Trust Company with costs. The registrar has taxed its bill of costs under column 2 of Appendix N. The Trust Company submits that its costs should have been taxed under column 4 as the "amount involved" in the action was over $25,000. Assuming this to be the case, this was the amount involved as between the plaintiff and the defendant MacCulloch.

In my opinion there was no "amount involved" as between the plaintiff and the Trust Company. I think the registrar was right. The appeal against his taxation is dismissed.

Appeal dismissed.

Apld
R. v. O'Leary
[1943] 3 W.W.R.

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Criminal law — Receiving stolen property — Explanation of possession— Judgment—Report—Criminal Code, Sec. 399.

Apld
R. v. Hoxe
92 C.C.C. 52.

The accused was arrested, and on being searched a parcel was found inside his shirt in which money was found that was subsequently identified as being part of the money that was stolen from a blown safe in a store previously in the same evening. On the hearing of a charge of retaining goods knowing the same to have been stolen, he swore that he had received the parcel from a friend on the understanding that it was to be returned the next day, that he did not know what the parcel contained, and did not know that the contents were stolen. The trial judge in giving judgment said "Giving the accused the benefit of every reasonable doubt, I do not believe his story. I find the accused guilty." In his report he said "I gave the accused the benefit of every doubt. I found his story utterly improbable and found him guilty."

Apld
R. v. Toulany
16 C.C.C. (2d) 208
(N.S.S.C. App.)

Held, on appeal, affirming the decision of BOYD, Co. J. (O'HALLORAN, J.A. dissenting), that the report when read with the judgment, as it must be, the judge was properly directing himself. He was saying in effect that the Crown had discharged the *onus* of satisfying him beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

APPEAL by accused from his conviction by BOYD, Co. J. of the 18th of March, 1942, on a charge of unlawfully retaining in his possession stolen goods, knowing the same to have been stolen. About 7 o'clock in the evening of January 24th, 1942, the accused borrowed the car of one Munovish, and with a friend, one Stedman, they went to the Canadian Legion on 49th Street, where they stayed for some time. On his arrival home about 12 o'clock, his wife told him that Munovish had been there and he wanted his car, telling her to have it left at his place on Harwood Street. Accused and Stedman then took the car away, and on finding Munovish, all three went to a bootlegging place owned by one Miss Anderson, where they stayed until 4 o'clock in the morning of the 25th of January. While there Munovish handed accused a parcel telling him to keep it until the next day, when he would get it from him. Accused put the parcel inside his shirt. On the night of the 24th of January, 1942, the Safeway Store at the corner of Knight Road and Kingsway was broken into, a safe was blown, and over $900 was stolen. On the accused with Munovish, Stedman and a woman named

Turnbull leaving the Anderson place in the car, they were stopped by the police at the corner of Seymour and Smythe Streets and taken to the police station. The accused was searched and the parcel given him by Munovish was found. On examination of the parcel it contained over $300 in bills, and was subsequently found to be part of the money taken from the safe in the Safeway Store.

The appeal was argued at Vancouver on the 24th of June, 1942, before McDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

Gordon M. Grant, for appellant: There is a distinction between what the learned judge said in delivering judgment from his report under section 1020 of the Criminal Code. He referred to *Rex* v. *Parker* (1941), 57 B.C. 117, at p. 121. He misdirected himself on the question of the appellant's explanation.

W. S. Owen, for the Crown, referred to *Rex* v. *Ketteringham, Senr.* (1926), 19 Cr. App. R. 159.

Cur. adv. vult.

30th June, 1942.

McDONALD, C.J.B.C.: I have examined carefully the record and the learned judge's report, and I am satisfied that we have no right to interfere. I would dismiss the appeal.

As to the appeal from sentence, in view of what was said by the police as to appellant's previous good reputation, and by Crown counsel before us, I think that the ends of justice would be met if we reduced the sentence to one year in Oakalla gaol.

O'HALLORAN, J.A. (DISSENTING): In his judgment the learned judge said:

> Giving the accused the benefit of every reasonable doubt, I do not believe his story.

In his report under section 1020 he said:

> I gave the accused the benefit of every doubt. I found his story utterly improbable and found him guilty.

The decided cases indicate a deep distinction between these two findings.

In *Rex* v. *Searle,* [1929] 1 W.W.R. 491, the Appellate Division of Alberta quashed the conviction when the magistrate in his report said of the accused's explanation "I have no hesitation in saying [it] was false." That decision was followed by this

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Court in *Rex* v. *Davis* (1940), 55 B.C. 552, where the magistrate said in his report "I did not believe his (the accused's) explanation." Those decisions apply the principle that if the explanation given is one which may reasonably be true, the accused is entitled to an acquittal, even though the judge does not himself believe it—*vide Rex* v. *Koriney*, [1931] 2 W.W.R. 566, and *Richler* v. *Regem*, [1939] S.C.R. 101.

If "utterly improbable" excludes any reasonable probability of truth as I think it must, then the learned judge in his report to this Court, now founds the conviction upon a different ground than he gave in his judgment. Whatever may be the legal force of a report under section 1020, a conviction must be regarded as unsatisfactory and doubtful, when it can only be supported by a finding in a subsequent report, at variance with the finding in the judgment itself at the time of the conviction. If this were not so, then an *ex facie* misdirection in the reasons for judgment and fatal to the conviction, could be cured after notice of appeal is given, by the report required under section 1020. It is obvious, I think, that section 1020 was never intended to have that effect.

In *Rex* v. *Rasumssen*, [1935] 1 D.L.R. 97, one of the grounds upon which a new trial was granted by the Appeal Division of New Brunswick arose out of the variance between the judgment and the report. Barry, C.J.K.B. said at p. 112:

> Both statements cannot stand. One or the other has to go by the board, and the question is, which one? The only way out of the difficulty that I can see is to send the case to a new trial.

That seems to be the best course in the present circumstances. I would therefore direct a new trial and allow the appeal accordingly.

FISHER, J.: In this matter I have first to say that the only submission of counsel on behalf of the appellant that seems to be worthy of consideration, if I may say so, is that based on the contention that the learned trial judge misdirected himself on the question of the appellant's explanation—*Rex* v. *Kettering-ham, Senr.* (1926), 19 Cr. App. R. 159 and *Rex* v. *Parker* (1941), 57 B.C. 117 were relied on. In addition to these cases reference might be made to the case of *Rex* v. *Davis* (1940), 55 B.C. 552 where my brother SLOAN in delivering the judgment of

the Court on an appeal where the accused had been convicted for retaining stolen property knowing the same to have been stolen refers to a great many of the authorities and then goes on as follows at pp. 556-7:

Fortunately the Supreme Court of Canada has recently interpreted *Schama's* case [(1914), 11 Cr. App. R. 45] in *Richler* v. *Regem*, [1939] 4 D.L.R. 281. Sir Lyman Duff, C.J., in delivering his judgment in which Rinfret, Kerwin and Hudson, JJ. concurred, said (at p. 282):

"The proper direction on the trial of an accused charged under s. 399 of the Cr. Code with receiving or retaining in his possession stolen goods, knowing them to be stolen, is explained in three judgments to which our attention was called by Mr. Gendron."

The learned Chief Justice then reproduces the "somewhat involved language" of Lord Reading in *Schama's* case, *supra*, notes that it was applied in Alberta in *Rex* v. *Searle*, *supra*, [(1929), 51 Can. C.C. 128] quotes the observations of Avory, J. in *Rex* v. *Ketteringham*, *Senr.* (1926), 19 Cr. App. R. 159, at 160 and then sums up the effect of these judgments in the following passage:

"The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the *onus* of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty."

It is, I think, clear that the learned deputy magistrate did not apply the test deemed proper by the quoted Canadian authorities. To find the explanatory testimony of the accused in this class of case unworthy of belief apparently is not enough to convict. . . .

In the present case the learned trial judge at the time of giving judgment said:

Giving the accused the benefit of every reasonable doubt, I do not believe his story. I find the accused guilty.

In his report he said:

I gave the accused the benefit of every doubt. I found his story utterly improbable and found him guilty.

I think that, if it is not clear from his judgment, it is clear from the report when read with the judgment as it must be, that the judge was properly directing himself. I think he was saying in effect that he found the explanation of the accused in this case not only unworthy of belief but also one that could not reasonably be true. In other words he was saying in effect that the Crown had discharged the *onus* of satisfying him beyond a reasonable doubt that the explanation of the accused could not be accepted

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as a reasonable one and that he was guilty. See *Richler* v. *Regem*, *supra*, at p. 282.

My conclusion on the whole matter is that the appeal should be dismissed but I agree with the Chief Justice that the sentence should be reduced to one year's imprisonment in Oakalla.

Appeal dismissed; sentence reduced.

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May 19; *June* 30.

MAINWARING v. MAINWARING. (No. 3).

Husband and wife — Desertion by husband—Action for alimony — Legal cruelty by wife—Desertion not without cause—Action dismissed on appeal—Application for compassionate allowance—Unable to earn living owing to ill health.

The plaintiff succeeded on the trial in an action for alimony. On appeal by the defendant the appeal was allowed and the action dismissed. Before judgment was entered the plaintiff applied to the Court of Appeal for a compassionate allowance on the ground that her health disabled her from earning her living and that her son, aged seventeen, was unable to find work.

Held, O'HALLORAN, J.A. dissenting, that the Court has power to make a compassionate allowance to a guilty wife. But in every such case the allowance is made as a term of or in consequence of the husband's obtaining a decree for divorce, judicial separation or nullity. An allowance may be made on the wife's petition but only on an ancillary petition in the original cause begun by the husband, and not an independent proceeding begun by the wife. There is no case in which without the husband's having obtained a decree, a guilty wife has been allowed to take the aggressive and obtain a compassionate allowance against him, or where a wife having failed to obtain a divorce, judicial separation, restitution of conjugal rights or nullity, has still been awarded alimony in that cause on any ground whatever. The Court has no equitable powers that the respondent can invoke in proceedings such as these, and the application is dismissed.

APPLICATION by plaintiff (respondent) to the Court of Appeal for a compassionate allowance from the defendant. Judgment had been given allowing the defendant's appeal, but this application was made before the judgment was entered. The facts are set out in the reasons for judgment. Heard at Van-

couver on the 19th of May, 1942, by McDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

A. M. Whiteside, K.C., for the application: The plaintiff is unable to support herself. In such circumstances, notwithstanding the judgment just delivered, she is entitled to some provision being made for her maintenance. In any case she is entitled to costs: see *Goodden* v. *Goodden,* [1891] P. 395; *Prichard* v. *Prichard* (1864), 3 Sw. & Tr. 523; *Forth* v. *Forth* (1867), 36 L.J. P. & M. 122; *Vernon* v. *Vernon* (1914), 6 W.W.R. 1047; *Flower* v. *Flower* (1873), L.R. 3 P. & D. 132; *Davey* v. *Davey* (1923), 32 B.C. 267; *Bourgoin* v. *Bourgoin* (1930), 42 B.C. 349; *Hornby* v. *Hornby,* [1929] 4 D.L.R. 406, at p. 407; *Cromarty* v. *Cromarty* (1917), 38 O.L.R. 481.

Cunliffe, contra: The issue is being confused here. Cruelty is a bar to an action for alimony: see *Leib* v. *Leib* (1908), 7 W.L.R. 824. There is no exercise of the Ecclesiastical Courts. On the question of costs it is attempted to bring in the divorce jurisdiction which does not apply here. In an action for alimony those rules do not apply: see *Hazelton* v. *Hazelton* (1937), 52 B.C. 401, at p. 403.

Cur. adv. vult.

30th June, 1942.

McDONALD, C.J.B.C.: Since we gave judgment allowing this appeal and before the judgment was entered, respondent's counsel applied to us to make her a compassionate allowance, even though we had held she was entitled to no alimony as of right.

This application was based on respondent's affidavit stating that her health disabled her from earning her living, and that her son, aged seventeen, was unable to find work. That would seem to require explanation, in view of the present state of the labour market; but I shall assume that it is true. We still have to see that we have power to make such an order as is asked for.

There can be no doubt that the power of any Court in this Province to grant alimony must be based on statute, so that if we have any power in these proceedings, it must be based either on the Matrimonial Causes Act of 1857 or Order LXXA of the Supreme Court Rules.

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Undoubtedly a number of decisions of which *Ashcroft* v. *Ashcroft,* [1902] P. 270 may be taken as typical, recognize the Court's power to make a compassionate allowance even to a guilty wife. But I think it will be found that in every such case the allowance was made as a term of or in consequence of the husband's obtaining a decree for divorce, judicial separation or nullity. It is true that as a matter of practice the allowance may be made on the wife's petition, but this is only an ancillary petition in the original cause, begun by the husband, and not an independent proceeding begun by the wife.

I do not think any case can be found in which without the husband's having obtained a decree, a guilty wife has been allowed to take the aggressive and obtain a compassionate allowance against him. I do not think any instance can be found where a wife, having failed to obtain a divorce, judicial separation, restitution of conjugal rights or nullity, has still been awarded alimony in that cause, on any ground whatever.

The case which has perhaps gone farthest is *Wickins* v. *Wickins (No. 2),* [1918] P. 282. There the wife obtained a decree for restitution of conjugal rights and periodic payments. Later the Court suspended her right to these payments on the ground of her subsequent adultery, but said that this suspension was not final, and that the wife could later apply to restore the payments, in whole or in part, on showing that she had since behaved herself. If, however, she had applied and the Court had restored her payments, I do not think that would be an exception to the principle I have mentioned: for it would be merely a continuation of the original proceedings, and the restoration of an order obtained by her when she was guiltless, against a guilty husband.

Section 17 of our Act which corresponds with section 32 of the English Act of 1857, on which *Ashcroft* v. *Ashcroft, supra,* and similar cases were decided, only provides for alimony on the making of a "decree." We have held that the wife would not be entitled to a decree, and the husband has asked for none. It is true that section 6 allows us to give relief where the Ecclesiastical Courts would have done so, but I do not think any case can be cited to show that those Courts would have awarded alimony under the circumstances that exist here.

Accordingly, if we were now exercising divorce jurisdiction, I think we could make no allowance. Under Order LXXA, I think the respondent's position is even weaker. Under that order she can only sue where she is entitled to alimony by the law of England or this Province. That is not apt language to give her the right to sue for a compassionate allowance, even if we could grant it under the divorce jurisdiction.

In my view, the Court has no equitable powers that the respondent can invoke in proceedings such as these.

It is unnecessary to consider what remedy, if any, the respondent might have in a different type of proceeding. It is sufficient to say that this appeal is allowed and the action dismissed, and judgment should be entered accordingly.

SLOAN, J.A.: I would refuse the application.

O'HALLORAN, J.A.: The point for decision concerns the husband's legal obligation to support his wife, in the peculiar circumstances which have arisen.

The parties were married in 1929, the husband then adopting the wife's five-year-old son. They quarrelled so much the husband left her four years later. In 1935 he began contributing various sums toward her support. From June, 1939, onward he paid her $40 per month. Much negotiation by correspondence took place between the parties and their respective solicitors regarding the amount the husband should contribute. In 1940 the husband then earning $170 per month for ten months in the year, offered to pay her $60 per month for ten months or for the number of months in the year he would actually work, if she would sign a separation agreement with that provision. But he refused to pay her more than $40 per month if she would not sign that agreement. She agreed to sign the separation agreement but demanded $60 per month for twelve months in the year (*vide* Exhibits 12 through 21).

The negotiations broke down at that point, and the wife issued a writ for alimony under Order LXXA of the Supreme Court Rules. The learned trial judge held the husband had deserted her without cause, and awarded her $60 per month alimony. The husband appealed. This Court (MCDONALD, C.J.B.C.

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SLOAN and O'HALLORAN, JJ.A.) considered that the evidence disclosed the husband's health had been undermined by persistent and deliberately unreasonable conduct on her part amounting to cruelty within the meaning of *Russell* v. *Russell,* [1897] A.C. 395. Concluding it was her own fault the husband was forced to leave her, we reached the view that she had not presented a case which entitled her to alimony. We delivered judgment accordingly on 3rd March, 1942: *vide Mainwaring* v. *Mainwaring,* [57 B.C. 390]; [1942] 1 W.W.R. 728.

On 13th March and before the entry of our judgment, counsel for the wife moved that the appellant husband "do make provision for the maintenance of the respondent and of John Roy Stewart Mainwaring, the son of the appellant and the respondent." That was in substantial effect a motion to reopen the hearing of the appeal, and was so treated by the Court. We adjourned the motion over to the Victoria Sittings on 14th April following, and threw out the suggestion the parties should try to reach an agreement. The adjourned motion was brought on and the appeal reargued in part before us at Vancouver on 19th May last when judgment was reserved. Counsel for the husband again submitted the Court had no jurisdiction to make an order for alimony under the given circumstances.

In this Province, under Order LXXA of the Supreme Court Rules, alimony may be recovered in an action by a wife who, *inter alia,* "would be entitled to alimony by the law of England or of this Province." In England there is no action for alimony *solus.* But it may be granted incidental to or consequential to proceedings for divorce or judicial separation. In this Province, however, a wife has the right to bring an action for alimony quite apart from divorce or judicial separation proceedings, and the Court has jurisdiction to grant alimony in such a case, *vide Rousseau* v. *Rousseau,* [1920] 3 W.W.R. 384, MARTIN, J.A. (later C.J.B.C.) at p. 387. The same jurisdiction exists in Alberta and *vide Lee* v. *Lee* (1920), 54 D.L.R. 608, where the subject was reviewed by Harvey, C.J. That distinction is of governing importance in the decision of the question now before us.

As I regard it, with respect, the objection to jurisdiction

must fail, as it failed in our prior judgment now reopened, *vide Rousseau* v. *Rousseau, supra.* In hearing the appeal as originally presented we asserted that jurisdiction, but declined to grant the wife alimony on the facts then before the Court, because we thought the wife had disentitled herself to the exercise of our jurisdiction in her favour. Any question of the statutory authority of Order LXXA was removed at the last Session of the Provincial Legislature—*vide Mainwaring* v. *Mainwaring, supra,* at p. 736.

In my view, the new facts presented on the reopening of the appeal, now call for the exercise of that jurisdiction in the wife's favour. These new facts demand the application of quite a different principle from the one we applied to the factual position which emerged originally. For it now appears the wife is in ill health and unable to support herself and child, and is otherwise without means. As our prior judgment had not been entered before the motion to reopen was heard, the Court is at liberty to review its judgment given on 3rd March last, and *vide Kimpton* v. *McKay* (1895), 4 B.C. 196, at p. 204, and *Rithet Consolidated Ltd.* v. *Weight* (1932), 46 B.C. 345, at pp. 347-8.

On the reopening of the appeal an affidavit of the wife sworn 12th March, 1942, was presented, reading as follows:

1. That since the 29th day of July, 1941, the date of the judgment of the Honourable Mr. Justice Fisher, I have used every effort in my power to obtain employment and have not been able to secure any steady employment.

2. That I did succeed in obtaining temporary employment at the Devon Cafe, 675 Granville Street, Vancouver, B.C. for a short time but was dismissed when the staff was reduced in August, 1941.

3. That since that time I have assiduously sought for employment and have been unable to obtain it except on some occasions I have been able to obtain a job as an extra waitress at the Hotel Vancouver during banquets and luncheons and I have been otherwise wholly dependent upon the money paid me for maintenance by my husband.

4. That I am not in good health and am unable to undertake any hard work involving long hours.

5. That last Fall my son left school to obtain employment and was employed for a short time at the Boeing Company's works and attended night school but he is now out of employment and dependent upon me.

6. That I verily believe that unless I receive money for the maintenance of myself and my son that I shall be forced to apply for relief to the Relief Department at the city of Vancouver.

The averments in that affidavit were not answered or cross-

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examined upon, although they were before the husband's solicitor for more than two months from the 13th of March, when the motion was first made, until 19th May when it was finally heard. We must therefore regard them as unchallenged. In effect the wife now says:

> The Court has held my husband left me because of my cruelty to him. But I am in bad health, am unable to support myself and child and if the man to whom I am still legally married does not support me I shall be forced to apply to the city of Vancouver Relief Department for relief.

In these circumstances with deference, I have no doubt of our duty to exercise our jurisdiction in her favour and order the husband to contribute to her support. In my view, it should be done *ex debito justitiæ*.

It is a cardinal principle of English law that a husband is bound to support his wife. Marriage is not a mere civil contract but of its essence creates certain inherent obligations, and *vide Jones* v. *Newtown and Llanidloes Guardians,* [1920] 3 K.B. 381, Shearman, J. at p. 385. In *Iles* v. *Iles* (1931), 47 T.L.R. 396, Lord Merrivale described the wife's right to her husband's support as independent of any specific contract and antecedent to any statutory provisions. That applies even in judicial separation proceedings, where its origin is ascribed to the jurisdiction inherited from the old Ecclesiastical Courts. The Court of Appeal in England so held in *Goodden* v. *Goodden,* [1892] P. 1.

The right of the wife to her husband's support is therefore recognized by the law of England as independent of statute. But although that is so, no form of action existed by which she could enforce that right *solus,* such as is provided in this Province by Order LXXA, *supra.* In England the wife had two remedies at least for enforcing that ancient right. She could pledge the husband's credit for necessaries, or she could obtain support as an incident to judicial separation proceedings. But it is essential for clear thinking that the remedies given by law to enforce that ancient right be not confused with the right itself. As Turner, L.J. said in *Jenner* v. *Morris* (1861), 30 L.J. Ch. 361, at p. 364, cases sometimes occur in which the principles by which the ordinary Courts are guided in their administration of justice, give a right, but from accident or defect in the forms of the law, a complete remedy is not available. That defect in the form of the law was cured in this Province by Order LXXA.

Examination of the decided cases leads me to the conclusion that the basis for either remedy was the husband's legal obligation in a proper case to support his wife according to his estate and condition in life; *vide,* among others, *Read* v. *Legard* (1851), 6 Ex. 636, Alderson, B. at p. 642; *Goodden* v. *Goodden, supra; Johnston* v. *Sumner* (1858), 3 H. & N. 261, and *Baseley* v. *Forder* (1868), 37 L.J.Q.B. 237, at p. 241. The common origin of the two remedies was aptly illustrated in *Hodgkinson* v. *Fletcher* (1814), 4 Camp. 70; 171 E.R. 23. The wife had pledged her husband's credit. The tradesman sued the husband who answered he had given his wife sufficient allowance. Lord Ellenborough said:

> I hold that the defendant's liability depends upon the sufficiency of the allowance he has made to his wife. . . . But the allowance must be sufficient according to the degree and circumstances of the husband; . . . To destroy the credit she carries with her for suitable necessaries, he [the husband] must prove he has paid her an adequate allowance.

Indicative of the recognition of the wife's ancient right is *Reg.* v. *Plummer* (1844), 1 Car. & K. 600; 174 E.R. 954. It was there conceded that if a husband and wife are separated by consent and he grants her a stipulated allowance which is paid regularly, he is not bound to supply her with shelter. Yet it was held that if he knows or is informed she is without shelter and refuses to provide her with it, in consequence of which her death ensues, then if it is shown that her death was caused or accelerated for want of shelter which he had denied, the husband may be indicted for manslaughter.

Since *Prichard* v. *Prichard* (1864), 3 Sw. & Tr. 523 and *Forth* v. *Forth* (1867) 36 L.J.P. & M. 122, approved in *Goodden* v. *Goodden, supra,* even in the case of granting the husband a judicial separation because of his wife's cruelty, the Court may require him to make provision for her support. But a wife guilty of cruelty and living apart from him without his assent could hardly pledge his credit for necessaries. However, that distinction serves but to emphasize the common source of the two remedies in the legal obligation of the husband to support his wife.

In judicial separation, the Court requires the guilty wife (apart from adultery which does not arise here), to be supported

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by the husband, because as Lord Penzance said in *Forth* v. *Forth, supra,* although the parties are given a legal warrant to live apart, they still remain husband and wife, and while they so remain, the obligation rests on the husband to contribute to his wife's support. The guilty wife living apart cannot, however, pledge her husband's credit for necessaries if he has not refused to support her and has done nothing to justify her remaining away from him. She has no legal warrant by Court decree or assent of the innocent husband to live apart from him, and hence she has no ground upon which to assert he has failed to support her, since she may receive that support at once by returning to him. No assistance one way or the other is derived from decisions in divorce, since the alimony jurisdiction therein is admittedly founded on statute, *vide Ashcroft* v. *Ashcroft,* [1902] P. 270, and *Wickins* v. *Wickins (No. 2)* (1918), 87 L.J.P. 169.

But the facts in the case at Bar are unusual, in that the husband deserted his wife because of her cruelty. But even though he was driven to that drastic step by her continued unreasonable conduct, it did not justify him leaving her without providing for her support. It did not relieve him from his legal obligation in that respect. While no doubt he was most anxious to relieve himself from the perils of almost continuous provocation, his legal and rational course would have been to provide for her support and to have sought a decree of judicial separation. In view of *Forth* v. *Forth, supra,* I doubt very much that he could have secured such a decree without an order for his wife's support. Certainly on the facts presented on the reopening of the appeal, I cannot conceive of such a decree being now granted him without that requirement.

I think it is only fair to the husband to say that he did eventually recognize his legal obligation to contribute to her support, for, as stated, he has done so in some degree or other since 1935. The real dispute between the parties was the *quantum* of that support as the learned judge below has so found. That finding is amply supported in the evidence. However, once the parties became involved in litigation, important legal questions made their appearance, which it is doubtful either husband or wife had any idea of originally. As the matter now stands it seems

(1) the husband has grounds to obtain a judicial separation; (2) if he does so, he will be required to support his wife, whereas (3) if he does not choose to petition for judicial separation, she cannot compel him to support her, because she has driven him from her by her cruelty.

In other words, she may importune him as much as she will, but so long as he can avoid her, and refrains from seeking a judicial separation, he can escape his legal obligation of contributing to her support. If that is the anomalous consequence which flows from our prior judgment, then the evidence deserves re-examination in the light of the new facts presented subsequently, in order to determine if the principles are still applicable which we applied before we were informed of these new facts.

In my view, the new perspective which then results, demands the application of the principles underlying *Hodgkinson* v. *Fletcher, supra,* and *Dixon* v. *Hurrell* (1838), 8 Car. & P. 717. In the latter case, the parties had been living separate for seven years, although it does not appear there was any written agreement or even an undisputed oral agreement. It was not alleged the husband had contributed to the support of the wife, who, it was said, had suitable maintenance from her own resources. In an action for necessaries, the question was whether the wife had sufficient provision. The separation was treated as mutually agreed upon and accepted.

Coltman, J. described it as "a sort of middle case" between the two extremes (a) where a wife leaves home without cause and (b) where she is driven out by the husband's misconduct. He said at p. 719:

> My opinion is, that if the husband and wife separate by mutual consent, the husband is liable for necessaries supplied to the wife, unless she has a competent provision, either from her husband, or from her own resources.

He founded that view upon the principle that when a man marries he contracts an obligation to support his wife. The facts presented on the reopening of the appeal show the wife is in ill health, unable to support herself and is otherwise without resources. She is plainly without "competent provision," and in my view, comes within *Dixon* v. *Hurrell* in that respect. Then comes the question, was the separation by mutual consent? If

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it was, then the wife is undeniably within the principle upon which *Dixon* v. *Hurrell* was decided.

Separation by mutual assent does not depend upon the existence of a written agreement or the proof of an oral agreement. It may be inferred from the conduct of the parties. That seems to be an integral part of the *ratio decidendi* in *Dixon* v. *Hurrell* and *Hodgkinson* v. *Fletcher*. In the former case, as already stated, the report of the decision as I read it, clearly implies there was not a written agreement, and that the oral agreement alleged depended on the interpretation of the evidence. This is made more clear in *Hodgkinson* v. *Fletcher, supra*. There the husband and wife had separated ten years before. There was no deed of separation between them, nor did the husband enter into any written agreement to support her. Nor does the report disclose the existence of any oral agreement. It did not appear how much he allowed her at first.

She later sued him for divorce and during its pendency he paid her £400 a year alimony by order of the Ecclesiastical Court. The suit for divorce had been dismissed several years before, but since then he had paid her £300 a year. On these facts the separation was treated as mutual and was considered by the Court as if that were unquestioned. In *Johnston* v. *Sumner, supra,* Pollock, C.B. said at p. 267:

> Now, it is easy to understand that where husband and wife part by mutual consent, and nothing is said, and she has no means and cannot maintain herself, a jury might infer the husband meant that his credit should be pledged. Nay, even though at the parting he said otherwise, a jury might perhaps be justified in saying (though we do not affirm this) that his acts and not his words must be looked at and that he meant otherwise.

In the case at Bar, the husband and wife have been living separate for some nine years. Although that separation was involuntary at first, the conduct of the parties when related to the lapse of time does not enable it to be so regarded now. By contributing to her support since 1935, in the given circumstances, the husband has indicated his assent to the wife living apart from him. Perusal of the record makes it clear throughout that he did not want her back and insisted upon her living apart from him. He was contributing to her support to keep her away from him. He pointedly refused to take her back. On one

occasion in December, 1936, she went to Chemainus where the husband then was, in an attempt to return to him. He refused to have her back. The husband admits in his evidence that he then refused to take her back and added significantly, "as I have always refused." Again, in reply to a letter she had written him suggesting they live together again, he wrote her in an undated letter after the outbreak of war in 1939 (Exhibit 31):

What do you mean, you'll get me a job, and we could live together again. Listen, Sister, I don't need you to act as an employment agency for me, and as far as ever living with you is concerned, don't think for a minute that I'm crazy enough to ever try that again.

The above evidence manifests in clear-cut fashion the husband's definite and announced determination that she should continue to live separate from him. It seems to me his conduct must be accepted as conclusive evidence of his assent to the separation, particularly when it is coupled with his contribution to her support while so separated. That the wife also accepted the separation as an existing fact amply appears from her letters to him. Her main concern was to obtain sufficient support from him. The conduct of the parties, in my view at least, forces the conclusion that in recent years in any event, the separation was mutually assented to. Once that appears, the principle in *Dixon* v. *Hurrell* is directly applicable.

In this aspect, the sincerity of the wife's desire to return to him is beside the point. Whatever her motive in offering to return to him, she had an undoubted legal right to return to him and be supported by him. The Court of Appeal in England definitely so decided in *Jones* v. *Newtown and Llanidloes Guardians, supra.* It need hardly be said that if he was under legal obligation to support her if she returned to him, he could not, by refusing to take her back, escape the responsibility of providing for her support when living separate thereafter. For her separation after his refusal, must then be regarded as brought into being by him. Even though the separation was caused originally by the wife, yet its continuance after he refused to take her back, was occasioned by him and by him alone. He thereby conferred on her the right to his support when living separate, which he might perhaps have been able to resist successfully before he had refused to take her back again.

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It is true that *Dixon* v. *Hurrell, Hodgkinson* v. *Fletcher,* and *Johnston* v. *Sumner* were "necessaries" cases. But as pointed out previously, the pledging of her husband's credit is but one of the remedies given the wife to invoke the application of the principle, that when a man marries he contracts an obligation to support his wife. That obligation crystallizes in the case of a wife living separate under circumstances amounting to mutual assent, when it is shown she has not been sufficiently provided for according to the estate and degree of her husband, and is without competent provision from her own resources. There may be various remedies open to the wife to enforce her ancient right which that principle protects, but in this Province at least, she is permitted to enforce it by an action for alimony *solus* under Order LXXA.

Having reached the conclusion that, (1) the parties mutually assented to the existing separation, (2) the wife is now unable to support herself and child and is otherwise without competent resources; (3) by reason of (1) and (2) the husband is under legal obligation to support her according to his estate and condition in life, and (4) in this Province the wife may enforce that obligation for her support in the form of an action for alimony *solus* under Order LXXA, I would grant the wife $60 per month maintenance, as was done in the Court below. Such provision to continue until further order, with liberty to either party to apply to a judge of the Supreme Court to suspend, increase or decrease it, as in any altered circumstances it may seem just to such judge to do so, while the parties remain husband and wife.

The appeal having been reopened as aforesaid, favourable consideration of the submissions then advanced on behalf of the wife, necessarily carries with it a denial of the husband's appeal, and a revision of the conclusion reached in our prior judgment in that respect. I would therefore dismiss the appeal.

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

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Criminal law—Automobile—Criminal negligence—Collision with pedestrian —Intersection — "Slow sign" — Judge's charge disclosing defence— Sufficiency—Pedestrian lane.

The accident in question took place on the evening of February 10th, 1942, at about 9.15, on the intersection of Kingsway and Victoria Drive. The accused was driving his car westerly on Kingsway, there being a slow sign at the corner of the next street east on Kingsway. The deceased, who was a cripple and walked with crutches, was crossing Kingsway within the intersection from the north side and close to the pedestrian lane on the east side of the intersection. Accused stated he was going 27 or 28 miles an hour when he passed the slow sign. He then slowed down and was going at about 17 miles an hour when he reached the intersection in question, that he did not see deceased until about twelve feet away from him, when he put on his brakes and swerved to the right, but too late, and his left head-light struck deceased. There were four street lights, one at each corner of the intersection, but the visibility was poor owing to the large area covered by the intersection, and the lights threw unusual shadows across the pavement. The impact took place just north of the north Kingsway street-railway rail and just west of the easterly pedestrian lane. Three witnesses who saw the impact did not see deceased until the impact took place. The jury found accused not guilty of manslaughter but guilty of driving to the common danger.

Held, on appeal, affirming the decision of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), as to the objection that the verdict discloses no crime known to the law, there is no other possible conclusion than that the jury intended to convict and did convict of driving in a manner dangerous to the public. On the objection that the learned judge failed to bring out the appellant's defence, the jury had to decide whether the appellant had committed a crime either by driving at too great a speed or failing to keep a proper look-out. That was the issue pure and simple and was put by the learned judge clearly and fairly to the jury. On the objection that deceased was not walking in the pedestrian lane, there is no greater right to run a man down if he is crossing at some point in the intersection outside the lane than if he kept within the lane, particularly where there is no by-law nor any other law requiring him to keep to the lane.

APPEAL by accused from the conviction by SIDNEY SMITH, J. and the verdict of a jury at the Spring Assize at Vancouver on the 28th of April, 1942, on a charge that on the 10th of February, 1942, he unlawfully did kill and slay Gordon Atherton. At 9.15 p.m. on the 10th of February, the defendant was driving

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his car westerly on Kingsway and on reaching the intersection of Victoria Drive he ran into the deceased who was walking across Kingsway from the north side within the intersection. The facts are set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 18th and 19th of June, 1942, before MCDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for appellant: The charge is under section 951, subsection 3 of the Criminal Code. The accused was found not guilty of manslaughter but was found guilty of driving to the common danger. Accused was driving west on Kingsway at 9.15 in the evening when it was dark. On the street before reaching Victoria Drive was a "Slow sign," and accused says he slowed down to seventeen miles an hour before reaching Victoria Drive. On reaching the intersection a man loomed up twelve feet away, when he jammed on the brakes and swerved to the right, but he hit him with the left head-light. The deceased was a cripple with one leg and used crutches. None of the witnesses saw the deceased before the accident. The learned judge did not fairly or at all present the defence to the jury: see *Rex* v. *West* (1925), 44 Can. C.C. 109, at p. 112; *Wu* v. *Regem*, [1934] S.C.R. 609; *Mancini* v. *Director of Public Prosecutions* (1941), 28 Cr. App. R. 65; *Rex* v. *Hill* (1911), 22 Cox, C.C. 625. The jury retired and came back with a conviction not known to the law. There is no such thing as a "common-danger" offence. On section 285, subsection 6 of the Code on misdirection see *Rex v. Bowman* (1939), 72 Can. C.C. 61, at p. 64; *Rex* v. *Greisman* (1926), 46 Can. C.C. 172. On the question of the charge with relation to the defence, and non-direction amounting to misdirection see *Rex* v. *Nicholson* (1927), 39 B.C. 264; *Rex* v. *Baker* (1928), 51 Can. C.C. 71, at p. 79; *Rex* v. *Dery* (1941), 79 Que. S.C. 252; *Rex* v. *Wilson* (1938), 70 Can. C.C. 153; *Rex* v. *Collison*, [1941] 1 W.W.R. 362, at p. 363.

Bull, K.C., for the Crown: There was the warning of the "Slow sign" and the motorist must take care. The intersection is in a slow zone. The question of liquor was no part of the Crown's case. As to putting the defence to the jury, the fact that McLeod, one of the witnesses, narrowly averted an accident

in the same place two days previously is not evidence that this intersection is a dangerous place. He complains that the judge should have put to the jury that the police had to use a flash-light there. There was a street light at each of the four corners of the intersection. There is no law that requires a pedestrian must stick to the pedestrian lanes. The charge should be considered as a whole and, in fact, it was favourable to the prisoner. As to his being convicted of an offence not known to the law see *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* (1940), 110 L.J.P.C. 1, and section 285, subsection 6 of the Criminal Code.

McAlpine, replied.

Cur. adv. vult.

30th June, 1942.

MCDONALD, C.J.B.C.: The appellant was convicted by a jury, sitting with SIDNEY SMITH, J. on a charge arising out of the death of one Gordon Atherton, through being struck by a motor-car driven by the appellant. The learned judge charged the jury carefully on the law regarding manslaughter arising out of a motor accident, and told them that the same law applied to the lesser charges of reckless driving and driving in a manner dangerous to the public. It is not necessary that we should decide whether or not this charge is more favourable to the appellant than it ought to be, and I should prefer to leave that open for further consideration when it arises. Certainly the appellant has no complaint in this regard, inasmuch as the learned judge charged that the law as laid down in *Andrews* v. *Director of Public Prosecutions* (1937), 26 Cr. App. R. 34, applied to all three charges. When the jury returned their verdict they said, through their foreman:

> On the charge of manslaughter we find him not guilty. The verdict we have come to is "guilty of driving to the common danger, with a strong recommendation to leniency."

It is said that the verdict discloses no crime known to the law and is not responsive to the charge. It is difficult for me to see, from reading the proceedings and the charge, how anyone in the Court room, including judge and counsel, could have drawn any other possible conclusion than that the jury intended to convict and did convict of driving in a manner dangerous to the public.

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It is worthy of notice that counsel for the defence must have taken the same view when the verdict was announced, for he took no action whatever to make the verdict clear if there was any doubt about it. Although it is a civil case, some assistance may be obtained, on the question of how one is to read a jury's verdict, by perusing the judgment in *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* (1940), 110 L.J.P.C. 1.

It is strongly urged that the learned judge failed to bring out with sufficient strength, or even at all, the appellant's defence. I have examined the charge carefully, and in my opinion this objection is unfounded. The appellant went into the witness box himself, and from his evidence I would gather that his defence was that the tragedy was a pure accident; that he read the sign "Pedestrian Lane, Slow," located one block east of the intersection where the deceased man was struck; that he took that as a warning that he must slow down at once; that he did slow down from his former speed to 27 or 28 miles per hour; and that he entered the intersection at about seventeen miles per hour; that he did not see the deceased man until he was within some twelve feet of him; that he tried to avoid him but it was too late; that his failure to see the man in time was due to the bad lighting and the general difficult conditions at the crossing.

I have read the charge several times and in my opinion the issues were put clearly and fairly to the jury, and they knew perfectly well what they had to decide, namely, whether the appellant had committed a crime either by driving at too great a rate of speed under the circumstances, or by failing to keep a proper look-out. That was the issue, pure and simple. Was it an accident, or at most negligence, giving rise to a civil liability, or was the appellant proceeding in such a manner under all the circumstances as to be driving in a manner dangerous to the public, within the meaning of the Criminal Code? We heard considerable argument as to what was the meaning of the sign. The answer to that is that the trial judge told the jury to adopt the more favourable meaning, as suggested by counsel for the defence.

It was further objected that the learned judge erred in admitting the evidence of two police officers that they smelled liquor on

the appellant's breath, and in any event that he ought to have warned them to ignore this evidence completely. Both policemen said that though they smelled liquor, the appellant acted quite normally, and so far as they could see, the liquor had had no effect. The appellant in the witness box stated that he had had some liquor an hour or so before the accident, but that it had not affected him in any way. These features of the evidence were clearly brought to the jury's attention, both by the judge and by Crown counsel. I think the judge was quite right in refusing to withdraw the question from the jury's consideration, provided, of course, he warned them, as he did, of just what was the full effect of the evidence on both sides.

Considerable time was spent on the trial and before us on the question whether the deceased man was crossing Kingsway from north to south in the path marked for pedestrians or at a point some short distance west of that path, and whether the trial judge had failed to lay due stress on the necessity for that inquiry. Surely it will not be suggested that there was any greater right to run a man down if he was crossing at some point in the intersection, outside the lane than if he kept to the lane, and particularly where there was no by-law nor any other law requiring him to keep to the lane. And in this connection one may safely assume that the jury took note of the fact that the appellant was thoroughly familiar with the intersection, with all its difficulties (on which he enlarges), and presumably with the habits of pedestrians in making the crossing. I am satisfied there is nothing whatever in this objection.

In my opinion the appeal should be dismissed.

O'HALLORAN, J.A.: At the last Vancouver Assize the appellant was acquitted of manslaughter but convicted under section 285, subsection 6 of the Criminal Code with a strong recommendation for leniency. Several points were argued before us, but I find it necessary to consider one only, *viz.*, non-direction amounting to misdirection in the charge of the learned judge to the jury. The strongest evidence in favour of the accused was not submitted to the jury's consideration, as in the circumstances it ought to have been. In my opinion, with deference, that has

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occasioned a substantial miscarriage of justice within the meaning of section 1014, and there should be a new trial accordingly: *vide Rex* v. *Nicholson* (1927), 39 B.C. 264, MARTIN, J.A. (later C.J.B.C.), at p. 270.

The scene of the accident was the intersection of Kingsway and Victoria Drive in Vancouver. The two streets cross transversely. It is known as a busy cross-roads, and pedestrian lanes are marked out on the four sides of the intersection. The appellant was driving westerly on Kingsway which is a "through" street. He testified he did not see the deceased pedestrian until the latter "loomed up in front of me," ten or twelve feet away well within the traffic intersection and past the pedestrian lane. It was then too late to avoid hitting the pedestrian, although he tried to do so by putting on his brakes and swerving to the right.

The defence was that faulty overhead street lighting threw unusual shadows on the black asphalt in the intersection, and denied the appellant the advantage of normal vision, and the pedestrian being in the traffic lane and not in the pedestrian lane, was in a place a motorist would not reasonably expect to find a pedestrian.

The summing-up of the learned judge was attacked on the ground it did not direct the minds of the jury to strong evidence in the appellant's favour which negatived the elements of criminal negligence in so far at least as "look-out" was concerned. The learned judge charged the jury as follows:

> Then the Crown comes forward and says, leaving the question of speed alone, "Consider the matter of look-out; do you, as reasonable men, do you say this man was keeping a proper look-out when he says he saw no man there until he was within twelve feet of him, can that, under any circumstances," the Crown asks you, "be considered a proper look-out?" The defence dealing explicitly with that, says, "Our answer to that is that this wide intersection is such that the lighting overhead throws unusual shadows, and it is quite possible for a man using the greatest care to find himself within twelve feet of a pedestrian on the road without having seen him beforehand." Do you think the Crown is right when it says that a man must necessarily be keeping a poor look-out when he does not see someone else until he reaches within twelve feet of him? The defence says that it is possible on account of the shadows. Do you think that is possible? That is why you are here. I am not going to say anything more about the facts, because there is nothing more to be said.

The learned judge also added later:

> The Crown says that in driving in such a manner that the accused could

not see another person until within twelve feet of him is such a want of care as to involve criminal responsibility. The defendant says in reply, in the circumstances of this case, the lighting of the street, the shifting shadows and no one being in sight that his driving did not indicate such want of care; that, perhaps, in two or three sentences, you may think is the whole crux of the case. But, that is for you. If you find such want of care, then the accused comes within the phrase, driving in a manner dangerous to the public.

As I read the evidence certain salient facts assert themselves. (1) The deceased was not crossing the street in a pedestrian lane; (2) he was hit at a point near the centre of the intersection of the two streets well within the traffic intersection. Facts (1) and (2) are established in the evidence of the three prosecution eye-witnesses, who confirm the appellant's evidence in this regard. It may therefore be said with a sound foundation of confirmative fact, that the deceased at the time of impact, was in the traffic lane within the intersection at a point no motorist would reasonably expect to find a pedestrian, more particularly in view of the pedestrian lanes marked out, and the warning to motorists concerning them posted a block away on Kingsway; (3) in addition the faulty street lighting threw unusual shadows on the intersection which denied the appellant normal vision, and rendered it easy for a careful motorist to run down a pedestrian at that point without fault on his part. This is established in the evidence of prosecution witnesses constable Whelan and S. McLeod; (4) the three prosecution eye-witnesses did not see the deceased before the impact although they looked around Victoria Drive, and the deceased should have been within the angle of normal vision of at least two of them, *viz.*, Mr. and Mrs. Boyle.

The foregoing must be regarded as really strong evidence in the appellant's favour. But none of it was put to the jury, or related to the answer of the appellant to the charge of criminal negligence. It is true that in regard to facts (1) and (2) the learned judge made passing mention of "jay-walking," but he failed to draw the jury's attention to the conclusive nature of the prosecution evidence in favour of the accused in that respect. The considerations weighing in favour of the accused were by no means brought out to the jury with full effect, *vide* Sir Lyman Duff, C.J. in *Markadonis* v. *Regem*, [1935] S.C.R. 657, at p. 662.

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The jury were charged as if the strong evidence in the accused's favour to which I have referred did not exist or was not material. The jury were charged as if the pedestrian was in fact crossing in the pedestrian lane, and the defence of dark shadows and light areas rested only upon the appellant's own evidence that he did not see the deceased before the latter "loomed up in front of him." The evidence I have referred to, if brought to the jury's attention with the clearness and particularity the case demanded, would in my opinion make it very difficult indeed for a properly-instructed jury to find the appellant guilty of criminal negligence, unless by excluding him from the benefit of a reasonable doubt.

The deceased was hit in a locality where no motorist would reasonably expect him to be. On Kingsway, along which the appellant was driving, and one block away from the intersection, there is a warning sign to motorists "Pedestrian Lane, Slow." What would any reasonable motorist do when he saw that sign? He would surely approach the intersection with his mind warned as to the possibility of pedestrians crossing in the pedestrian lanes. He would not expect them to be anywhere alse in the intersection, any more than he would expect a pedestrian to be in his path in the middle of the block. That all goes to the question of criminal negligence but the minds of the jury were not directed thereto.

It is not suggested that a motorist may drive through an intersection even on a "through" street such as Kingsway, with total disregard of any pedestrian who might unexpectedly be there. But a much less rigid test of lack of care will then be demanded, than where a pedestrian is in a place a motorist would reasonably expect him to be, *viz.*, in the pedestrian lane. And if joined with the less rigid test of lack of care there is the unchallenged evidence that the shadows from faulty street lights were such as to bear out the evidence of a person of reputable character that he could not see the deceased before he loomed up in front of him, then in my opinion at least, the elements of criminal negligence are excluded except for the question of speed, of which I speak later.

It is, of course, the duty of the judge to present to the jury the material evidence in its proper relation to the questions

requiring factual decision, and directed to the case put forward by the prosecution and the answer of the defence or such answer as the evidence permits. Were it not so the judge need only say to the jury "Gentlemen, you have heard the evidence, please study it and come to your conclusions." In this connection I refer to *Rex* v. *West* (1925), 44 Can. C.C. 109, at p. 112, Ferguson, J.A. who delivered the judgment of the Appellate Division of Ontario; *Rex v. McKenzie* (1932), 58 Can. C.C. 106, MACDONALD, C.J.B.C. at p. 115; *Rex* v. *Nicholson, supra; Rex* v. *George* (1936), 51 B.C. 81, MARTIN, J.A. (later C.J.B.C.), at pp. 93-95, and *Rex* v. *Krawchuk* (1940), 56 B.C. 7, MACDONALD, C.J.B.C. at pp. 11 and 15, and in the Supreme Court of Canada, [1941] 2 D.L.R. 353, Crocket, J. at p. 375, and Kerwin, J. (with whom Taschereau, J. agreed), at p. 376; and my own observations in *Rex* v. *Krawchuk, supra,* and in *Rex* v. *Hughes, Petryk, Billamy and Berrigan* [(1942), 57 B.C. 521] in which judgment was given this day.

There were two main questions before the jury, *viz.*, speed and "look-out." Whether or not the evidence of speed before them would constitute criminal negligence in the minds of the jury, must in my opinion depend largely upon the way they viewed "look-out" as then presented to them. I cannot say that if the jury came to the conclusion on proper instructions, that the "look-out" of the appellant was free from criminal negligence, that nevertheless they would inevitably find that the evidence of speed before them was sufficient in itself to constitute criminal negligence in the appellant. In my view, with respect, the actual direction to the jury disabled them from reaching a true conclusion upon the matters which required decision.

For the reasons stated I would direct a new trial and allow the appeal accordingly.

FISHER, J.A.: I concur in the reasons for judgment of the Chief Justice and would dismiss the appeal.

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

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July 15, 21.

IN RE TAXATION OF COSTS AND *IN RE* LOCKE, LANE, NICHOLSON & SHEPPARD, SOLICITORS. (No. 2).

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Practice—Costs—Solicitor and client—Taxation—Order LXV., r. 8 (b)—Ultra vires—Appendix M, Schedule No. 5—R.S.B.C. 1936, Cap. 249, Sec. 4 (6)—B.C. Stats. 1941-42, Cap. 37, Sec. 2 (2).

The solicitors' bill of costs rendered for services in non-contentious matters was taxed by the registrar under rule 8 (*b*) of Order LXV. as amended by order in council on the 11th of October, 1938, and on review of the taxation it was held by SIDNEY SMITH, J. on December 10th, 1941, that the words "with such further allowances as the taxing officer . . . shall consider proper" in said rule 8 (*b*) were *ultra vires* because they had not been approved by the Judges of the Supreme Court as required by section 4 (6) of the Court Rules of Practice Act, and that the bill should be taxed under Appendix M. The Court of Appeal affirmed this decision on March 3rd, 1942. On the 12th of February, 1942, the Court Rules of Practice Act was amended by striking out section 4 (6) and substituting therefor a subsection that did not require the approval of the Judges of the Supreme Court to any tariff enactment. When the bill came before the registrar again he held the 1942 amendment of the Court Rules of Practice Act was retroactive and therefore rule 8 (*b*) in its entirety was validated by it, and he taxed the bill on this basis. On an application to review said taxation:—

Held, that the *ultra vires* words were no part of the rules as they were never "in force from time to time." The registrar having wrongfully taxed under rule 8 (*b*) the bill must go back to him for taxation in accordance with the views expressed in this judgment.

Item 42 in Schedule No. 5 of Appendix M is followed by the words "In all the above enumerated cases the Registrar shall have power to allow higher fees than those mentioned, but either party may appeal from the Registrar's decision to the Judge, who may either increase or reduce such fee."

Held, that the words "in all the above mentioned cases" were intended to refer to all the items in Schedule No. 5.

APPLICATION by the Spencer estate to review the taxation of the solicitors' bill of costs. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Vancouver on the 15th of July, 1942.

Donaghy, K.C., for the application.
Bull, K.C., contra.

Cur. adv. vult.

21st July, 1942.

ROBERTSON, J.: This is a second application to review the taxation by the registrar of the above solicitors' bill of costs rendered for services in non-contentious matters. This same bill was taxed last year. An application to review the taxation was made to SIDNEY SMITH, J. who held, on the 20th of December, 1941, that the words "with such further allowances as the taxing officer . . . shall consider proper," in rule 8 (*b*) of Order LXV., as amended by order in council on the 11th of October, 1938, were *ultra vires* because they had not been approved by the Judges of the Supreme Court as required by the Court Rules of Practice Act. See [(1941), 57 B.C. 304]; [1942] 1 D.L.R. 321. He also held that the bill should be taxed under Appendix M. On the 3rd of March, 1942, the Court of Appeal affirmed his decision. See [57 B.C. 308]; [1942] 2 D.L.R. 200.

After Mr. Justice SIDNEY SMITH's decision, and, before that of the Court of Appeal, the Court Rules of Practice Act was amended by striking out subsection (6) of section 4, and substituting the following:

(6) Notwithstanding anything contained in the "Supreme Court Act" or in this Act, the taxation of costs as between party and party, or solicitor and client, shall be governed by, and the Registrar in any taxation of costs shall allow, all such costs, fees, charges, and disbursements, as are prescribed in the said "Supreme Court Rules, 1925," and the appendices thereto, and in the rules, appendices, and tariffs in amendment thereof or substitution therefor, in force from time to time; . . .

When the bill came before the registrar again he held the 1942 amendment was retroactive and that therefore rule 8 (*b*) in its entirety was validated by it and he taxed the bill on this basis.

Mr. *Donaghy* submits that the *ultra vires* words were no part of the rules as they were never "in force from time to time." I think this is so. Mr. *Bull* expressly disclaimed any wish to support the taxation on the view taken by the registrar. But Mr. *Bull* said the taxation could be supported on the words appearing at the end of Schedule No. 5 of Appendix M that I shall later refer to.

Although the registrar in my opinion has proceeded upon a wrong basis, yet there is no object in sending the bill back to him for taxation without first determining whether Mr. *Bull's* contention is correct. Schedule No. 5 is headed:

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Scale of fees in non-contentious business and in all other matters not otherwise provided for.

Then follow 21 items covering such things as "Instructions for any document," "Drawing any document under seal," "Drawing *lis pendens*," "Drawing will or codicil." Then there is another heading "Attendances," followed by seven items Nos. 22 to 28, covering attendances generally and in the Land Registry office and otherwise; then another heading "Journeys, etc.," followed by two items Nos. 29 and 30, providing for fees for time spent in travelling in lieu of other charges and then item 31 providing "The taxing officer may increase the above allowances for any reasons that he shall think fit."

Mr. *Bull* and Mr. *Donaghy* both agree that item 31, applies only to items 29 and 30. Then appears the final heading, the exact words of which are "Fees to Counsel, etc.," which is followed by eleven items covering "settling or revising any document," "attending on any proceedings, commission, arbitration, or inquiry, not being an action or matter pending in any Court," counsel fees generally, "Conferences or consultations," advice on questions submitted for opinion and other cases not provided for otherwise when attendance of counsel is necessary. Then appear the following words upon which Mr. *Bull* relies:

In all the above enumerated cases the Registrar shall have power to allow higher fees than those mentioned, but either party may appeal from the Registrar's decision to the Judge, who may either increase or reduce such fee.

It will be noted that the items with even numbers under the heading "Fees to Counsel, etc.," provide for maximum fees. It is submitted by Mr. *Donaghy* that the purpose of the words following item 42 is to give the registrar power to increase those fees. On the other hand, it was pointed out, that the word "cases" is used in items 22, 23, and 29 and therefore the words in question must also apply to them and are not confined to the items 32 to 42 following the heading "Fees to Counsel, etc." Then it is submitted that the words relied upon must apply to all the items in Schedule No. 5 because the power given to the registrar is to allow higher fees and as the whole of Schedule No. 5 is a scale of fees, the registrar's power must extend to all the items in Schedule No. 5.

It is pointed out that if there is no power to increase the

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fees provided (*e.g.*) in items 7 and 12, which read respectively "For drawing any document under seal," and "For drawing will or codicil," a solicitor drawing a trust deed or a will involving intricate trusts, could never be sufficiently remunerated for his work; even though, as Mr. *Donaghy* points out, in addition to the charges which are provided for in the items mentioned, item 32 allows a fee for settling documents. My view is that it could not have been intended that the maximum charges as set out in the first 28 items of Schedule No. 5 should be the maximum charges. Even though counsel fees might be allowed under item 32, such fees might not provide for fees which might be fairly charged for drawing the documents which I have mentioned.

If it had been intended to limit the powers of the registrar to items 32 to 42, one would have expected a clear indication of this. I think the words "In all the above enumerated cases" were intended to refer to all the items in Schedule No. 5. In this view the registrar having, as I hold, wrongfully taxed under rule 8 (*b*) the bill must go back to him for taxation in accordance with the views expressed in this judgment.

The applicants are entitled to costs.

Application granted.

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July 22, 23.

Practice—Costs of original hearing of petition—Taxation—Review—Costs of review—Taxed — Review of said taxation—"Amount involved"—Column 1 of tariff of costs.

After the hearing of the petition herein which involved shares in the company of the estimated value of over $75,000, the petition was withdrawn and the respondent was awarded the costs of the original hearing. After taxation petitioner applied for an order to review the taxation. On the hearing the respondents were awarded the costs of the review. On the taxation of said costs the registrar held that the "amount involved" was under $3,000, and the bill was taxed under column 1 of

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the tariff of costs. On respondent's application for an order to review the taxation on the ground that the "amount involved" was over $75,000, and that the bill should be taxed under column 4:—

Held, that when the petition was withdrawn all "amounts involved" in it had been disposed of. The only "amount involved" upon the last taxation would be the total amount of the bill. The amount claimed in the petition had nothing to do with it and the bill was properly taxed under column 1.

APPLICATION for an order to review the taxation of the costs allowed in respect of the review of the taxation of costs incurred on the original hearing herein. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Vancouver on the 22nd of July, 1942.

Carmichael, for plaintiff.
Murray, for defendant. *Cur. adv. vult.*

23rd July, 1942.

ROBERTSON, J.: The facts in connection with the presentation of the petition may be found in 57 B.C. 1. The value of the shares in question was said to be over $75,000. The costs of the original hearing were taxed under column 4 of the tariff of costs. Finally, the petition was withdrawn and the respondents were given costs. Their bill was presented at $622.20 and taxed at $195.60. The petitioner applied to SIDNEY SMITH, J. under Order LXV., r. 41, for an order to review the taxation, and succeeded in reducing the bill by $25. The respondents were given the costs of the review, and they then presented a bill under column 4, amounting to $102. The registrar held that the "amount involved" was under $3,000, and the bill was taxable, therefore, under column 1. The bill was allowed at $27. The respondents now apply for an order to review the taxation upon the ground that the bill should have been taxed under column 4, as the "amount involved" was over $75,000. When the petition was withdrawn all "amounts involved" in it had been disposed of. The only "amount involved" upon the last taxation would be, at most, the total amount of the bill. The amount claimed in the petition would have nothing whatever to do with this. For these reasons I think the learned registrar was right. The application is dismissed with costs to be taxed under column 1.

Application dismissed.

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May 26, 27; *June* 9.

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Dist'd R. v. Eldridge 81 CCC 388

Criminal law—Perjury—Declaration made by vendor pursuant to Bulk Sales Act—Canada Evidence Act—Not made in judicial proceeding—Substitution of lesser offence—R.S.C. 1927, Cap. 59, Sec. 2—R.S.B.C. 1936, Cap. 29, Sec. 3—Criminal Code, Secs. 170, 171, 172, 175, 176, 951 and 1016, Subsec. 2.

The accused sold his cafe business and Station View Apartments in Port Coquitlam and made a declaration under the Canada Evidence Act pursuant to the provisions of the Bulk Sales Act, declaring that all accounts owing by him with respect to said business had been paid and fully satisfied. The declaration proved to be false and he was convicted on a charge of perjury.

Held, on appeal, reversing the decision of BOYD, Co. J., that the charge was founded on section 172 of the Criminal Code, but the evidence fails to support it because the declaration not having been made in a judicial proceeding cannot, if false, be perjury, further as it was in a civil matter over which the Parliament of Canada does not exercise jurisdiction, the Canada Evidence Act, by section 2 thereof, can have no application, consequently it was not a declaration permitted to be made by that Act.

Held, further, MCDONALD, C.J.B.C. and O'HALLORAN, J.A. dissenting, that where on an appeal by the accused from his conviction the prosecution seeks to have section 1016, subsection 2 applied and a conviction under section 175 substituted, the prosecution must be confined to the case so particularized. Assuming that the commission of an offence under section 175 was proved, such proved offence is not a part of or included as a lesser offence in the particularized offence charged in the indictment before the Court, and the Court below could not have convicted the appellant of the proved offence on the charge laid. It is not a case where the power of substitution can be exercised.

APPEAL by accused from the conviction by BOYD, Co. J. on the 20th of April, 1942,

For that he, . . . , on the 11th day of August, A.D. 1941, being permitted by the Canada Evidence Act to verify certain facts relating to his financial obligations by solemn declaration, unlawfully did commit perjury by knowingly, wilfully and corruptly by solemn declaration, declaring that he did not owe any debts, in respect of Good Eats Cafe and Station View Apartments such declaration being false, contrary to the form of the statute in such case made and provided.

The accused contracted to sell his businesses in Port Coquitlam in the name of "Good Eats Cafe" and "Station View Apartments" and made a statutory declaration pursuant to the provisions of the Bulk Sales Act, that all accounts owing by him

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with respect to the said businesses of Good Eats Cafe and Station View Apartments had been paid and fully satisfied. The evidence disclosed that certain sums were owing in respect of the business at the time the declaration was made.

The appeal was argued at Vancouver on the 26th and 27th of May, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

J. A. Sutherland, for appellant: The declaration was made by virtue of the Canada Evidence Act. Section 2 of that Act says the Part shall apply to all civil proceedings respecting which the Parliament of Canada has jurisdiction. The declaration was made with respect to the Bulk Sales Act, a Provincial statute. There is therefore no such charge as laid. By section 3 of the Bulk Sales Act it only applies to traders and merchants, and he is not a trader or merchant: see *Barthels, Shewan & Co.* v. *Peterson* (1914), 16 D.L.R. 465; *Brown* v. *McLeod* (1915), 8 W.W.R. 110; *John Martin Paper Co. Ltd.* v. *American Type Foundry Co.,* [1924] 3 D.L.R. 1080; *Bank of Montreal* v. *Ideal Knitting Mills Ltd.,* [1924] 4 D.L.R. 429; *Mickelson* v. *Nash-Simington Co., Ltd.,* [1923] 3 W.W.R. 843; *Rex* v. *Moynes* (1919), 33 Can. C.C. 303; *Ex parte Lindsay* (1918), 30 Can. C.C. 387; *Rex* v. *Phillips* (1908), 14 Can. C.C. 239. The declaration cannot be made under the Dominion Act. If at all it should be made under the Provincial Act: see *Rex* v. *Davidson* (1933), 14 C.B.R. 474. It must be proved he made a formal declaration before the commissioner: see *Rex* v. *Schultz* (1922), 37 Can. C.C. 301. He signed the declaration but there was not a solemn declaration before the commissioner. Section 172 of the Code should be read with sections 170 and 171 and the declaration must be made in a judicial proceeding: see Warburton & Grundy's Leading Cases in the Criminal Law, 5th Ed., 171. This was not a judicial proceeding: see *Rex* v. *Dupuis* (1941), 76 Can. C.C. 347.

W. S. Owen, for the Crown, relied on *Rex* v. *Rutherford* (1923), 41 Can. C.C. 240. The *Dupuis* case was badly decided. As to section 172 see Crankshaw's Criminal Code, 6th Ed., 158. We are in a different position from the *Dupuis* case. That the

Canada Evidence Act authorizes the taking of this declaration see *Rex* v. *Nier* (1915), 9 W.W.R. 838; *Reg.* v. *Skelton* (1898), 4 Can. C.C. 467. This man was selling tobacco in a substantial way. He was a merchant.

Sutherland, in reply: Section 951 of the Code does not apply, it would be an entirely new charge: see *Regina* v. *Oxley* (1852), 3 Car. & K. 317.

Cur. adv. vult.

9th June, 1942.

McDONALD, C.J.B.C.: The appellant was convicted of perjury before BOYD, Co. J.

> For that he, . . . , being permitted by the Canada Evidence Act to verify certain facts relating to his financial obligations by solemn declaration, unlawfully did commit perjury by knowingly, wilfully and corruptly . . . , declaring that he did not owe any debts, in respect of Good Eats Cafe. . . .

He was sentenced to imprisonment for the two days which he had served, and a fine of $500 was imposed.

Having regard to some of the minor objections which were raised, and in which I think there is no merit, I commend to those who are interested the judgments of the Supreme Court of Canada in *Curry* v. *Regem* (1913), 48 S.C.R. 532 and *Shajoo Ram* v. *Regem* (1915), 51 S.C.R. 392, and particularly the words of Brodeur, J. at p. 399 in the latter case:

> I am of opinion that if a witness allows himself to be sworn in any form without objecting to it, he is liable to be indicted for perjury, if his testimony prove false.

These words I think exactly fit this case in so far as the making of the declaration is concerned.

The main contention of the appellant is that the charge discloses no offence. Much reliance is placed on section 2 of the Canada Evidence Act, which reads:

> This Part [which includes section 36] shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

It is said that because the statutory declaration in question was made pursuant to the Provincial statute known as the Bulk Sales Act, the Canada Evidence Act cannot apply to the offence. In my opinion there is nothing whatever in this objection, and if I am wrong I am at least fortunate enough to find myself in the

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company of many able judges who must have taken the same view.

In *Reg.* v. *Skelton* (1898), 3 Terr. L.R. 58; 4 Can. C.C. 467 a Court composed of Richardson, Rouleau and Scott, JJ. upheld a conviction for perjury where the declarant had voluntarily made a statutory declaration that he knew that one Mercer had been guilty of certain irregularities in regard to the list of voters at Battleford.

This case was followed by a Court of Appeal in Saskatchewan composed of Lamont, McKay and Martin, JJ.A. in *Rex* v. *Rutherford,* [1923] 2 W.W.R. 963, where the charge was laid in respect of a statutory declaration made under the Bulk Sales Act of Saskatchewan.

A similar view was taken by a majority of the Appellate Division in Alberta in *Rex* v. *Nier* (1915), 25 Can. C.C. 241. There Harvey, C.J. and Scott, J. expressly held that a conviction for perjury for having made a false statutory declaration in respect of a fire-insurance policy should be sustained as a conviction under section 176 of the Criminal Code, as it was a declaration which the defendant was permitted by section 36 of the Canada Evidence Act to make, was made before an officer authorized by law to permit it to be made before him, and contained statements which would amount to perjury if made on oath in a judicial proceeding. I should say that the draftsman of the charge in the instant case must have had these decisions before him and that he intended faithfully to follow them.

I now come to consider the decision in *Rex* v. *Dupuis* (1941), 76 Can. C.C. 347. This was a decision of five judges sitting in appeal in Quebec where a conviction was upheld because a false oath was made in an examination conducted under article 590 of the Code of Civil Procedure (C.P.), though the Court was of opinion that the oath was not taken in a judicial proceeding. Having this latter fact in mind, the Court held, following *Reg.* v. *Hodgkiss* (1869), L.R. 1 C.C. 212, that the conviction ought to have been not for perjury (as it would have been in a judicial proceeding) but for the lesser offence of taking a false oath (that is in a non-judicial proceeding).

Upon consideration, while not dissenting from any of the

earlier judgments above referred to, I think the better view is that taken by the Quebec Court, and I would affirm the conviction as for the offence of taking a false oath. This, of course, does not affect the sentence which was not at all too severe for the lesser offence.

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

SLOAN, J.A.: As the Court is unanimously of the opinion that the conviction herein cannot be supported, having regard to the evidence, there is left for consideration the sole question of whether, instead of allowing the appeal, we ought to substitute a verdict of guilty of some other offence than the one upon which the verdict of guilty was found below by the learned trial judge.

The power of this Court to substitute a different verdict than that found below is contained in section 1016, subsection 2 of the Code. That section must be read with section 951 which is in part as follows:

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

The whole question then is whether the offence as described in the section of the Code defining it, or as charged in the indictment herein, includes within it the commission of another offence disclosed in evidence. The indictment in this case is in part as follows: [already set out in the statement and the judgment of MCDONALD, C.J.B.C.].

The facts, shortly put, are that the appellant made the statutory declaration required by the Bulk Sales Act, on the sale of his business, which declaration was false.

The first point is then: Is the offence disclosed by those facts included in and part of the indictment as laid?

The relevant sections of the Code are 170, 172 and 175.

The indictment herein is apparently founded upon section 172, but the evidence fails to support it because, first, the declaration not having been made in a judicial proceeding, cannot, if false,

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be perjury; secondly, as it was made in a civil matter over which the Parliament of Canada does not exercise jurisdiction, the Canada Evidence Act, by section 2 thereof, can have no application, consequently it was not a declaration permitted to be made by that Act as charged.

Certainly the appellant cannot be found guilty under section 175 of taking a false oath in an extra-judicial matter because, as pointed out in *Rex* v. *Curry* (1913), 21 Can. C.C. 273 (affirmed 48 S.C.R. 532) the essential part of the oath administered to a witness is the calling of God to witness the truth of what the witness states. The oath was not administered to the appellant in any form and consequently he cannot be held guilty of doing something falsely which he never did at all.

Can he then under section 175 be found guilty of making a false statement on solemn declaration? The answer, as I have said, depends upon whether or not that offence is included in the terms of the present indictment. I think not. The said Bulk Sales Act is "the law" by which the appellant is "required" to make the solemn declaration. The indictment is particularized to exclude all other laws permitting, requiring or authorizing the making of the solemn declaration, other than the Canada Evidence Act.

It does not include within its framework the declaration herein which is required by the Bulk Sales Act and permitted by the British Columbia Evidence Act. A declaration required and permitted by a Provincial statute, when false, is, of course, a matter giving rise to the prosecution of its maker under section 175, for making falsely the declaration required by a Provincial statute, but I am unable to say that such an offence is a lesser and cognate one included in the crime charged in the present indictment. In other words, the proof of the allegations contained in the indictment as particularized would not necessarily include proof of the elements requisite to support a conviction under section 175. *Rex* v. *Taylor and Young* (1923), 40 Can. C.C. 307.

It may be that section 172 includes within it the lesser offence of making a false statutory declaration in an extra-judicial matter, and that if the accused had been indicted for perjury

generally the conviction might be recorded in the terms of section 175—*Rex* v. *Dupuis* (1941), 76 Can. C.C. 347. But it seems to me that when the Crown descends from the general to the specific in the indictment and fails, it cannot request the Courts to record a conviction for an offence not included within the particularized terms of the indictment as laid. Counsel for the respondent drew to our attention section 63 of the British Columbia Evidence Act, but I am quite unable to subscribe to any theory by which the express language of an indictment under the Code may be given a different interpretation by resort to the terms of a Provincial statute. See *Staples* v. *Isaacs and Harris* (1940), 55 B.C. 189. Section 63 of the Provincial Evidence Act is designed to validate statutory declarations expressed to to be made pursuant to the Canada Evidence Act in matters to which that Act by section 2 thereof does not apply, and in my opinion is not of any assistance herein.

In leaving this case, I may say I am in agreement with the reasons of my brother FISHER. I would allow the appeal.

O'HALLORAN, J.A.: It was submitted by counsel for the Crown respondent, that if the conviction for perjury could not be supported, yet the jurisdiction conferred on this Court by section 1016, subsection 2, and *vide* section 951, subsection 1, should be invoked to substitute a verdict of guilty of the lesser offence of making a false declaration under section 176.

With respect, I feel satisfied that is the proper course. The appellant did make a false declaration knowingly, although he accompanied his admission with a plea of what he regarded as extenuating circumstances. If the appellant had taken an oath in judicial proceedings to the facts which he declared to in his extra-judicial statutory declaration, he would have been guilty of perjury. That is the statutory test written into section 176.

Swearing falsely is the dominating characteristic which runs through the major offence of perjury under sections 170 through 172, as well as the lesser offence of making a false declaration under section 176. That common fundamental ingredient constitutes them cognate offences and gives occasion for the substitution contemplated in sections 951, subsection 1 and 1016, subsection 2.

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Although the impeached conviction may not perhaps disclose all the ingredients essential to the crime of perjury (which it is not now necessary to decide), it does, in my view at least, disclose all the ingredients essential to the crime of making a false declaration under section 176. I might add that the interpretation of the latter section in *Rex* v. *White*, [1929] 3 W.W.R. 729 is in my view, more in accord with its true meaning than that found in *Rex* v. *Shiff* (1939), 72 Can. C.C. 44.

The appellant was charged and convicted of perjury in that he made a solemn declaration under the Canada Evidence Act, falsely declaring that he did not owe any debts in respect to a business he was selling. Section 2 of the Canada Evidence Act relates Part I. thereof to criminal proceedings and "to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf." Counsel for the appellant argued that statutory declaration related to a matter which does not come within the ambit of said section 2.

It was contended therefore that the appellant could not be convicted of the lesser offence under section 176, and consequently that the power of substitution is lacking. It was necessarily conceded that a conviction for the lesser offence could be sustained if the charge related to the making of a declaration expressed to be made under the British Columbia Evidence Act instead of the Canada Evidence Act. The appellant's contention is deprived of substance by the express language of section 63 of the British Columbia Evidence Act, which reads:

> Any declaration made in the form in the Schedule [and that is the form in the declaration under discussion] shall be as valid and effectual as if expressed to be made by virtue of this Act, notwithstanding that the same is expressed to be made by virtue of the "Canada Evidence Act."

In the result the making of a statutory declaration under the Canada Evidence Act has the same statutory efficacy as if expressed to be made under the British Columbia Evidence Act. The conviction must be read in that light. The false declaration was made in a matter within the Provincial and outside the Federal field. It was therefore governed by the Provincial Evidence Act and section 63 thereof in particular. It may be desirable to add that both section 36 of the former statute and section 62 of the latter statute empower certain designated officers

in almost *ipsissimis verbis* to take voluntary statutory declarations concerning, *inter alia,* "the truth of any fact."

I would therefore substitute the lesser offence in exercise of the jurisdiction conferred by section 1016, subsection 2. I would not interfere with the sentence which this decision necessarily demands we also review. The appellant was sentenced to a term of imprisonment equal to the time he had spent in gaol prior to his trial, to commence from the date of such arrest, together with a fine of $500, or in default of payment to six months' imprisonment. It is observed that the penalty under section 176 may be two years' imprisonment.

FISHER, J.A.: This is an appeal by one Charles T. Orford from his conviction "for," [etc.] [already set out in the statement and in the judgment of MCDONALD, C.J.B.C.].

I understand that it is agreed, but if not I would say, that the said conviction for perjury cannot stand. I pause here to say that I have not overlooked the case of *Rex* v. *Rutherford,* [1923] 2 W.W.R. 963 but, with all respect, I think it is clear that the false statement alleged here, not having been made in judicial proceedings, is not punishable as perjury. See Crankshaw's Criminal Code, 6th Ed., 159 and *Rex* v. *Dupuis* (1940), 74 Can. C.C. 82; (1941), 76 Can. C.C. 347. Counsel for the Crown, however, submits that, if the present conviction cannot stand, this Court in the exercise of its jurisdiction under section 1016, subsection 2 of the Criminal Code should substitute a verdict of guilty of an offence under section 175 or section 176. I have carefully considered this submission and have come to the conclusion that section 1016, subsection 2 read, as it must be, with section 951, is applied only in cases where the offence proved to have been committed and proposed to be substituted is a part of, or included as a lesser offence in, the offence charged in the indictment (or charge) and where the Court below might have convicted the accused of the other proved offence on the charge as framed. See *Rex* v. *Ross* (1924), 43 Can. C.C. 14; *Rex* v. *Sam Chin* (1926), 36 B.C. 397, *per* MARTIN, J.A. at p. 400; *Rex* v. *Dupuis, supra,* and *cf. Rex* v. *Dale* (1939), 54 B.C. 134, and *Barton* v. *Regem,* [1929] S.C.R. 42, especially

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at p. 47. I come now, therefore, to deal with the question as to whether the present case is one in which the section applies and the power of substitution can be exercised.

In my view it is one of the essential elements of the offence under section 175, and a necessary allegation in a charge thereunder, that the accused was required or authorized by law to make the statement in question on oath, affirmation or solemn declaration. Similarly it is one of the essential elements of the offence under said section 176, and a necessary allegation in a charge thereunder, that the accused was permitted by law to make the statement or declaration in question. See *Reg.* v. *Skelton* (1898), 4 Can. C.C. 467. In my view also one of the principles that should be applied in the present case is that indicated in two of the judgments in the case of *Rex* v. *Nier* (1915), 25 Can. C.C. 241. In such case, though the conviction was confirmed by the majority of the Court, Stuart, J. said in part as follows, at pp. 242-5:

> This is a case reserved for the opinion of the Court by Mr. Justice Walsh.
>
> The accused was tried by the judge without a jury and convicted upon the charge that he, on the 18th September, 1915, at Crossfield, being required or authorized by law, to wit, by the Alberta Insurance Act, being ch. 16 of the Statutes of 1915, to make a solemn declaration, did then make a solemn declaration before Charles Hultgren, a Notary Public duly authorized to make such declarations, in which solemn declaration the said Nier made the following statements: (here follows a statement that certain goods belonged to him and had been destroyed by fire and were of the value placed thereon in the list), which statements would amount to perjury if made in a judicial proceeding, and which were known by him to be false and were intended to mislead the Wawanesa Fire Insurance Co., contrary to sec. 175 of the Criminal Code.
>
> The questions reserved by the learned judge are as follows:—
>
> "1. Is the document of the 18th of September, 1915, made and taken in the manner described in the evidence of Charles Hultgren, a solemn declaration within sec. 175 of the Criminal Code?
>
> "2. Was I right in holding as I did that it was not essential to a conviction, either that this declaration should have been required by the company, or that it should have been such a statutory declaration as is required by statutory condition 20 (*c*), as enacted by the Alberta Insurance Act?
>
> "3. If not, is the declaration in question a statutory declaration within the requirements of said statutory condition 20 (*c*)?"
>
> . . . . .
>
> Coming now to the second question reserved, . . . in view of the special form of the charge, which went the quite unnecessary length of stating by what law the requirement or authorization was enacted, and thus,

as so often happens, opened the way for trouble which might easily have been avoided by laying the charge in the terms of sec. 175 of the Code, at least so far as stating law as distinguished from facts was concerned, it would seem to me to be doubtful whether the learned judge took the correct view. But, however, that may be and even if he was wrong, it seems unnecessary in view of the affirmative answer which I think ought to be given to the third question to deal more specifically with this second one.

Beck, J. (dissenting) said at pp. 249-50:

Section 37 of the Canada Evidence Act, which I have already quoted, does authorize, but does not require the making and the taking of statutory declarations by way of proof of loss.

But, in my opinion, the conviction can not be supported by invoking this provision—

(1) Because the charge which might have been generally in the words of sec. 175 did in fact give particulars leaving the case in the same condition as if particulars had been ordered. In such a case, the prosecution ought to be confined to the case as particularized. See Arch. Crim. Pract. 24th ed., p. 63. In my opinion, the accused was tried only and could be tried only (subject to amendment, and none was made) on the particularized case, and on that case he was entitled to be acquitted.

(2) On the evidence, I am of opinion that the statutory declaration was not one which the prosecution has shown was required by the Insurance Company. . . .

I have omitted to meet the objection that the reference in the charge to the Insurance Act may be treated as surplusage. In my opinion it cannot be so treated.

There are cases in which it has been held that incorrect statements of conclusions of law or immaterial statements may be treated as surplusage, but to particularize a case and have the case tried on those particulars, and then attempt to support a conviction on other particular facts, is quite different. I would quash the conviction.

Here the charge contains an allegation to the effect that the accused had been permitted by the Canada Evidence Act to make the declaration in question herein and the declaration itself shows that he made it pursuant to the provisions of our Bulk Sales Act. Under the circumstances counsel for the appellant submits that the appellant was permitted by a British Columbia Act to make the declaration and that the Crown did not and could not prove the allegation that the accused had been permitted by the Canada Evidence Act to make the declaration. In reply to this submission it may first be said that it is contrary to the opinion expressed in several of the judgments in the following cases: *Rex* v. *Rutherford, supra, Rex* v. *Nier, supra,* and *Reg.* v. *Skelton, supra.* Upon a perusal of such cases, however, I cannot see that such judgments deal specifically with the

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contention being made in the present case, *viz.*, that the nature of the proceedings at the time the declaration in question is made may be such that Part I. of the Canada Evidence Act, by virtue of section 2 thereof, has no application and therefore section 36 thereof, being included in said Part I., does not apply to give permission to make the declaration. No reference would appear to be made in any of the said judgments to said section 2, which, referring to said Part I., reads as follows: [already set out in the judgment of McDONALD, C.J.B.C.].

As to the decision in the *Rutherford* case, apparently followed and applied *Rex* v. *Nier* and *Reg.* v. *Skelton, supra,* it is interesting to note what was the precise question before the Court in the *Rutherford* case, and what was the contention of counsel for the accused in such case. The question answered in the affirmative was

> Whether the declaration in question is a declaration under section 172 of the Criminal Code?

and the head-note reads, in part, as follows:

> A statutory declaration made by a vendor for the purposes of The Bulk Sales Act was held to be a declaration under sec. 172 of the Criminal Code, notwithstanding that previous to the making thereof the purchaser had paid a sum on the purchase-price; and if the statement purporting to be verified by the declaration was false the vendor was guilty of perjury.
>
> The declaration was one under said sec. 172 apart from the consideration of The Bulk Sales Act, the reference to which in the charge might be treated as surplusage (*Rex* v. *Nier*, 9 Alta. L.R. 353, 9 W.W.R. 838) *per* McKay and Martin, JJ.A., following and applying *Reg.* v. *Skelton*, 3 Terr. L.R. 58, 4 C.C.C. 467 at pp. 478, 479, 482-483.

The contention of counsel for the accused is set out in case stated at p. 965:

> Mr. McIntyre for the accused contends that under section 5 of The Bulk Sales Act, ch. 198, R.S.S. (1920), the declaration must be made before paying to the vendor any part of the purchase price, and that therefore the declaration in question is not one required or permitted under section 172 of the Criminal Code, and that therefore there was no offence.

It may also be noted that Lamont, J.A., while stating that he concurred in the conclusion reached by McKay, J.A., also stated at p. 964 as follows:

> The declaration in question was in my opinion a declaration within the meaning of sec. 172. Section 5 of The Bulk Sales Act, R.S.S. 1920, ch. 198, requires the vendor to furnish a written statement verified by statutory declaration, to the purchaser upon demand. The duty is cast upon the purchaser of obtaining the statement before paying over any part of the

purchase-price. The fact that the purchaser in this case paid $350 before obtaining the statement cannot in my opinion make the statement when received anything other than a statement required by the Act.

In my view the judgments in the three cases as aforesaid should not be considered as determining the precise issue raised here, and though, as I have indicated, opinions expressed in some of the judgments are contrary to the submission of counsel for the appellant in the present case, I have to say, with the greatest respect, that I disagree with such opinions. I think the answer to the question as to whether the appellant was permitted by a Dominion or a Provincial Act must be settled by the nature of the proceedings at the time when he came forward to make the declaration, and not by the nature of the proceedings taken thereafter. I also think that the nature of the proceedings at such time was such that Part I. of the Canada Evidence Act had no application, and section 36 thereof did not apply to give permission to the appellant to make the declaration. I agree therefore with the submission of counsel on behalf of the appellant and hold that the Crown did not and could not prove the allegation that the accused had been permitted by the Canada Evidence Act to make the declaration. It thus becomes apparent that the appellant was tried and convicted of perjury upon a charge containing such allegation without the prosecution proving its truth and without any amendment being made or applied for. Counsel for the Crown relies upon the final decision in *Rex* v. *Dupuis, supra,* in which a conviction for an offence under section 175 was substituted. It must be noted, however, that, so far as it appears from the reports of such case as aforesaid, perjury was charged generally and so the present case is distinguishable from such case in which the charge itself presented no such difficulty as here. It may also be noted that the *Dupuis* decision followed *Reg.* v. *Hodgkiss* (1869), L.R. 1 C.C. 212, which distinguished *Rex* v. *Foster* (1821), Russ. & Ry. 459. With all deference to contrary opinion, I would say that, though the present case is not exactly similar to the *Foster* case, there is more ground for distinguishing the *Hodgkiss* case than the *Foster* case, and in the result I would follow the latter.

In the present case the charge went the length of stating by what law the appellant was permitted to make the declaration

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in question, and so the way for trouble was opened (as Stuart, J. said in the *Nier* case, *supra*) and in my opinion the reference to such law as the Canada Evidence Act cannot be treated as surplusage. As Beck, J. said in the *Nier* case, so I would say here, that the accused was tried only and could be tried only (subject to amendment and none was made) on a particularized case. The appellant was convicted of perjury and it is my view that, where on an appeal by the accused from such conviction the prosecution seeks to have said section 1016, subsection 2 applied and a conviction under section 175 or section 176 substituted, the prosecution must be confined to the case as so particularized. Having in mind the evidence and the charge as aforesaid, and assuming that the commission of an offence under section 175 or section 176 was proved (with respect to which I make only an assumption and not a finding as there were other submissions which were, or might have been, made on behalf of the appellant on which I express no opinion), I am satisfied and hold that such proved offence is not a part of, or included as a lesser offence in, the particularized offence charged in the indictment before the Court, and that the Court below could not have convicted the appellant of the proved offence on the charge as framed, without amendment.

My conclusion on the whole matter therefore is that the case now before the Court is not one in which the power of substitution can be exercised. I would allow the appeal and quash the conviction.

Appeal allowed and conviction quashed, McDonald, C.J.B.C. and O'Halloran, J.A. dissenting in part.

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April 16, 17; *May* 19.

Contract—Sale of business and living-premises—Purchase price paid to agent of owner—Repudiation by owner—Agent retains his commission from the sum paid him—Action against agent.

M. carried on a fish-and-chips business in premises he rented from the owner of the building. M.'s agent advertised the "fish-and-chips business with living-quarters" for sale. The plaintiff answered the advertisement and the price of $440 being agreed upon, he paid this sum to the agent. The plaintiff and M. then went to see the owner of the building concerning the tenancy, but he refused to permit the plaintiff to enter into occupation of the premises. The plaintiff demanded his money back but the agent paid him $400 and retained $40, claiming this sum as his commission. In an action against the agent to recover $40 wrongfully retained, or in the alternative for damages for breach of warranty of authority, it was held that when the purchase price is paid the money belongs to the owner and the agent cannot be sued.

Held, on appeal, affirming the decision of SHANDLEY, Co. J. (MCQUARRIE and O'HALLORAN, JJ.A. dissenting), that on the claim for return of the purchase-money, as the claim was for only $40, it is not appealable under section 116 of the County Courts Act without leave, which was never obtained. On the alternative claim for damages, the plaintiff has to show that the agent did not have M.'s authority to offer for sale what he did offer. There is no evidence to show that the agent did not have this. The *onus* is on the plaintiff and the action fails.

Per FISHER, J.A.: The plaintiff's appeal must be dismissed as the action fails for want of proof that the plaintiff obtained a completed contract with respect to the living-quarters. If wrong in so holding then I would say that the action fails for want of the contract being enforceable with respect to the living-quarters by virtue of the Statute of Frauds which was pleaded by the defendant.

APPEAL by plaintiff from the decision of SHANDLEY, Co. J. of the 17th of February, 1942, in an action to recover $40, the balance paid by the plaintiff to the defendant on an agreement to purchase a fish-and-chips business at 145 Menzies Street in Victoria. The defendant advertised in the Colonist newspaper offering for sale the said fish-and-chips business together with living-quarters. The plaintiff and defendant came together and an agreement was entered into for the plaintiff to purchase the business and living-quarters for $440. On the 7th of October, 1941, the plaintiff paid the defendant $100, and on the next day he paid the defendant the balance of $340. The defendant was unable to deliver said business and premises to the plaintiff and

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returned the plaintiff $400, but retained the balance of $40 and refused to pay this sum to the plaintiff. Alternatively the plaintiff says that the defendant assumed to have authority from the owner of the building to dispose of the living-quarters as aforesaid, and asserted and warranted to the plaintiff that he, the defendant, was so authorized. The plaintiff, on the faith of the said warranty, paid him $440. The owner of the premises repudiated the right of the defendant to dispose of the said living-quarters. The plaintiff claims $100 in damages for breach of warranty of authority.

The appeal was argued at Victoria on the 16th and 17th of April, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Higgins, K.C., for appellant: The plaintiff paid defendant $440, and defendant agreed to deliver the business in question with living-quarters. The owner of the premises repudiated the right of the defendant to sell, and defendant then told the plaintiff he could not get the premises, paid him back $400, and retained the $40. The agent is personally liable on the contract if it is shown that he is incapable of making the contract: see *The Queensland Investment and Land Company (Limited)* v. *O'Connell and Palmer* (1896), 12 T.L.R. 502. We are entitled to recover for breach of warranty of authority: see *Richardson* v. *Williamson* (1871), L.R. 6 Q.B. 276; *McManus* v. *Porter* (1910), 15 W.L.R. 269.

McKenna, for respondent: Woodward was agent for one Munn who simply owned the business. We rely on section 4 of the Statute of Frauds: see Bowstead on Agency, 9th Ed., 304; *Duncan* v. *Beck* (1914), 6 W.W.R. 1149; *Warr* v. *Jones* (1876), 24 W.R. 695; Leake on Contracts, 6th Ed., 189; *Fitzmaurice* v. *Bayley* (1860), 9 H.L. Cas. 78. This Court will not interfere with the finding of the trial judge: see *The Hamstead Steamship Co.* v. *The Vaughan Electric Co.* (1908), 38 N.B.R. 418; *McCoy* v. *Trethewey* (1929), 41 B.C. 295; *Coghlan* v. *Cumberland,* [1898] 1 Ch. 704. See also *Dung* v. *Parker* (1873), 52 N.Y. 494; *Balzea* v. *Nicolay* (1873), 53 N.Y. 467; ; *Hermann* v. *Clark* (1923), 108 Or. 457; 219 P. 608; *Beattie* v. *Lord Ebury* (1872), 7 Chy. App. 777, at p.

800; *Thilmany* v. *Iowa Paper-Bag Co.* (1899), 79 N.W. 260; *Halbot* v. *Lens,* [1901] 1 Ch. 344.

Higgins, in reply: There was part performance and the Statute of Frauds does not apply.

Cur. adv. vult.

19th May, 1942.

MCDONALD, C.J.B.C.: The judgment appealed from dismisses an action by a would-be purchaser of a fish-and-chips business against a real-estate agent to recover a balance of purchase-money paid to the agent. An alternative claim for damages for breach of warranty of authority was also dismissed.

I think we can ignore the claim for return of purchase-money. The notice of appeal indicates that the real complaint is of the failure to award damages, and the other claim was only faintly pressed. In any case the decision on the latter seems to have been clearly right; moreover, since the claim was for only $40, it would not appear to be appealable under section 116 of the County Courts Act without leave, which was never obtained. I therefore deal only with the claim for damages, under which $100 was sought.

It is not easy to get at the exact facts of this case. There was no stenographer at the hearing, and the judge's notes are sketchy, being often hard to follow. A good deal has to be conjectured. However, even putting the most favourable construction for the appellant on the evidence, I am satisfied that his claim is misconceived.

The exact claim for damages in the plaint is that the defendant advertised for sale certain "living-quarters" along with the fish-and-chips business, thereby warranting that the defendant had the owner's authority to sell these "living-quarters," which in fact he had not.

The advertisement is in evidence. It appeared under the heading "Business Opportunities" in a Victoria newspaper and ran:

> Net income $75. FISH-AND-CHIPS: living-quarters. Price $450.

A warranty of authority is a representation of authority by one who purports to act as an agent; but I do not see how it can be said there was here any representation of authority at all; the

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advertisement merely invited enquiry. If this is an offer to sell, there is nothing to suggest that the property does not belong to the advertiser.

Very shortly after seeing the advertisement, the plaintiff paid $440 by two instalments to the defendant as agent, learning that the principal was one Munn. Plaintiff says that what was offered him was a lease, but further enquiry satisfied him that Munn could not give him title, even to a lease. The nature of the title offered is disputed. Eventually the plaintiff and Munn rescinded the agreement for sale, whatever it covered, and defendant refunded to the plaintiff $400 but refused to give up the remaining $40, claiming it as commission. Plaintiff thereupon sued.

I think this case can be disposed of on the simple ground that the plaintiff had to show that defendant entered into a contract to sell what he was never authorized to offer. The plaintiff never showed anything of the sort; not a particle of evidence to that effect was produced. The only evidence on the point at all was the defendant's, and he testified that his principal, Munn, did say that the premises in question were for sale. Munn, presumably the only person who could question that statement, if it were untrue, was never called at all.

It may be that I have misstated the plaintiff's case, which was very vaguely put. It may be that his argument was intended to be that defendant purported to act for whoever was the owner of the premises. If this is the argument the answer is that there is not a particle of evidence that defendant ever purported to act for anyone but Munn. The plaintiff himself admitted that "he knew Woodward was agent for Munn." This disposes of any suggestion that defendant purported to act for whoever might be the owner. As I have said, the advertisement made no representations of authority at all.

The plaintiff's evidence was largely directed to the wholly irrelevant point whether Munn had a good title to the premises. The evidence on this point was unsatisfactory; those who denied Munn's title were not shown to be in a position to have certain knowledge. But even if Munn's title had been shown to be entirely non-existent, that would not have helped the plaintiff

in the least. The plaintiff's case is not that defendant warranted Munn's title; that is an entire misconception; the plaintiff had to show that the defendant did not have Munn's authority to offer what he did offer. There is, as I have said, not a particle of evidence to show that defendant did not have this; and the *onus* is on the plaintiff. Quite obviously, he has misconceived his case.

On the evidence, I have strong doubts whether plaintiff ever obtained a contract that satisfied the Statute of Frauds, or even a completed contract of any kind. But it becomes unnecessary to decide these points, or whether he could show any damage in the absence of a binding contract, if he had shown a breach of warranty of authority.

It would certainly seem that the plaintiff has a real grievance. But he has, in my opinion, sued the wrong party. When he tries to find a second string for his bow, the evidence does not support it.

The conclusions I have reached are, I think, borne out by the decision in *Peacock* v. *Wilkinson* (1915), 51 S.C.R. 319, though in that case there were other complications.

I would dismiss the appeal with costs here and below.

MCQUARRIE, J.A.: With all deference, I would allow the appeal and direct judgment be entered in favour of the appellant for $40, which amount counsel for the appellant stated he was willing to accept, although his claim was for $100. The amount, $100, was on his alternative claim for damages for breach of warranty of authority. In any event, I think the appellant is entitled to return of the $40 paid by him, just as much as he was entitled to return of the $400. The respondent was in no sense the appellant's agent, and his claim, if any, for commission must be against his principal who listed with him.

In my opinion none of the authorities so vaguely referred to by the learned trial judge is distinguishable from the case at Bar. The facts are quite different here.

SLOAN, J.A.: I would dismiss the appeal.

O'HALLORAN, J.A.: This appeal raises questions of some importance, although the amount involved is small. Victor

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Munn carried on a fish-and-chips business at 145 Menzies Street, Victoria, in premises he rented from the owner of the building. He listed it for sale with the respondent real-estate agent. The latter inserted an advertisement under the caption "Business Opportunities" in a daily newspaper reading: [already set out in the judgment of MCDONALD, C.J.B.C.].

The appellant answered the advertisement and the price of $440 being agreed on, he paid the respondent $100 on account, and the balance of $340 on the next day and received receipts therefor. The appellant testified the respondent told him a lease went with the premises but that was denied by the respondent. The appellant and Munn then went to see the agent of the owner of the building concerning the tenancy. But the owner did not wish a fish-and-chips business carried on there any longer because of the alleged smell from it. He refused to permit the appellant to enter into occupation of the premises. The latter then went to the respondent and demanded the $440 he had paid him. The respondent paid him back $400.

But he refused to pay the balance of $40 on the ground as I understand it, that once the $440 came into his hands it was his principal's (Munn's) money, and as he asserted Munn owed him $40 commission for finding a willing and able purchaser, he claimed payment thereof out of the principal's moneys then in his hands, and the appellant's remedy was therefore against Munn. The appellant then sued the respondent for return of the $40, and in the alternative for damages for breach of warranty of authority. The respondent pleaded the above defence as well as the Statute of Frauds. The learned trial judge dismissed the action on the ground that

> the moment the purchase price is paid the money belongs to the owner and that the agent cannot be sued to recover it or any part of it.

The learned trial judge stated the proposition too broadly, and *vide* Bowstead on Agency, 9th Ed., 307. An agent is personally liable to repay purchase-money, if it is paid him under a mistake of fact or in consequence of some wrongful act, and repayment is demanded from him before he has in good faith paid the money over to or otherwise dealt to his detriment with his principal, in the belief that the payment was good and valid. That is what happened here. The respondent agent did not pay the money

over to his principal Munn. That cannot be questioned since the $400 was paid back by the respondent agent, and the $40 in question is still held by him for services he claims he rendered his principal. That a mistake or wrongful act occurred is plain from the evidence. That was the reason the $400 was paid back to the appellant.

In *Scottish Metropolitan Assurance Co.* v. *Samuel & Co.* (1922), 92 L.J.K.B. 218, Bailhache, J. said at pp. 219-20:

> Ever since the decision in *Buller* v. *Harrison* [(1777), 2 Cowp. 565, Lord Mansfield] it has been held that the mere passing of money to the credit of an account where there is no settled account is not such a payment by an agent as will excuse him from repaying money which his principal is not entitled to retain. It would be a different matter if an agent had paid money over to his principal without knowing that the principal was not entitled to it. In such a case the agent would be a mere conduit pipe, and if the money had been wrongly paid to the agent the person who had paid it would have to look to the principal after the settlement of accounts between the agent and the principal. All this is now old law, certainly 150 years old.

It is plain the ground of decision in the Court below cannot be sustained. But counsel for the respondent submitted in support of the judgment, that the transaction was a sale of equipment and goodwill of a business which need not be carried on at 145 Simcoe Street. The respondent said in evidence "he [the appellant] could take the stuff anywhere he liked." There are two answers to that submission: (1) the inducing emphasis given "living-quarters" in the advertisement points definitely to the business being continued where it was; and (2) there was no reason for the repayment of the $400 unless the parties clearly understood that the right to continue the business at its existing location was an essential term, if not a condition precedent to the sale, and consequently that the money had been paid for a consideration which had failed, since the respondent could not deliver that which he had advertised for sale.

The foregoing should be sufficient to allow the appeal. But before this Court the argument centred on whether the Statute of Frauds was an answer to the alternative claim for breach of warranty of authority. Counsel for the respondent relied on the principle applied by Lamont, J. in *Duncan* v. *Beck* (1914), 6 W.W.R. 1149, that an agent cannot be sued for breach of warranty of authority if the transaction is one in which the principal

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could not have been sued in any event. It was argued that action against the principal was barred here by the Statute of Frauds, on the ground as I understand it, that while the advertisement and the two receipts contain sufficient particulars to satisfy the statute in respect to a sale of the business as such, yet they contain no particulars of the terms of tenancy of the business premises.

On examination that submission is found to defeat itself. For we would then have a contract void *ab initio* for uncertainty, according to the principle applied in *Murphy* v. *McSorley,* [1929] 4 D.L.R. 247, and more recently by this Court in *Jackson* v. *Macaulay Nicolls Maitland & Co. Ltd. and Willett,* [57 B.C. 492]; [1942] 2 W.W.R. 33. The Statute of Frauds could not then apply at all. For there could not be a contract of any kind since the transaction would be a nullity. The respondent's claim to the $40 would fall with it, since he could not then be heard to say he had effected a sale, or earned any commission. No basis for his claim to the $40 could then exist, and he would have to return it as he did the $400. His conduct in returning the $400 would estop him also from denying the appellant's right to the balance of the money paid and *vide Cornish* v. *Abington* (1859), 4 H. & N. 549.

If our decision were to turn upon the last-mentioned considerations, no doubt could remain as to the right of the appellant to recover the $40 or damages in that amount. The respondent's obligation to repay that sum would then arise by operation of law, *vide Chillingworth* v. *Esche,* [1924] 1 Ch. 97, and also *Craven-Ellis* v. *Canons, Ld.* [1936] 2 K.B. 403, and *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Brothers,* [1937] 1 K.B. 534, Lord Wright, M.R. at p. 544. No separate question need arise concerning the "living-quarters" since the evidence discloses they were part of the business premises.

But in any event the plea of the Statute of Frauds would be excluded by the doctrine of part performance. The respondent accepted the full amount of the purchase price of a business carried on at a specified location and gave the appellant a receipt accordingly. His claim to retain the balance of $40 is necessarily based on a contract the existence of which he now seeks

to deny. What took place points unequivocally to the existence of the contract. Paraphrasing what Lord O'Hagan said in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, at p. 485, his claim to the balance of $40 is sufficient of itself to satisfy the Court it is consistent only with his acknowledgment of the contract upon which the appellant relies. And *vide* also *Cornish* v. *Abington, supra.*

I would allow the appeal.

FISHER, J.A.: In my view the judgment of the Court below on the claim set out in paragraph 1 of the amended plaint was clearly right and I will deal at length only with the alternative claim of the plaintiff (appellant) for damages for breach of warranty of authority. This claim is set out in paragraph 2 of the amended plaint but, in order to understand its exact nature, I think it is necessary to set out the whole plaint, reading as follows:

1. The defendant by an advertisement in the Colonist newspaper published at the city of Victoria, British Columbia, on Tuesday, October 7th, 1941, offered for sale a fish-and-chips business situate at 145 Menzies Street, in the said city of Victoria, together with living-quarters. The plaintiff answered the said advertisement and on the 7th October, 1941, paid to the defendant $100 deposit and on the 8th October, 1941, the plaintiff paid the defendant the balance of the agreed purchase price amounting to $340, totalling altogether $440. The defendant was unable to deliver said business and premises to the plaintiff and returned to the plaintiff the sum of $400 but still wrongfully retains $40 of the plaintiff's money. The plaintiff has demanded the said sum of $40 from the defendant from time to time but he refuses to repay such sum.

The plaintiff claims $40.

2. In the alternative the plaintiff says that the defendant assumed to have authority from the owner of the building to dispose of the living-quarters as aforesaid and asserted and warranted to the plaintiff that he, the defendant, was so authorized. The plaintiff on faith of said warranty paid the defendant the said sum of $440. The defendant was not authorized to dispose of the said living-quarters nor enter into a contract on behalf of the owner in respect of same and the owner repudiated the right of the defendant to dispose of the said living-quarters.

The plaintiff claims damages against the defendant for breach of warranty of authority in the sum of $100.

On its face this plaint alleged, in effect, that the defendant (respondent) represented himself to have authority from the owner of the building. At the trial, however, the plaintiff said that he knew the defendant was agent for one Victor Munn and,

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though it may perhaps still be argued that the plaintiff did not know it at the time, it must be admitted that Munn was not the owner but only a tenant of the building. It is clear now, therefore, that, whatever authority the plaintiff claims the defendant represented himself to have, the representation was made by the defendant as agent for Munn who was the tenant and not the owner of the premises and the case must be dealt with on this basis.

It must first be noted that in this action for breach of warranty of authority the plaintiff is seeking to make the defendant personally liable for making an unauthorized contract and is claiming damages for loss alleged to have been sustained by reason of the repudiation of the contract and the plaintiff's not having the valid contract which the plaintiff alleges the agent impliedly warranted that he should have. The damages claimed are damages for the loss of the contract or, as it may be put, damages on account of the supposed goodness of the bargain lost. The plaintiff says, according to the judge's notes of the evidence, as follows:

> He said we couldn't get the premises. I figure we could have made $15 per day.

In the present action, therefore, the plaintiff must show, *inter alia,* not only that the defendant did not have the authority which he professed to have from Munn to make a contract as his agent in respect of the living-quarters as aforesaid but also that he (the plaintiff) obtained a completed contract with regard to the living-quarters which would have been enforceable if the defendant had had the authority which he professed to have from his principal Munn. See Bullen & Leake's Precedents of Pleadings, 9th Ed., 77-78 and cases there referred to.

The question, therefore, arises at the outset as to what is the contract which the plaintiff alleges the defendant represented and warranted he was authorized by Munn to make and which the plaintiff alleges he did enter into with the defendant. On this question I must say, with all respect, that I found the submission of counsel on behalf of the plaintiff hard to follow, as he seemed to submit at first that a sale of the fish-and-chips business situate at 145 Menzies Street, Victoria, B.C., necessarily meant a sale of the premises also, but I am satisfied that his final

submission was that the defendant warranted that he was authorized by Munn to make a contract for the sale or disposal of only what Munn had, *viz.*, a monthly tenancy in the living-quarters as aforesaid, and that the plaintiff entered into such a contract. On the other hand the submission of counsel on behalf of the defendant is also somewhat hard to follow as he submits that the defendant was authorized to sell and sold only the fish-and-chips business. I find this hard to follow because the advertisement (Exhibit 1) contained the words "living-quarters" and because the defendant in his evidence, while stating that he never sold a lease, said on cross-examination that Mr. Munn told him "place for sale and living-quarters at that time." On this phase of the matter it is interesting to note that the learned trial judge in his reasons for judgment says, in part, as follows:

> I find that the defendant was the duly-authorized agent of the owner of the business in question to find a purchaser to purchase the business and as agent for the owner sold the business to the plaintiff.

This would appear to be a finding of fact, supporting the submission of counsel on behalf of the defendant, but I may say that, apart from such finding, I have come to the conclusion upon the evidence which is before us that the plaintiff has not sustained the burden which is on him of proving that he did enter into a completed contract with the defendant as agent for Munn for the transfer to him of a monthly tenancy in the living-quarters. I would say that the evidence falls short of proving any completed contract with regard to the living-quarters. The evidence of the plaintiff himself reads, in part, as follows, the person called Ker being associated with defendant's office:

> I paid Ker $100 as deposit—as a result of the advertisement.
>
> . . . . .
>
> Ker had promised me a lease. He said a lease to go with the premises. Before I paid money I think I was there and Ker and Charley Lewis and Ker said a lease goes with the business. We were promised a lease by Ker. I can't say when but it was at Woodward's office.
>
> . . . . .
>
> When the $100 was paid I don't know anything said about a lease. Next day I paid $340 to Ker—got a receipt. At that time Ker said a lease would go with the premises. When I paid $340 Ker said there would be a lease.

(See also Exhibit 4). I pause here to say that Ker, called as a witness, denied that he ever made any such statement about a lease. However, even on the assumption that what the plaintiff

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says is true, my view would be as already indicated. See Williams on Landlord & Tenant, 2nd Ed., 68 and *McSorley* v. *Murphy* (1928), 40 B.C. 403; [1929] S.C.R. 542. On this phase of the matter, as well as on the question of the contract, if any, being enforceable, I would also refer to Leake on Contracts, 6th Ed., 182, and cases there cited.

In my view, therefore, the plaintiff's appeal must be dismissed as the action fails for want of proof that the plaintiff obtained a completed contract with respect to the living-quarters. As I have already intimated the present case is one in which the plaintiff must prove that on the faith of a certain warranty he entered into such a contract with the defendant as agent. I pause here to say that *Oliver* v. *Bank of England* (1902), 71 L.J. Ch. 388 is obviously a different kind of case even though the principle laid down in *Collen* v. *Wright* (1857), 27 L.J.Q.B. 215 was there applied. If I should be wrong in holding that the plaintiff had not proved a completed contract as aforesaid, then I would say that the action fails for want of the contract being enforceable with respect to the living-quarters by virtue of the Statute of Frauds which was pleaded by the defendant. See Leake on Contracts, *supra; Duncan* v. *Beck* (1914), 6 W.W.R. 1149 and authorities there referred to. In the *Duncan* case, Lamont, J. says at p. 1150:

> . . . But in order to make the agent personally liable for making an unauthorized contract, the contract must have been one which would have been enforceable against the principal if he had in fact authorized it. If this were not so, the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract when a breach of the contract itself, if it had been authrized, would have furnished no ground of action; 31 Cyc 1550.

On my view of this matter, as hereinbefore set out, it is not necessary for me to consider the defence based on the argument that in any event the defendant did have from Munn the authority he professed to have with regard to the living-quarters and, therefore, the action should fail as the plaintiff has not shown a breach of warranty of authority by the defendant. I have to say, however, that I find the submission of counsel for the plaintiff in reply to such argument very interesting and I cannot refrain from making some comments on it. Counsel on behalf of the plaintiff submits that the argument is not sound

as Munn was incapable of making the contract in question and, therefore, the defendant is personally liable. Counsel on behalf of the appellant especially relies upon the following authorities: Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 299, par. 485; *The Queensland Investment and Land Company (Limited)* v. *O'Connell and Palmer* (1896), 12 T.L.R. 502; *Richardson* v. *Williamson* (1871), L.R. 6 Q.B. 276. Reference might also be made here to *Collen* v. *Wright, supra,* which laid down the rule that a person professing to make a contract as agent for another, impliedly, if not expressly, warrants or promises to the person who enters into such contract upon the faith of such profession that the authority which he professes to have does in fact exist. It would appear that the submission on behalf of the plaintiff amounts to this, *viz.,* that in the present case the authority which the defendant agent professed to have from Munn was authority to make a contract in respect of the living-quarters, that the defendant did not have such authority as Munn could not give such authority and therefore according to the said cases the defendant is personally liable for the actual loss sustained by the plaintiff by reason of his not having the valid contract which the agent impliedly warranted that he should have. In the two cases relied upon as aforesaid the agent would appear to have been held liable where the principal was incapable of making the contract in question. In the *O'Connell* case the principal was incapable because he was an infant and in the *Richardson* case (in which case the plaintiff had lent £70 to a Benefit Building Society and received a receipt signed by the defendants as two directors of the society) because the society had no power to borrow money. In the present case the submission of counsel for the appellant would raise the question as to the reason for the rule and its applicability to a case such as this where the principal had what might be called general capacity to enter into such a contract, as the one here, but no power to enter into the particular one in respect of the living-quarters as aforesaid. As already intimated, I do not find it necessary to express an opinion upon the question thus raised, though reference might be made to 31 Cyc 1548, notes 22 and 23, but before parting with this case I wish to make it clear that I am not holding that the

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plaintiff's claim fails because he has not proved that the defendant did not have the authority he professed to have from Munn in respect of the living-quarters.

Appeal dismissed, McQuarrie and O'Halloran, JJ.A. dissenting.

Solicitor for appellant: *Frank Higgins.*
Solicitor for respondent: *Joseph McKenna.*

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June 9, 10, 24.

MUSGRAVE v. SCHUTZ *ET AL.*

Negligence—Collision between cars—Both parties equally responsible—Contributory Negligence Act—Costs—Apportionment of—R.S.B.C. 1936, Cap. 52, Secs. 3 and 4.

Under the provisions of the Contributory Negligence Act, on a finding of joint liability, each party is obliged to pay such percentage of the costs of the other party as corresponds to the degree in which each party was held in fault.

In this case they were found equally to blame: therefore each party must pay one-half the costs of the other with a set-off. An *allocatur* will then issue for the balance which is due to one or the other.

Held
Lutes v. Leonard
58 W.W.R. 321
(B.C.C.A.)
60 D.L.R. (2d) 459

ACTION for damages resulting from a collision between the plaintiff's and defendant's automobiles. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 9th of June, 1942.

Sedgwick, for plaintiff.
L. St. M. Du Moulin, and *W. H. K. Edmonds,* for defendants.

Cur. adv. vult.

10th June, 1942.

SIDNEY SMITH, J.: I find that the defendant Mrs. Schutz was proceeding north on Slocan Street and that she stopped at the stop sign on Kingsway. But I think that she did not exercise care on resuming the journey in that she failed to give the plaintiff the right of way to which he was entitled.

I find that the plaintiff was also in fault in that he did not keep a proper look-out and that the negligence of both parties

contributed to the accident in equal degree. I allow damages as follows: Special $174.11; general $650.

Costs as directed under the Contributory Negligence Act.

24th June, 1942.

SIDNEY SMITH, J.: In this action I found the parties equally liable for the damages which resulted from the collision between their respective motor-vehicles and directed costs to be apportioned in accordance with the provisions of the Contributory Negligence Act, R.S.B.C. 1936, Cap. 52, Upon the settlement of the judgment counsel have asked for a ruling as to the method of apportionment under the said Act.

The Act was originally chapter 8 of the statutes of 1925. It was repealed and replaced by a new statute, namely, chapter 12 of the 1936 statutes, and this statute is now to be found as chapter 52 of the 1936 revision.

Under the 1925 Act there have been several decisions on the question of apportionment of costs, such as *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214; *Wegener* v. *Matoff* (1934), 49 B.C. 125; *Jackson* v. *Lavoie* (1935), 50 B.C. 119.

These are decisions of the Court of Appeal and therefore binding upon me. They would, of course, be followed in the present case were it not for the new provisions introduced by the 1936 statute. These are as follows:

3. The awarding of damage or loss in every action to which section 2 applies shall be governed by the following provisions:—

(*a.*) The damage or loss (if any) sustained by each person shall be ascertained and expressed in dollars:

(*b.*) The degree in which each person was at fault shall be ascertained and expressed in the terms of a percentage of the total fault:

(*c.*) As between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person such percentage of the damage or loss sustained as corresponds to the degree of fault of that other person:

(*d.*) As between two persons each of whom has sustained damage or loss and is entitled to recover a percentage thereof from the other, the amounts to which they are respectively entitled shall be set off one against the other; and if either person is entitled to a greater amount than the other he shall have judgment against that other for the excess.

4. Unless the judge otherwise directs, the liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damage or loss; and the provisions of section 3 governing

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the awarding of damage or loss shall apply, *mutatis mutandis*, to the awarding of costs, with the further provision that where, as between two persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there shall be a further set-off of the respective amounts and judgment shall be given accordingly.

It seems to me that under these provisions on a finding of joint liability each party is obliged to pay such percentage of the costs of the other party as corresponds to the degree in which each party was held in fault.

In this case they were found equally to blame; therefore each party must pay one-half the costs of the other, with a set-off. An *allocatur* will then issue for the balance which is due to one or the other, and I so hold.

I am fortified in this view in that this was the method of apportioning damage under the old Admiralty rule of division of loss which prevailed prior to the Maritime Conventions Acts (1911 in England; 1914 in Canada). It is aptly set out in Mayers's Admiralty Practice, 157, to the effect that there is one final judgment for the balance between a moiety of the loss of the one and a moiety of the loss of the other.

Under the aforesaid provisions this method of apportionment would apply whether for damages or costs and whether the liability be equal or unequal.

By way of illustration reference may be made to the *Jackson* case (1935), 50 B.C. 119, at p. 121. If my view of the present provisions of the statute is correct the costs in that case under these provisions would have been ascertained as follows:

Plaintiff's costs $332.55; defendant's costs $397.27.

Plaintiff was found 20 per cent. in fault and therefore he pays 20 per cent. of defendant's costs, $79.45.

Defendant was found 80 per cent. in fault, and so pays 80 per cent. of plaintiff's costs, $266.04.

Balance in favour of plaintiff, $186.59.

Allocatur would then have issued for $186.59, being the costs payable by the defendant.

Judgment accordingly.

FRASER AND FRASER v. CITY OF VANCOUVER.

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June 3, 4; *July* 7.

Municipal corporation—Drainage system—Ditches and culvert—"Temporary purpose"—Spilling water on plaintiffs' land—Right of action—Negligence — Damages — Injunction — Prescription — Compensation under Municipal Act—B.C. Stats. 1914, Cap. 52, Sec. 54 (176)—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163 (39).

In 1938 the plaintiffs purchased a lot on the south side of 54th Avenue in Vancouver, opposite Osler Street, upon which they built a residence. In 1915 the municipality of Point Grey (now part of Vancouver) constructed a culvert across 54th Avenue just west of the plaintiffs' lot, which drained a ditch running east and west on the north side of 54th Avenue. North of 52nd Avenue is a large area of swampy land and from 52nd Avenue to some distance south of the plaintiffs' lot there is a gradual slope in the whole area to the south. On the complaint of the owner of a house near the corner of 52nd Avenue and Hudson Street in 1918, the municipality constructed a ditch along 52nd Avenue, then south through various lots to connect with the ditch on 54th Avenue, and subsequently all the ditches were improved from time to time, mainly in the way of clearing them of debris. After the water left the said culvert it flowed south in a ditch close to the west boundary of the plaintiffs' lot and a stone wall was constructed along the west boundary of the plaintiffs' lot to keep the water from overflowing on the lot, but in the wet season the water seeped through, flooded the plaintiffs' cellar and formed a pond at the south end of their lot. The plaintiffs recovered judgment in an action for damages, and an injunction.

Held, on appeal, affirming the decision of SHANDLEY, Co. J., that in the absence of evidence proving when all the said ditch construction was completed, and when the large quantity of water brought from the watershed began to flow through the culvert and spill over, the defendant has failed to establish its plea that it has acquired a prescriptive right to do what it is now doing, because it has failed to prove the actual user and exercise for more than twenty years of the right which it now claims: further the plea fails as the culvert and ditches were constructed for a temporary purpose only.

Held, further, on the defence that the only remedy the plaintiffs had was to seek compensation under the provisions of the Municipal Act. The defendant did something it was permitted to do by statutory authority, but the damage done is not inevitable, as the water could be carried away so as not to damage the plaintiffs' land. The damage did not arise from a specifically authorized work, but from the method of carrying it out, which was in the discretion of those doing it, and it not having been established that the plaintiffs' damage was the inevitable result of what was specifically authorized, the plaintiffs were entitled to their remedy by action.

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APPEAL by defendant from the decision of SHANDLEY, Co. J. of the 26th of February, 1942, in an action for damages for spilling water over the plaintiffs' lands, and for an injunction. In 1938 the plaintiffs purchased a lot on the south side of 54th Avenue, opposite Osler Street, on which they built a large dwelling-house. The area in question was formerly in the municipality of Point Grey until amalgamation with the city of Vancouver in 1929. North of 52nd Avenue is an area of fairly level swampy ground. From 52nd Avenue south to 54th Avenue and further south through the Fraser property to 57th Avenue is a steady slope downwards. In 1915 a culvert was built across 54th Avenue immediately west of the Fraser lot, which carried the water from a ditch running east and west on the north side of 54th Avenue. The water on leaving the culvert on the south side of 54th Avenue flowed south on the west side and close to the Fraser lot. In 1918 a house was built near the corner of 52nd Avenue and Hudson Street. In order to drain the lot the municipality constructed an open ditch east along 52nd Avenue, then south through a number of lots until it reached 54th Avenue, and thence east along the north side of 54th Avenue to the entrance of the above-mentioned culvert, and the drainage thus accumulated was allowed to spill from 54th Avenue over private property in a southerly direction. Later two more houses were built near the corner of 52nd Avenue and Hudson Street, and both of the lots were drained into the same ditch. These houses drain their septic tanks into the ditch in question. The defendant also constructed ditches on both sides of 54th Avenue, east and west of the culvert, and a quantity of water passing through these ditches flows over the plaintiffs' land.

The appeal was argued at Vancouver on the 3rd and 4th of June, 1942, before SLOAN, O'HALLORAN and FISHER, JJ.A.

Lord (*E. N. R. Elliott*, with him), for appellant: We have a statutory right to do what we have done in the way of building ditches and the culvert in question. The natural flow of the water is to where the culvert is situate, and the ditches have not increased the flow of water to that point: see *Spratt* v. *Township of Gloucester* (1920), 47 O.L.R. 593, at p. 596; *Herron* v. *Rath-*

mines and Rathgar Improvement Commissioners, [1892] A.C. 498; *Renahan* v. *City of Vancouver* (1930), 43 B.C. 147; *Montgomery et al.* v. *R.M. of Assiniboia,* [1930] S.C.R. 494; *Durrant* v. *Branksome Urban Council,* [1897] 2 Ch. 291. All this work was completed more than twenty years prior to the action. We have a prescriptive title: see Halsbury's Laws of England, 2nd Ed., Vol. 11, pp. 290 and 307, par. 554; *Attorney-General and Bromley Rural Council* v. *Copeland* (1902), 71 L.J.K.B. 472; *Township of West Flamborough* v. *Pretuski* (1930), 66 O.L.R. 210; *Gibbons* v. *Lenfestey* (1915), 84 L.J.P.C. 158; *Harrison* v. *Harrison* (1883), 16 N.S.R. 338; *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852, at p. 864; *Earl de la Warr* v. *Miles* (1881), 50 L.J. Ch. 754. Their proper remedy is to seek compensation under the Municipal Act, B.C. Stats. 1914, Cap. 52, Secs. 357-8 and amendments: see *Pratt* v. *City of Stratford* (1888), 16 A.R. 5, at p. 12; *McCurdy* v. *The Township of Bayham,* [1935] O.R. 271.

A. Alexander, for respondents: One claiming a prescriptive right must show he has enjoyed it for twenty years, and it must be one not temporary in character. There is no definite evidence to establish a prescriptive right uninterrupted for twenty years. He must prove he has a prescriptive right, and user is the test of a prescriptive right. Enjoyment of user for twenty years must be proved and this has not been done: see *Cardwell* v. *Breckenridge* (1913), 11 D.L.R. 461, at p. 466. It can only be acquired by continuous usage and must be permanent: see Gale on Easements, 11th Ed., 292; *Burrows* v. *Lang,* [1901] 2 Ch. 502, at pp. 506-8. It was never intended that the ditches should be permanent. They were built for a temporary purpose only. A prescriptive right must be an open adverse prescriptive right: see Gale on Easements, 11th Ed., 244; *Blewett* v. *Tregonning* (1835), 3 A. & E. 554, at p. 588. The time at which prescription must begin is when an actionable wrong is committed: see *Butt* v. *City of Oshawa* (1926), 59 O.L.R. 520, at p. 525. By the ditches they accumulated the water at the culvert in question and the water spilled over our property, the cellar of the house being flooded and the south portion of the lot inundated: see *Campbell* v. *Township of Morris* (1923), 54 O.L.R. 358. As to seeking

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compensation under the Municipal Act, it not having been established that the plaintiffs' damage was the inevitable result of what was specifically authorized, we have our remedy by action: see *Guelph Worsted Spinning Co.* v. *City of Guelph* (1914), 30 O.L.R. 466; *Imperial Varnish and Colour Co. Ltd.* v. *City of Toronto* (1927), 60 O.L.R. 240, at p. 243; *Aikman* v. *Mills & Co.*, [1934] 4 D.L.R. 264, at p. 271; *Manchester Corporation* v. *Farnworth*, [1930] A.C. 171, at pp. 183 and 206-7; *Bower* v. *Richardson Construction Co.*, [1938] 2 D.L.R. 309; *Dufferin Paving & Crushed Stone Ltd.* v. *Anger*, [1940] S.C.R. 174, at p. 177; *Smiley* v. *Ottawa*, [1941] 2 D.L.R. 390.

Lord, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 11, pp. 296 and 358, par. 630; *Arkwright* v. *Gell* (1839), 5 M. & W. 203, at p. 232; Gale on Easements, 11th Ed., 236 and 245; *Geall* v. *Township of Richmond* (1932), 46 B.C. 249.

Cur. adv. vult.

27th July, 1942.

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

O'HALLORAN, J.A.: The factual findings of the learned trial judge are supported by the evidence. In my view also the disposition of the action is in accord with the application of correct principles to the facts so found.

I would dismiss the appeal.

FISHER, J.A.: In this matter I have first to say that in my view there was evidence to support and I would accept the findings of fact of the learned trial judge as set out in his reasons for judgment except as hereinafter stated.

It is or must be common ground that there was evidence to prove that the defendant or its predecessors, more than twenty years before this action, had constructed a culvert at point "D" as shown on the plan Exhibit 1, from the north side of 54th Avenue to the south side thereof, with an outlet adjacent to the north and west boundaries of the plaintiffs' land and premises. It is or must be common ground also that there was evidence to prove that after the construction of said culvert a certain quan-

tity of water, at least at certain times of the year, would flow through the culvert and spill out on to the lands of the plaintiffs or their predecessors in title, and that after the construction of what may be called the long ditch or ditches down from 52nd to 54th a large quantity of water passed through the ditches and culvert and spilled over the aforesaid lands. After a careful consideration of the evidence, however, I have come to the conclusion that there was no evidence to prove when all of the said ditch construction was completed or to prove that a certain quantity of water had, at certain times of the year for at least twenty years before this action, passed through said ditches and culvert and spilled over on the said lands. In my view the *onus* was on the defendant to prove this in order to establish its plea that it had acquired a prescriptive right to do what it is now doing, and that "the alleged grievances were uses by the defendant of the said right." The substantial grievance alleged and proved by the plaintiffs is not simply that a small quantity of surface water from the 54th Avenue road or ditches is spilled over their said lands from the culvert D, but that a very large quantity of water is spilled from it which has been brought to the culvert by the defendant from elsewhere, *viz.*, from the watershed described, by means of the ditch construction as aforesaid. In the absence of evidence proving when all of the said ditch construction was completed and when the large quantity of water brought from the watershed began to flow through the culvert and spill over I conclude that the defendant has failed to establish its plea as aforesaid because it has failed to prove the actual user and exercise for more than twenty years of the right with which it now claims to burden the lands of the plaintiffs. I think it should be clear from what I have already said, but in case it is not I wish to make it clear, that this conclusion is not based upon the finding of fact of the trial judge that "the lands being vacant plaintiffs and their predecessors in title suffered no damage from the water until the plaintiffs built their home" as I do not accept or at least do not base any conclusion upon such finding of fact. Even granting that some damage from the water was suffered before the plaintiffs built their home, I would still conclude that the defendant had failed to establish its plea as aforesaid and

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I would refer to *Cardwell* v. *Breckenridge* (1913), 11 D.L.R. 461 and authorities therein cited, especially at pp. 466-67, where Hodgins, J.A. says as follows:

> . . . the user is the test of the prescriptive right.

Neville, J., in *Attorney-General* v. *Great Northern Railway*, [1909] 1 Ch., at p. 779, says:—

> "The prescription must depend upon and is limited and defined by the user that is proved."

In *Crossley & Sons, Limited* v. *Lightowler*, [(1867)] 2 Chy. App. at p. 481, Lord Chelmsford, L.C., says:—

> "The user which originated the right must also be its measure."

Graham, B., in *Bealey* v. *Shaw* (1805), 6 East 208, speaking of the right to enjoy or divert water, charged the jury that "every such exclusive right was to be measured by the extent of its enjoyment"; and his direction was upheld by the full Court.

In *Calcraft* v. *Thompson* (1867), 15 W.R. 387, Lord Chelmsford, L.C., speaks of the easement of light in language which is applicable to an easement such as this, *i.e.*, a right which is gradually ripening—and which after twenty years is absolutely acquired—and continues:—

> "When the full statutory time is accomplished the measure of the light is exactly that (neither more nor less) which has been uniformly enjoyed previously."

This is the rule in this Province. The headnote of *McNab* v. *Adamson* (1849), 6 U.C.Q.B. 100, is as follows:—

> "The right which a party has acquired by twenty years' uninterrupted user to pen back the water of a stream, in certain quantities, for the purposes of his mill, will be strictly confined to the right as actually exercised."

Robinson, C.J., in *Bechtel* v. *Street* [(1860)], 20 U.C.Q.B. 15, says at p. 17:—

> "The important question of fact is not how high the dam was for twenty years, but how high the water has been backed up on the plaintiff's land during that time."

Cain v. Pearce Co. [(1910)], 1 O.W.N. 1133; [(1911)], 2 O.W.N. 887, 1496; [(1912)], 3 O.W.N. 1321; 5 D.L.R. 23, is, I think, quite to the same effect.

From the above authorities I conclude that, even granting that the use of summer water, when it came down, is proved, the prescriptive right to use it is limited by the actual user (neither more nor less), and that to use it in prolongation of the spring freshets is a different and more oppressive use, considering the season of the year and the right of the plaintiffs to cultivate their land. In *Hall* v. *Swift* [(1838)], 4 Bing. N.C. 381, the right had been established by a long course of enjoyment, and the cesser during the dry season was only urged as an interruption destroying the right. It must be borne in mind that one of the elements of a prescriptive right is, that the servient tenement shall be burdened with some right openly and continuously exercised, and that it cannot be gradually and insensibly increased: Goddard on Easements, 6th Ed., pp. 398, 399.

As to the plea of prescriptive right I have also to add that, if

I should be wrong in the basis for my conclusion as hereinbefore set out, I would still be of opinion that the plea failed as it was only intended that the water should flow and overflow as it did so long as the municipality did not see fit otherwise to drain the lands, and so the said culvert and the said ditches were constructed for a temporary purpose only—see evidence of William B. Greig, assistant engineer for the defendant. The principle applied in the case of *Burrows* v. *Lang,* [1901] 2 Ch. 502 is therefore applicable to this case. In the *Burrows* case Farwell, J. at pp. 507-08 says as follows:

> Regarded as a question of prescription, I should have to consider whether the artificial watercourse was made for a temporary purpose or not. The plaintiff contends that this was not a temporary purpose. That depends on the meaning of the word temporary. In *Arkwright* v. *Gell,* 5 M. & W. 203, 232, the fact that water pumped from mines had flowed over a man's land for upwards of sixty years gave him no right to a continuance of the flow. The meaning of "temporary purpose" is, therefore, not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end. For example, if a man pumps water from his mines for the purpose of draining them, that is a temporary purpose, as it is limited by the duration of the workings. If a man makes a watercourse leading water to a mill-pond for the use of his own mill on his own land, that is a temporary purpose, as it is limited to the period for which he uses the mill. In both cases, in my judgment, it is a temporary purpose within the meaning of the authorities. It is not meant to be a permanent alteration of the face of nature, but a temporary alteration for the purpose of and co-extensive with the carrying on of a particular business —in this case the business of a miller, and that is a temporary purpose within the authorities.

As to the defence that the only remedy the plaintiffs had was to seek compensation under the provisions of the Municipal Act, I would adopt the reasoning of the Court below. In addition to the cases referred to by the learned trial judge reference might also be made to *Campbell* v. *Township of Morris* (1923), 54 O.L.R. 358, especially at p. 366, where Kelly, J. refers to *Rudd* v. *Town of Arnprior* (1920), 18 O.W.N. 411; (1921) 20 O.W.N. 261, and applies the principle enunciated in the reasons for judgment of Sir William Meredith, C.J.O., in such case.

I have only to add that upon the evidence before the Court in this case I would dismiss the appeal and affirm the judgment.

Appeal dismissed.

Solicitor for appellant: *A. E. Lord.*
Solicitors for respondents: *Alexander & Fraser.*

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April 20,21; May 19.

REX v. ANDERSON.

Criminal law — Intoxicating liquors — Keeping for sale — Conviction — Quashed on appeal to county court—Accused's husband owner of premises—Confession of accused—Grounds for excluding—Proof of marriage—Appeal—R.S.B.C. 1936, Cap. 160, Sec. 56.

Four policemen with a search warrant entered the premises occupied by the accused and her husband, and found several persons in the dining-room drinking beer, also a quantity of beer and empty beer bottles in other rooms. The policeman in charge, without giving any warning, interrogated the accused as to who was in charge of the premises, to which she replied that the premises were registered in the name of the accused's husband. Accused was convicted for keeping liquor for sale, and on appeal to the county court the conviction was quashed, when it was held that it was the accused's husband, the owner of the house, who should have been charged with "keeping for sale." On appeal by the Crown, the Court of Appeal's jurisdiction being restricted to the consideration of points of law only, it was contended: (1) That there was no evidence to support the finding that the accused was the wife of the owner; (2) that even if there was such evidence, by that fact alone, the accused could not escape the *onus* sections of the Government Liquor Act; (3) that the judge should not have excluded a certain statement made by the accused to the police.

Held, on appeal, affirming the decision of LENNOX, Co. J., that the appeal should be dismissed.

Per SLOAN and FISHER, JJ.A.: There is some evidence upon which the finding could be sustained, enough to be weighed by the tribunal invested with jurisdiction to find marriage or no marriage. The learned judge below considered it sufficient and the question of sufficiency is one of fact and not open to us on this appeal. The accused attempted to rebut the presumptions of guilt arising from proof of possession and sale, by relying on the contrary presumption arising from the relationship of husband and wife, namely, that the husband was keeper and owner of the premises. Conflicting presumptions neutralize each other and leave the matter at large to be determined on the evidence. The determination of guilt or innocence becomes not a question of law alone but one in which the facts and circumstances of the case must be weighed, which is beyond the jurisdiction of this Court. When a suspected person is interrogated by the police and afterwards charged with an offence because of admissions elicited by that questioning, the exclusion of those inculpatory statements at his trial is a matter which must be left to the discretion of the trial judge to be decided upon the diverse and particular circumstances of each case. To say because the statement of the accused is proved to have been made without fear of prejudice or hope of advantage it is therefore admissible against him in complete disregard of all other factors which a wise "rule of policy" might, under certain circumstances, consider as having exercised an

improper influence or inducement upon the free mind of the confessor, is in our opinion to fetter unduly the discretion of the trial judge to exclude the statement. See *Rex* v. *Knight and Thayre* (1905), 20 Cox, C.C. 711; *Rex* v. *Booth and Jones* (1910), 5 Cr. App. R. 177; *Ibrahim* v. *Regem*, [1914] A.C. 599; *Rex* v. *Myles* (1922), 40 Can. C.C. 84; *Rex* v. *Price* (1931), 55 Can. C.C. 206; *Rex* v. *Minogue* (1935), 50 B.C. 259; and *Rex* v. *Thompson*, [1940] 3 W.W.R. 341. The grounds upon which he may decide the incriminatory statement admissible are, however, of a more rigid character and that distinction must be kept in mind.

Per O'HALLORAN, J.A.: In the circumstances it cannot be said that the judge erred in law in refusing to admit the statement upon the facts which he has found and which this Court has no choice but to accept as correctly found by him.

APPEAL by the Crown from the decision of LENNOX, Co. J. of the 26th of February, 1942, allowing the defendant's appeal from her conviction by police magistrate Hall for Victoria, on the 4th of June, 1941, on a charge of

unlawfully [keeping] for sale a liquid known as beer, contrary to the statute in such case made and provided.

On the afternoon of May 18th, 1941, four policemen entered house number 728 King's Road, Victoria, with a search warrant. They found seven persons in the dining-room drinking beer and about a dozen and one-half of full beer bottles were found in another room with many empty bottles. The accused's husband, George Anderson, was living in the house at the time and the title to the property is registered in the name of George Anderson. It was held that the charge was not proved and that if any one, it is the husband George Anderson, the owner of the house, who should have been charged with "keeping for sale."

The appeal was argued at Victoria on the 20th and 21st of April, 1942, before SLOAN, O'HALLORAN and FISHER, JJ.A.

C. L. Harrison, for the Crown: This is a charge under section 56 of the Government Liquor Act. It was held that the charge should have been against the husband. We say there was no proof of the marriage: see *Ex parte Ault & Wiborg Company of Canada, Limited* (1914), 42 N.B.R. 548, at p. 549; *Rex* v. *Rasmussen* (1934), 62 Can. C.C. 217, at p. 231; *Rex* v. *Lyons* (1938), 70 Can. C.C. 68; *Rex* v. *Lawson* (1941), 77 Can. C.C. 59; Phipson on Evidence, 7th Ed., 373. On the wrongful

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exclusion of evidence, the accused made a voluntary statement to the policeman that should have been allowed in evidence: see Crankshaw's Criminal Code, 6th Ed., 1190; *Rex* v. *Segal* (1920), 53 D.L.R. 472; *Belyea* v. *Regem,* [1932] S.C.R. 279; *Rex* v. *De Mesquito* (1915), 21 B.C. 524, at p. 528. Even if she is married it does not matter and is not ground for acquittal, because the statute put the *onus* on her. She was the person in charge of the liquor. She was there in control and possession: see *Rex* v. *Condola* (1918), 30 Can. C.C. 298.

McKenna, for respondent: Whether Mr. and Mrs. Anderson were married is a question of fact. There is ample evidence from which the learned judge could infer that a marriage relationship existed. The *onus* that she was in possession of liquor has not been discharged. On the question of marriage see *Rex* v. *Turner* (1938), 70 Can. C.C. 404; *Gauthier* v. *Regem* (1931), 56 Can. C.C. 113; Eversley on Domestic Relations, 5th Ed., 5; Russell on Crimes, 8th Ed., Vol. I., p. 103; *Morris* v. *Miller* (1767), 4 Burr. 2057; 98 E.R. 73. The marriage may be inferred in a case of this nature, and in all cases except bigamy or criminal conversation: see *Leader* v. *Barry* (1795), 1 Esp. 353; *Woodgate* v. *Potts* (1847), 2 Car. & K. 457; *Regina* v. *Lloyd* (1890), 19 Ont. 352; *Rex* v. *Howe* (1913), 24 Can. C.C. 215; *Rex* v. *Marion* (1922), 35 Que. K.B. 503; *Rex ex rel. Rooney* v. *Burton,* [1939] 2 D.L.R. 526. The police with search warrant went into the dining-room and took charge when the sergeant asked accused a question and she answered: see *Rex* v. *Thompson,* [1940] 3 W.W.R. 341, at p. 342; *Rex* v. *Jones,* [1921] 3 W.W.R. 411. There was no warning whatever given: see *Rex* v. *Read, ib.* 402, at pp. 406 and 409; *Rex* v. *Nelson Price* (1931), 3 M.P.R. 303, at p. 317; *Rex* v. *Rodney* (1918), 42 O.L.R. 645, at p. 650; *Briggs & Turivas Inc.* v. *Canadian Pacific Railway Co.* (1929), 64 O.L.R. 314, at p. 321; *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company Limited,* [1914] A.C. 25, at p. 40; *Rex* v. *Tanchuk,* [1935] 1 W.W.R. 257, at p. 258. We are asking for costs against the informant.

Harrison, in reply, referred to Phipson on Evidence, 7th Ed.,

pp. 258 and 302; *Lewis* v. *Harris* (1913), 110 L.T. 337; *Walker* v. *Regem,* [1939] S.C.R. 214.

Cur. adv. vult.

19th May, 1942.

SLOAN, J.A.: The respondent Nell Anderson was convicted by the police magistrate for the city of Victoria on a charge of keeping for sale "a liquid known or described as beer" contrary to the Government Liquor Act.

Believing herself aggrieved by this conviction, she appealed, under the provisions of the Summary Convictions Act, to the County Court of Victoria. LENNOX, Co. J. allowed the appeal and quashed the conviction. His reasons for so doing are as follows:

> I find the charge is not proved and that if any one, it is the husband, George Anderson, the owner of the house who should have been charged with "keeping for sale."

The Crown, now feeling aggrieved by this turn of events, appeals to us to restore the conviction, and to succeed must convince us that the learned county court judge erred in law in allowing the appeal to him, as on an appeal of this nature our jurisdiction is exclusively confined to the consideration of points of law alone.

Crown counsel contended there was no evidence upon which the learned judge below could base a finding that Nell Anderson is the wife of George Anderson. Whether there is total lack of proof, is a question of law and if there is no evidence to support that finding it follows there is no factual foundation from which it could be presumed that the keeper was the husband and not the wife—*Rex* v. *Cramer* (1936), 51 B.C. 310. Upon a careful reading of the record, I am of the opinion there is some evidence upon which the challenged finding could be sustained. Had this trial taken place before a jury the trial judge could not, in my opinion, have taken it from the jury on that issue of fact. For a case of this nature there is enough evidence to be weighed by the tribunal invested with jurisdiction to find marriage or no marriage. The learned judge below considered it sufficient and the question of the sufficiency of evidence is one of fact not open to us on this appeal. This point therefore fails.

Crown counsel anticipating this result, took an alternative

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position. He submitted that even if there was evidence of a husband and wife relationship, Nell Anderson could not by that fact alone, escape the *onus* sections of the Government Liquor Act. *Rex* v. *Lawson* (1941), 77 Can. C.C. 59.

By section 96 of the said Act if *prima facie* proof is given that the person charged with keeping for sale had in his possession or control the liquor in question he may be convicted unless he can prove himself innocent of the offence, and by section 91 (2) proof of one unlawful sale shall suffice to establish the intent and purpose of unlawfully keeping liquor for sale. By those sections the presumption of guilt is consequent upon proof of the simple facts of possession and sale. The respondent attempted to rebut the presumption of guilt—which is not conclusive—by relying upon the contrary presumption arising from the relationship of husband and wife, *i.e.,* that the husband is the keeper—*Rex* v. *Cramer, supra.* She also proved that he was the owner of the premises. Which presumption is to prevail? Phipson on Evidence, 7th Ed., says at p. 34:

> Conflicting presumptions, however, neutralize each other and leave the case at large to be determined solely on the evidence given.

That seems to me to be the position here. The determination of the guilt or innocence of the respondent becomes not a question of law alone but one in which all the facts and circumstances of the case must be weighed, a task beyond the jurisdiction we exercise in this appeal.

It follows, therefore, that the second contention of the Crown must fail.

The third ground of appeal advanced by the Crown raises the question of the admissibility of a certain statement of the respondent to the police officers. Sergeant Woolsey, after searching the house and without any warning to the accused, asked her a question because, he said, he "wasn't clear on who was the owner of the house." He wanted "to find out who was the responsible person." If her answer was self-incriminatory it was his then intention to charge her with the offence. She answered the question and was thereupon charged. The learned county court judge considered the answer to the question inadmissible. Crown counsel contends he erred in law in so ruling,

submitting that although there was no warning and the answer was induced by the police sergeant's question, nevertheless, it was admissible because it was shown to be a voluntary statement in that it had not been obtained from her either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

While the law upon this subject is not as clear as one might wish, and the authorities are conflicting, in my view the general trend of more modern authority seems to indicate that when a suspected person is interrogated by the police and afterwards charged with an offence because of admissions elicited by that questioning, the exclusion of those inculpatory statements at his trial is a matter which must be left to the discretion of the trial judge to be decided upon the diverse and particular circumstances of each case. To say because the statement of the accused is proved to have been made without fear of prejudice or hope of advantage it is therefore admissible against him in complete disregard of all other factors which a wise "rule of policy" might, under certain circumstances, consider as having exercised an improper influence or inducement upon the free mind of the confessor, is in my opinion to fetter unduly the discretion of the trial judge to exclude the statement. See *Rex* v. *Knight and Thayre* (1905), 20 Cox, C.C. 711; *Rex* v. *Booth and Jones* (1910), 5 Cr. App. R. 177; *Ibrahim* v. *Regem,* [1914] A.C. 599; *Rex* v. *Myles* (1922), 40 Can. C.C. 84; *Rex* v. *Price* (1931), 55 Can. C.C. 206; *Rex* v. *Minogue* (1935), 50 B.C. 259; and *Rex* v. *Thompson,* [1940] 3 W.W.R. 341.

The grounds upon which he may decide the incriminatory statement admissible are, however, of a more rigid character and that distinction must be kept in mind. There are certain requirements necessary of fulfilment before the statement may be admitted. As Duff, C.J. said in *Thiffault* v. *Regem,* [1933] S.C.R. 509, at p. 515:

> Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses, at least for cross-examination on behalf of the accused; and, where the statement professes to give the substance of a report of oral answers given by the accused to interrogatories, without reproducing the questions, then the written report ought not to be admitted

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in evidence unless the person who is responsible for its compilation is (here again in the absence of some adequate explanation of his absence) called as a witness.

And see *Rex* v. *Pais* (1941), 56 B.C. 232.

Perhaps I may explain the distinction I make by this illustration: Let us assume the first police officer called in the "trial within the trial" admitted that the confession under consideration had been forced by threats. In my opinion the trial judge could then at that stage and without hearing any other witnesses, rule the statement inadmissible. No matter what other police evidence might be available, the first witness could so destroy the value of the confession that nothing which might be said could rehabilitate it in the mind of the trial judge.

If that is so, then it follows the trial judge could rule out a confession at any stage of the "trial within the trial" when he was satisfied from the evidence that the confession was not voluntary in the sense that the statement had been elicited by conduct on the part of a person in authority to whom or in whose presence the confession had been made, which, while not exerting the pressure of fear nor raising expectation and hope of advantage, nevertheless, could reasonably be held to have exercised at that time and under those circumstances an undue and improper influence on the mind of the accused.

On the other hand, let us assume that the "trial within the trial" followed the more usual routine and the first Crown witness swore to circumstances which would beyond doubt, if true, prove the voluntary nature of the statement. The trial judge should not at that stage state he was satisfied and in the exercise of a mere discretion admit the statement when other police officers were present at the questioning and were available as witnesses at the trial. He must, in order to satisfy himself that the confession is voluntary, fulfil those conditions declared requisite in *Thiffault* v. *Regem*, *supra*, and *Rex* v. *Pais*, *supra*, before admitting the statement in evidence.

Briefly, in my view, the trial judge has a wider range of reasons for excluding a statement than he has for admitting it. This really results from giving "voluntary" a more extended meaning when excluding a statement (as in *Rex* v. *Price*, *supra*,

and like cases) than when admitting it (as in *Ibrahim* v. *Regem*, *supra*).

In England, instead of recognizing the distinction as basic, we find in a case of this kind an effort to exclude the admission by the expression by the Court of the desire that the question be not pressed by counsel (*Rex* v. *Booth and Jones*, *supra*). That to my mind, with deference, is not the most helpful approach to the problem. Either the statement is admissible or it is not, and for the Court to suggest to counsel that he should not tender the statement in evidence thus escaping the necessity for a ruling upon its admissibility, is to leave the law in a most unsatisfactory state of uncertainty. It seems to me the nettle must be grasped more firmly.

Applying what I have said to this case, I am of the opinion the surrounding circumstances were such that the learned county court judge could, in the exercise of a proper discretion, exclude the respondent's statement when he did, and I cannot say he was wrong in so doing. The Crown fails on the third ground, and it follows the appeal must be dismissed, but without costs.

O'HALLORAN, J.A.: It was not contended that the presence or absence of a warning in itself determines the voluntary character of a statement elicited after interrogation by a person in authority. Nor did I understand it to be submitted, that in assessing the factual value of its presence or absence, a narrow line of distinction should be drawn, based solely on whether it was elicited before or after arrest. Obviously, in some cases that distinction may be of great importance, while in others it may be of little, if any significance.

Authorized by search warrant, three police officers were searching the house for liquor. While still in apparent control of the premises, and while the respondent's movements could reasonably appear to be under his direction if not control, the sergeant of police asked the respondent "who was in charge of the premises," but without first warning her. That question went to the root of the charge upon which she was later arrested. Whether the recited conditions would reasonably convey to the respondent that she was then surrounded by an atmosphere of authority and

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compulsion, and to an influencing degree subject to the active and pointed direction of a person in authority, is a question of fact, or at most a question of mixed law and fact.

As this is a Crown appeal, the subject-matter of review by this Court is confined to questions of law alone. We have no jurisdiction therefore to review the findings of the learned judge in the Court below upon questions of fact. If his complained-of rejection of the statement is a question of law which we may review, yet his findings of material facts and his legitimate inferences therefrom, although they provide the basis upon which to determine the principles of law applicable, are nevertheless beyond our jurisdiction to review in an appeal of this nature.

In the given circumstances I am unable to say the learned judge erred in law in refusing to admit the statement upon the facts which he has found, and which this Court has no choice but to accept as correctly found by him.

I agree in dismissing the appeal.

FISHER, J.A.: I would dismiss the appeal for the reasons given by my brother SLOAN. No costs.

Appeal dismissed.

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May 26, 29.

REX v. LILLIAN ELLIOTT.

Criminal law—Possession of opium—Circumstantial evidence—Sufficiency—Can. Stats. 1929, Cap. 49, Secs. 4 (d) and 17.

The accused and her husband were jointly charged with being in possession of opium. The husband pleaded guilty, the wife not guilty. At about 7.30 p.m. on February 24th, 1942, two constables saw the husband at the corner of Cambie and Hastings Streets in Vancouver, and followed him to the entrance of the school grounds on Cambie and Pender Streets. He went up a few steps, leaned over a low cement wall, and started digging in the earth with his hands. After a minute or two he left, was followed by the constables, but he disappeared. The constables then went back to the place where he had been digging, and dug down and found a large cream-jar. The jar was empty. They replaced the jar and went back across the street and watched. At about 8.35 p.m. the

husband came back alone but was followed in half a minute by his wife. She lifted her dress at the steps at the entrance to the school grounds, and after they were there two or three minutes they went away. The constables did not see anything in her hands nor did they see her pass anything to her husband. After following them a short distance the constables went back and dug up the jar, opened it and found 90 decks of opium in it. They then reburied the jar with the opium in it and waited again. At 10.45 p.m. both the Elliotts came back to where the jar was hidden and were there a minute or two. As they left the place they were arrested and some decks of opium were thrown away by the husband. The husband had been an addict for some years, but the wife was not. The husband was called by the defence and said he bought the opium from a stranger at the spot where the jar was buried, but the constables saw no third person present as they watched. He denied that he received the opium from his wife. The wife gave evidence and stated she lifted her skirt to fix a shoe. The accused was convicted.

Held, on appeal, affirming the decision of BOYD, Co. J. (MCQUARRIE and FISHER, JJ.A. dissenting), that during the interval while the police officers kept the *locus* under observation the opium was brought there in some way or by some person. The appellant's husband swore he did not bring it, and the judge accepted that part of his evidence, though he rejected that part wherein it was sworn that a mysterious stranger (not visible to the watching police) had brought it. There was evidence from which it could be reasonably inferred that it was passed by the appellant to her husband, though the police could not see the very act of passing. In these circumstances no other conclusion can be drawn than that which the learned judge drew.

APPEAL by accused from her conviction by BOYD, Co. J. on the 7th of April, 1942, on a charge of having opium in her possession. The facts are set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 26th of May, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Russell, K.C., for appellant: There is no evidence that the accused was in possession of the drug. It is common ground that section 17 of The Opium and Narcotic Drug Act, 1929, does not apply to this case.

Donaghy, K.C., for the Crown: The Crown relies entirely on circumstantial evidence, and it is submitted there was sufficient evidence upon which the learned trial judge could find that the accused was guilty.

Cur. adv. vult.

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MCDONALD, C.J.B.C.: The appellant was convicted before BOYD, Co. J. of having opium in her possession. Her husband, who was charged jointly with her, pleaded guilty. The evidence against the appellant is purely circumstantial. It seems a little late now to spend time in discussing the rule of law which applies in such cases, but having regard to the course of the argument in the present case, I shall do so.

This rule was stated in 1838 by Alderson, B. in *Hodge's Case*, 2 Lewin, C.C. 227, at p. 228, to be as follows:

"Not only that those circumstances were consistent with his [the accused] having committed the act, but they [the jury] must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

It is true that learned judges have from time to time, mistakenly, I think, attempted to add to or subtract something from this rule, but there can be no manner of doubt that the rule still prevails: *McLean* v. *Regem*, [1933] S.C.R. 688, at p. 690.

In the case at Bar both the appellant and her husband gave evidence, and the learned judge, as he was quite entitled to do, accepted certain portions of the evidence tendered, and rejected other portions.

Taking as proven the facts which he must necessarily have accepted before he could convict, I listened throughout the argument for some suggestion as to what other rational conclusion he could have reached than that the appellant was guilty. I have searched to find whether I myself could suggest any other rational conclusion, and have failed.

During the interval while the police officers kept the *locus* under observation, the opium was brought there in some way or by some person. The appellant's husband swore he did not bring it, and the judge accepted that part of his evidence, though he rejected that part wherein it was sworn that a mysterious stranger (not visible to the watching police) had brought it. There was evidence from which it could be reasonably inferred that it was passed by the appellant to her husband, though the police could not see the very act of passing. In these circumstances I cannot see how any other conclusion, rational or otherwise, can be drawn than that which the judge drew. It is not

suggested, of course, that the small container which held the opium either dropped from the sky or came up from the ground.

I see nothing for it, therefore, but to dismiss the appeal.

McQUARRIE, J.A.: The appellant and her husband were charged with unlawfully having in their possession a drug, to wit, opium, contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto. The husband (Elmer Elliott) pleaded guilty but the appellant entered a plea of not guilty and proceeded with her defence. She was convicted although her husband was called as a witness and assumed full responsibility for possession of the drug, and stated that she didn't know he had it. Counsel for the appellant urged that there was no evidence of possession by the appellant. It appeared to be common ground that section 17 of the Act did not apply and counsel for the Crown stated that the Crown's whole case is that the appellant had the drug on her person and gave it to her husband. The Crown relies entirely on circumstantial evidence. Counsel for the appellant argued that the evidence submitted by the Crown is as consistent with innocence as with guilt, and the conviction against the appellant should be quashed.

In his statement of the facts counsel for the Crown intimated that it is common ground that the opium was buried in the ground in a jar, in public school grounds, near his place of residence by the husband and that he and the appellant were together at the spot where he admittedly was leaning over the wall. Counsel for the Crown admitted that the whole proceeding did not make sense and that he could offer no reasonable explanation of the method chosen by them of concealing the drug. I agree that it is a difficult thing to explain, and that to her is of important significance. It could not have been an arrangement which would have been made by a sensible person but might have appealed to drug addicts who sometimes do most peculiar things. The husband had been a drug addict for eighteen years. The appellant was not and never had been an addict. She had separated from her husband for some time previously, but continued to be friendly with him, with the intention, as explained by her counsel, of helping him to overcome his weakness, if possible.

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The Crown relied on the findings of the trial judge (BOYD, Co. J.) as shown by his report. The most damaging evidence against the appellant was that she was with him at the school grounds referred to, on two occasions, and on the first of these occasions she was seen by one of the police operatives to lift her dress at the steps at the entrance to the school grounds. The Crown tendered this as proof that she had the drug on her person and handed it to her husband. The trial judge apparently did not believe the husband's evidence in which he absolved his wife, and did not believe the appellant's reasonable explanation as to how she happened to be at the place in question with her husband, or as to why she lifted her skirt, as detailed by the operative mentioned. As to the latter point, her explanation was that she lifted her skirt to fix a shoe. None of the operatives suggested that the appellant had anything to do with burying the drug or digging it up. None of them said he saw appellant remove anything from her person when she lifted her skirt, or hand anything to her husband. The appellant's explanation of being with her husband was that he had complained about losing his pipe, and they were in the school grounds while he was looking for it. As a matter of fact, one of the operatives (Atherton) admitted on cross-examination that he had found the pipe and gave it to the husband when he asked about it after his arrest. The trial judge appears to have overlooked this evidence, which clearly corroborates the story told by the appellant. The husband in his evidence stated that he had told the appellant he had lost his pipe, and that they were there looking for it on their way to a cafe.

The Crown, as far as I can see, did not cross-examine either the husband or the appellant on their evidence as to searching for the lost pipe or tender any evidence to contradict their evidence in that respect. The rule as to circumstantial evidence was clearly stated by HUNTER, C.J. and affirmed by the Full Court (IRVING, MORRISON and CLEMENT, JJ.) in *Rex* v. *Jenkins* (1908), 14 B.C. 61, and has been followed ever since by this Court on many occasions. The rule as stated by HUNTER, C.J. in his charge to the jury was as follows:

I thought they should satisfy themselves that there was one fact, or set

of facts proved against the accused which, on any reasonable hypothesis, was inconsistent with innocence, and not merely consistent with guilt.

I am of opinion that counsel for the appellant was quite right in his contention that the evidence submitted by the Crown is as consistent with the innocence of the appellant as with guilt. I would, therefore, allow the appeal and quash the conviction.

SLOAN, J.A.: I would dismiss the appeal.

O'HALLORAN, J.A.: I take the same view as the Chief Justice, and would dismiss the appeal accordingly.

FISHER, J.A.: In this matter it is or must be common ground that the conviction of the appellant rests solely upon a basis of circumstantial evidence. In such a case the rule in *Hodge's Case* (1838), 2 Lewin, C.C. 227 must be applied. It is not enough that the facts are consistent with the guilt of the accused. See *Fraser* v. *Regem* (1936), 65 Can. C.C. 1, where Rinfret, J. (in Chambers) says as follows at p. 2:

> It is common ground that the conviction of the appellants was grounded exclusively on circumstantial evidence. In such cases, the rule laid down by Baron Alderson in *Hodge's Case*, 2 Lewin, C.C. 227, at p. 228, 168 E.R. 1136, may be said to have been generally adopted that the jury "must be satisfied, not only that [the] circumstances were consistent with his [the prisoner] having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.'"
>
> Counsel for the appellants referred me to at least four judgments of other Courts of Appeal in like cases, where the rule so laid down was accepted and applied. They are:—*The King* v. *Jenkins* (Court of Appeal of British Columbia) (1908), [14 B.C. 61], 14 Can. C.C. 221; *Rex* v. *Hislop* (Appellate Division of the Alberta Supreme Court) (1925), 43 Can. C.C. 384; *Rex* v. *Yok Yuen* (Appellate Division of the Ontario Supreme Court), [1930] 1 D.L.R. 716, 52 Can. C.C. 300; *Rex* v. *Demetrio* (Appellate Division of the Ontario Supreme Court) (1926), 46 Can. C.C. 133.
>
> It may be added that this Court has also adopted the rule, amongst other instances, in the cases of *McLean* v. *The King*, [1934] 2 D.L.R. 440, 61 Can. C.C. 9, and *Reinblatt* v. *The King*, [1934] 1 D.L.R. 648, [(1933)] 61 Can. C.C. 1.
>
> The result of that rule and of the decisions where it was applied is that "in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt" (Wills, on Circumstantial Evidence, p. 262).

See also the *Fraser* case (1936), 66 Can. C.C. 240, especially at pp. 242-4. Reference might also be made to *Rex* v. *Comba*

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(1938), 70 Can. C.C. 205. In such case the accused had been found guilty of murder by a jury on circumstantial evidence, and on appeal to the Ontario Court of Appeal, Middleton, J.A. with whom the majority of the Ontario Court of Appeal agreed (though some of them added further observations) examined separately the inculpatory facts and it will be noted that after the examination of the evidence, he says in effect in each case:

> Admitting that this evidence is consistent with his guilt, it is not inconsistent with his innocence.

On an appeal by the Crown the Supreme Court of Canada agreed with the majority of the Court of Appeal and dismissed the appeal. At pp. 237-38 Sir Lyman P. Duff, C.J., delivering the judgment of the Court, said in part as follows:

> It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada as in all countries of the British Empire, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.
>
> We have no doubt that the facts adduced have not the degree of probative force that is required in order to satisfy the test formulated by this rule; which is one that Courts of justice in Canada are governed by and are bound to apply.

In the present case also I would say that

> the facts adduced have not the degree of probative force that is required in order to satisfy the test formulated by this rule.

I would, therefore, allow the appeal, quash the conviction and direct an acquittal to be entered.

Appeal dismissed, McQuarrie and Fisher, JJ.A. dissenting.

CREWE v. STAR PUBLISHING COMPANY LIMITED.

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May 28, 29; *June* 1, 2, 3; *Sept.* 8.

Negligence—Contract to repair roof sign—Material to repair carried to roof by fire-escape—Loose railing on platform of fire-escape—Plaintiff leans against railing and falls to ground—Damages—Liability of occupier—Trespasser.

The plaintiff, an employee of the Neon Sign Company, while engaged in hoisting material to repair a Neon sign on the roof of the Star Building at the north-west corner of Pender and Hamilton Streets in the city of Vancouver, was injured by a fall from the fire-escape platform adjoining the second storey at the back of the building. While hoisting a ladder to the platform above, he leaned against the outside iron railing of the platform, the railing gave way, he lost his balance and fell to the ground. This railing was hinged at the westerly end of the platform and fastened at the easterly end in an iron hook by means of a safety catch. This end was safe when properly fastened, but was left loose at the time of the accident. The North American Life Assurance Company was, at the time of the accident, and had long been the registered owner of the building. In 1920 it had given an agreement to sell the building to one Cohen. This right to purchase, after two *mesne* assignments, was vested in General Odlum. The General assigned the agreement for sale to the Star Publishing Company. The General was the president and held most of the shares in this company, and all the assets were charged by debentures, all of which the General held. More than ten years prior to the accident the agreement for sale fell into arrear and it had long been apparent there was no equity in the property for the Star Company. There was controversy between the Life Company and General Odlum for some time as to who should take control of the building and collect the rents, finally in 1935 it was agreed that the Life Assurance Company should take control as agent for the Star Company. In 1940 the Life Assurance Company appointed The Toronto General Trusts Corporation to "administer" all its real estate, including the Star Building, and this arrangement was in force at the time of the accident. Neither General Odlum nor the Star Publishing Company were consulted as to this appointment. In 1933 the Life Assurance Company decided to utilize the space in the Star Building, and it obtained a lease signed by the Star Publishing Company which gave them an office on the ground floor, together with the right for the use of the roof of the building for placing advertising thereon, whether by way of Neon sign or otherwise. In October, 1935, the plaintiff's employer, the Neon Company, entered into a contract with the Life Assurance Company to erect and maintain on the roof of the building a Neon display reading "North American Life." The contract provided that the Neon Company should maintain the sign and the Life Assurance Company should obtain permission from the owners for means of access to the roof. The Neon Company sent employees to the premises from time to time for the purpose of repainting or repairing the sign.

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A city by-law prohibited the blocking of any fire-escape. On the trial the learned trial judge dismissed the action as against the Life Assurance Company on the ground that said company was in control of the building as agent for the Star Publishing Company, and he proceeded to address the jury with regard to the claim against the Star Publishing Company. Judgment was given for the plaintiff against the Star Publishing Company on the findings of the jury.

Held, on appeal, reversing the decision of COADY, J. (O'HALLORAN, J.A. dissenting), that the appeal be allowed.

Per MCDONALD, C.J.B.C.: Considering that there were three alternative methods of getting equipment to the roof, and one of these was unlawful, the suggestion that the Star Publishing Company should have assumed that the unlawful method would be the one adopted, seems to me little short of preposterous. Obviously the company was entitled to assume that the law would be observed. If so, then it never authorized the plaintiff even by implication to use the fire-escape, and in using it he was a trespasser. As a trespasser, he was owed no duty that was disregarded. The verdict therefore cannot stand, and the appeal should be allowed.

Per FISHER, J.A.: The relationship between the appellant and respondent with respect to the fire-escape balcony is different from the relationship between them with respect to the roof. Under all the circumstances my view is that no reasonable jury could fairly hold on the evidence that the appellant should have reasonably supposed the employees of the Sign Company would be likely to go upon the fire-escape and use the balconies for the purpose of raising materials to the roof without asking anyone's permission and without any communication from the Sign Company to the appellant, its agents or servants as to the manner in which access to the roof should be effected. I think, therefore, that the plaintiff, while on and using the said balcony as aforesaid, was a trespasser. The plaintiff has failed to establish that the appellant owed him any duty that was unperformed.

APPEAL by defendant from the decision of COADY, J. of the 18th of March, 1942, in an action for damages through injuries sustained in a fall from the second balcony of a fire-escape at the back of the building at the north-west corner of Pender and Hamilton Streets in the city of Vancouver. The plaintiff is an employee of Neon Products of Western Canada Limited (called the Sign Company), a company engaged in vending and maintaining advertising signs. In 1933 the defendant the Star Publishing Company Limited (called the Publishing Company) leased the ground floor of the premises to the North American Life Assurance Company (called the Life Company), together with the rights for the use of the roof of the building for adver-

tising thereon. Under contract between the Life Company and the Sign Company, the Sign Company erected an advertising sign on the roof of the building in 1935, and the Sign Company was to keep it in good repair as and when required. On the morning of the 12th of September, 1940, the plaintiff and other employees of the Sign Company proceeded with ladders and other equipment to said building to do what maintenance work was necessary on the Neon sign which was on the roof of the building. In order to reach the roof with their equipment the plaintiff and other employees of the Sign Company used the fire-escape attached to the rear of the building in a lane. There were platforms at each of the three storeys of the building attached to the fire-escape, and the men proceeded to bring the ladders and other material up from one platform to the next one above. While the plaintiff was standing on the second platform and engaged in passing a ladder to a fellow-employee standing on the third platform, the plaintiff leaned against the outside guard-rail of the platform. The guard-rail gave way, causing the plaintiff to lose his balance, and he fell into the lane beneath, a distance of about 25 feet. This guard-rail reaches from the west end to the east end of the platform. It is pivoted to an upright stanchion from the floor of the platform at the west end, but at the east end it is attached to an upright stanchion from the platform by a safety-catch, and it can be lifted off. This end of the guard-rail gave way when the plaintiff leaned against it. The plaintiff alleged the hook was not properly attached to the upright stanchion at the time of the accident. The building in question was first owned by one Carter-Cotton subject to a mortgage to the Life Company. The Life Company acquired title under a foreclosure order and is the registered owner of the building. In October, 1920, under an agreement in writing, the Life Company agreed to sell to one Cohen for $80,000, payable $3,000 in cash and balance in deferred payments. In March, 1922, Cohen assigned his interest to Universal Knitting Co. Ltd. In September, 1924, Universal Knitting Co. Ltd. assigned its interest to General Odlum, who was president of the Publishing Company and held a large majority of the stock of the company. In April, 1931, Odlum assigned his interest in the building to the

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Publishing Company. The Publishing Company had no interest other than the right to purchase the building. It had not been carrying on business for some years, and from 1935 to 1939 there were no meetings of the company. In 1933 the Life Company leased the ground floor with the right to advertise on the roof of the building, and for some time negotiations went on between the Life Company and Odlum as to the collection of rents and obtaining tenants for the space in the building. Finally in May, 1935, it was arranged between them that the Life Company was to take over the administration of the building, but they were to do so not as mortgagees but as agent for the Publishing Company. In 1940, the Life Company appointed The Toronto General Trusts Corporation to collect the rents and account to the Life Company, and pursuant to arrangement between them The Toronto General Trusts Corporation took over the management and control of the building.

The appeal was argued at Vancouver on the 28th and 29th of May, and the 1st to the 3rd of June, 1942, before MCDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

Locke, K.C. (*Sheppard,* with him), for appellant: The plaintiff did not enter the premises on any matter of business which concerned this defendant, or in which the plaintiff and this defendant had a common interest: see *Indermaur* v. *Dames* (1866), 35 L.J.C.P. 184, at p. 188; *Power* v. *Hughes* (1938), 53 B.C. 64, at p. 68; *Hambourg* v. *The T. Eaton Co., Ltd.,* [1935] S.C.R. 430, at p. 436; *Hayward* v. *Drury Lane Theatre and Moss' Empires,* [1917] 2 K.B. 899, at p. 913; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358, at p. 371. There was no contract in which the plaintiff and the appellant were parties: see *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; *Cavalier* v. *Pope* (1906), 75 L.J.K.B. 609. The contracts in this case could not impose any liability on the defendant: see *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147; *Fairman* v. *Perpetual Investment Building Society* (1922), 92 L.J.K.B. 50, at p. 53. This defendant had no interest in the contract between the Life Company and the Neon Company: see *Guindon* v. *Julien,* [1940] O.R. 346. There was no invitation, express or implied, to the plaintiff to use the fire-escape as a means of hoist-

ing material to the roof, and the plaintiff was therefore a trespasser at the place of the accident. No invitation from this defendant to the plaintiff to use the fire-escape can be implied on the evidence: see *Connor* v. *Cornell* (1925), 57 O.L.R. 35; *Azzole* v. *W. H. Yates Construction Co. Ltd.* (1927), 61 O.L.R. 416; *Walker and Others* v. *Midland Railway Company* (1886), 55 L.T. 489; *Knight* v. *Grand Trunk Pacific Development Co.*, [1926] S.C.R. 674; *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253; *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ld.*, [1936] A.C. 65. In so raising the materials the plaintiff blocked the fire-escape contrary to fire by-law No. 2193 of the city of Vancouver. It is the duty of the judge, not the jury, to determine the appropriate category of the plaintiff, whether it is invitee, bare licensee or trespasser: see *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), 98 L.J.P.C. 119. In this case the learned judge declined to assume the duty of determining the appropriate category of the plaintiff: see *Walker and Others* v. *Midland Railway Company* (1886), 55 L.T. 489. Assuming the relationship of the plaintiff to this defendant was that of licensee, then the plaintiff as licensee must establish a trap or hidden danger of which this defendant knew: see *Power* v. *Hughes* (1938), 53 B.C. 64; *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371. The plaintiff states the safety-catch must have been unfastened when he went on the platform. He must establish this defendant knew the catch was off at the time of the accident. To charge this defendant as an invitor the plaintiff must adduce evidence from which it may be reasonably inferred that this defendant knew or ought to have known of the danger: see *Pritchard* v. *Peto* (1917), 86 L.J.K.B. 1292. There is no such evidence. It is submitted that the finding of negligence is perverse and contrary to the evidence. Neither on the pleadings nor on the suggestion of counsel on the trial was this defendant ever invited to meet the issue that the rails on the first and third platforms were fixed and only the second rail was movable. He has made it part of his case that all the rails were movable. The jurors cannot substitute their faulty inspection for the evidence: see *London General Omnibus Co.* v. *Lavell* (1900), 70 L.J. Ch. 17, at p. 18. The jury found there is a

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concealed trap or danger which consisted of the safety-catch. This finding is immaterial as the jury never found that the trap caused the accident: see *Thompson* v. *Ontario Sewer Pipe Co.* (1908), 40 S.C.R. 396. Any inference that the trap found did cause the accident is excluded by the express finding that the negligence which caused the accident was the movable rail not being fastened on the second balcony while there were immovable rails on the first and third balconies. That this Court has power to reverse the finding of a jury see *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43; *Zellinsky* v. *Rant* (1926), 37 B.C. 119; *Victory (R.M. of)* v. *Saskatchewan Guarantee & Fidelity Co. Ltd.*, [1928] S.C.R. 264, at p. 269; *Paquin, Limited* v. *Beauclerk*, [1906] A.C. 148. The plaintiff must establish that this defendant was in occupation or possession and irrespective of whether his claim is on the basis of invitee or licensee. On the definition of possession see *Lord Advocate* v. *Lovat* (1880), 5 App. Cas. 273, at p. 288; *Reid* v. *Galbraith* (1926), 38 B.C. 36, at p. 41; *Kirby* v. *Cowderoy* (1912), 81 L.J.P.C. 222. The premises is a building divided for rental purposes. Acts of possession consist of renting space, collecting rents, providing for maintenance and janitor service. The evidence discloses possession with the Life Company and not this defendant. The Life Company collected the rents and managed the building until June, 1940, when it appointed The Toronto General Trusts Corporation to manage and control as agent. Neither Odlum nor this defendant were parties to this arrangement. The collection of rent *qua* rent is evidence of possession: see *Heales* v. *M'Murray* (1856), 23 Beav. 401; *Ward* v. *Carttar* (1865), 35 Beav. 171. At no material time was there any act of occupation or control by this defendant.

A. Alexander, for respondent: As to what an appellate Court has to determine in connection with the jury's verdict see *Scotland* v. *Canadian Cartridge Co.* (1919), 59 S.C.R. 471, at p. 477; *Danley* v. *Canadian Pacific Ry. Co.*, [1940] S.C.R. 290, at pp. 296-7; *Knight* v. *Grand Trunk Pacific Development Co.*, [1926] S.C.R. 674, at p. 678; *Kerr or Lundrum* v. *Ayr Shipping Company Limited*, [1915] A.C. 217, at p. 232; Phipson on Evidence, 7th Ed., 650; *Lord Advocate* v. *Lord Blantyre*

(1879), 4 App. Cas. 770, at p. 792; *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* (1940), 110 L.J.P.C. 1, at p. 7. As to who was in possession and control of the building, the Life Company was the agent of the Publishing Company, the latter being the owner in possession, and as such agent the Life Company appointed The Toronto General Trusts Corporation to act as sub-agent. The plaintiff took the position that the defendant was jointly in control and management of the premises: see *Union Estates Ltd.* v. *Kennedy,* [1940] S.C.R. 625, at p. 626; *Sutcliffe* v. *Clients Investment Co.,* [1924] 2 K.B. 746. The jury's finding that the appellant was guilty of negligence which caused the accident, of necessity includes a finding that the damage was the result of the injury which was caused by the appellant's negligence: see *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg R. Co.,* [1933] 1 D.L.R. 1, at pp. 4 and 5; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263, at p. 271; *Graham* v. *Regent Motors Ltd. & Stephens,* [1939] 2 D.L.R. 781, at p. 782; *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.* (1941), 56 B.C. 484, at p. 525. The question of invitation or leave and licence is a mixed question of fact and law and proper to be determined by the jury: see *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1, at p. 9; *Cooke* v. *Midland Great Western Railway of Ireland,* [1909] A.C. 229, at p. 241; Phipson on Evidence, 7th Ed., 14; Storey on Evidence, 12th Ed., 41; *Doorman* v. *Jenkins* (1834), 2 A. & E. 256, at p. 261. The evidence establishes "common interest" and "invitation": see Salmond on Torts, 9th Ed., 513; *Union Estates Ltd.* v. *Kennedy,* [1940] S.C.R. 625, at pp. 630 and 634; *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74, at p. 80; *Ellis* v. *Fulham Corporation* (1937), 107 L.J.K.B. 84, at p. 93; *Power* v. *Hughes* (1938), 53 B.C. 64, at p. 74; *Holmes* v. *North Eastern Railway Co.* (1869), L.R. 4 Ex. 254, at p. 259; *Mersey Docks and Harbour Board* v. *Procter,* [1923] A.C. 253, at p. 273; *Heaven* v. *Pender* (1883), 52 L.J.Q.B. 702; *Greisman* v. *Gillingham,* [1934] S.C.R. 375; *Sutcliffe* v. *Clients Investment Co.,* [1924] 2 K.B. 746; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213; *Dymond* v. *Wilson* (1936), 51 B.C. 301; *Indermaur* v. *Dames*

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(1866), L.R. 1 C.P. 274; *Wright* v. *London and North Western Railway Co.* (1876), 1 Q.B.D. 252, at p. 255; *Fraser* v. *Pearce* (1928), 39 B.C. 338. Apart from the question of common interest, the "invitation" can be inferred in this case from the relationship existing between the defendant Life Company and the appellant. There is cogent evidence to support such a conclusion. On the contention that the invitation did not extend to the use of the fire-escape and that he was a trespasser, the evidence was amply sufficient to justify the jury's findings that the plaintiff's use of the fire-escape was reasonable and proper, and therefore within the scope of the "invitation." The plaintiff is entitled to succeed even if held to be a bare licensee, as the fire-escape, where the plaintiff met with his accident, constituted a trap or concealed danger of which the appellant knew and the plaintiff did not know. The findings of the jury in this respect are supported by the evidence: see *Danley* v. *Canadian Pacific Ry. Co.*, [1940] S.C.R. 290, at p. 300; *Storry* v. *Canadian National Ry. Co.*, [1940] S.C.R. 491, at p. 497; *Weigall* v. *Westminster Hospital (Governors)* (1936), 52 T.L.R. 301, at p. 303.

Locke, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 459, par. 519; *Guindon* v. *Julien*, [1940] O.R. 346; Pollock on Torts, 13th Ed., 410; *London General Omnibus Co.* v. *Lavell* (1900), 70 L.J. Ch. 17.

Cur. adv. vult.

8th September, 1942.

MCDONALD, C.J.B.C.: This appeal is from a judgment awarding damages for personal injuries caused by dangerous premises.

Respondent plaintiff has the special verdict of a special jury. COADY, J. in entering judgment on motion, agreed that this is a "border-line case," but entered judgment according to the verdict. The question for us is whether there is evidence to justify the verdict. Though a large amount of evidence was given, there was practically no conflict on any important point.

The plaintiff was injured by a fall from the fire-escape platform opposite the second storey of a four-storey building, known as the Star Building, and his fall was caused by the condition of

the railing of the platform, which appears to have given way when the plaintiff either leaned against it or struck it with a ladder which he was handing up to his helper on the next higher platform. He states that he was standing approximately in the middle of the platform and also that he had raised the ladder clear of the guard-rail before he fell. It seems obvious, however, that either he himself or the ladder must have come into contact with the rail. This railing was peculiarly constructed, having one bar of the railing not fixed, but hinged. The bar should have been held in place by a safety-catch and plaintiff himself said that the catch was in good working order, and would have been quite effective if in place. The jury apparently believed that the catch must have been out of place, and I think we must so assume. The plaintiff claims that he knew nothing of the railing's being hinged, and I think we must assume this, especially as there is nothing improbable in his statement, the safety-catch being hidden from a casual view by an upright stanchion, to which it was attached.

The plaintiff's presence on this platform was due to his being an employee of a sign company, which had a Neon sign upon the roof of the building, a sign leased to the North American Life Assurance Co. and renovated about every six months. The right to use the roof, *inter alia,* was leased by the appellant Star Co. to North American Co.; and by the further lease from the Sign Co. to the North American Co., the Sign Company undertook to keep the sign in repair. The North American Co. undertook by the agreement to obtain the owner's consent. There is enough to show that the Star Co. knew of some arrangement between the Sign Co. and the North American Co., though not that the Star Co. knew of any details. The Sign Company's employees had been going on the roof every six months for nearly five years before the plaintiff's accident, without asking anyone's approval or permission, but without being interfered with by anyone. They followed on different occasions two methods: either one man went at once to the roof by the fire-escape ladder, and by a rope hauled up directly from the street, the ladders, plank, and other material used in renovating the sign, or these were handed and hauled up from platform to plat-

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form of the fire-escape until the roof was reached. The latter method was always adopted when only two men were available, the direct-haul method requiring three men. The platform-to-platform method was in progress when the plaintiff was injured.

The relations between the Star Co. and the North American Co. were peculiarly complicated. The North American Co. was at the time of the accident and had long been the registered owner of the building. In 1920 it had given an agreement to sell the building to one Cohen; his right to purchase, after two *mesne* assignments, was vested in General Odlum. The General assigned this to the Star Co. He held most of the shares in this company, and all its assets were charged by debentures, all of which the General held. In consequence, he always treated the Star Co.'s property as his own, and negotiated about it in his own name. The North American Co., in dealing with the building, adopted his attitude, though they and their solicitors knew the state of the title. More than ten years ago the agreement for sale fell into arrear, and it had long been apparent that there is no equity in the property for the Star Co. The North American Co. were constantly pressing for an arrangement by which they would get the income from the property. They were, however, anxious to avoid assuming the position of vendors in possession, which they feared, probably rightly, would saddle them with the responsibilities of a mortgagee in possession. On the other hand, they refused to accept a quit claim, presumably because they wished to keep open remedies against General Odlum on his covenant, which they had acquired in a roundabout way.

In November, 1933, General Odlum agreed to the North American Co.'s request made by letter that he

> authorize us or our nominee to receive the rentals and other revenues of the property and to generally manage the same.

However, after some hesitation, the North American Co. decided to let General Odlum's own firm of Odlum & Brown manage the property. This did not prove satisfactory and in 1935 the North American Co. again asked for control. This was agreed to, the North American Co. stipulating and General Odlum agreeing, that it was not to be deemed "mortgagee in possession," but only the General's agent. This arrangement lasted until

June, 1940, the North American Co. looking after repairs, letting, collections, etc., but doing so gratuitously, and consulting General Odlum constantly. In June, 1940, the North American Co. appointed The Toronto General Trusts Corporation to "administer" all its real estate, including the Star Building, and this arrangement was in force at the time of the accident. There is nothing to show that either General Odlum or the Star Co. was consulted as to this appointment, the North American Co.'s solicitor justifying it at the trial as coming under the original arrangement of November, 1933. The Trust Corporation's charges were apparently absorbed by the North American Co.

In 1933 the North American Co. had decided to utilize space in the building. They obtained a lease signed by the Star Co. which gave them an office on the ground floor,

> together with rights for the use of the roof of the said building for placing advertising thereon, whether by way of a Neon sign or otherwise.

This lease was for five years, and called for payment of rent. Actually this was merely credited against the purchase price of the building. On the expiration of the lease a renewal in writing for three years was signed, the above words about user of the roof being exactly repeated.

I am far from satisfied that either the North American Co. or the Trust Corporation ever became agents of the Star Co., in view of the fact that any arrangements were made with General Odlum, who negotiated in his own name and without purporting to act for the Star Co., and at a time when he personally had far more interest in the arrangements than the Star Co. had. So I am not prepared to accept any argument that the Star Co. had imputed knowledge of the Sign Company's user of the fire-escape because of the alleged knowledge of the North American Co. or the Trust Corporation.

However, I do not think the point arises; there was no evidence that either of these companies actually knew of such user, and nothing to justify the jury's hazarding conjectures as to knowledge. The Trust Corporation had no office on the premises, and though the North American Co. had, this commanded no view of the lane where the fire-escape ascends. Indeed plaintiff's counsel raised no serious argument that actual knowledge of the

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user could be imputed to any of the companies. His chief argument has been that some of them should have seen the probability of the Sign Company's agents' user of the fire-escape, because it was the natural thing to expect. I shall consider this argument presently.

Since there was never any contractual arrangement between the plaintiff and the Star Co., the judgment must be founded on tort. Several bases for it have been argued. Plaintiff had to show, of course, that he was lawfully on the fire-escape, that it was a trap, and that the Star Co. owed him a duty to have no trap there. I will assume that the safety-catch's being out of place constituted a trap. The plaintiff still had to show that he was a licensee or invitee of the Star Co. in order to show a duty towards him. Since neither he nor his employer, the Sign Co., had any dealing with the Star Co., only a licence or invitation, implied from circumstances, could be suggested. The circumstances relied on to justify the implication were these: first, the fact that the lease from the Star Co. to the North American Co. gave the latter "rights" upon the roof to instal a sign. The roof itself was not leased, and the North American Co. would itself be an invitee there. The lease said nothing about access for renovating; but I think the jury would be justified in assuming an invitation to the North American Co. to go on the roof for that purpose. It was not expressly shown that the Star Co. knew of the terms of the contract made between the North American Co. and the Sign Co., but I think it could reasonably be inferred that the Star Co. knew that some arrangement had been reached between the two, constituting an invitation by the North American Co. to the Sign Co. to go on the roof. The plaintiff would be in the position of an invitee of the Sign Co. His counsel has perforce argued that the invitee of an invitee of an invitee stands in the position of an invitee of the original invitor. This seems to be decidedly a moot point; there is considerable conflict of authorities; but in the view I take, it is not necessary to weigh them.

Even if the plaintiff could be considered as having been invited by the Star Co. to go on the roof, he still had to show that the invitation extended to his going by the fire-escape. To show this

extension plaintiff had to lean heavily on inference; and at the outset he had to show the Star Co.'s actual or imputed knowledge of the user being made of the fire-escape.

What plaintiff's counsel actually argued as authorizing this user was that the Star Co. must have known that the Sign Company's employees had to get to the roof somehow, from which it is said the Star Co. should have assumed that the fire-escape would be the means adopted. That argument, however, requires inferences to be drawn which I do not think legitimate, even for a jury. The method adopted by the plaintiff, far from being the only method of getting to the roof, was only one of three alternative methods open. The building had no elevator, but it had stairways, and there was also a trap-door to the roof. This was kept locked and bolted, as it naturally would be; but there is no suggestion that the plaintiff could not have had it opened on application to the management. Neither he nor any of the Sign Company's employees ever made such an application. They testified that they did not use the stairs because this might annoy tenants, and it was their policy to avoid stairs for that reason. It seems to me clear, however, that until a workman has applied for leave to use the safe means of access available and been refused, he cannot throw on a property-owner the responsibility of his taking a riskier course through a false sense of delicacy.

The third alternative method open of reaching the roof with equipment was for one workman to climb directly to the roof with only a rope, and to haul the equipment directly from the street. If this method was followed, the fire-escape platforms would not be used at all. This method was often followed in practice; indeed the plaintiff had himself used it in reaching the roof of the Star Building. Some evidence was given that this method was not favoured because it was likely to break windows. But other evidence shows that it was used when three men were available, and all the witnesses admitted that they had not seen any windows broken by the direct-haul method. I think the plaintiff and his co-workman were using the platform-to-platform method either because the Sign Co. were economizing on labour, or because the plaintiff and his helper chose of their own motion to adopt this method while their foreman was absent on

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a journey to obtain material. Where the alternative was open to the Sign Co., I think it is altogether unreasonable to impute to the Star Co. knowledge that workmen would be using the platform-to-platform method. This unreasonableness was doubled when there were two alternatives.

But objections to imputing this knowledge do not end there. A city by-law prohibited the blocking of any fire-escape, obviously with the object of keeping them clear for their primary use. The evidence shows that when the Sign Company's equipment was being hoisted from one platform to another, very little other use could have been made of the platforms, so that the Sign Company's user of them seems to have been clearly illegal. I do not say that this illegality would have precluded the plaintiff's success if he could have shown that the Star Co. knew what he was doing —it is unnecessary to decide—but when he asks us to impute knowledge of what he was doing, then it seems to me his position is hopeless. When we consider that there were three alternative methods of getting equipment to the roof, and one of these was unlawful, the suggestion that the Star Co. should have assumed that the unlawful method would be the one adopted, seems to me little short of preposterous. Obviously the company was entitled to assume that the law would be observed. If so, then it never authorized the plaintiff even by implication to use the fire-escape, and in using it he was a trespasser. As a trespasser, he was owed no duty that was disregarded. The verdict, therefore, cannot stand, and the appeal should be allowed.

Costs as between the two defendants would offer some difficulties. However, we are notified that they have arranged these between themselves, so I would simply set aside the judgment *in toto*. If my brothers agree, the parties may be heard on any other relevant questions as to costs.

O'HALLORAN, J.A. While engaged in fulfilling his employer's contract to paint a large Neon advertising sign on the roof of the Star Building, a three-storey office building in Vancouver, the respondent Crewe fell some 25 feet from the second storey fire-escape balcony when its movable guard-rail gave way. He and another workman were bringing their ladders and other equipment up to the roof by use of the fire-escape, in the same manner

paint and electrical service crews of his employer had used frequently during the previous five years. He received injuries for which a special jury awarded him $6,914.18 damages.

Crewe sued the North American Life Assurance Company and the appellant Star Publishing Company Limited. He alleged the two companies were joint occupiers of the building, or alternatively, the Assurance Company was the sole occupier, or again alternatively, that the appellant Star Company was the sole occupier. At the trial the Assurance Company maintained it was acting as agent of the appellant Star Company, and as such agent it had appointed The Toronto General Trusts Corporation its sub-agent to operate the building. The appellant denied the agency and contended the Assurance Company was the occupier.

During the trial the learned judge accepted the submissions of counsel for the two defendant companies, that he should not leave it to the jury to decide which of them was the occupier of the building. He construed the written documents upon which that issue depended and found the Assurance Company was the agent of the appellant Star Company, and consequently in law that the latter was "the sole party in control and management of the premises." He then dismissed the Assurance Company from the action, and allowed the case to go to the jury as between the plaintiff and the appellant Star Company.

Whether the learned judge was right or wrong in withdrawing that question from the jury is not now in issue. Its propriety has not been questioned. The learned judge adopted that course, and with respect I think correctly in the particular circumstances, at the behest of counsel for the two companies affected. The plaintiff respondent who had opposed it has not cross-appealed. On this appeal the argument of counsel for the appellant resolves itself into two main submissions: (1) That it was not the occupier of the building, and (2) even if it were, the evidence does not disclose a cause of action involving a breach of duty on its part.

As to the first ground of appeal, I see no sufficient reason to doubt the correctness of the learned trial judge's decision as to the legal effect of the documents introduced in evidence on this issue. The Assurance Company as registered owner of the lands

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and premises had sold them in 1920 under an agreement for sale giving possession to one Cohen, whose assignee in 1924 assigned it to Brigadier-General Odlum, who in turn assigned it in 1931 to the appellant company of which he was president and in which he holds the great bulk of the share capital. In November, 1933, the principal and interest payments under the agreement for sale were greatly in arrears, and Thomas Bradshaw of Toronto then president of the Assurance Company discussed the default with General Odlum.

The latter on behalf of the appellant Star Company offered to quit claim, but Bradshaw indicated the Assurance Company preferred a course which would protect Odlum's equity in the property if financial conditions should improve. Bradshaw wrote Odlum on 7th November, 1933 (Exhibit 18):

> We do not wish to take a quit-claim deed, and would much prefer making some other arrangement with you in the meantime while real-estate conditions in Vancouver remain in the present difficult situation, in the hope that when values return and your present embarrassment, we trust, is over, you will be in a position to discharge the obligation to our company, and at the same time realize something for your equity.

General Odlum wrote in acceptance and appreciation (Exhibit 18). I mention this now, because to my mind it represents not only the spirit but the letter of the arrangement which still prevails. That is to say, the appellant Star Company retained all the usual rights under its agreement to purchase including possession. The Assurance Company did not want the property back, nor did it wish to be saddled with its possession as a trustee. It did not attempt to "foreclose" or to have a receiver appointed as it could have done. It adopted a middle course. Preserving all the appellant's rights as purchaser under the agreement for sale, it sought and obtained a *status* whereby as the appellant's agent, and thereby avoiding the perils of a "mortgagee in possession," it could nevertheless keep a watchful eye upon the management of the building and the revenue derived from it. It not unnaturally desired that the building should be operated in the most business-like way.

As part of that plan, in December, 1933 (*vide* Bradshaw's letter, *supra*), it leased the ground floor of the building from the appellant company. That lease was renewed in 1939 for a further

three-year period. At first in 1933 it was arranged General Odlum should operate the building (and *vide* Exhibit 35 (b)). But this was not found satisfactory and in 1935 it was arranged the Assurance Company should collect the rents without remuneration. At that time the Assurance Company's solicitors wrote General Odlum (Exhibit 19):

> Please confirm the fact that the North American Life Assurance Company are not mortgagees in possession, but are collecting the rents without remuneration as your agent.

In reply General Odlum wrote two letters (Exhibits 20 and 26) to the Vancouver office of the Assurance Company, in which he said the new arrangement "is understood to be for the mutual convenience of both parties" and also:

> The relationship between the North American Life and myself is not altered by the new system we are adopting. My rights and liabilities remain unchanged, as do those of the company.

In some of the inter-office correspondence between the Vancouver office of the Assurance Company or its solicitors and its head office occur expressions which read alone might import possession and occupation in the Assurance Company. But no such rights were or could be asserted against the appellant company in view of the terms of its subsisting agreement to purchase.

The arrangement as to operation made in 1933 between Thomas Bradshaw and General Odlum and continued without substantive variation up to the date of the litigation did not alter the legal rights which that agreement imposed.

Some point was made also, that the Assurance Company was dealing with General Odlum in his personal capacity and not as representative of the appellant company. Manifestly, General Odlum's personal control of the inactive appellant company overshadowed it to the point it was seldom expressly referred to in the correspondence. But looking at the picture as a whole he must be regarded as speaking on its behalf, since it was known that it, and not he, held the governing legal rights affected. Viewed realistically, as businessmen knowing the circumstances would view it, his decisions would be accepted as including and governing the decisions of his inactive company. It is to be noted that when authority from the "owner" of the building was required by the Sign Company to instal and maintain the Neon

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sign on the roof for the Assurance Company's advertising, the necessary authority was given in a letter to the Assurance Company written in September, 1935, by the appellant company *per* "Victor W. Odlum, President" and "E. W. Kyle, Secretary" (refer Exhibits 6 and 16).

A convincing test of the relationship between the two companies it seems to me lies in this, that the appellant company could have sold the building at any time and given legal possession to the purchaser. The Bradshaw letter expressly contemplated that eventuality. The appellant company throughout had the legal possession, whether it was physically in possession or not. The Assurance Company was its agent in law for the operation of the building, with authority to depute that operation to a sub-agent, which it did. In that analysis, the appellant company must be regarded as the legal occupier for the purpose of this litigation.

This clears the way for consideration of the other main ground of appeal, *viz.*, that the evidence does not disclose any cause of action in the respondent involving a breach of duty towards him by the appellant company as legal occupier of the building. This branch of the appeal falls under two heads: (1) The learned trial judge should have held as a matter of law the appellant company was a "trespasser" and not an "invitee," and should have withdrawn the case from the jury accordingly; and (2) even if the appellant could be regarded as an "invitee" in respect to the building, there was no evidence whatever that the invitation extended to the fire-escape, or that it "knew or ought to have known" that the guard-rail on the fire-escape balcony was a concealed danger. I discuss them in that order.

The learned judge instructed the jury the action was one of negligence, that the plaintiff had to prove there was a breach of duty owed him by the defendant as recognized in law, and that such breach of duty resulted in the injury complained of. After describing negligence, he told them the duty of the appellant to the respondent was dependent upon the relationship between them. He pointed out that persons entering upon premises of another tend to fall into certain classifications which may determine the degree of duty owing by the occupier, and then continued:

In other words, in what class of person is he when he comes on the premises? That is the first step, and that is a matter, gentlemen of the jury, for you. I shall outline to you what persons fall in these categories, . . . I shall also outline to you the duty that . . . , the one that has the control of these premises, owes to the parties in these categories, then it will be for you to decide into what category the plaintiff here falls, and having decided that, apply the law as I shall instruct you, to see or to ascertain what duty is owing by the occupier. . . .

In my view the appellant has no legitimate ground of complaint against the charge to the jury as thus presented, or against the questions to the jury which reflect this charge and are to be interpreted accordingly. Negligence has now emerged as a distinctive tort in itself. It is something more than merely an element in "some more complex relationship or in some specialized breach of duty," as Lord Wright put it in *Grant* v. *Australian Knitting Mills, Ltd.* (1935), 105 L.J.P.C. 6, at p. 14. In modern legal usage it has come to denote a breach of duty owed to some person, as Lord Macmillan said at p. 374 in *Shacklock* v. *Ethorpe, Ltd.,* [1939] 3 All E.R. 372, expressing the view of the House of Lords. 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. That case was described as an "epoch-making decision" in the preface to the eighth edition to Salmond on Torts.

The learned judge told the jury that breach of duty springs from absence of reasonable care in the doing of something which a reasonable person would not do, or the omission to do something which a reasonable person would do, in all the circumstances. The relationship between the parties becomes the first consideration since it determines if a duty exists. That relationship is a matter of evidence to be left with the jury for determination as a question of fact, unless of course as in any other jury case, there is nothing to leave to the jury, either because the relationship depends upon the construction of documents (becoming then a question of law and not of fact), or else there is no evidence at all to go to the jury to support the plaintiff's allegations in that respect.

When, however, there is evidence which requires to be weighed,

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that relationship becomes a question of fact, or at most a question of mixed law and fact. But the legal consequences of that relationship is a question of law. If the judge instructs the jury that the law regards a certain factual relationship as "invitor and invitee," and another factual relationship as "occupier and trespasser," and then tells them the respective legal consequences of those relationships, he is obviously instructing them to find the relationship as a question of fact in those terms. But it is also true that when the jury find the factual relationship in those terms as terms of fact, such terms then contain as well the legal consequences necessarily flowing from the jury's application of the law as the judge has explained it to them.

If the jury fail to apply the law according to the judge's direction, that is another matter not now involved. But to argue the judge should have withdrawn this case from the jury, is to argue in effect the judge should have usurped their functions by depriving them of their right to find the facts and to fix liability according to the law as explained by the judge. In *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, Willes, J. in giving the judgment of the Court on the rule *nisi* to enter a nonsuit on the ground (as here) that the evidence did not disclose a cause of action said at p. 289:

> We think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; . . .

That conclusion of the Court should be related to the facts of the case to which I shall shortly refer. But it is plain that in *Indermaur* v. *Dames,* the question whether Indermaur was an "invitee" when he was injured, was left to the jury to decide, and the Court of five judges on the rule *nisi* unanimously held it was properly so left to them, and that view in turn was sustained in the Court of Exchequer Chamber without division—*vide* (1867), L.R. 2 C.P. 311. As Lord Wright said in *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1933), 102 L.J.P.C. 123, at p. 131:

> . . . at the ordinary law the standard of duty must be fixed by the verdict of a jury, . . .

However, because of the Assurance Company's written contract with the Sign Company (Crewe's employer) to install and

maintain a sign on the roof, of which sign the Sign Company retained ownership, and because of the consent of the appellant thereto in writing (Exhibits 6 and 16) and because also of the learned judge's finding as a matter of law that the Assurance Company was the agent of the appellant for the operation of the whole building, I agree that the learned judge should as a matter of law have decided the relationship between the appellant and Crewe when the latter came to the building and with respect, should have instructed the jury accordingly. Having so instructed the jury, then he should have left it to them to decide as a question of fact whether that relationship extended to the fire-escape.

This view is not in conflict with *Indermaur* v. *Dames* or anything said previously. Crewe's relationship to the appellant when he came to the building was a question of law because it depended on the construction of documents and the legal consequences flowing from undisputed facts. His relationship on the fire-escape, however, was purely factual, depending on whether or not in all the circumstances it was reasonable that he should use the fire-escape for the purpose he did. In *Indermaur* v. *Dames* a gas-saving device was installed pursuant to a written contract and guarantee. But Indermaur was not injured during the installation. If he had been and his relationship had depended solely on the construction of the contract, it would have been fixed as a matter of law.

He was injured several days afterwards when the burners were being tested. A serious question arose as to his relationship at that time with Dames the plant owner. The plant manager gave evidence that during the installation he had refused to admit Indermaur to the premises because he was not quite sober (p. 275). He testified also that if he had known Indermaur was coming to test the burners at the time of his injury (p. 277) he would not have allowed him to do so. In the circumstances the trial judge, Erle, C.J. evidently regarded Indermaur's relationship with Dames at the time of his injury as a question of fact, since he left it to the jury to decide. He was upheld in the specific language of Willes, J. already cited.

The criticism of the judge's charge which I have expressed

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is not serious in its result, as it might be in other circumstances. The learned judge properly left the jury to decide the relationship between Crewe and the appellant at the time of his accident on the fire-escape. He referred to the contract with the Insurance Company under which Crewe came to the building, and left no doubt in their minds that the real question for their decision was whether it was reasonable that Crewe should have used the fire-escape in the course of fulfilling his employer's contract. The word "premises" in the first question to the jury was confined by his instruction to the fire-escape only. The non-direction to which I have referred does not amount to misdirection. The appellant company did not suffer since the charge thereby became too favourable to it.

If the learned judge had told the jury as a matter of law, as I think he should have done, that Crewe was at least a "licensee with an interest" when he came to the building, it would naturally have had a greater influence against the appellant in the minds of the jury, than the course he adopted of simply stating the facts which supported that legal conclusion, but without telling them of that conclusion. In so far as the charge may be defective in that respect it reacted to the appellant's advantage. The jury could not have been misled by it and *vide Blue & Deschamps* v. *Red Mountain Railway* (1909), 78 L.J.P.C. 107, at p. 110. The most that can be said is that they were not instructed as favourably as they ought to have been in regard to the case for the respondent. But he has no complaint, since their verdict was in his favour and he has not cross-appealed.

Since the duty in the case of a "licensee with an interest" is not materially different to the duty in the case of an "invitee," I am including the former in "invitee" and "invitation" when these words are used in this judgment. Further examination of the argument of counsel for the appellant leads to the conviction that his submission that the judge should have withdrawn the case from the jury, and should have himself determined Crewe's classification as a matter of law, and in so doing have found him to be a trespasser, rests upon the premise that the relationship between the parties is determined by some cast-iron scheme into which the facts must be fitted at any cost. In effect it is a

refusal to recognize that the law of negligence is governed by rational principles capable of adjustment to new combinations of circumstances.

The submission that the learned judge should have found Crewe was a trespasser as a matter of law and withdrawn the case from the jury accordingly fails on analysis unless it may be successfully pressed to the point, that even if there was some evidence that use of the fire-escape was within the invitation, yet the judge must disregard it, and hold that under no circumstances could the fire-escape be used as it was in this case. But when so tested that submission discloses weaknesses which destroy it. For if the judge must disregard evidence of invitation to use the fire-escape it would follow: (1) In no case may the judge leave it to the jury to decide if there was an invitation. But such a conclusion is directly contrary to the principle of the decision in *Indermaur* v. *Dames, supra,* and *vide* also *Cooke* v. *Midland Great Western Railway of Ireland,* [1909] A.C. 229, Collins, L.J. at p. 241 and *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1, MACDONALD, C.J.B.C. at p. 9; and (2) that it is for the judge in each case to decide if the plaintiff is an invitee.

But as the duty must be inferred from the facts, and the jury is the judge of the facts, then by taking the case from the jury, the judge would be usurping its function in that respect. Contrary to guiding modern decisions that submission would supersede the law of negligence, by literal adherence to certain fixed and arbitrary categories developed in the mid-Victorian era, to which authority attached before negligence emerged as a distinctive tort in itself to reflect a truer relation between legal remedies and obvious social wrongs. I shall refer to some of the leading cases in this respect. *Excelsior Wire Rope Co.* v. *Callan* (1930), 99 L.J.K.B. 380, is an example of the futility of attempting to confine the concept of negligence to rigid and exclusive categories. Throughout there was much discussion as to whether the injured child was a trespasser or a mere licensee. But the decision of the House of Lords was not governed by the category into which the child might fit. It turned rather, upon the duty of the Excelsior Company which was deduced from the

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facts, to see that no child would be where it might be hurt. Lord Buckmaster who gave the leading judgment and with whose reasons Lord Atkin agreed, said at p. 383:

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

In *Donoghue* v. *Stevenson* (1932), 101 L.J.P.C. 119, Lord Atkin, Lord Thankerton and Lord Macmillan in apt and pointed language warned of the impossibility of confining the law to rigid and exclusive categories and thus restricting the inherent adaptability of English law.

It was emphasized that in their relation to the practical problems of everyday life the principles of the law are consonant with justice and common sense. Lord Atkin remarked at p. 135 that there may be a class of things where there is a special duty to take precautions but "this is the very opposite of creating a special category in which alone the duty exists." At p. 134 Lord Atkin warns of the error in

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

Lord Thankerton said at p. 139:

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

Lord Macmillan at p. 146 thus describes the circumstances which give rise to the duty to take care:

> In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other.

and continues at p. 146:

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

I end the quotation with Lord Macmillan's concluding observation at p. 147:

The categories of negligence are never closed.

In *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152, Lord Wright said at pp. 175-6:

> Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, . . . The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. 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.

That statement of the law was adopted by Sir Lyman Duff, C.J. in *The King* v. *Hochelaga Shipping & Towing Co. Ltd.*, [1940] S.C.R. 153, at p. 156.

The real effect of the foregoing is that categories become the servants and not the masters of the law of negligence. It may be a common tendency to attempt classification of the various human relationships which may give rise to a breach of duty. But the more modern decisions to which I have referred indicate that such classifications cannot be final. They cannot be set up as inflexible yard-sticks, but must be regarded rather as convenient sensitive instruments fashioned and refashioned from time to time in the judicial workshops, to record and harmonize the relation between the law and altering social and business conditions and outlooks. The standard of duty must be deduced from the facts in the particular case at the particular time.

Existing classifications may be very helpful in some cases and a source of confusion in others. Instead of limiting the duty to arbitrary and fixed standards, it is becoming even more apparent, that existing classifications should be increased ("the categories of negligence are never closed" *per* Lord Macmillan, *supra*), or widened sufficiently (so as not "to unduly restrict the inherent adaptability of English law" *per* Lord Atkin), to include all the varying relationships to which the law of negligence may apply. As I ventured to say in *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1, at p. 16 the main problem of negligence should not be obscured in an effort to place the injured person in a rigid and exclusive category.

It is observed that *Mourton* v. *Poulter* (1930), 99 L.J.K.B. 289, followed *Excelsior Wire Rope Co.* v. *Callan, supra,* and allowed an appeal from a judgment which had followed *Robert*

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Addie & Sons (Collieries) v. *Dumbreck* (1929), 98 L.J.P.C. 119, an appeal from the Scottish Court. *Mourton* v. *Poulter* was not appealed to the House of Lords, and at pp. 291-2 may be found what Scrutton, L.J. considered to be the slight difference in facts in the *Addie* and *Excelsior* decisions; and *vide* also the reference thereto in *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1, at p. 18. Instances extending the classification of "invitee" beyond rigid limits are *Dymond* v. *Wilson* (1936), 51 B.C. 301, where this Court (MACDONALD, C.J.B.C., MCPHILLIPS and MCQUARRIE, JJ.A.) reversed the Court below, *vide* (1936), 50 B.C. 458 in that respect; also *Union Estates Ltd.* v. *Kennedy,* [1940] S.C.R. 625 which affirmed the majority of this Court in that same respect.

The full import of that decision may be best appreciated by studying the judgments of the minority of this Court in (1940), 55 B.C. 1, which had accepted the doctrine of rigid categories to which effect had been given in *Power* v. *Hughes* (1938), 53 B.C. 64. The latter decision, in my opinion, at least, must now be regarded as overruled in principle by *Union Estates Ltd.* v. *Kennedy, supra.* Another such case is the decision of the English Court of Appeal in *Gould* v. *McAuliffe,* [1941] 2 All E.R. 527, affirming Singleton, J., reported in [1941] 1 All E.R. 515. An interesting note thereon may be found in 191 L.T. Jo. at p. 315. In *Ellis* v. *Fulham Borough Council,* [1938] 1 K.B. 212 a little boy the son of a ratepayer, cut his foot on a piece of glass embedded in the sand in a paddling-pool in a public park maintained by the council. The Court of first instance held he was an invitee and awarded his father damages. The Court of Appeal upheld the judgment, notwithstanding the fact it considered the boy was a mere licensee and not an invitee.

The council did not, of course, know the glass was there, but the Court of Appeal held the council liable on the ground that if they had taken proper precautions it would have been discovered and removed. If that means that they "ought to have known" glass was there or might be there, then the distinction between "know" and "ought to have known" seems to become purely verbal and without substantive force, and *vide* MACDONALD, C.J.B.C. in *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1,

at pp. 9-10, and also *infra* and 54 L.Q.R. 160-1. In his article on "The History of Negligence in the Law of Torts" found in 42 L.Q.R. 184, Professor Winfield in Appendix B catalogues some 35 decisions in which omission appears to ground liability for the tort of negligence just as much as an act of commission. But *vide* also Professor Wright in 19 Can. Bar Rev. 465.

Then as to the second head of this branch of the appeal, *viz.*, even if the respondent was an "invitee" in respect of the building, that there is no evidence whatever that relationship extended to the fire-escape, or that the appellant "knew or ought to have known" that the guard-rail on the fire-escape balcony was a concealed danger. This head divides itself into two parts. First as to evidence of invitation, *viz.*, evidence that Crewe was acting reasonably in making use of the fire-escape for the purpose of bringing the equipment to the roof in the course of fulfilling his employer's contract.

The approach to this question is necessarily premised upon (a) the appellant was the occupier of the building as found and that Crewe came to the building as a licensee with an interest at least; (b) the contract for servicing the sign to which the appellant consented, did not stipulate the equipment should be brought to the roof by any particular method. It follows that everyone affected including the appellant contemplated the use of any reasonable method; (c) whether the method employed was reasonable or not was a question of fact for the jury. The equipment consisted of four sections of ladder each about fourteen feet long and each weighing some 30 pounds, a plank of the same length weighing about 40 pounds, together with brushes and can of paint.

The precise question is, was there evidence before the jury that Crewe was using a reasonable method in the circumstances? The evidence is conclusive there was no practical means on the inside of the building for bringing the equipment to the roof. There was no freight elevator. While there was an inside stairway, the ladders and plank were said to be too long to be taken around the bends of the stairway. There was no evidence to the contrary and the jury had a view and could satisfy themselves.

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The evidence discloses there were three practical and reasonable ways of bringing the equipment to the roof. All three were on the outside of the building and two of them involved use of the fire-escape.

Crewe was using the first method, *viz.*, passing the equipment by hand from balcony to balcony. Use of the I-beam with block and tackle was the second method. The I-beam was perpendicularly above the three fire-escape balconies, according to the oral evidence and the photograph (Exhibit 5 (a)). It seems the fire-escape balconies had been designed not only for fire-escape purposes but as landing platforms for unloading into the building large rolls of newsprint hoisted up by the use of the I-beam perpendicularly above and so placed for that purpose. There was evidence before the jury, therefore, that use of the I-beam for hoisting equipment implied use of the fire-escape as well.

The third or "hand-line" method required two men on the roof to haul up the equipment, and a third man on the ground to secure the rope and to guide the equipment on its ascent. This could be done safely only at a corner of the building where there were no windows which might be broken by the equipment swaying back and forth as it was hauled up. It was said in evidence that two men were needed on the roof for safety. This method was not favoured since three men had to be sent on a painting job which two men could do just as well. As one witness put it, the third man then became a boy. There was ample evidence before the jury that the method employed by Crewe was reasonable. It had been used frequently during the previous five years by the paint crew who serviced the sign every six months and more frequently by the electrical crew.

Neither the janitor, manager nor any person having the immediate supervision, or the maintenance and operation of the building was called to testify it was not a reasonable and proper use in the circumstances. A city fire-warden of four years' experience gave it as his opinion the fire-escape should not have been used for that purpose, because it obstructed the fire-escape. He was also of opinion that use of the fire-escape in a manner the city building inspector thought was quite proper, *viz.*, mov-

ing machinery, stock and accessories in and out the building (for on this ground the building inspector sought to justify the movable guard-rail) was also improper because it was an obstruction.

The fire-warden's opinion was necessarily founded upon the city by-law No. 2193 and particularly section 33 thereof which makes it unlawful for any person "to obstruct a fire-escape." The word employed is "obstruct." The by-law does not prohibit the use of fire-escapes for any purpose which does not cause obstruction. Whether an "obstruction" occurred here was, of course, a question of fact for the jury. On the evidence before them coupled with their view of the *locus in quo*, the by-law does not hinder the conclusion they reached. The jury were fully aware of the ordinary purpose of fire-escapes as such. That is common knowledge. But this fire-escape had a wider purpose. It was designed to permit use of its balconies as landing-stages to bring rolls of newsprint to the second and third storeys by utilizing the I-beam already referred to.

The city building inspector in his evidence concerning the movable guard-rail to be shortly referred to on the aspect of concealed danger, testified it was proper to retain the movable guard-rail in case of getting machinery accessories and stock in and out of the building. Such use would more certainly imply an "obstruction" than merely passing up four ladders and a plank, which it is plain could be discarded almost instantly if occasion required. The learned trial judge, in my view, directed the minds of the jury to the essentials for a proper conclusion upon this aspect, and adequately instructed them upon the applicable law. His direction was such as to require them to come to the opposite conclusion which they did, if they were not convinced the evidence justified Crewe in using the fire-escape for the purpose he did.

It is important to bear in mind as well that the jury had a view of the building and fire-escape, and had visual opportunity then to appreciate the oral evidence relating to the advantages and disadvantages of the three methods referred to, and to determine the reasonableness of the method employed by Crewe when compared with any other course he could have taken. In this

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connection Hudson, J. observed in *Danley* v. *C.P.R.*, [1940] S.C.R. 290, at p. 300:

> Their visit . . . might well have changed what theretofore seemed "possible" to what appeared "probable." We in this Court have not had the advantages of the jury and I do not feel justified in holding that there was no evidence before the jury upon which they could reasonably have arrived at the conclusion which they did.

The evidence referred to and the implications arising from it cannot exclude a finding by the jury, that use of the fire-escape for the purpose Crewe was using it when he was hurt came within the invitation. Paraphrasing the language of Kerwin, J. in *Union Estates Ltd.* v. *Kennedy,* [1940] S.C.R. 625, at p. 630, in the circumstances the appellant must be taken by itself or its agent to have invited the respondent to use the facilities provided with the building, in order to reach the roof to service the sign. Once it is found that use of the fire-escape for the purpose Crewe used it, was a reasonable method of bringing the equipment to the roof, then in the present circumstances the appellant as occupier must be deemed to have invited Crewe or at least authorized him as a licensee with an interest, to use the fire-escape for that purpose and *vide Letang* v. *Ottawa Electric Rly.* (1926), 95 L.J.P.C. 152, at pp. 154-5.

Applying the view of Bovill, C.J. in *Smith* v. *The London and St. Catherine Docks Co.* (1868), 37 L.J.C.P. 217, at p. 221, it seems to me that the appellant "held out" the fire-escape as an access to the roof to all persons such as Crewe who had a right and a duty to go on the roof. *Vide* also *Heaven* v. *Pender* (1883), 52 L.J.Q.B. 702, Cotton, L.J. and Bowen, L.J. at p. 708. The duty of the appellant was then to have the fire-escape in such condition that the respondent and other members of the paint and electrical crews should not be exposed to any danger in the use thereof which they could avoid by the exercise of reasonable care for their own safety. It is a salutary rule of law that where a person is in legal possession of fixed property, he must so use and manage it that others are not injured thereby, whether the injury arises in nuisance or in his negligence.

In Pollock on Torts, 14th Ed., it is said at p. 411:

> A person lawfully entering on land, or into a building, in the discharge of a public duty or otherwise with justification, would seem to be in the same position as a customer and not to be a mere licensee, though such

terms as "licence by authority of law" may sometimes be applied to these cases. We do not know of any English authority precisely in point, but the question has been raised in America.

On the existing facts Crewe was clearly using the fire-escape "with justification." In the foot-note (*y*) to Pollock, *supra,* the American view as expressed by Winfield is quoted thus: "the balance of opinion is against erecting such people (*i.e.,* persons entering as of right) into a separate class." The learned writer adds to it his comment, that if they have a common interest with the occupier they are invitees, otherwise they are mere licensees. And *vide* also interesting analyses by Professor W. L. Prosser of the University of Minnesota and G. W. Paton of the University of Melbourne appearing respectively in 20 Can. Bar Rev. 357, and 19 Can. Bar Rev. 1.

Secondly, was there evidence to permit the conclusion the appellant "knew or ought to have known" that the guard-rail on the second fire-escape balcony was movable and a concealed danger? That it was a concealed danger is beyond reasonable question. It appears to have been the only one of its kind discovered in Vancouver. The city building inspector said, that to a person who did not know the guard-rail was held by a safety-catch, it would be as safe as a fixed guard-rail. But he admitted nevertheless that the safety-catch was easily dislodged. It follows the guard-rail itself could be dislodged easily, which of course a fixed bar could not be. There was evidence that it would not reasonably be obvious to Crewe that the guard-rail was movable. And there was evidence also that he had no reason to believe by warning, sight or otherwise that it was not as secure and safe as the guard-rail on the first balcony.

The jury passed on that evidence and saw the balcony with the movable guard-rail. In addition to the knowledge which the appellant had or should have had of this building as occupier since its purchase in 1931, it is also fixed with any knowledge its agent the Assurance Company and its sub-agent The Toronto General Trusts had or should have had. The building was originally built for the former "News-Advertiser" newspaper. As stated previously the fire-escape balconies had been designed and used in conjunction with the I-beam for the purpose of bringing rolls of newsprint to the second and third storeys. For

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that purpose the guard-rails on each balcony were attached by a so-called safety-catch, so that the guard-rails could be removed easily to admit the rolls of newsprint.

At some unfixed date the safety-catches on the first and third balconies were clamped down and permanently fixed. But for some reason which does not appear the guard-rail on the second balcony was left as it was. The building inspector testified it was proper to so retain it in case of machinery accessories and stock being moved in or out of the building. On these facts the jury were clearly entitled to infer that the appellant "knew or ought to have known" the movable guard-rail was there. The appellant company made no attempt to show it did not know of its existence. Neither the manager, janitor, nor any other person having to do with the every-day operation of the building was called to give evidence, and *vide Storry* v. *Canadian National Ry. Co.*, [1940] S.C.R. 491, at p. 497.

In my view the appellant's ten years' occupancy of the building in the circumstances referred to, raised a presumption of knowledge on its part, and placed an *onus* upon it to rebut that presumption by apt evidence. It did not attempt to do so. In *Scott* v. *London Docks Co.* (1865), 3 H. & C. 596, Erle, C.J. said at p. 601:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

That passage was referred to in the judgment of Atkinson, J. in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*, [1940] 1 K.B. 812, particularly at pp. 827-34. The House of Lords in [1942] A.C. 154 held Atkinson, J. had taken the right view of the case before him.

Furthermore, upon the facts and the law as they must be regarded at this stage, the appellant's lack of knowledge of the danger in the guard-rail is immaterial to the case. In *Donoghue* v. *Stevenson* (1932), 101 L.J.P.C. 119, Lord Macmillan said at p. 145:

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

If the appellant was unaware of the existence of the movable guard-rail because it did not take ordinary care to avail itself of its opportunity of knowledge, it is in precisely the same position as if it did know of its existence, *per* Lord Macmillan in *Donoghue* v. *Stevenson, supra,* at p. 145, approving what Lush, J. said in that respect in *White* v. *Steadman* (1913), 82 L.J.K.B. 846, at p. 850. If the persons or person charged with the every-day duties of maintaining, cleaning and supervising the building and its offices did not actually know of its existence, it was because they failed to carry out the duties of inspection or observation necessarily incidental to their work.

In *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430 the plaintiff pianist had been injured by the bursting of a lens in an overhead spotlight. Crockett, J. who gave the judgment of the Court said (p. 439) that the "most thorough examination possible" before the accident

> would not have revealed to the manager of the auditorium any more than to the appellant or anybody else that the lens was likely to burst.

He found (p. 440) that if the lens

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

The learned judge concluded (p. 440):

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

The *Hambourg* case can have no present application unless it could be said that the most thorough examination by the appellant its agents or servants would have failed to reveal the movable guard-rail and the latent danger from its being easily dislodged. That cannot be said here.

Then it was said there was no common interest between the appellant and the respondent. Counsel for the appellant desired to confine that to a common financial interest. As the sign was used for the Assurance Company's advertising purposes, it was contended the appellant could not be said to have any financial interest in such expenditures of the Assurance Company either as its agent or tenant. But no direct fee or financial interest need be shown to establish common interest and *vide* Kerwin, J. in *Union Estates Ltd.* v. *Kennedy, supra,* at p. 630. It was, however, of distinct advantage to the appellant to have its build-

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ing associated in the public mind with its tenant one of the well-known insurance companies of the country, through the medium of the large advertising sign on the roof, which it knew required to be regularly serviced by paint and electrical crews.

The desirability of the building for offices was enhanced accordingly as to the type, number and stability of tenants. It tended to increase the revenue from the building, and of course its value, and to render that value more secure. It all went to a strong common interest related indirectly to the financial advantage of the appellant. As Hudson, J. said on this point in *Union Estates Ltd.* v. *Kennedy,* at p. 634:

> As stated in Pollock on Torts, 14th Edition, page 140, it is not necessary that there should be any direct or apparent benefit to the occupier from the particular transaction, and here there are indirect benefits coming to the defendant company.

If there is anything in the majority judgment in *Power* v. *Hughes* (1938), 53 B.C. 64, and upon which the appellant seemed to rely, to support a contrary view, then in my opinion at least it has been overruled in that respect also by *Union Estates Ltd.* v. *Kennedy, supra.*

It was urged the appellant was not a party to the contract between the Sign Company (Crewe's employer) and the Assurance Company. But the Assurance Company had no authority as lessee of the ground floor, to give the Sign Company access to the roof. It had that authority, of course, as agent of the appellant. The latter in consenting to the placing and maintenance of the sign on the roof had not divested itself of possession and control over the means of access to the roof. Obviously if the authority to go on the roof did not come from the appellant itself, it must have come from the Assurance Company as its agent. If that view is correct then there was privity between Crewe and the appellant through its agent the Assurance Company.

But if that were not a correct view, it still remains to say that privity is not an essential so long as

> the want of care and the injury are in essence directly and intimately associated:

per Lord Wright in *Grant* v. *Australian Knitting Mills, Ltd.* (1935), 105 L.J.P.C. 6, at p. 15. After stating at p. 14 that the duty to take care was to be deduced from the facts, and at p. 15 that privity was not essential, Lord Wright continued:

. . . though the duty is personal, because it is *inter partes*, it needs no interchange of words, spoken or written, or signs of offer or assent; it is thus different in character from any contractual relationship; . . .

Vide also *Donoghue* v. *Stevenson, supra,* Lord Macmillan, p. 142.

We have here in my opinion that direct and intimate association of want of care and the injury to which Lord Wright refers. Crewe came to the appellant's business premises as a workman on business in which the appellant as occupier was "concerned," to use the word Willes, J. employed in *Indermaur* v. *Dames, supra.* He had to get to the roof with his equipment. No means of access was available inside the building itself, so he had to use such facilities as were provided on the outside and were "held out" to him for that purpose. The jury have found the invitation to use them was implied and that Crewe used a reasonable method of gaining access to the roof in the circumstances, and was injured in doing so without contributory negligence on his part.

Objection was taken to the form of the answers by the jury to the questions submitted to them. To my mind, taken as a whole and read with the evidence and the learned judge's summing up, the answers are not open to serious criticism. The language of a jury in answer to questions should not be construed too narrowly or too critically, and *vide British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 and 271; *Pronek* v. *Winnipeg, Selkirk, & Lake Winnipeg R. Co.* (1932), 102 L.J.P.C. 12, at p. 15; *Grinnell Company of Canada Ltd.* v. *Warren,* [1937] S.C.R. 353 and *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* (1940), 101 L.J.P.C. 1, at p. 7. I am satisfied the jury drew their conclusions in terms of the realities appearing in the evidence. That they may not have expressed those conclusions in legalistic language is not in itself a substantive objection.

I would dismiss the appeal.

FISHER, J.A.: I have had the privilege of reading the judgment herein of the learned Chief Justice and, in order to avoid repetition, I would refer to such judgment for a summary of the evidence as to how the plaintiff (respondent) was injured and as to the relations between the appellant Star Publishing Company

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Limited, and the North American Life Assurance Company (hereinafter called the "Life Company"). There are, however, certain facts in the case which I will have to mention in detail and some of them are as follows:

1. The contract between the appellant and the Life Company gave, for the consideration therein stated, not only a lease of a certain portion of the premises but the right to use the roof for advertising purposes. 2. One paragraph in the contract between the Life Company as advertiser and the Neon Products of Western Canada Limited (hereinafter called the "Sign Company") read as follows:

> The advertiser shall obtain the necessary permission from the owners of the premises and others, exclusive of public authorities, whose permission is requisite for the installation and maintenance of the display and shall be responsible that such permission once obtained shall not be revoked.

Neither this nor the first-mentioned contract said anything about the method of access to the roof for the installation and maintenance. 3. The permission required as aforesaid was given by the appellant by letter addressed to the Life Company dated the 26th of September, 1935. 4. The plaintiff's presence on the premises was due to his being an employee of the said Sign Company and his having proceeded there on the morning of the accident with other employees of the Sign Company with ladders, paint and other equipment for the purpose of doing whatever maintenance work might be found necessary to be done on the Neon sign which was placed on the roof of the building pursuant to the provisions of the last-mentioned contract. 5. The plaintiff fell from the fire-escape balcony opposite the second storey of the Star Building while using it and other balconies of the fire-escape for the purpose of raising materials to the roof.

At the trial the learned trial judge held that the appellant Life Company which was apparently exercising possession and control of the premises in question was doing so only as agent for the appellant Star Company and that the latter was in possession and control and the real occupier. The appellant submits that the learned trial judge was in error in these findings, but in my view the appellant is entitled to succeed even on the assumption that the trial judge was right in such findings. My view, shortly stated, is that the plaintiff while on and using the

said balcony as aforesaid was a trespasser and that as a trespasser he was owed no duty by the appellant that was unperformed even on the assumption that the appellant was the occupier.

The question as to the standard of duty owed by the occupier of land to persons coming there has been before our own as well as other Courts in many cases during the last few years. In this connection reference might be made to the editorial note to the case of *Hiatt* v. *Zien and Acme Towel & Linen Supply Ltd.* [(1939), 54 B.C. 450] as reported on appeal in [1940] 1 D.L.R. 736 in which it is stated that

> Originally, at any rate, the division of persons into invitees, licensees and trespassers for the purpose of determining an occupier's duty towards them had reference merely to the condition of the land itself.

Reference might also be made to Salmond on Torts, 9th Ed., where the writer referring to the distinction established by the leading case of *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; (1867), L.R. 2 C.P. 311, between an invitee or a licensee with an interest and one who is called a licensee or a bare licensee, says in part at pp. 513-4 as follows:

> As the authorities stand, however, the distinction is vague and unsatisfactory, both in respect of its nature and in respect of its consequences. A licensee may be defined as a person who enters on the premises by the permission of the occupier, granted gratuitously in a matter in which the occupier has himself no interest. . . .
>
> An invitee, on the other hand, is a person who enters on the premises by the permission of the occupier granted in a matter in which the occupier has himself some pecuniary or material interest. He is a person who receives permission from the occupier as a matter of business and not as a matter of grace.

and at p. 528 referring to the case of *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404, says:

> . . . the defendants were not occupiers of the land upon which the accident happened, but merely had a licence to have their machinery on the land.

And at p. 529:

> The position of a licensee upon land should differ from that of an occupier.

And at p. 530 that in *Mourton* v. *Poulter,* [1930] 2 K.B. 183, the defendant was a nurseryman who was felling an elm tree for the occupier of the land.

There is an interesting article on "Negligence—Liability to Trespassers" published in 17 Can. Bar Rev. 445, in which refer-

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ence is made to the judgment of MCDONALD, J. (now C.J.B.C.) in the *Hiatt case,* [54 B.C. 17] *supra,* as reported in [1939] 2 D.L.R. 530, and to the dissenting judgment of my brother O'HALLORAN in *Power* v. *Hughes* (1938), 53 B.C. 64, at pp. 71-4, in which he held that it was not essential for the decision of that case to determine whether the respondents were "invitees" or "licensees." Although it may be, as suggested by the writer of the said article in the Canadian Bar Review, that

> this department of law, . . . has become so cluttered with classifications of the character in which persons enter on the premises that the main problem of negligence often bids fair to be lost in the very endeavour to characterize or describe the class in which the plaintiff should be placed,

nevertheless, in the present case, where it may be said that the condition of the land or building thereon is in question, I think it is necessary, in order to arrive at a proper understanding of the measure of the duty, if any, owed to the plaintiff by the appellant as occupier, to consider in which category the plaintiff must be placed at the exact time and place of the accident.

Counsel for the appellant relies especially upon the decisions in *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74 and *Hambourg* v. *The T. Eaton Co. Ltd.,* [1935] S.C.R. 430 to show that at no time or place was the plaintiff an invitee of the appellant. Counsel submits that the plaintiff was a trespasser and alternatively only a bare licensee. Although as pointed out by my brother O'HALLORAN in *Power* v. *Hughes, supra,* at pp. 72-3 the three law Lords who held against the plaintiff in the *Fairman* case did so, not because they considered her a bare licensee, but because she did not use reasonable care, nevertheless they obviously held that she was not an invitee but only a licensee of the defendants. Lord Atkinson said in part at pp. 85-6 as follows:

> As between the plaintiff and the tenant she had no doubt an interest, as he had, in her occupation of his flat and in the using these stairs to enable her to occupy it with his family. But the landlords, the defendants, were no parties to this arrangement. They gained nothing by her becoming the lodger of the tenant. She did not traverse these stairs, either when ascending or descending, to do any business with or for the landlords, or to discharge any duty she owed them by contract or otherwise. There is not even any evidence that the tenant, by taking the plaintiff as a lodger, was thereby helped to pay the landlord his rent or to discharge any duty he owed to the landlord. The plaintiff, being only a licensee, was therefore bound to take

the stairs as she found them, but the landlord was on his side bound not to expose her, without warning, to a hidden peril, of the existence of which he knew, or ought to have known. He owed a duty to her not to lay a trap for her.

In the *Hambourg* case the head-note at pp. 430-1 reads in part as follows:

Defendant rented its auditorium to H. for a musical recital which H. was giving, and permitted H., without charge, to use it for a rehearsal previous to the recital. Plaintiff, H.'s brother, was, for a fee (which also covered his preparatory work), to assist H. as a pianist in the recital. During the rehearsal, while plaintiff was playing a piano on the stage of the auditorium, the lens of a spotlight suspended above the piano burst and a piece of broken glass cut his hand. He sued defendant for damages.

Held: Plaintiff was a mere licensee of defendant, without an interest, plaintiff not having entered the auditorium upon business which concerned defendant upon defendant's invitation, express or implied. In such circumstances plaintiff did not come within the rule applied in *Indermaur* v. *Dames*, [(1886)] L.R. 1 C.P. 274, [(1867)] L.R. 2 C.P. 311, and certain later cases, which treat a licensee with an interest as being entitled practically to the same degree of protection at the hands of the licensor as an invitee in the usual sense. To bring a person within this category it must be shown that he was upon the premises for some purpose in which he and the proprietor had a common or joint interest (*Hayward* v. *Drury Lane Theatre*, [1917] 2 K.B. 899, at 913; *Addie* v. *Dumbreck*, [1929] A.C. 358, at 371). . . .

Though the matter is not easy of solution in the present case I still think, as already intimated, that I should come to a conclusion as to the relationship between the plaintiff and the defendant. Upon the authorities, some of which have been or may be hereinafter referred to, I do not think that it can be successfully argued that the relationship between the appellant and the respondent with respect to the fire-escape balcony is necessarily the same as the relationship between them with respect to the roof, and I have no hesitation in reaching the conclusion that the relationship may not only be but actually is different. With respect to the roof I think that the *Fairman* and *Hambourg* cases, *supra,* are distinguishable and that the respondent was an invitee or licensee with an interest, as the word is used in the cases. In the *Fairman* case the plaintiff was not on the premises on any business but was a guest living with her sister in a flat of which the sister's husband was the tenant. At p. 85 Lord Atkinson points out that apparently it was not contemplated by either landlord or tenant when the letting was made that the tenant should take in lodgers. In the *Hambourg* case

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it may be said that the use of the auditorium for rehearsal was allowed as a matter of grace and not as a matter of business, since the lease of the auditorium had already been signed and the rent fixed containing no provision for the holding of a rehearsal, and the defendant would have been under no liability if the permission to hold a rehearsal in the auditorium had been refused. In the present case the plaintiff was on the premises on business and obviously it was contemplated by the parties when the first above-mentioned contract was made that the roof would be used for advertising purposes. Under all the circumstances I am of the opinion that, if at any time during the currency of the contract, the appellant had refused access to the roof to the said Sign Company the appellant would thereby have committed a breach of contract, preventing it from enforcing payment of the consideration which the Life Company had therein agreed to pay, as the appellant by virtue of the contract and the letter as aforesaid had not only expressly given its permission for the installation and maintenance of the sign by the Sign Company but in my view had also impliedly bound itself to permit the Sign Company and its employees to have access to the roof from time to time to install and maintain the sign. With respect to the roof therefore I think as I have already intimated that the respondent was an invitee or licensee with an interest.

I agree with the submission of counsel for the appellant that it is not sufficient for the respondent to establish permission to enter upon the premises in order to go upon the roof, but he must also establish that he had permission to use the fire-escape as a means of hoisting materials to the roof and therefore had permission to stand upon the second balcony of the fire-escape for the purpose of hoisting materials. I come therefore now to consider the question as to the relationship between the appellant and respondent with respect to such balcony. Counsel for the respondent does not contend that there was an express or "specific" invitation to the respondent to use the fire-escape balconies as he was doing at the time of the accident, but submits that there was an implied invitation. It is necessary therefore to consider and have in mind the situation with respect to the following matters:

1. It is or must be common ground that neither the plaintiff nor his employer the Sign Company was directed at any time by the appellant its servants or agents as to the manner in which access to the roof should be effected nor was any request made by the plaintiff or his employer for such directions. 2. The fire-escape in itself did not constitute a direct invitation by the occupier. It was not, as suggested by counsel for the respondent, an outside staircase available to the respondent for the purpose of going, or raising materials, to the roof. As pointed out by counsel for the appellant the fire-escape ladder commenced a distance of about nine feet above the ground and this gap should have informed the plaintiff that the fire-escape was not intended as a means of access to the roof. In fact the plaintiff could not get on to the fire-escape except by means of the ladder which he had brought with him. 3. There were other means of gaining access to the roof and raising materials to it. There was an inside staircase with a trap-door to the roof. There was an I-beam projecting from the roof. Panels for the sign were raised by means of this I-beam. The I-beam was obviously designed for the purpose of raising materials. It was quite visible and was obviously available for hoisting materials to the roof. Then there was what was called the hand-line method. If this method was used the equipment would be raised directly from the lane and the fire-escape balconies would not be used at all. 4. The superintendent of the Neon Company states that he left the method of raising materials to the discretion of his men. On the first occasion that the plaintiff attended at the premises he used the hand-line method, on the instructions of the foreman. On several other occasions the plaintiff was in charge of repairing operations. He says he enquired of a tenant if there was an elevator, then proceeded to raise the materials from balcony to balcony in September, 1940, when the accident happened. 5. In raising the materials as he did the respondent blocked the fire-escape contrary to fire by-law 2193 of the city of Vancouver (see section 33).

Having the facts of the present case in mind I come now to consider the authorities applicable. In *Walker* v. *Midland Railway Company* (1886), 55 L.T. 489 the Earl of Selborne said at p. 490:

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Wrongful neglect or default there could not be, unless a duty, which was not performed, was previously owing by the respondents towards the plaintiff's husband, or towards persons in the same situation, in respect of the place where the accident happened. *Prima facie*, there was no such duty, for the service room was a place in which no guest of the hotel had any right or legitimate occasion to be, and into which no such guest was expressly or impliedly invited to go. I think it impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in his house, at all hours of night or day, irrespective of the question whether any such guests may have a right, or some reasonable cause, to be there. The duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so.

In *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253, Viscount Cave, L.C. said in part as follows at pp. 259-62:

The respondent's case is rested on the well-established principle that where a landowner invites or induces a person to go upon his land, not as a bare licensee but for some purpose in which both have an interest, he must make reasonable provision for that person's safety. This rule was clearly stated in the judgment of Willes, J. in *Indermaur* v. *Dames*, [(1866)] L.R. 1 C.P. 274, 288; affirmed [(1867)] L.R. 2 C.P. 311, . . .

In the present case it is not disputed that the deceased man came within the class described by Willes, J. He came upon the dock property and passed to and from the vessel where he was engaged upon business which concerned both the dock company and himself; and he was entitled, subject to using reasonable care on his part, to expect that the dock company should use reasonable care to protect him from any unusual danger known to the company and not known to or reasonably to be expected by him. If so, the questions of fact which arise or may arise are three—namely, (1) Were the appellants guilty of negligence or want of reasonable care for the safety of the deceased? . . .

In dealing with the first question, it is important to bear in mind the exact nature of the appellants' duty to the deceased. It was not to give him absolute protection in whatever part of the appellants' premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation; and this duty must be limited, as Lord Selborne pointed out in *Walker* v. *Midland Ry. Co.* (1886), 55 L.T. 489, 490, to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so. If this test is applied, it appears to me that there was no breach of duty on the part of the appellants. The deceased was not invited or entitled to go to the quayside of the West Float; . . .

When a person is invited or licensed to pass by a particular way, and the landowner without warning to him does something which makes it dangerous for him to use that way, liability may no doubt be incurred. But this is because the use of the permitted way itself is subjected to an unknown and unexpected danger; and where, as here, the danger zone is far removed from the permitted way, the same considerations do not apply. To say that a landowner who permits an element of danger to exist in a place to which

he neither invites nor expects a person to go thereby sets a trap for that person would appear to me to be a strange use of language. . . .

The result is that in my opinion no negligence on the part of the company was proved; and if so, the other questions do not arise.

In a recent case which was before the Supreme Court of Canada on appeal from our Court of Appeal, *Union Estates Ltd.* v. *Kennedy*, [1940] S.C.R. 625 Sir Lyman Duff, C.J. speaking of the duty of the occupier and referring to what was said by Lord Selborne in the *Walker* case as aforesaid, says (p. 626).

The passage in the judgment of Lord Selborne in *Walker* v. *Midland Railway Co.* (1886), 55 L.T. 489, at 490; 2 T.L.R. 450, at 461, cited by Lord Buckmaster in *Mersey Docks* v. *Procter*, [1923] A.C. 253, at 256 is, I think, apposite. So far as pertinent it is in these words:

" . . . the duty is limited to those places to which a person may reasonably be supposed to be likely to go in the belief, reasonably entertained, that he is invited . . . to do so."

In *Hillen* v. *I.C.I. (Alkali), Ltd.* (1935), 104 L.J.K.B. 473, at p. 475, Lord Atkin says:

The plaintiffs' claim against the defendants is based upon the theory that they were invitees of the defendants for business purposes, and that the defendants consequently owed them a duty to take reasonable care to see that the barge was reasonably safe, or at least to warn them against any hidden danger of which they were unaware but which was known, or ought to have been known, to the defendants or their servants. In my opinion this duty to an invitee only extends so long as, and so far as, the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As Scrutton, L.J. has pointedly said: If I invite a man to go down my staircase I do not invite him to slide down the banisters. So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly.

I still have to consider the possibility recognized by the authorities that a trespasser may be transformed into a licensee by the acquiescence of the occupier. Counsel for the respondent contends not only that it was the well-established and usual practice for artisans to proceed to roofs of large buildings in Vancouver by way of the fire-escape but also that in the case of the Star building it was established that the Neon sign had been serviced by the paint crew approximately every six months for the previous period of five years by workmen of the Sign Company, and that on all occasions the roof was reached *via* the fire-

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escape. It is argued therefore that the jury was entitled to draw the inference that this frequent and long-continued user was known to and had the consent of those who had possession and control of the building. On this phase of the matter I have only to say that I agree with the Chief Justice that there was no evidence that either of the said companies actually knew of such user and nothing to justify the jury's hazarding conjectures as to knowledge. In my view therefore one cannot come to the conclusion that, if the plaintiff would otherwise be a trespasser, he had been transformed into a licensee by the acquiescence of the appellant.

I now come to consider the submission of counsel for the respondent that, since the jury has found that the plaintiff acted in a reasonable and proper manner in making use of the fire-escape to get to the roof, such finding must be conclusive upon the question as to whether the invitation extended to the use of the fire-escape for the purpose of raising materials to the roof. I agree with the submission of counsel for the respondent that the question of invitation is a question of mixed law and fact as pointed out in the case of *Kennedy* v. *Union Estates Ltd.* (1940), 55 B.C. 1, *per* MACDONALD, C.J.B.C. at p. 9, but it must be noted that the finding of the jury does not answer the question that must be asked if the test to be applied is that which was applied in the authorities as aforesaid. Such question is not whether the plaintiff acted in a reasonable and proper manner in making use of the fire-escape balconies for the purpose of raising materials to the roof but whether the place where he went and acted as he did was a place he might reasonably be supposed by the occupier (appellant) to be likely to go and act as he did in the belief reasonably entertained that he was invited by the occupier to do so. Whatever may be said as to there being evidence from which a reasonable jury could fairly find an affirmative answer to the question which was put before them (and on this I express no opinion) I have no hesitation in coming to the conclusion that there was no evidence upon which a reasonable jury could fairly answer affirmatively the question which must be so answered before the plaintiff can be considered an invitee with respect to the balcony and his user thereof as

aforesaid. I pause here to say that in coming to such conclusion I have not overlooked the evidence that the guard-rail of the fire-escape balcony in question was constructed years ago so as to be movable by means of a hinge for the purpose of enabling goods to be brought in to the second storey of the building from the lane and that the said balcony was used for such purpose when the building was used by the appellant as a publishing establishment. There is no evidence, however, that either the Sign Company or any of its employees including the plaintiff knew of such user before the accident, and the evidence of the plaintiff at the trial was that he had the impression that the rail was a solid bar. Moreover there is no evidence that the appellant knew (or that it was common knowledge) what it is suggested the Sign Company or its employees, familiar with such sign work, did know, *viz.*, that it was the usual practice for artisans to proceed to roofs of large buildings in Vancouver by way of the fire-escape and that the fire-escape on most if not all of such buildings had a solid bar and not a movable guard-rail. Under all the circumstances, many of which have been hereinbefore referred to in detail, my view is that no reasonable jury could fairly hold on the evidence, that the appellant should have reasonably supposed the employees of the Sign Company would be likely to go upon the fire-escape and use the balconies for the purpose of raising materials to the roof without asking anyone's permission and without any communication from the Sign Company to the appellant its agents or servants as to the manner in which access to the roof should be effected. I think, therefore, as I have already indicated, that the plaintiff while on and using the said balcony as aforesaid was a trespasser.

It is quite obvious that in dealing with this case one must keep in mind the principle that makes it necessary for the plaintiff before he can establish liability for negligence to first show that the law recognizes some duty owing by the defendant to him and, before parting with the case, I have to say that I think that, if the plaintiff here has shown that the law recognizes some duty owed to him under the circumstances, he has not shown that it was the appellant that owed him the duty. In this connection there is still one phase of the matter to which I have not yet

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referred but to which I will now refer. It should be noted that the witness John Crossman Reid, building inspector for the city of Vancouver for the past 21 years, testified that the fire-escape "particularly the second balcony" complies with the by-laws and that the movable bar is permissible and would be allowed today. It must also be noted that it is or must be common ground on the evidence that the bar cannot be moved at all and is safe when the safety-catch is in place. Assuming then for the moment that the movable guard-rail would give the plaintiff, upon seeing it, the impression that it was a solid bar (though the witness Ronald Barry Errett, called on behalf of the plaintiff at the trial, said that he noticed it was loose because it fitted in a groove) and assuming also that, if the safety-catch was out of place, it would constitute a concealed danger, nevertheless my attention has not been called to any law, and none was cited to us, which would put a duty upon the appellant under the circumstances here, to make the said movable guard-rail, which he legally had on his property, a solid bar or give notice of its exact nature so as to prevent trespassers from running into danger. Though it is really not necessary to say anything further one might add that, if any duty to the plaintiff was unperformed, there is much to be said in favour of the view that the Sign Company as employer owed a duty to its employees, including the plaintiff, to provide for them a safe means of access to the roof and adequate equipment to permit them to raise materials to the roof in safety instead of leaving the method to the discretion of the employees. My conclusion, however, on the whole matter, after considering all the circumstances of the case, which would seem to be unusual, is that the plaintiff has failed to establish that the appellant owed him any duty that was unperformed. I have also to say, with all deference, that I am of the opinion that the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence and no reasonable view of the evidence could justify a verdict for the plaintiff. As to the power of this Court to reverse the finding of a jury I would refer to rule 5 of our Court of Appeal Rules, 1924, and to the following authorities cited by counsel for the appellant: *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, at p. 53;

Paquin, Limited v. *Beauclerk,* [1906] A.C. 148, especially at p. 161; *Zellinsky* v. *Rant* (1926), 37 B.C. 119, especially at p. 122; *Knight* v. *Grand Trunk Pacific Development Co.,* [1926] S.C.R. 674. In the latter case Newcombe, J. delivering the judgment of the Court, says in part as follows at pp. 678-9:

> The Court must of course be careful to distinguish between the separate functions of judge and jury and to avoid the disposition of a case upon inferences inconsistent with findings which there is evidence to sustain. But here the case does not depend upon contradicted evidence, and I find no support for the finding, which, in view of the charge of the learned trial judge, must necessarily be implied in the general verdict, that the deceased was invited, or was justified to believe that he was invited, by the respondent to enter or to use the private passage, or to meddle with the door of the service elevator. There can be no doubt that the hotel management did not intend or expect that he should or would go into the private service quarters. . . . I see no evidence to indicate that, by anything for which the hotel is responsible, the deceased was misled into a belief that he was invited to use the private passage; and, having gone there, where he had no right to be, he was not entitled to rely, if he did rely, upon the adequacy of the lock of the elevator door to withstand the shock which he gave it.

I would set aside the verdict and allow the appeal.

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

Solicitor for appellant: *W. S. Lane.*
Solicitors for respondent: *Alexander & Fraser.*

IN RE TAXATION OF COSTS AND *IN RE* LOCKE, LANE, NICHOLSON & SHEPPARD, SOLICITORS. (No. 3).

C. A.
1942
Sept. 11, 28.

Practice—Costs—Taxation—Solicitor and client—Non-contentious matters—Appendix M, Schedule 5.

Item 42 in Schedule 5 of Appendix M to the Supreme Court Rules, 1925, is followed by the words "In all the above enumerated cases the Registrar shall have power to allow higher fees than those mentioned, but either party may appeal from the Registrar's decision to the Judge, who may either increase or reduce such fee."

On review of the taxation by the registrar of the solicitors' bill of costs in non-contentious matters it was held that the words "In all the above-enumerated cases" were intended to refer to all the items in Schedule 5.

Held, on appeal, affirming the decision of ROBERTSON, J., that the words

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after item 42 are not confined to the items under the heading "Fees to Counsel, etc.," but the language of item 31 should be confined to items 29 and 30, that is those coming under the heading "Journeys, etc.," because of the difference in language used. The expression used in one instance is "fees" which is as applicable to items 1 to 28 as to items 32 to 42, but the expression used in item 31 is "allowance" which is most appropriate to items 29 and 30, that is to compensation for time lost, but not so appropriate to pay for work done. If item 31 only affects items 29 and 30 then the words following item 42 can apply to items 1 to 28 as well as items 32 to 42 without serious anomaly.

APPEAL by Catherine I. Spencer, David Spencer, Jr. and Norman M. Littell, Executors of the estate of Thomas Arthur Spencer, deceased, from part of the order of ROBERTSON, J. of the 21st of April, 1942 (reported, *ante*, p. 46) on an application to review the taxation by the registrar of the above solicitors' bill of costs rendered for services in non-contentious matters. The executors appeal from that part of the order whereby it was held that the words

> In all the above enumerated cases the Registrar shall have power to allow higher fees than those mentioned, but either party may appeal from the Registrar's decision to the Judge, who may either increase or reduce such fee

(following item 42 in Schedule No. 5 of Appendix M, p. 243, Supreme Court Rules, 1925) were intended to refer to all the items in said Schedule No. 5: and whereby it was ordered that in taxing the bill of costs herein the registrar may allow higher fees than those mentioned in items numbered 1 to 42, both inclusive, of Schedule No. 5 of said Appendix M in respect of any and all items in said bill of costs to which items numbered 1 to 42, both inclusive, of said Schedule are applicable.

The appeal was argued at Victoria on the 11th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE and FISHER, JJ.A.

Donaghy, K.C., for appellants: It was held that the words following item 42 in Schedule No. 5 applied to all the items in Schedule No. 5. We contend they only apply to the items below the heading "Fees to Counsel, etc.," namely, items 32 to 42 inclusive. There is an analogous point in *In re Taxation of Costs and In re Locke, Lane, Nicholson & Sheppard, Solicitors* (1941), 57 B.C. 304. The same rule of construction applies to the rules as apply to the statutes: see *Rex* v. *Dean* (1917), 28

Can. C.C. 212; *Inglis* v. *Robertson,* [1898] A.C. 616, at pp. 624 and 630; *Re Morris Provincial Election* (1907), 6 W.L.R. 742, at pp. 748-9; *Toronto Corporation* v. *Toronto Railway. Toronto Railway v. Toronto Corporation,* [1907] A.C. 315, at p. 324; *Re Clearwater Election* (1913), 4 W.W.R. 1025, at p. 1032.

Bull, K.C., for respondents: The words are "In all the above enumerated cases." This must necessarily include more than the items under "Fees to Counsel, etc." The learned judge properly found it applied to all the items in the Schedule. This is the only taxation of a solicitor and client's bill of costs in non-contentious matters.

Donaghy, replied.

Cur. adv. vult.

On the 28th of September, 1942, the judgment of the Court was delivered by

MCDONALD, C.J.B.C.: This appeal involves a very narrow point, but one difficult to solve satisfactorily, since decision involves construction of some very slovenly draftsmanship, and inevitably means choosing that alternative which involves the fewest anomalies.

The point is as to the meaning of the clause following item 42 in Schedule No. 5 of Appendix M of the Supreme Court Rules, 1925, which clause reads: [already set out in the statement and head-note].

The question is whether the expression "all the above enumerated cases" refers to items 1 to 42 of the Schedule or only to items 32 to 42.

ROBERTSON, J. has held that this expression refers to items 1 to 42, basing his view on the consideration that the other construction might make maximum allowances under the early items quite inadequate.

It is pointed out that the maximum fee for drawing a will, if appellants' construction should prevail, would be $5 under item 12 or $1 per polio over three folios under item 13. Appellants answer this by saying that the registrar could allow a large counsel fee for settling the will. This does not seem to me altogether a satisfactory answer in this country, where most prac-

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titioners are both barristers and solicitors, and where drawing wills is regarded as pre-eminently solicitors' work.

Respondents rely on that consideration, on the generality of the word "all" in the clause quoted, and also on the assistance given by the contrast presented by Schedule No. 4 of Appendix M. Items 32 to 42, which appellants say alone are affected by the words quoted, are headed "Fees to Counsel, etc."; the corresponding section in Schedule 4 headed "Fees to Counsel" begins with item 214. After item 217 appear the following words:

> In all the above enumerated cases mentioned in items 214, 215, 216, and 217, the Registrar shall have power to award fees higher than those mentioned, but either party may appeal from the Registrar's decision to the Judge, who may either increase or reduce such fee.

The distinction between this language and that first quoted suggests that the framers, when they set out to restrict its operation to items under a particular heading, took care to say so explicitly. This difference in language raises something of a presumption that the registrar's powers under the first-quoted clause are not restricted to items 32 to 42, otherwise those items would have been specified. There is, however, a difficulty in the way of this presumption, not only in the way the language following item 42 is printed, as though it related particularly to matters under the one heading, but also arising under item 31.

Item 31 also comes under a specific heading, *viz.*, "Journeys, etc.," which contains items 29, 30 and 31, the last reading:

> 31. The taxing officer may increase the above allowances for any reasons that he shall think fit.

The appellants argue that if the decision appealed from is right in holding that the power to increase applies to all preceding items, the same construction should also apply to item 31, with the result that there would be two overlapping provisions, both giving the registrar power to increase under items 1 to 30, which the framer could not have intended.

This is a strong argument; but respondents' counsel offers an explanation. He says that the words after item 42 are not confined to the items under the heading just above, but that the language of 31 should be confined to items 29 and 30, that is those coming under the last heading, "Journeys, etc.," because

of the difference in language used. The expression used in one instance is "fees," which is as applicable to items 1 to 28 as to 32 to 42; but the expression used in item 31 is "allowances," which is most appropriate to items 29 and 30, that is to compensation for time lost, but not so appropriate to pay for work done. If item 31 only affects 29 and 30, then the words following item 42 can apply to items 1 to 28 without serious anomaly.

On the whole this seems to me a plausible answer, and though even this makes the arrangement and form of the Schedule an inartistic job, it seems to me to involve fewer anomalies than any other solution. I note also that the language of item 31 admits of restriction more easily than that used in the other clause, in that 31 merely refers to "the above allowances," whereas the other adds the word "all."

The slovenliness of the draftsmanship in this Schedule appears in several ways. The word "cases" used in the clause following item 42 is a vague and inappropriate word, whatever its application, and through the Schedule we have the terms "taxing officer," and "registrar" used presumably interchangeably, though such inconsistency might well invite an attempt to draw a distinction presumably not intended, and is to be deplored.

The obscurity of the language of the Schedule is obviously due to grafting fresh clauses on to the Schedule in the Rules of 1912, without sufficient care having been taken to harmonize the whole. The whole Schedule would seem to need revision.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *D. Donaghy.*

Solicitors for respondents: *Locke, Lane, Nicholson & Sheppard.*

S. C.
In Chambers
1942
July 6, 24.

IN RE THE BANKRUPTCY OF DAYBREAK MINING COMPANY LIMITED, N.P.L.
AND
IN RE APPLICATION OF MINNIE M. MAY AND J. J. UNVERZAZT ACTING FOR AND AS THE LIQUIDATORS OF THE GIBSON MINING COMPANY LIMITED, N.P.L.

Practice—Application for leave to bring action refused—Order settled without notice to applicant—Subsequent application to vacate order on ground that applicant was not notified of appointment to settle—Bankruptcy Rule 20—Refused.

By rule 20 of the Bankruptcy Rules "All orders made by a Judge in Chambers shall be settled and signed by him or by the Registrar or proper officer. All orders made by the Registrar shall be settled and signed by the Registrar. The person who has the carriage of any order which in the opinion of the Judge or Registrar requires to be settled shall obtain from the Judge or Registrar, as the case may be, an appointment to settle the order and give reasonable notice of the appointment to all persons who may be affected by the order, or to their solicitors."

An application by Mrs. May for leave to bring an action against the trustee in bankruptcy of the Daybreak Mining Company Limited was dismissed by MANSON, J. Subsequently she made an application to set aside the order on the ground that she had not been served with notice of the appointment to settle the order, that rule 20 of the Bankruptcy Rules had not been complied with and the order should be vacated.

Held, that the order made by MANSON, J. was a simple order dismissing the application and rule 20 does not require all orders to be settled by an appointment, an appointment only being necessary when the judge or registrar is of the opinion that there is some point involved which requires the parties to be heard and it is only in such cases that it is necessary that an appointment to settle the order shall be served on the parties interested. In this case the judge was not of the opinion that an appointment to settle should be taken out and he settled it by signing the same. In so entering the order there was no violation of rule 20 and the application should be dismissed.

Irving v. *Bucke* (1915), 21 B.C. 17 followed.

APPLICATION by Minnie M. May to set aside an order of MANSON, J. of the 13th of April, 1942, dismissing Mrs. May's application for leave to bring an action against the trustee in bankruptcy of the Daybreak Mining Company Limited. The

facts are set out in the reasons for judgment. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 6th of July, 1942.

Minnie M. May, in person.
Eades, for trustee in bankruptcy of Daybreak Mining Co.

Cur. adv. vult.

24th July, 1942.

FARRIS, C.J.S.C.: This application came before me in a rather unusual way. The applicants applied for leave to bring an action against the trustee in bankruptcy of the Daybreak Mining Company Limited which was heard by MANSON, J., who, on the 13th of April, 1942, dismissed the application. On the 15th of April, 1942, the applicant Minnie Mead May wrote the registrar of this Court in Vancouver intimating that she would like to bring further matters to the attention of the Court on the lines indicated in her letter. No further steps were taken until June 18th, 1942, when the applicant Mrs. May again wrote the registrar making formal application to be heard. My brother MANSON then brought the matter to my attention, expressing the view that where possible every opportunity should be afforded any person to be heard in Court, and as the application of Mrs. May would in fact amount to a rehearing of the application made before him, he requested me to hear the application instead of himself. In June, 1942, the applicants appeared before me in person and the Daybreak Mining Company Limited was represented by Mr. *Eades.* It then appeared that the order made by MANSON, J. on the 13th of April, 1942, had been duly taken out and entered sometime prior to Mrs. May's application of June 18th, 1942, and the preliminary objection was taken by Mr. *Eades* that the order having been entered, relief by the applicants could only be sought by an appeal to the Court of Appeal of British Columbia. The applicants suggested that the order had not been properly settled and entered, and should be set aside.

I then gave leave for an application to be made before me in vacation to set aside the order, and on July 6th, 1942, the matter was heard by me, the applicants again appearing in person and Mr. *Eades* appearing for the trustee in bankruptcy of the Daybreak Mining Company Limited. Mrs. May argued the case on

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Farris, C.J.S.C.

behalf of the applicants, relying on rule 20 of the Bankruptcy Rules, being as follows:

> All orders made by a Judge in Chambers shall be settled and signed by him or by the Registrar or proper officer. All orders made by the Registrar shall be settled and signed by the Registrar. The person who has the carriage of any order which in the opinion of the Judge or Registrar requires to be settled shall obtain from the Judge or Registrar, as the case may be, an appointment to settle the order and give reasonable notice of the appointment to all persons who may be affected by the order, or to their solicitors.

Mrs. May stated, which was admitted by Mr. *Eades,* that she had not been served with notice of the appointment to settle the order, and contended that this not being done, rule 20 had not been complied with, and that therefore the order should be vacated.

I reserved judgment in the matter, giving leave to Mr. *Eades* to file a written argument, to be served on the applicant Mrs. May. Mr. *Eades's* memorandum was received, dated 20th July, 1942, and Mrs. May's reply has also been received, dated 21st July, 1942.

In view of the fact that the applicants appeared in person and are not versed in the law, and that a very important point of practice is involved, I have given more than ordinary consideration to this application and have had the benefit of a consultation with my brother judges in respect thereto. The order of my brother MANSON as made on the 13th of April, 1942, was a simple order dismissing the application. It is clear to my mind that rule 20 does not require all orders to be settled by an appointment, an appointment only being necessary when the judge or registrar, as the case may be, is of the opinion that there is some point involved which requires the parties to be heard, and it is only in such cases that it is necessary that an appointment to settle the order shall be served on the interested parties. It is quite clear in this case that the judge was not of the opinion that an appointment to settle the order should be taken out, and he himself settled it by signing the same. I therefore find that in entering the order there was no violation of rule 20.

I have also given consideration, although it was not raised on the application, to what is commonly known as the "slip rule." It is my view that this rule is of no assistance in this application.

I have also given consideration as to whether or not, being

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requested by my brother MANSON to rehear the application, it was competent to the parties to apply to me to rehear the application even with the consent and request of my brother MANSON. In my opinion the request and consent of my brother judge adds nothing to my jurisdiction, and the case of *Irving* v. *Bucke* (1915), 21 B.C. 17 is clearly in point and must be followed.

I would dismiss the application with costs to the trustee in bankruptcy of the Daybreak Mining Company Limited.

Application dismissed.

PEARSON v. THE BOARD OF SCHOOL TRUSTEES OF VANCOUVER *ET AL.*

S. C.
1941
Nov. 25;
Dec. 1.

Negligence—School board—School child injured outside school grounds—Liability of school board—Notice of intention to bring action—R.S.B.C. 1936, Cap. 253, Sec. 133.

Dist'd Card v. Duncan [1946] 1 D.L.R. 35

The infant plaintiff after stepping off his school grounds on to an adjoining boulevard, was knocked down and injured by a bicycle ridden by a young girl. In an action for damages against the School Board and the girl:—

Held, that the School Board was not liable for an accident to a school child occurring on the boulevard outside the school grounds.

Section 133 of the Public Schools Act provides "No action shall be brought . . . , unless within six months after the act committed, and upon four months' previous notice thereof in writing," etc. The plaintiff's solicitor wrote a letter to the solicitor for the School Board within the prescribed time, stating that they had been "instructed to take the necessary steps to recover damages."

Held, that the letter fairly and reasonably discloses the ground of complaint and indicates sufficiently the plaintiff's intention to bring action.

ACTION for damages resulting from the infant plaintiff being run into by a bicycle ridden by an infant girl on the sidewalk just outside the school grounds. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 25th and 26th of November, 1941.

Campbell, K.C., for plaintiff.

Locke, K.C., and *Sheppard*, for defendant The Board of School Trustees.

Christian, for defendant Joyce Fisher.

Cur. adv. vult.

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PEARSON v. BOARD OF SCHOOL TRUSTEES OF VANCOUVER ET AL.

1st December, 1941.

SIDNEY SMITH, J.: The Sir Richard McBride School is a public school in the city of Vancouver under the control and supervision of the defendant The Board of School Trustees of Vancouver. It is attended by some 400 pupils, contains about twenty rooms, is situated in a quiet working-class district of modest homes and is surrounded by gravelled roads on which there is little traffic. At the north-west corner of the school grounds is one of the exits consisting of four steps to the street level, the grounds there being slightly higher than the street.

The primary class of the school is dismissed at 2.30 p.m. and the rest of the school at 3 p.m. On the 26th of March, 1941, the school was dismissed as usual. One of the pupils lent her bicycle to another pupil, who after taking a short ride upon it lent it to the defendant Joyce Fisher, aged eleven, for the same purpose. About 3.35 p.m. Joyce Fisher was riding the bicycle in a northerly direction on the boulevard of Culloden Street, which lies to the west of the school. She was therefore riding parallel to the western boundary of the school grounds along which there is a concrete retaining wall. When nearing the exit at the north-west corner and proceeding, as I find, at little more than a walking rate she collided with the plaintiff Edward Pearson, aged seven years.

I find that the plaintiff had been standing at the top of the steps at the north-west exit, and had suddenly hurried down the steps out of the school grounds and on to the boulevard. There was some evidence that he had done this in response to the call of another boy somewhere on the other side of Culloden Street. However this may be, I find that he momentarily paused upon reaching the boulevard, then hurried on into the path of the advancing bicycle and was knocked down, the bicycle falling on top of him, at a distance of some eight to ten feet from the boundary of the school grounds. He suffered injuries and now brings this action by his next friend against the defendant Joyce Fisher and the School Board, claiming damages for such injuries. His action is founded on negligence and on nuisance.

Section 133 of the Public Schools Act states that:

> No action shall be brought . . . , unless within six months after the act committed, and upon four months' previous notice thereof in writing.

Solicitors for the plaintiff wrote to the solicitor for the School Board on 1st April, 1941, stating that they had been "instructed to take the necessary steps to recover damages." It was contended that this letter did not comply with the requirements of section 133 in two respects: (1) In that it was addressed to the solicitor for the School Board and not to the Board itself; (2) that it did not give specific notice of the action.

I can agree with neither contention. It is true that each requirement of the section is equally arbitrary. *Ritchie* v. *Gale and Board of School Trustees of Vancouver* (1934), 49 B.C. 251, at p. 269. But a notice of action should not be construed with extreme strictness, and it is sufficient as a general rule if the notice fairly and reasonably discloses the ground of complaint relied on by the plaintiff. *Iveson* v. *City of Winnipeg* (1906), 5 W.L.R. 118, at p. 126. The cases cited on the question of sufficiency or otherwise of this notice turn on statutes differently worded from ours, and on different circumstances, and therefore cannot be of much assistance in this case. But this much is clear—the solicitor for the Board received this written notice, at once dealt with it on behalf of the Board, and after investigation repudiated liability. And this, too, I think, is clear—that the language of the notice about taking "the necessary steps to recover damages" can only mean (certainly as between solicitors and in the circumstances of this case) the bringing of an action. I think, therefore, that there was compliance with the statutory requirement for notice of action. It may well be that the letter in question was not intended as formal notice under the statute. It would appear that such formal notice was intended to be sent and was in fact sent later. This of course does not prevent reliance being now placed on the letter as the statutory notice, provided it is sufficient for that purpose, as I find it was.

On the merits of the case I am unable to find any negligence on the part of the defendant Joyce Fisher. The day was a normal one. Pupils were leaving school in the usual way and in the usual numbers. The usual and sufficient measures of supervision and inspection of buildings and grounds were carried out. The riding of a bicycle immediately outside school grounds is not by any means out of the way. There was nothing untoward

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until the accident happened. And in my opinion it happened because the infant plaintiff was not keeping a proper look-out. I think the unfortunate lad must have become confused and so did the very thing he should not have done. Had he not paused or, having paused, had he not run on again, there would have been no accident. As it was it could not be avoided.

I think it well to add, however, that even if the defendant Joyce Fisher had been negligent there would not in my opinion have been any liability on the part of the School Board. There is not around school grounds a zone over which the school authorities exercise supervision as, for example, do the authorities of a State over its territorial waters. School supervision does not extend beyond the school premises. I think this follows from *Patterson* v. *Board of School Trustees of District of North Vancouver* (1929), 41 B.C. 123. It is true that like every other landowner a school board must not use its property so as to cause injury to other persons or property. But that is not this case. I can find no nuisance. The action must be dismissed. I take it the defendants will not ask a useless order for costs.

Action dismissed.

McFALL AND McFALL v. VANCOUVER EXHIBITION ASSOCIATION: MARBLE, THIRD PARTY.

S. C.
1942
Sept. 17, 18, 21, 22, 24.

Negligence—Pile of gravel left on roadway—Plaintiff falls over it at night—Invitee—Duty of occupier—Personal injuries—Quantum of damages.

The Exhibition Association was the lessee of the exhibition grounds in Vancouver and of the adjoining golf course. The association employed the female plaintiff as a caterer at the golf course and she and her husband used the golf club house as living-quarters. On the day of the accident in question she was especially employed by the defendant in catering for a dinner given by the defendant in a building on the exhibition grounds. She finished her services shortly after 11 o'clock at night and started for her home when the grounds were in darkness. While walking on a roadway close to one of the other exhibition buildings and towards the golf grounds she fell over a pile of gravel which had been left there in the course of construction of a new building and she was severely injured. In an action for damages:—

Held, that the plaintiff was an invitee when catering at the exhibition building and on her return home. The path taken by her was a proper one which the defendant knew or ought to have known she would take on her way home. The defendant was negligent in leaving the pile of gravel on the pathway, and in not warning the plaintiff by having the gravel properly guarded or lighted and said negligence resulted in the injury. There was no contributory negligence on the part of the plaintiff in failing to provide herself with a flash-light or other form of light.

ACTION for damages resulting from an accident suffered by the plaintiff Ellen McFall on the exhibition grounds in the city of Vancouver on the 3rd of May, 1940. The facts are set out in the reasons for judgment. Tried by FARRIS, C.J.S.C. at Vancouver on the 17th, 18th, 21st and 22nd of September, 1942.

McAlpine, K.C., and *W. C. Thomson*, for plaintiffs.
Bull, K.C., and *Ray*, for defendant.
Locke, K.C., and *Guild*, for third party.

Cur. adv. vult.

24th September, 1942.

FARRIS, C.J.S.C.: In this connection the plaintiffs' claim as against the defendant was for damages as a result of an accident suffered by the plaintiff Ellen McFall on the 3rd of May, 1940,

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on the lands and premises known as the Exhibition Grounds in the city of Vancouver, Province of British Columbia, of which lands the defendant is a lessee and occupier. The facts are that the defendant, in addition to the premises above mentioned, is the lessee or occupier of what is known as the Hastings Golf Course, which lands abut on the exhibition grounds. The plaintiff Ellen McFall had her residence in the golf club on the golf course, being employed by the defendant as a caterer at the golf course. Included in such term of employment was the use of the golf club as living-premises for the two plaintiffs. The plaintiff Ellen McFall, in addition to her employment as caterer at the golf club for the defendant, was at times given special employment by the defendant to cater for certain functions held on the exhibition grounds. On the day in question the plaintiff had been employed by the defendant to cater for a supper or dinner given by the defendant in what is known as the Administration Building, being located on the exhibition grounds. The plaintiff Ellen McFall had certain equipment at the club house which was necessary to be used in the catering at the administration building. The defendant sent a car for the plaintiff Ellen McFall prior to the said supper or banquet, in order that the equipment might also be taken from the club house to the administration building. The plaintiff, Ellen McFall remained in the administration building until about ten minutes to 12 o'clock of that evening when the general manager of the defendant, Major McLennan, notified the plaintiff Ellen McFall that her services were finished for the evening and that she could return home. The defendant did not provide any car for the return of the plaintiff nor was it apparent in the contemplation of the parties that such a car should be so supplied. At about ten minutes past 11 o'clock of the same evening all lights on the exhibition grounds had been turned out by the defendant company, and at the hour of the departure of the plaintiff Ellen McFall, the grounds were in darkness. The plaintiff left the administration building, going for a short distance in an easterly direction, then turning south and then east along the south side of what is known as the Live-stock Building. On the roadway or walk alongside of the live-stock building and about the centre

of such live-stock building there was quite a sharp decline in the road. On the brow of this decline the plaintiff in the darkness encountered an obstruction and fell, and was severely injured. It might here be pointed out that the roadway along which the plaintiff was proceeding was a hard-surfaced roadway with the exception of a part at the westerly end which had been graded, rolled, and was ready for hard surfacing and, in fact, for the purposes of this action, can be treated as a hard-surfaced roadway. The roadway continued in an easterly direction along the side of the south side of the live-stock building. At the easterly end of the live-stock building were two cottages shown on Exhibit 2, numbers 26 and 27. Between these two cottages there was a gate, then a clearly-defined pathway following the easterly side of cottage No. 27, and a further gateway through the fence around the golf course, which fence is marked "F" on Exhibit 2. After pursuing through the gateway there was a clearly-defined roadway and a fill in a slight gulch, over which fill vehicular or pedestrian traffic could pass. This roadway continued in a clearly-defined manner for a short distance across the gulch and on to the golf course. From there there was an unobstructed walk over the golf course direct to the club house, the residence of the plaintiffs. It has been suggested by the defendant that the plaintiff Ellen McFall, instead of taking the road which she did, should have proceeded on the pathway from the front entrance of the administration building, which is marked "General Offices, No. 33," on Exhibit 2, to Miller Walk, and then proceeded along Miller Walk to Windermere Street and thence along Windermere Street to the club house. At the request of counsel and in the presence of counsel for all of the parties, I visited the premises and had pointed out to me these various routes that the plaintiff might have taken to return home. From the evidence given before me on the trial and from my observations on the ground, I have no hesitation in finding as a fact that the route taken by the plaintiff Ellen McFall on her return home, was the natural and proper route for her to have taken, and that the defendant either knew or should have known that this is the route that the plaintiff Ellen McFall would have taken when she left her work in the administration building and

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started to return to her home. I find as a fact that the plaintiff was an invitee on the premises of the defendant in attending at the administration building and that in returning by the route which she did and at the time of the accident, her *status* as an invitee had not been changed. It would appear from the evidence that the defendant had been carrying on construction on the premises constructing a new building, being what is referred to as the live-stock building, and alongside of which building the plaintiff was injured. According to the evidence of the plaintiffs they had seen activity during the winter months of this construction but that several days prior to the accident this activity had ceased and there was no reason for the plaintiffs to believe that the roadway along which the plaintiff was proceeding was not a perfectly safe roadway or walk to proceed. The evidence disclosed, as did a view of the premises, that at the place of the accident there was a hard-surfaced roadway, and the evidence also disclosed that this walk or roadway was used both by pedestrians and vehicular traffic, and in general the view disclosed that it was little different than any other walk or roadway (including Miller Walk) on the premises, and there is nothing in the evidence to indicate that the plaintiff Ellen McFall might have anticipated any more obstruction or menace on this roadway or walk than on any other roadway or walk on the premises. I find as a fact that there was negligently left on this roadway at the point of the accident, gravel which was sufficient in quantity to constitute a menace to any person walking over the said roadway, at least at night. In fact, I would say that the quantity of gravel, located as it was, was practically a trap. The evidence disclosed that while the plaintiff had not been over the roadway or walk in question since 1939, she had been for a period of approximately four years employed at the golf club, as before pointed out, and during that period of time frequently used the said roadway and was familiar with the same, and I find that she had no reason to anticipate or expect that such an obstruction or menace might be found on the roadway in question. I find as a fact that the defendant was guilty of negligence in leaving the gravel in the manner mentioned on the said roadway or walk, which constituted a menace, and that the defendant was further

negligent in not warning the plaintiff by having the said menace properly guarded or lighted, and that the negligence of the defendant resulted in the accident to the plaintiff. I was somewhat concerned with the question of contributory negligence, that is to say, whether or not the plaintiff Ellen McFall should have provided herself with a flash-light to go over this roadway. It is clear to my mind that the accident would not have happened if there had not been the menace of the gravel on the road, and as there was no reason for the plaintiff to anticipate such gravel being there. I find that there was no contributory negligence on the part of the plaintiff in failing to provide herself with a flash-light or other form of light.

I have carefully examined the authorities submitted by defence counsel, which cases were directed to two points: (1) What constitutes an invitee and, (2) what constitutes a licensee. The case of *Mersey Docks and Harbour Board* v. *Procter,* [1923] A.C. 253 is probably the leading case to determine that the *status* of an invitee may be changed to that of a licensee by the invitee deviating in even a slight degree from following the proper route supplied by the occupier of the premises. In view of my finding of fact that the plaintiff did in this case follow the route which was a natural and proper route for her to have followed, these cases are not applicable. The law is well defined as to the duty of an occupier of premises to the invitee. This duty, briefly, is that the occupier is to take reasonable care that the premises are safe and to prevent injury to the invitee from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware. (See Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 604).

Having found that the accident to the plaintiff was brought about by the negligence of the defendant, the question of damages is now to be determined. The accident occurred on May 3rd, 1940. The plaintiff Ellen McFall is now 53 years of age. Two doctors were called, Dr. Walsh by the plaintiff and Dr. Thomson by the defendant. There was very little difference of opinion between the two doctors. Dr. Walsh was called to attend the plaintiff on the morning of May 4th, 1940, at the residence of the plaintiff Mrs. McFall, at her home at the golf course, as she

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was in bed at the time suffering from great pain. On May 16th she was taken to the hospital for X-ray treatment when it was discovered that among other injuries she was suffering from a compound fracture of the first lumbar vertebra. On May 17th she was admitted to the hospital for treatment and put in a special bed which required her to remain in a practically immovable position. She remained in the hospital in this position until July 25th of the same year, when she was taken to her home and placed on a similar bed and was compelled to remain in a similar position. She remained there until December 2nd when she was again readmitted to the hospital and remained there until March 1st, 1941. In the hospital she was placed on the special bed and remained in the same position for a period of approximately six weeks. Then she was placed on what is known as an ordinary fracture bed. On her return home on March 1st, 1941, she was instructed to remain in bed but to start getting up and down which she did, gradually increasing the time of being up until she eventually was able to carry on light household work. Her evidence is that at present she is not able to do any heavy work such as mopping up floors or making beds. Dr. Walsh last examined her on the 16th of September of this year. He found the plaintiff still complaining of pains and in his opinion it would be another year or eighteen months before she could carry on her work as a caterer, and that she would have some permanent disability. Dr. Thomson last examined the plaintiff in July of this year. He gave as his opinion that the plaintiff had suffered total disability for 22 months and it would be another six or nine months before she could carry on her usual work, and thereafter she would have a five per cent. disability. It appeared from the evidence that the plaintiff, at the time of the accident, was earning approximately $100 per month as a caterer. Her employment ceased as a caterer for the defendant company at the golf club in December of 1940. During the year of 1940 from the time of her injury until her contract expired she had to pay another caterer an amount of $612, which is claimed as special damages and was not disputed by the defence as being the correct amount. With this exception no evidence was tendered by the plaintiff to indicate that during that period her earnings were

lessened. From all of the evidence it would appear that for approximately three years the plaintiff Ellen McFall could not carry on her usual occupation as a caterer, although as before pointed out, from the time of her accident until December 7th, 1940, she suffered no monetary loss with the exception of the special damages. It is a serious matter, particularly at the age of the plaintiff Mrs. McFall, to in effect lose practically three years from her life. During a great deal of this time the plaintiff suffered the great discomfort of lying on the particular bed as before described, in addition to which, at times, she suffered intense pain. There is no measure-stick by which damages can be assessed to properly and reasonably compensate a person for injuries as suffered by the plaintiff. At this point I might add that a suggestion was made by the defence that previous illnesses of the plaintiff Ellen McFall might have contributed to her condition or the length of time in which she took to recover. I find no evidence to support such a suggestion, and find that the condition of the plaintiff since March 3rd, 1940, was due entirely to the accident of that date.

Viewing all of the circumstances, I would allow the plaintiff Ellen McFall, as general damages, the sum of $5,000 and, as special damages, $612. The plaintiff George E. McFall, husband of the plaintiff Ellen McFall, claims general damages by reason of the loss of society and service of the plaintiff. I would allow the plaintiff George E. McFall $500 as general damages under this claim, and I would allow him the sum of $1,019.11 as special damages, being the special damages agreed upon by counsel as being correct. There will accordingly be judgment for the plaintiff Ellen McFall in the sum of $5,612 with costs, and there will be judgment for the plaintiff George E. McFall in the sum of $1,519.11 with costs.

Judgment for plaintiffs.

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Sept. 17, 18, 21, 22; *Oct.* 7.

McFALL v. VANCOUVER EXHIBITION ASSOCIATION: MARBLE, THIRD PARTY. (No. 2.)

Indemnity — Negligence — Remedy over — Contract with third party— Indemnity clause—Construction.

Under a contract between the defendant and the third party for the construction of a building on the exhibition grounds article 19 of the contract recited: "The contractor shall use due care that no person is injured in or about said work and shall be responsible for and discharge all claims for compensation under the Employers' Liability Act and the Workmen's Compensation Act and any Act extending or amending these Acts or any of them and all claims for injury to persons, including death, arising out of or made in respect of anything done or omitted to be done in the execution of the work, and the contractor shall indemnify and save harmless the owner from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted in any manner based upon, occasioned by or attributable to any such injury or death."

In the action between the plaintiff and the defendant, the defendant was found guilty of negligence in permitting the gravel in question to remain at the point where the plaintiff came in contact with it, in that it created a menace, and in not providing a guard or light for the gravel. In determining that issue the acts of the third party were treated as the acts of the defendant, the defendant being the occupier of the premises. It was not disputed that in the course of the construction of the building the gravel in question was left in the particular place by the third party.

On an issue between the defendant and the third party the defendant claims that under article 19 of the contract entered into between the defendant and the third party, the third party is bound to indemnify the defendant from any negligence of the third party which created a liability against the defendant.

Held, that the cause of the accident is solely attributable to the negligence of the third party in violation of article 19 of the contract entered into between them, and under the said article the defendant is entitled to indemnification as against the third party for the judgment for damages and costs of the plaintiff against the defendant in the action and costs of the third-party issue.

ISSUE between the defendant and the third party, the defendant claiming indemnity from the third party under notice of indemnity filed on the 7th of November, 1941, by the defendant. In the action it was held that the defendant was guilty of negligence in permitting the gravel in question in the action to remain at a point where the plaintiff came in contact with it and was

injured, in that it created a menace. In determining that issue the acts of the third party were treated as the acts of the defendant as the defendant was the occupier of the premises. It is not disputed that the gravel in question was left in the particular place by the third party. Under a contract between the defendant and the third party, the third party was constructing a building on the exhibition grounds in the course of which the gravel in question was left on a roadway. The defendant claims that under article 19 of the contract (recited in the judgment) the third party is bound to indemnify the defendant from any negligence of the third party which created a liability against the defendant. Tried by FARRIS, C.J.S.C. at Vancouver on the 28th of September, 1942.

W. C. Thomson, for plaintiff.
Bull, K.C., and *Ray,* for defendant.
Locke, K.C., and *Guild,* for third party.

Cur. adv. vult.

7th October, 1942.

FARRIS, C.J.S.C.: This is an issue between the defendant and the third party under which the defendant has claimed indemnity from the third party under a notice of indemnity filed on the 7th of November, 1941, by the defendant. It was agreed by counsel for the defendant and the third party that the evidence taken on the trial between the plaintiff and the defendant should be evidence in the issue between the defendant and the third party. I found in the action between the plaintiff and the defendant that the defendant was guilty of negligence in permitting the gravel in question to remain at the point where the plaintiff came in contact with it, in that it created a menace, and in not providing a guard or light for the said gravel. In determining that issue I treated the acts of the third party as the acts of the defendant, the defendant being the occupier of the premises. It is not disputed that the gravel in question was left in the particular place by the third party, and the defendant claims that under article 19 of a contract entered into between the defendant and the third party, being filed as Exhibit 1 herein, that the third party is bound to indemnify the defendant from

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any negligence of the third party which created a liability against the defendant. Paragraph 19 of the general articles of Exhibit 1 is as follows:

> The contractor shall use due care that no person is injured in or about said work and shall be responsible for and discharge all claims for compensation under the Employers' Liability Act and the Workmen's Compensation Act and any Act extending or amending these Acts or any of them and all claims for injury to persons, including death, arising out of or made in respect of anything done or omitted to be done in the execution of the work, and the contractor shall indemnify and save harmless the owner from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted in any manner based upon, occasioned by or attributable to any such injury or death. Certificates from the Workmen's Compensation Board shall be filed with the owner if he so requires.

It was contended by the third party that the defendant had knowledge of the existence of the gravel which constituted the menace, through Cuthbertson, the grounds superintendent and next in charge to the general manager of the defendant company, and that (a) the defendant, knowing of the menace, was guilty of negligence in inviting the plaintiff to the premises, having such knowledge and failing to light the road where the menace existed, that is, by turning out the lights before the plaintiff left the premises; (b) the defendant was guilty of negligence in failing to warn the plaintiff verbally or otherwise, of the existence of the menace of the gravel.

It was further contended the defendant, having knowledge of the menace, was solely responsible for the accident in that the real or approximate cause of the accident was the act of the defendant inviting the plaintiff on to the premises without providing the plaintiff with the proper protection against the menace. The third party relied upon Salmond on Torts, 9th Ed., 519; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, at p. 288; *Sutton* v. *Town of Dundas* (1908), 17 O.L.R. 556, at p. 561; *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200, particularly at pp. 206, 211, 215; *City of Kitchener* v. *Robe and Clothing Company,* [1925] S.C.R. 106; *Butler* v. *Grand Trunk Pacific Ry. and Jasper Coal Ltd.,* [1940] 2 W.W.R. 532; and *Haley* v. *Canadian Northern Railway and Hawke,* [1920] 1 W.W.R. 460.

Counsel for the third party further contended that the premises at the point of the accident were safe for ordinary day

use, and if properly lighted at night there was no danger, and the third party could not be expected to know that the defendant would invite some person to use the premises after dark, but if the defendant did so the third party was entitled to expect the defendant would fulfil his duty to the invitee, namely, to guard the invitee against an unknown danger of any menace, and having failed to do so the negligence or obligation was that of the defendant and not the third party, the third party relying upon the authority of *Indermaur* v. *Dames, supra,* and *Toronto Railway* v. *King* (1908), 77 L.J.P.C. 77, particularly at p. 80. As to the first contention of the third party, it would appear to me that the third party's position is well supported by the cases and is sound in law, and had the defendant had actual knowledge of the menace and then proceeded to invite a person upon the premises knowing that such person would be subject to this menace, the defendant would have by such act absolved the third party from his original negligence and assumed the obligation for any negligence in the matter, and would have been solely responsible for the negligence. In other words, the defendant could not be heard to say: "I knew of your negligence, knew that it constituted a menace to the invitee, but because I had an agreement of indemnity with you I relied upon this agreement and invited a person upon the premises knowing that that person might be injured by the menace which you had left, and took no steps to protect the invitee." I do not think a party can in law rely on such a proposition. This, therefore, brings me to the question: Did the defendant have actual knowledge of the menace? The third party's position was that the knowledge of Cuthbertson, the grounds superintendent, was the knowledge of the defendant, and that Cuthbertson had knowledge of the menace and relied upon the evidence of Cuthbertson to establish this fact. The facts appear from the evidence that while Cuthbertson had the general superintendency of the grounds, nevertheless all dealings by the defendant company with the third party in respect to the work being done for the defendant by the third party were through the engineer of the defendant company, as provided for in Exhibit 1, and not through Cuthbertson. The evidence of Cuthbertson was that he was frequently around

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the premises and at the point of the accident, but it is also clear that his being there was not as an inspector of the work being done by the third party but just incidentally in connection with his general duties as grounds superintendent.

The third party having alleged that the cause of the accident was the negligence of the defendant, the burden of proof to establish such negligence is upon the third party and, in respect to this branch of the third party's case, to establish that the defendant had actual knowledge of the menace existing. This would seem to me to be particularly true in view of the fact that the defendant was entitled, subject to actual notice either express or implied, to rely upon the covenant of the third party as contained in article 19 of Exhibit 1, namely, that the third party would maintain the premises at all times free from any menace which might create a liability to the defendant.

I do not think that it is necessary for me, in view of my conclusions, to find whether or not under the circumstances the knowledge of Cuthbertson, who had clearly nothing to do with the work of the construction of the third party, was knowledge of the defendant. Assuming, however, that the knowledge of Cuthbertson was knowledge of the defendant, the evidence must be conclusive that Cuthbertson did have knowledge of the menace existing. That Cuthbertson was often at the point of the accident is clearly indicated by the evidence. I quote from parts of the testimony of Cuthbertson as submitted by counsel for the third party:

By the way, how often did you go over that road? Any time I had anything to do around that way, I went down there.

Can you give an idea how many times a week you would be over it? Might be two or three times a day.

. . . . .

During the course of that work, did the contractors have a concrete-mixer at any time at or near the south side of that building? Yes.

What position was it in? Just at the top of that rise in front of that door there.

When you say "there," you are pointing to the door in the area where this accident happened, on Exhibit 4? Yes.

. . . . .

In front of the door. When was that cement-mixer removed? I couldn't say.

Was it removed prior to May 3rd? Yes.

. . . . .

Now, Mr. Cuthbertson, you were, during the course of construction of this building, and reconditioning this road, the regrading of the road at the one end in and around and passing that building many times, several times a day? Yes.

And again I quote from the examination of Cuthbertson taken prior to the trial and put in evidence on the trial:

And you were in charge of the maintenance and the repair to the roads? Yes.

On the grounds? Yes.

I am speaking as of May 3rd, 1940, and while you were working for the Exhibition as superintendent? Yes.

. . . . .

Were you down around the building, Mr. Cuthbertson, in the latter stages of the work when the building was pretty well finished and they were putting in the pens? I was around there back and forward, but I would'nt say when I was there.

. . . . .

I don't know whether I quite understand this clearly or not, Mr. Cuthbertson, but I believe from what you told me before, toward the end of the contractors' work on the live-stock building, you were down there quite a lot? Oh, I was around the building, yes.

Daily? I would say daily, more or less.

Yes, and that would include the period prior to May 3rd, 1940, too? Yes.

And you do recollect seeing some gravel about opposite the fourth door? I do.

. . . . .

And seeing it around May 3rd, 1940? I would not be definite about May 3rd, but around that week, or after it was there.

The above-quoted evidence is, to my mind, the most pertinent evidence in support of the third party's contention of notice to the defendant.

It is obvious that Mr. Cuthbertson was mistaken as to the date of the removal of the concrete-mixer, as it was clearly there on the day of May 3rd and was apparently removed some time during the day of May 3rd. It must be noted that no questions were asked of Mr. Cuthbertson whether he went over this roadway after dark and, consequently, neither was he asked whether there were any lights or other protection which would indicate the menace to a person walking along this roadway after dark. The general evidence would indicate that there was a pile of gravel which was apparently to be used in the concrete mixing at some time prior to the accident. It would seem a reasonable conclusion to draw, that the gravel which caused the accident and which Marble instructed the witness Atwell to remove was

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not that pile of gravel but the gravel which was left after the concrete-mixer was removed. Mr. Marble, in his discovery which was put in as evidence on the trial, stated that he was not at the scene of the accident on the 3rd of May. But on other questions as to time of being there he was quite indefinite. It would seem probable that Mr. Marble was mistaken as to this date, and that the day when he saw the gravel as described by him was after the concrete-mixer was removed, and before the accident which places the day as of May the 3rd, and it was at this time that he instructed the witness Atwell to remove the same. The only definite time that Cuthbertson can give as to seeing the gravel which was the apparent cause of the accident was on the 6th of May following the accident. Mr. *Locke* for the third party contended that I must take into consideration all the circumstances, and if from them I could draw a reasonable inference that the defendant had knowledge of the menace through the knowledge of Cuthbertson, I was entitled so to do. With this I agree; but I do not believe from all the circumstances I can draw any such reasonable conclusion, and I find as a fact that the third party has failed to prove that Cuthbertson had knowledge of the menace at a material time prior to the accident. It does seem to me that the reasonable explanation of what really did happen was that the witness Atwell, after the removal of the concrete-mixer on May 3rd, was instructed to remove the gravel. This he negligently failed to do, and thus his demeanour in Court when giving evidence, and his testimony that he had made an arrangement with Cuthbertson to remove the gravel (which I did not believe) may be accounted for. While it is not necessary for me for the purposes of this action to make a finding to this effect, yet, nevertheless, it appears to me that the cause of the accident was brought about solely by the neglect and failure of Atwell to carry out his employer Marble's instructions to remove the gravel.

I now come to the second point raised by the third party, namely, that regardless of whether the defendant had knowledge or not of the menace existing, that inasmuch as the premises even with the gravel on it were safe for ordinary day traffic, the third party could not be expected to anticipate that the defendant would invite anybody on the premises after dark without pro-

viding suitable protection, and was entitled to rely upon the belief that the defendant would carry out his obligation to the invitee. As above pointed out, the third party relied upon the authority of *Toronto Railway* v. *King,* and in particular the case of *Indermaur* v. *Dames.* The fallacy of this contention in the first place is the assumption by the third party that the roadway was to be used only in daylight. There is no evidence to support this, and in fact what evidence is given on this point would indicate that the contrary is the fact. It would appear to me that the authority of *Indermaur* v. *Dames* rather than helping the third party could well be relied upon by the defendant. It is true that the defendant had an obligation to the invitee, and in order to carry out this obligation the defendant had engaged the third party to do the work which, if all proper steps had been taken by the third party, would have prevented the accident; and the defendant to ensure that the third party would take such proper steps, had inserted in the contract (being Exhibit 1), paragraph 19, as previously quoted. It would seem to me that without notice and under the authority of *Indermaur* v. *Dames* that the defendant would be entitled to expect that the third party would carry out its duty.

I find, therefore, that the cause of the accident is solely attributable to the negligence of the third party in violation of paragraph 19 of Exhibit 1, and that under the said paragraph the defendant is entitled to indemnification as against the third party for the judgment for damages and costs of the plaintiff against the defendant in the action, and costs of the third-party issue. There will be judgment accordingly.

Judgment for defendant.

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IN RE ESTATE OF GEORGE C. NIVEN, DECEASED.

Adoption—Child born in Manitoba and surrendered to Children's Home—Child given to adopting parents by home—Family move to British Columbia—Decease of adopting parent intestate—Right of child to share in the estate—R.S.B.C. 1936, Cap. 6, Sec. 11.

PAD
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D.L.R. (2d) 769

In June, 1914, one George Henderson was born in Winnipeg, Manitoba. In February, 1915, his mother surrendered entire control and care of the child to the Children's Home in Winnipeg. In May, 1915, the Home purported to give the child in adoption to a Mr. and Mrs. Niven. In the following September an adoption agreement was prepared in favour of Mr. and Mrs. Niven and signed by the Home and Mrs. Niven (the husband was Overseas on active service at the time). Such adoptions made by the Children's Home to adopting parents were at a later date given statutory sanction. When Mr. Niven returned home he was disabled and given additional pension allowance for an adopted child until he reached sixteen. In 1924 the family moved to the municipality of Saanich, B.C., and the boy attended school until 1928 when he went to work and contributed to the welfare of the family. In April, 1934, he left the home of the Nivens. When 12 years old he had been told by Mr. Niven that he was an adopted son. In April, 1941, Mr. Niven died intestate and Mrs. Niven is of unsound mind and confined in a mental hospital. On the application of George Henderson for determination as to whether he is the lawfully adopted son of Mr. Niven, deceased, and Mrs. Niven, and entitled to share in the estate of Mr. Niven:—

Held, that under section 11 of the Adoption Act any person adopted elsewhere than in this Province shall in the case of intestacy of an adopted parent have the same rights in respect of the property of such parent as he would have if the property were situate in the country where the adoption took place. In Manitoba by section 132A of The Child Welfare Act any agreement made prior to September 1st, 1921, between the Children's Home of Winnipeg and any persons for the adoption of such child was thereby made absolute and every child so adopted should be deemed to have been adopted under the preceding provisions of the Act. Said provisions gave to the child adopted thereunder the capacity of inheriting from the adopting parents as fully as their child by natural birth. In the circumstances outlined above there was an agreement between the Children's Home and Mr. Niven (as well as his wife) for the adoption of the applicant. Under the laws of Manitoba the applicant became the adopted son of Mr. and Mrs. Niven. It follows that he is entitled to share in the estate of Mr. Niven.

ORIGINATING summons to determine whether George Henderson is the lawfully adopted son of George Campbell Niven and his wife Rosa Niven. The facts are set out in the reasons

for judgment. Heard by SIDNEY SMITH, J. in Chambers at Victoria on the 2nd of October, 1942.

Stanton, for the applicant.
Sedger, for the Official Administrator.

Cur. adv. vult.

7th October, 1942.

SIDNEY SMITH, J.: Originating summons upon the application of George Henderson to determine whether he is the lawfully adopted son of George Campbell Niven, deceased, and of Rosa Niven his wife, and as such entitled to share in the estate of the said George Campbell Niven.

The circumstances are unusual. George Henderson was born posthumously in Winnipeg, Manitoba, on the 14th of June, 1914. His birth was registered under the name of George Harold Anderson. His mother had to earn her own livelihood and found it difficult to obtain employment with her child. Consequently on the 20th of February, 1915, she surrendered the entire control and care of the child to the Children's Home of Winnipeg, which is incorporated by Act of the Province of Manitoba.

On the 8th of May, 1915, the said Children's Home purported to give the child in adoption to George Campbell Niven and Mrs. Rosa Niven. On the following 17th of September an adoption agreement was prepared in favour of both Mr. and Mrs. Niven and signed by the Home on the one part but by Mrs. Niven only on the other part. Her husband was not then in Canada, having proceeded overseas on active service with the Canadian forces on the 1st of June, 1915. Such adoptions made by the Children's Home to adopting parents were at a later date given statutory sanction. (The Child Welfare Act, C.A. 1924 and amendments.) I have no doubt that the child was thereby lawfully adopted by Mrs. Rosa Niven.

But it is submitted that the child was never adopted by the husband George Campbell Niven because he did not at any time sign the adoption agreement. The surrounding and subsequent circumstances must therefore be considered.

On the 12th of September, 1919, Mr. Niven returned from overseas and continued to live with his wife and the adopted boy.

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Sidney Smith, J.

He had been disabled and was in receipt of "additional pension allowances for an adopted child until he reached the age of sixteen years." Until November, 1924, the family lived in Winnipeg, the boy attending public school there. In November, 1924, they moved to the municipality of Saanich, British Columbia, and the boy attended public school in Saanich until June, 1928. From June, 1928, until April, 1934, the boy worked at various jobs and contributed to the welfare of the family. In April, 1934, he left the home of the Nivens. He states he visited them on sundry occasions thereafter but this is disputed. I am prepared to find that he made no visits at a date later than 1935.

One or two other matters should be mentioned here. The applicant says that when he was about twelve years of age he had been told by George Campbell Niven that he had been adopted by the said Niven and his wife. The record of the Home states that the boy had been "given in adoption to Mr. & Mrs. Geo. Niven." A letter for information sent by the Home to Mr. and Mrs. Geo. Niven on 24th April, 1923, and requesting an answer to this question amongst others "Have you learned to love him or have you regretted adopting this child as your own?" was returned to the Home with the marginal note "He has endeared himself to both of us." Next-door neighbours in Saanich say the applicant was treated by the Nivens as a son.

In August of 1934 the applicant changed his name to George Henderson and has been known as such since then. Later in November, 1941, he endeavoured to obtain statutory authority for this action by filing a notice of change of name under the provisions of the Change of Name Act, B.C. Stats. 1940, Cap. 3. But I find that this notice failed to comply with the requirements of the Act and was of no legal effect.

On the 7th of April, 1941, George Campbell Niven died intestate and his estate is being administered by the Official Administrator for the county of Victoria, who opposes this application. The widow Mrs. Rosa Niven is now of unsound mind and confined in a mental hospital.

Under section 11 of the Adoption Act, R.S.B.C. 1936, Cap. 6, any person adopted elsewhere than in this Province shall in the case of intestacy of an adopted parent have the same rights in

respect of the property of such parent as he would have if the property were situate in the country where the adoption took place. The question is therefore whether under the law of Manitoba this was a legal adoption.

In Manitoba by section 132A of The Child Welfare Act, C.A. 1924, Cap. 30, added thereto by 1926, Cap. 4, it was provided that any agreement made prior to 1st September, 1921, between the Children's Home of Winnipeg or a person having the legal guardianship of a child and any person or persons for the adoption of such child, was thereby made absolute; and every child so adopted should be deemed to have been adopted under the preceding provisions of the Act. Said provisions gave to a child adopted thereunder the capacity of inheriting from the adopting parents as fully as their child by natural birth. (*In re Dzurman Estate* (1936), 44 Man. L.R. 151).

In the circumstances outlined above I think there was an agreement between the Children's Home and Mr. Niven (as well as his wife) for the adoption of the applicant. I therefore find that the applicant became under the law of Manitoba, by virtue of such agreement and of the aforesaid statutory enactments, the adopted son of both Mr. and Mrs. Niven.

It follows that the applicant is entitled to share in the estate of the said George Campbell Niven, deceased. (*Purcell* v. *Hendrick* (1925), 35 B.C. 516 and *In re Mary Ann McAdam* (1925), *ib.* 547).

Order accordingly.

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SHAUGHNESSY HEIGHTS PROPERTY OWNERS' ASSOCIATION v. McANDLESS.

Practice—Interlocutory injunction—Application for—No consent to treat motion as trial of action—Order if granted would give substantially all relief claimed in action—Not the usual practice—B.C. Stats. 1922, Cap. 87, Sec. 2 (b).

The plaintiff brought action for trespass and for an injunction to restrain the defendant from violation of the Shaughnessy Heights Building Restriction Act, 1922, in using a certain house premises for any purpose other than a dwelling-house. On an application for an interlocutory injunction, the parties not agreeing that the motion should be treated as the trial of the action:—

Held, that an injunction will not be granted on an interlocutory application which has the practical effect of granting the whole relief claimed. On the balance of convenience the action should go to trial and as the action is based on a statute which is restrictive of the common-law rights it must be construed strictly and the fullest inquiry should be made which can only be had, by the trial of the issues between the parties. The plaintiff's right to an injunction ought not to be determined on this application, the action should proceed to trial and the motion will stand over until the hearing.

APPLICATION for an interlocutory injunction to restrain the defendant from violation of the provisions of the Shaughnessy Heights Building Restriction Act, 1922, and amendments, in using a certain house premsies for any purpose other than a dwelling-house. Heard by COADY, J. in Chambers at Vancouver on the 5th of October, 1942.

O'Brian, K.C., and *Killam*, for the application.
Locke, K.C., contra.

Cur. adv. vult.

8th October, 1942.

COADY, J.: The plaintiff sues for damages for trespass and for an injunction to restrain the defendant or agents or servants from violation or attempted violation of the provisions of the Shaughnessy Heights Building Restriction Act, 1922, and amendments, in using a certain house premises for any purpose other than a dwelling-house.

The motion before me is for an interlocutory injunction, the

parties not agreeing that the motion should be treated as the trial of the action. In fact, counsel for the defendant insists that the action proceed to trial. He wants the issues defined in pleadings and he wants discovery. He denies the plaintiff's right at law and the alleged breach, and in addition states that he will plead acquiescence on the part of the plaintiff.

I have come to the conclusion that the matter of the plaintiff's right to an injunction ought not to be determined on this application, but that the action should proceed to trial.

I base this conclusion upon three grounds: first, the practice seems to be that an injunction will not be granted on an interlocutory application which has the practical effect of granting the whole relief claimed. See *Dodd* v. *Amalgamated Marine Workers' Union* (1923), 93 L.J. Ch. 65—the head-note reads as follows:

> It is not the usual practice of the Court, upon an interlocutory motion, where there has been no consent to treat the motion as the trial of the action, to grant all the relief claimed in the action itself.

While the plaintiff there also claimed damages it was pointed out that the claim dealt with in the order appealed from was substantially the whole claim. Here, it is true, the plaintiff claims damages in addition to an injunction, but it would seem, although I am not deciding it, that the claim for an injunction is substantially the whole claim. Secondly, on the balance of convenience it would seem that the action should go to trial. (See Halsbury's Laws of England, 2nd Ed., Vol. 18, pp. 33-4):

> Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff.

No injury can result to the plaintiff by delay until the trial of the action, and counsel for the defendant has agreed to facilitate the trial. On the other hand, to grant an injunction at this time before the issues between the parties are properly tried and deter-

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mined might cause serious damage and injury to the defendant and great inconvenience to herself and those at present residing in the house with her. Thirdly, this action is based on a statute which is restrictive of the common-law right and must, therefore, according to the authorities, be construed strictly. The fullest inquiry should therefore be made, which can only be had by the trial of the issues between the parties.

The action should be set for trial at an early date. Counsel can speak to that if they cannot agree, and directions will be given. The motion will stand over until the hearing.

Application refused.

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REX v. ASHCROFT.

Criminal law—Speedy trial—Distributing betting information—Intention—Appeal by the Crown—Mixed questions of fact and law—Jurisdiction—Criminal Code, Secs. 235 (f) and 1013, Subsec. 4.

The accused was charged with unlawfully printing information intended for use in connection with betting on horse-races. Police officers executed a search warrant at 211 Abbott Street in Vancouver and in a small room at the back of the premises occupied by the accused, seized a number of racing-sheets and a Gestetner machine for printing same. These sheets (with a circulation of from 1,600 to 1,800 a day) were for racing to be held at two tracks in the United States and contained the names of the horses, the jockeys, the odds and the weights. The charge was dismissed and the Crown appealed.

Held, on appeal (MCQUARRIE and O'HALLORAN, JJ.A. dissenting), that to reverse the magistrate the Court must weigh the evidence and reach certain conclusions of fact thereon in relation to the essential elements of the crime. The appeal involves the determination of questions of mixed fact and law. This being a Crown appeal, it must be dismissed as the Court has no jurisdiction except on a point of law.

Rex v. *Turner* (1938), 52 B.C. 476 applied.

APPEAL by the Crown from the judgment of police magistrate Wood, Vancouver, dismissing a charge that the accused at the city of Vancouver, between the 1st day of December, 1941, and the 30th day of May, 1942, unlawfully did print information intended for use in connection with betting on horse-races.

On 29th May, 1942, police officers executed a search warrant at 211 Abbott Street and in a small room at the back of the premises occupied by the accused, seized a number of racing-sheets and a Gestetner machine for printing same. These sheets (with a circulation of from 1,600 to 1,800 a day) were for racing to be held at two tracks in the United States and contained the names of the horses, the jockeys, the odds and the weights.

The appeal was argued at Victoria on the 8th of September, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Wasson, for appellant: This charge was laid under section 235 (*f*) of the Criminal Code. The appeal is on a question of law under section 1013, subsection 4. In the case of *Rex* v. *Hewitt* (1922), 69 D.L.R. 576 the paper distributed was used by and useful to breeders and race-track officials and the conviction was quashed on appeal but in this case the distribution was amongst book-makers and betters and thus distinguishable. The facts here constitute an offence. No other inference can be drawn but that it was for betting.

Fraser, K.C., for respondent: It is necessary for the Crown to prove intention. This man is only an employee and an employee may not know what the distribution of the printed information was intended for. The gist of the offence is that he knew the printed information was intended to be used for betting. *Rex* v. *Hewitt* (1922), 69 D.L.R. 576, at p. 579 applies. The employee is merely following his principal's instructions. The intention must be proved: see *Rex* v. *Luttrell* (1911), 18 Can. C.C. 295, at p. 297; *Gauthier* v. *Regem* (1931), 56 Can. C.C. 113; *Rex* v. *Smallpiece* (1904), 7 Can. C.C. 556, at p. 559. It is not an offence as the information is with reference to races outside of Canada. Section 235 (*f*) only deals with races in Canada. "Common gaming-house" is distinguished from section 235 (*f*): see *Regina* v. *Smiley* (1892), 22 Ont. 686; Crankshaw's Criminal Code, 6th Ed., 233; *Regina* v. *Giles* (1895), 26 Ont. 586, at p. 594; *Regina* v. *Osborne* (1895), 27 Ont. 185, at p. 192.

Wasson, in reply.

Cur. adv. vult.

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MCDONALD, C.J.B.C.: I think this appeal must be dismissed upon the ground that the question presented is one of mixed law and fact, hence no appeal lies: see *Rex* v. *Turner* (1938), 52 B.C. 476.

This makes it unnecessary to decide the other question raised, as to whether section 235 (*f*) of the Criminal Code applies to a race to be run outside Canada. However, I may say that, as at present advised, I am not satisfied that *Regina* v. *Smiley* (1892), 22 Ont. 686 which was cited, decides this question.

MCQUARRIE, J.A.: I agree with my brother O'HALLORAN that the appeal should be allowed and a new trial ordered. As I see it the learned magistrate did not direct his mind to the issue involved in this case. Here the facts show that there was a clear infraction of section 235 (*f*) of the Criminal Code, which reads as follows:

(*f*) advertises, prints, publishes, exhibits, posts up, sells or supplies, or offers to sell or supply, any information intended to assist in, or intended for use in connection with book-making, pool-selling, betting or wagering upon any horse-race or other race, fight, game or sport, whether at the time of advertising, printing, publishing, exhibiting, posting up or supplying such news or information, such horse-race or other race, fight, game or sport has or has not taken place; or

The respondent printed a large quantity of sheets which related entirely to horse-races to be held outside of Canada. The question presents itself whether that comes within the provisions of the said section or not and as I understand it the magistrate did not decide that question at all. The case should therefore be remitted back in order that a proper trial should be held.

SLOAN, J.A.: In order to reverse the magistrate we must weigh the evidence and reach certain conclusions of fact thereon in relation to the essential elements of the crime. The appeal, therefore, in my opinion, involves the determination of questions of mixed fact and law. As this is an appeal of the Crown it follows it must be dismissed as it is not within our jurisdiction to decide questions of this nature on appeals of this character—*Rex* v. *Turner* (1938), 52 B.C. 476.

O'HALLORAN, J.A.: The respondent was charged under section 235 (*f*) of the Criminal Code of unlawfully printing information "intended for use in connection with betting on horse-races." The learned magistrate dismissed the charge without calling upon the defence. The Crown now appeals and under section 1013, subsection 4 we are necessarily confined to a "question of law alone." That is the substantive objection to our jurisdiction now advanced.

It is said for the respondent that in the existent circumstances, whether the "racing-sheets" involved were "intended for use in connection with betting on horse-races," was a matter of factual inference, and therefore a question of fact or mixed law and fact. But it is not as simple as that. The nature of the submissions of counsel for the Crown appellant do not permit the competency of the appeal to be decided on that general proposition. It is urged conclusively that the magistrate did not direct his mind to the real question for his decision, or for that matter even if he did, he allowed his decision to be governed by extraneous considerations.

The governing facts are not in dispute. Ashcroft was printing "racing-sheets" on a machine in premises used for the purpose of "book-making." These sheets contained particulars of horse-races to be run on two United States race-tracks, and had a daily circulation of sixteen to eighteen hundred copies. In his statement to the police officers which was admitted in evidence, Ashcroft said:

> Everybody knows how I make my living, . . . I put these sheets out in the winter, and I work for Randall, of the Racing Association, in the summer-time.

The magistrate dismissed the case without calling upon the defence, for the stated reason that Vancouver newspapers publishing allegedly similar information were not also prosecuted.

The transcript of the proceedings is short—some nineteen pages. The magistrate introduced the newspaper issue himself by asking the difference between the racing-sheets Ashcroft printed and "what you read in the papers." He reverted several times to what the newspapers published before finally epitomizing his decision:

> I don't see anything to it at all, I don't see anything different between

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this and what the newspapers publish. If they were committing an offence they should be prosecuted.

It must be plain the magistrate dismissed the case because he did not consider Ashcroft any more guilty than the newspapers, and that the latter were not to be regarded as breaking the law since they had not been prosecuted.

The magistrate's cited language truly reflects his ground of decision. Prosecution counsel in stating that the newspapers would probably be prosecuted also found it necessary to say in justification:

> One has to start somewhere and the fact that you didn't start everywhere at once is surely not a defence.

Again in his report to this Court under section 1020, the magistrate in effect repeats the ground which influenced his approach to the case and governed his decision, when he said in summarizing the evidence:

> This is practically the same information published in the daily newspapers with a circulation of from 70,000 upwards. I dismissed the charge.

It is plain from the record that the magistrate did not confine his mind to the guilt or innocence of the accused on the existing facts in evidence before him, but allowed his decision to be influenced and governed by an extraneous consideration which he himself had interjected into the case, *viz.*, that the newspapers were publishing similar information without being prosecuted. In *The Queen* v. *Adamson* (1875), 45 L.J.M.C. 46, the Court stressed the necessity of justices acting only on the evidence before them. If a magistrate acts upon some extraneous knowledge or belief, in reality he declines jurisdiction, *vide* Cockburn, C.J. at p. 48. Also Field, J. who said at p. 49 with double present aptitude:

> I should be the last to wish to infringe upon the rule that this Court has no jurisdiction to act as a Court of Appeal from justices upon questions of fact. But so far from doing so here, . . . , I am forced to the conclusion that they did not decide on a question of fact.

In *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371, Lord Esher, M.R. said at pp. 375-6:

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

And Lord Esher added significantly at p. 377:

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

And *vide* also *Rex* v. *Board of Education,* [1910] 2 K.B. 165, affirmed in the House of Lords, [1911] A.C. 179; *Rex* v. *Brighton Corporation* (1916), 85 L.J.K.B. 1552, Lord Reading, C.J. at pp. 1554-5 and *Rex* v. *Farnborough Urban Council,* [1920] 1 K.B. 234.

On principle and authority the conclusion is unavoidable that the magistrate did not exercise his discretion judicially. The nature of his decision opens it to legitimate attack by the Crown appellant under section 1013, subsection 4. A new trial should be directed. But despite what clearly appears on the record, it seems to be contended that this Court nevertheless should regard his dismissal of the case as a convincing implication *eo ipso* that he did draw the factual inference the "racing-sheets" were not intended for use in connection with betting on horse-races. But even if we assume for the moment that he could and did draw that factual inference, nevertheless his conclusion is still open to attack under section 1013, subsection 4, since he admittedly governed his mind by extraneous considerations within the meaning of *The Queen* v. *Adamson,* and *The Queen* v. *Vestry of St. Pancras, supra,* and justice would demand a new trial according to law.

But factual inference of innocence is denied by the objective facts. It is not capable of inference. As Lord Wright said in *Caswell* v. *Powell Duffryn Associated Collieries Ld.,* [1940] A.C. 152, at p. 159, inference must be carefully distinguished from conjecture or speculation. Without objective facts there can be no inference. But it cannot be inference, if it is inconsistent with what must necessarily flow from the reasoned relation of those objective facts to one another. Ashcroft was printing "racing-sheets" concerning horse-races on two United States race-tracks. He was printing some sixteen hundred of them for daily circulation. That they were being used in connection with betting on horse-races was plain on their face. Their name

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"racing-sheets," the particulars they contained, their distribution, and Ashcroft's admitted method of livelihood left but one inference as to their intention, purpose and use.

In the absence of an explanation to the contrary no other inference could reasonably be drawn. As Ashcroft said in his statement to the police, *supra*, "everybody knows how I make my living." The only inference which the relevant objective facts could support pointed so completely to Ashcroft's guilt as charged, that in the absence of any explanation by him, no reasonable doubt of his guilt could exist. It is true that this conclusion of guilt might have been defeated by an explanation of the accused such as occurred in *Rex* v. *Hewitt* (1922), 38 Can. C.C. 264. But that cannot be the case here since no explanation was given and the defence was not called upon. The case did not get that far. It might have been defeated also perhaps on some question of statutory interpretation, but that would also involve a question of law.

To draw an inference of innocence when there is no evidence whatever to support it and all the evidence points to guilt, is no different in principle from drawing an inference of guilt without any supporting evidence whatever. If it is a question of law whether there is any evidence at all which points to guilt, it must equally be a question of law whether there is any evidence at all which points to reasonable doubt. As in my view there are in this case no objective facts capable of producing an inference to support a reasonable doubt, the objection to the judgment appealed from is properly open to the Crown appellant in this Court under section 1013, subsection 4.

On either or both grounds considered herein the objection to our jurisdiction should be denied. I would allow the appeal and direct a new trial.

FISHER, J.A.: I cannot say that the question involved is a "question of law alone" and I would therefore dismiss the appeal. See *Rex* v. *Turner* (1938), 52 B.C. 476.

Appeal dismissed, McQuarrie and O'Halloran, JJ.A. dissenting.

REX v. HUGHES, PETRYK, BILLAMY AND BERRIGAN. (No. 2).

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Criminal law—Murder—Conviction—New trial ordered on appeal—Appeal to Supreme Court of Canada—Motion for reprieve granted—Appeal—Criminal Code, Secs. 1013 and 1063, Subsec. 2.

The appellants were convicted of murder and sentenced to be hanged on the 15th of July, 1942. A new trial was ordered by the Court of Appeal on the 30th of June, 1942. The Crown appealed to the Supreme Court of Canada. The Crown then applied to the assize judge for a reprieve for such period beyond the time fixed for the execution of the sentence as may be necessary for the hearing and adjudication of the appeal. The order was granted until the 18th of November, 1942.

Held, on appeal, that there was no jurisdiction to hear the appeal and a motion to quash was granted.

Followed R v Jacques (1) 12 CCC (2d) 7 (Que C

APPEAL by accused from the order of SIDNEY SMITH, J. of the 10th of July, 1942, granting a reprieve of the sentence of death passed upon the said prisoner Robert Hughes until Wednesday, the 18th day of November, 1942. Hughes was convicted at the Spring Assize at Vancouver on the 18th of April, 1942, for the murder of Yoshyuki Uno on the 16th of January, 1942, and was sentenced to be hanged on the 15th of July, 1942. By the judgment of the Court of Appeal pronounced on the 30th of June, 1942, the said conviction was quashed and a new trial ordered on the said charge, MCDONALD, C.J.B.C. and FISHER, J.A. dissenting. An appeal from the said judgment of the Court of Appeal is being taken to the Supreme Court of Canada.

The appeal was argued at Victoria on the 8th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Branca, Burton and *Schultz,* for appellants.

Bull, K.C., for respondent, moved to quash the appeal. A new trial was ordered by the Court of Appeal and the Attorney-General gave notice of appeal to the Supreme Court of Canada under section 1023, subsection 2 of the Criminal Code. Under section 1025A accused must remain in custody until the determination of the appeal. It is submitted there is no appeal from

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the order in question. All rights of appeal are included in sections 1012 and 1013, subsections 2 and 3: see *Rex* v. *Hansher et al.*, [1940] O.R. 247; *Rex* v. *Imperial Tobacco Co.*, [1939] 3 W.W.R. 577. Once a notice of appeal is given to the Supreme Court of Canada then there is no case reserved.

Branca, for Hughes and Berrigan, *contra*: The right of appeal is regulated by statute. There is jurisdiction to hear this appeal: see sections 1013 and 1015 of the Criminal Code; see also sections 6 and 7 of the Court of Appeal Act. The conviction was quashed by the Court of Appeal. There must be a valid conviction existing. Section 1063 of the Criminal Code was never contemplated to cover a case of this kind.

Burton, for Billamy.

Schultz, for Petryk.

Bull, replied.

Cur. adv. vult.

28th September, 1942.

MCDONALD, C.J.B.C.: This appeal reveals a grimly grotesque series of events. The appellants were convicted of murder and sentenced to be hanged on 15th July, 1942. On 30th June, 1942, this Court by a majority set aside the conviction and directed a new trial: see [57 B.C. 521]; [1942] 3 W.W.R. 1. The Crown then appealed to the Supreme Court of Canada. By this time it became apparent that the Crown's appeal could not be disposed of before 15th July, and the Crown's advisers apparently became apprehensive that, if something was not done, and that date was once passed, even success at Ottawa might create a situation where, though the conviction was restored, there was no power in anyone to fix a new date for execution.

This, to my mind, was a misapprehension of the legal situation. I can feel no doubt that if this conviction should be restored at Ottawa, there would be ample power in the Supreme Court of Canada to fix a new date itself, or remit the matter to a Provincial Court competent to implement the Supreme Court's judgment.

However, in this case the Crown took a different course, apparently following some precedents which were never chal-

lenged. The Crown applied to the assize judge for an order respiting execution until a date that would give time for the appeal at Ottawa to be heard, and he made an order respiting it until 18th November next. I do not understand how a judge could in effect stay execution of a judgment that had already been set aside, and therefore had ceased to be of record. The anomalous situation that had arisen was emphasized by the prisoners' appearing by their counsel before the learned judge and protesting against their execution being respited.

However, the order was made, and to complete anomalies, the prisoners now appeal against it. The Crown has moved to quash the appeal on the ground that no appeal lies. Crown counsel argues that appeal lies only by virtue of statute, and the only right given is under section 1013 of the Code. This section gives only a right of appeal against a conviction, a sentence or an acquittal, and the order involved in this appeal is none of these. The cases cited in support are *Rex* v. *Hansher et al.*, [1940] O.R. 247; *Rex* v. *Wilmot*, [1941] S.C.R. 53 and *Rex* v. *Imperial Tobacco Co.*, [1939] 3 W.W.R. 577. These cases seem to me practically conclusive. The point was raised during argument whether there would be no remedy if an order was made altogether without jurisdiction. I do not think it necessary to discuss that contingency because, even assuming, as I do, that the learned judge had no right to make this order, I do not regard it as objectionable on purely jurisdictional grounds.

Moreover, even if I considered that we could entertain this appeal, which I do not, I would still hold that we ought not to, because I think that no appeal lies against a stay of execution, by the party reprieved. This appeal falls within the principle that no appellant can assign error that is in his favour. This principle is thus laid down by Lord Campbell, C.J. in *The Queen* v. *The Justices of Denbighshire* (1853), 1 C.L.R. 239, at p. 240:

> Now, it is a general principle, that parties cannot be heard to complain of what is done in their own favour; . . .

Similarly, in *Gamon* v. *Jones* (1792), 4 Term Rep. 509, at p. 510 Buller, J. said:

> . . . , it is an invariable rule that if a judgment be more favourable

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> to the plaintiff [in error] than he is entitled to, he cannot take advantage of it, because he is not injured.

It is true that some old decisions have not applied this principle to error in the sentence of a Court; but the modern view is that expressed by Bramwell, L.J. in *Reg.* v. *Castro* (1880), 5 Q.B.D. 490, at pp. 507-8, where he says:

> . . . the plaintiff in error has been sentenced to seven years' penal servitude upon each count; but he ought in addition to that to have been sentenced to some amount of fine and imprisonment. I very much doubt whether he has any right to make such a complaint as that upon error, even if the objection were sustainable when urged upon behalf of the Crown. He cannot say that any wrong has been done to him.

In the present case the prisoners' counsel tried to escape this principle by suggesting that the order appealed from orders the prisoners to be hanged. The short answer is that the order does nothing of the sort and does not purport to. It merely stays execution of a sentence supposed to be effective, and if no such sentence is in effect, the order has no operation. If, for example, the Crown should abandon its appeal to Ottawa, it cannot be suggested that the prisoners could be hanged under this order. There is at present no existent sentence, and this order imposes none. The appellants therefore suffer no legal prejudice by it, and an appeal from it will not lie. As pointed out by Duff, C.J. in *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy upon Deportation Proceedings,* [1933] S.C.R. 269, at p. 273 a convict under capital sentence has no right to insist on being hanged; so even if the sentence had been effective when the order was made, so as to give the order something to operate on, the order would furnish no legal grievance.

Actually, in my view, the order has so little effect that, even if the conviction should be restored by the Supreme Court of Canada, some other provision will have to be made in order to authorize execution.

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

SLOAN, J.A.: I agree that no appeal lies and would, in consequence, grant the motion to quash.

O'HALLORAN, J.A.: I agree in allowing the motion of counsel for the respondent Attorney-General of the Province to quash

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the appeal. Our appellate jurisdiction is confined by section 1013 of the Criminal Code to appeals against conviction, appeals against sentence and appeals on questions of law by the Attorney-General against an acquittal.

The complained of reprieve order which purports to be granted under section 1063, subsection 2 is not, in the existent circumstances at any rate, within the ambit of the statutory right of appeal. Accordingly, whatever may be the force of the objections to the reprieve order now complained of, our appellate jurisdiction cannot be invoked to review its validity.

FISHER, J.A.: I agree that the appeal herein should be quashed on the ground that this Court has no jurisdiction to hear the said appeal.

Appeal quashed.

HENRY v. COLUMBIA SECURITIES LIMITED.

IN RE LEGAL PROFESSIONS ACT AND *IN RE* FREEMAN & FREEMAN, SOLICITORS.

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Legal Professions Act — Barristers and solicitors — Charge on property recovered—Judicial discretion—R.S.B.C. 1936, Cap. 149, Sec. 106.

Apld
Wellman v. Jerom
63 D.L.R. (2d) 530
(Sask. Q.B.)

Apld
Ginter v. Chapman
61 W.W.R. 632
(B.C.S.C. Ch.)

The plaintiff, a dealer in motor-cars, was financed by the defendant in their purchase. A dispute arose and the defendant took possession of certain cars which were purchased with money he had advanced. The plaintiff then brought action for delivery of the cars and the defendant counter-claimed on promissory notes which he had obtained from the plaintiff. On the 15th of June, 1942, the plaintiff obtained judgment for delivery up of thirteen cars and the defendant obtained judgment on his counter-claim for over $10,000. On the 24th of June, the defendant delivered the cars to the plaintiff and at once issued a writ of *fi. fa.* for its money judgment under which the sheriff seized the cars on the same day and on the 15th of July, he sold the cars under the *fi. fa.* for $2,300. On the 25th of June, Messrs. *Freeman & Freeman*, who acted as solicitors for the plaintiff at all material times, took out a summons to obtain a charging order on these cars for their costs pursuant to section 106 of the Legal Professions Act. An order was made on the 11th of July, directing that the solicitors' costs be referred for taxation and declaring

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that they were entitled to a charge upon the said cars recovered by the plaintiff in the action.

Held, on appeal, reversing the decision of ROBERTSON, J., that by section 106 of the Legal Professions Act, the solicitor shall be "deemed" to have a charge. The charge is only enforceable by a judge's order and the section merely says that "it shall be lawful" to make an order, implying discretion. The construction which makes the enforcement of a solicitor's charge discretionary is concluded by this Court's decisions. The trial judge had a discretion as to whether he would enforce the solicitors' lien against the cars. The plaintiff's action to recover the cars was in the nature of an action of detinue and the ordinary judgment in such an action is that the plaintiff "have a return" of the goods or recover the value which is assessed at a stated figure. The defendant then has the option of returning the goods or paying. The defendant is entitled to a judgment in the usual alternative form. If then the judgment had taken the usual form, the plaintiff would have had judgment for a much smaller sum than the defendant and there is no reason why a set-off would not have been feasible. The Court in exercising its discretion can look at the real merits and hold it just and proper not to allow the solicitor to take advantage of a position that ought not to have existed. Far from the plaintiff obtaining a victory in this action, he sustained a decisive defeat. The decisive point was not raised either here or below, namely, the common form of judgment in detinue, so no costs of appeal were given.

APPEAL by defendant Columbia Securities Limited from the order of ROBERTSON, J. of the 11th of July, 1942, directing that the costs of Messrs. *Freeman & Freeman,* solicitors for the plaintiff Henry against said plaintiff in the action, be referred for taxation and declaring that they were entitled to a charge upon the motor-vehicles recovered by the plaintiff in the action, the order further providing leave to apply for directions for the realization of the charge. The application was made pursuant to the provisions of section 106 of the Legal Professions Act. The action above referred to was commenced on April 28th, 1942, and the relief sought in the action by the plaintiff was, *inter alia,* the recovery of a number of motor-vehicles which he alleged were wrongfully taken from him by the defendant. The plaintiff was a motor-car dealer and the defendant was engaged in the business of financing. The defendant filed a counterclaim for moneys loaned to the plaintiff. The action was tried by ROBERTSON, J. and judgment was delivered on June 15th, 1942, whereby the plaintiff recovered thirteen of the motor-vehicles claimed by him and the defendant recovered judgment on his

counterclaim for $10,650. The automobiles were duly returned to the plaintiff by the defendant as directed, and on the same day they were seized under a writ of *fieri facias* issued by the defendant against the plaintiff. The said automobiles were sold on July 15th, 1942, by public auction by the sheriff of Vancouver to one S. W. Beard for $2,300. The order of the 11th of July was finally settled and entered on the 24th of July, 1942, one week after the automobiles had been sold.

The appeal was argued at Victoria on the 15th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Campbell, K.C., for appellant: The order should not have been made as there was no property "recovered or preserved" under the judgment of the 15th of June, 1942. The plaintiff recovered $50 damages and the return of thirteen automobiles which were eventually sold for $2,300 whereas the defendant recovered $10,650 on its counterclaim, an amount in excess of what was recovered by the plaintiff. There can be no charge if no property was "recovered or preserved" in the action, and section 106 of the Legal Professions Act cannot be invoked: see *Westacott* v. *Bevan*, [1891] 1 Q.B. 774; *McGregor* v. *Campbell* (1909), 11 W.L.R. 153; *Knight* v. *Knight*, [1925] Ch. 835; *Levi Blumenstiel* v. *Edwards* (1905), 11 O.L.R. 30; *Brown* v. *Nelson* (1884), 11 Pr. 121; *Pringle* v. *Gloag* (1879), 10 Ch. D. 676; *Taylor* v. *Popham*. *Monke* v. *Taylor* (1808), 15 Ves. 72; *Linden* v. *Bastedo* (1915), 7 O.W.N. 603, at p. 605; *In re McCormack and Brockest Metal Wares Ltd.*, [1936] 2 W.W.R. 78. The word "deemed" implies a discretion must be exercised: see *De Beauvoir* v. *Welch* (1827), 7 B. & C. 266; *The Queen* v. *Freeman* (1890), 22 N.S.R. 506, at p. 513; *The King* v. *Fraser* (1911), 45 N.S.R. 218, at p. 226; *Hickey* v. *Stalker et al.*, [1924] 1 D.L.R. 440. There is a further discretion given in the words "And it shall be lawful": see *York, &c., Railway Co.* v. *The Queen* (1853), 1 El. & Bl. 858; *In re Neath and Brecon Railway Co.* (1874), 9 Chy. App. 263, at p. 264; *Re Bridgman* (1860), 1 Dr. & Sm. 164; *Miller* v. *Wollaston* (1929), 41 B.C. 145, at p. 149. There is nothing to show that the respondents

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demanded or received payment from their client: see *Croghan* v. *Maffett* (1890), 26 L.R. Ir. 664; *Harrison* v. *Harrison* (1888), 13 P.D. 180; *Phillipps and Scarth* v. *London Guarantee & Accident Co. Ltd.*, [1927] 2 W.W.R. 570. Rule 1037 cannot be invoked to allow an amendment of the style of cause so as to have the remedies and rights under it to apply to a different and separate action: see Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 260, par. 281; *Smurthwaite* v. *Hannay*, [1894] A.C. 494, at p. 501; *Morrall* v. *Prichard* (1865), 11 Jur. (N.S.) 969; *Rowlatt* v. *Cattell* (1842), 2 Hare 186. The application for a charge should not be heard without notice to the creditors and the learned judge improperly followed *Jackson* v. *Smith* (1884), 53 L.J. Ch. 972. The Chamber summons and material in support did not disclose sufficient facts to give the learned judge jurisdiction under the Legal Professions Act to make the order. The right to an order for taxation is statutory: see *Ex parte Bowles's Trustees* (1835), 1 Bing. (N.C.) 632; *Clutterbuck* v. *Combes* (1833), 5 B. & Ad. 400; *Gundy* v. *Johnston* (1913), 12 D.L.R. 71, at p. 77. The order granting a charge on the automobiles was settled on July 22nd, 1942, one week after the automobiles had been sold to innocent third parties. No automobiles existed at the time when the charge could attach.

D. A. Freeman, for respondents: The chief objection by the appellant to the right of the respondents to a charge on the plaintiff's property is based upon the contention that in the action there was no net recovery by the plaintiff of any property. It is submitted that it is not possible to set off specific chattels such as motor-vehicles against a money judgment. Section 106 of the Legal Professions Act designates the subject of the charge as the "property which is recovered." The plaintiff recovered thirteen motor-vehicles and under the statute, the solicitor is deemed to have a charge upon these motor-vehicles. The property cannot be translated into money terms for the purpose of set-off. The distinction between the English statute and the B.C. statute is that the charge in England is granted at the discretion of the Court whereas in British Columbia it is created by the statute itself: see *Miller* v. *Wollaston* (1929), 41 B.C.

145; *Foxon* v. *Gascoigne* (1874), 9 Chy. App. 654; *Stumore* v. *Campbell & Co.* (1891), 61 L.J.Q.B. 463. The counterclaim does not affect the rights of the solicitor under these circumstances: *Stumore* v. *Campbell & Co.*, [1892] 1 Q.B. 314. The claim and counterclaim are separate actions for all purposes material to this appeal. The right of set-off does not arise: see Holmested & Langton's Ontario Judicature Act, 5th Ed., 1115; *Pallas* v. *Neptune Marine Insurance Company* (1879), 5 C.P.D. 34; *In re Milan Tramways Company* (1884), 25 Ch. D. 587; *McCreagh* v. *Judd,* [1923] W.N. 174. It is not necessary for the solicitor to first submit the state of accounts respecting his bill between himself and his client. The charge is created by statute and the question of the client's ability to pay out of his own funds is dealt with upon the hearing for directions. The costs referred to in section 106 of the Act are costs as between solicitor and client: see *Miller* v. *Wollaston* (1929), 41 B.C. 145. The Court has very wide powers of amendment, particularly where the amendment does not involve a substantial change in the proceedings but, as in this case, involves only a technical alteration: see Order XXVIII., r. 12 of the Supreme Court Rules, 1925. The procedure under section 106 is not affected by sections 81 and 84 of said Act. There is nothing in the Act suggesting the necessity of giving notice to all creditors of the application. It is not possible for the charge to be defeated by the claims of other creditors. On a solicitor's lien see *Scholfield* v. *Lockwood* (1868), 38 L.J. Ch. 232.

Campbell, in reply, referred to *Knight* v. *Knight,* [1925] Ch. 835; *In re Legal Professions Act and In re a Solicitor* (1935), 49 B.C. 403.

Cur. adv. vult.

28th September, 1942.

MCDONALD, C.J.B.C.: The order appealed from is an order of ROBERTSON, J. declaring that the respondent solicitors have a lien on thirteen motor-cars for their solicitor-and-client costs incurred in an action between Henry and the appellant.

The course of events leading up to this order was as follows: Henry was a dealer in motor-cars and appellant was financing him in their purchase. A dispute arose in which appellant tried

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to retain certain cars bought with its money, though it had no security on them. Henry sued the appellant for delivery of the cars, and appellant counterclaimed on promissory notes. After trial before ROBERTSON, J., Henry obtained judgment for delivery up of the cars, and appellant judgment against him for $10,650.87. Judgment was rendered on 15th June, 1942. On 24th June appellant delivered the cars to Henry, and at once issued a *fi. fa.* for its money judgment, under which the sheriff seized the cars on the same day.

On 24th or 25th June (the summons is undated), Messrs. *Freeman & Freeman* (respondents) who had acted for Henry at all material times, took out a summons to obtain a charging order on these cars, on which ROBERTSON, J. made the order appealed from on 11th July. On 15th July the sheriff sold the cars under the *fi. fa.* for $2,300.

Presumably the result of the order appealed from, if it stands, will be that the respondent solicitors will be paid first out of the proceeds of the sale, and that the appellant will only get the residue.

Appellant attacks the order on a large number of grounds, some of them formal and technical. I have concluded that none of these technical objections is sound, and that the only real questions we have to consider are whether the charging order lay in the discretion of the judge, and, if so, whether he exercised his discretion rightly. However, I will first state my reasons for rejecting the technical objections raised by appellant:

First it is objected that the proceedings for charging order were taken by summons headed in the matter of the Legal Professions Act, whereas they should have been headed in the action only. However, ROBERTSON, J. amended the style of cause to read in the action and even if the technicality was good, I think it was cured, and that amendment was rightly allowed. But I may say that I doubt whether amendment was necessary. From a rather superficial examination of the authorities, I rather infer that a heading in the cause is favoured because it permits of an ordinary summons being used, and thus saves costs, but that the other procedure is correct enough.

The next objection taken is that the solicitors should have

served the summons on all creditors of Henry. How they were to discover these creditors has not been explained, nor how unsecured creditors could have any *locus standi*. The case of *Jackson* v. *Smith* (1884), 53 L.J. Ch. 972 cited for the need to serve creditors, is not really in point. There the property which the solicitors sought to charge was not entirely their client's, but was the property of a partnership, of which he was only one member. Furthermore, the property was in the hands of a receiver, an officer of the Court, who had been appointed in a partnership action, which is somewhat analogous to an administration action. Following that decision, ROBERTSON, J. appointed appellant's counsel to represent all creditors of Henry. I am not satisfied that there was any need for this, but certainly his taking such a precaution cannot be complained of by the appellant.

Next it is objected that the solicitors proceeded against their client without having delivered any signed bill and without waiting a month thereafter, contrary to sections 81 and 84 of the Legal Professions Act. However, the English decisions make it clear that delivery of a bill and expiration of the month have no bearing on the right to obtain a charging order, and it is really the charging order here that prejudices the appellant. I am not satisfied that these formalities are necessary preliminaries to taxation under a charging order (I express no opinion); but even if they were, we should do the appellant no good by merely setting aside the order for taxation, which could later be replaced by another. I doubt strongly in any event whether it would lie in the appellant's mouth to raise these objections, which appear to be personal to the client.

Next it is said that the seizure under the *fi. fa.* preceded the application for the charging order, and *North* v. *Stewart* (1890), 15 App. Cas. 452 is cited as authority for saying that that gives the *fi. fa.* priority. That decision, however, is not in point at all, and decided nothing as to priorities. Except for the appellant's other connexion with these cars, I think it is clear that its *status* as an execution creditor would give it no rights as against the solicitors; an execution creditor has no higher rights than the execution debtor under whom he claims, as against third parties,

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unless statute gives him a better right, as the Bills of Sale Act does.

Next it is said that the solicitors produced no evidence that they could not get paid otherwise by their client, and appellant relies on decisions holding that they must do this in order to get priority over third parties, *e.g.*, those who have executions. I think the answer to this is that even before the order was entered, the sheriff had sold the cars, which was certainly very strong evidence that the owner could not pay his debts. Even if we must look at the date when the order was pronounced, there had then been an unsatisfied execution in the sheriff's hands for approximately three weeks, which I think was sufficient presumptive evidence for the learned judge to act on.

Appellant further objects that the solicitors did not "recover" the cars, so as to bring themselves within section 106 of the Legal Professions Act, because the cars were worth less than the amount of the counter-judgment. Strictly speaking, I think this objection untenable; for the solicitors obtained for their client delivery of the cars, as well as a judgment for delivery, and I think that clearly satisfied the section, if this is a pure matter of legal right. The cases holding that a solicitor does not "recover" anything for his client, when he obtains a judgment, but his adversary obtains a larger cross-judgment, are distinguishable because there the client receives nothing as the result; the opponent never pays.

So far, I find all the appellant's points untenable. However, counsel raises the further point that section 106 does not give solicitors a lien even on property recovered, as of legal right, but only a right that lies in the discretion of the Courts, and that here the discretion should have been exercised against the solicitors. Respondents against this contend that, though in England and elsewhere a solicitor has no legal charge on property recovered by his efforts, but only a right to ask a judge to give him one, still it is far otherwise under our Act. Section 106, he says, gives an absolute legal charge, one quite different from that given elsewhere, and one which a judge does not confer, but only enforces. His argument seems to imply that a judge cannot refuse to enforce it, once the solicitor has recovered property.

Outwardly at least, our Act does go farther than that in England and elsewhere. But I think it is a fallacy to say that because a charge is statutory, therefore it must be absolute. It is quite competent for the Legislature to give a conditional or defeasible charge, or one that a judge can refuse to enforce under certain circumstances. It may be noted that section 106 states that the solicitor who has recovered property shall be "deemed" to have a charge, not that he shall have one; but even if this means the same thing, we must look at the section as a whole. The charge is only enforceable by a court's or judge's order, and the section merely says that "it shall be lawful" to make an order, implying a discretion; and this is confirmed by the power's being a power to make such order as "may appear just and proper." In the result, it seems to me, the effect of the section is not much different from that of the English section, in spite of the initial difference in language.

It seems to me that the respondent wishes us to ignore the words "just and proper," when he contends that a solicitor is entitled as a matter of course to a charging order on property recovered. The construction which makes the enforcement of a solicitor's charge discretionary seems to me to be concluded by this Court's own decisions in *Inlay Hardwood Floor Co.* v. *Dierssen* (1928), 39 B.C. 514 and *Bank of Hamilton* v. *Atkins* (1924), 33 B.C. 315, where this Court allowed a set-off of judgments in different actions, though this would prevent enforcement of solicitors' liens. Such a set-off is discretionary, so the Court was exercising its discretion against solicitors. In *Ray* v. *Ruby Hou* (1928), 40 B.C. 438 the Court exercised its discretion in favour of the solicitors. I am not sure that this decision is consistent with its own earlier decisions; but at all events the ruling turned on an element that is missing here.

I think then that ROBERTSON, J. had a discretion as to whether he enforced the solicitors' lien against the cars. Let us consider the matters that might have affected his discretion. While it is true that the cars had reached Henry's hands, they were then seized within a few hours, by the sheriff on behalf of the appellant, who held them when application for the charging order was made; so that the order had the direct effect of depriving

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appellant of part of the fruits of its judgment. It is not disputed that this judgment was for moneys that had gone into the purchase of these cars, and though that gave the appellant no right *in rem*, it is a matter that might be considered in deciding what was "just and proper" as between the parties. A more important consideration is this: the plaintiff's action to recover the cars was in the nature of an action of detinue, and the ordinary judgment in such an action is that the plaintiff "have a return" of the goods or recover their value, which is assessed at a stated figure. Under such a judgment the defendant has the option of returning the goods or paying: *Chilton* v. *Carrington* (1855), 15 C.B. 730. It is true that under Order XLVIII., r. 1 the judge may compel the return of the goods without giving such an option; but such a discretion is only exercised where the particular goods have some sentimental or personal value to the owner. It can hardly be suggested that that element existed here; so I think that the appellant was entitled to a judgment in the usual alternative form. ROBERTSON, J. did not make such an order because it was not brought to his attention that that was the usual form.

There is evidence that the cars were worth somewhere about $4,600 at most; actually the sheriff sold them for $2,300, as stated. If then, the judgment had taken the usual form, the plaintiff would have had judgment for a much smaller sum than the defendant, and I see no reason why set-off would not have been feasible. The plaintiff's claim was not liquidated, but once it was reduced to figures by assessment, it was thereby liquidated. The case cited against setting off unliquidated damages, *McCreagh* v. *Judd* (1923), W.N. 174, only shows that a claim for these should be pleaded as a counterclaim, not as a set-off; but after judgment the damages would be liquidated and capable of set-off. In any case, this Court's decision in *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Co.* (1915), 21 B.C. 513 does not appear to recognize the principle of *McCreagh* v. *Judd, supra.*

If the appellant had obtained the form of judgment that I think it was entitled to, I do not think there would have been much to argue about. That being so, though the judgment actu-

ally made governs the legal rights of the parties, I think in exercising our discretion, we are not bound by those and can look to the real merits. I think, therefore, that we should hold it just and proper not to allow the solicitor to take advantage of a position that ought not to have existed.

Even taking the judgment as it actually stands, though it cannot be said that the solicitors did not "recover" the cars for their client in the strict sense, still the advantage gained was purely illusory. From the time judgment was given, it must have been obvious that what did happen would happen. The seizure of the cars came on the same day as their redelivery, so that repossession could not have been for more than a few hours; it may well have been a matter of minutes. I think that in exercising our discretion, we should look to the substance, not the form. Far from the client Henry's obtaining a victory in this action, he sustained a decisive defeat. Fairly obviously the result was that he was worse off than if the appellant had established a charge over his cars; because, as it was, his cars were sold for half their value, whereas more leisurely realization would have been in his interests as well as the appellant's. I think we should consider the extent of the benefit to the client in exercising our discretion and the decision in *In re McCormack and Brockest Metal Wares Ltd.*, [1936] 2 W.W.R. 78, affirmed *ibid.* 509, supports this view.

Though we have power to review the learned judge's exercise of discretion, I might feel diffidence in doing so if it was evident that he had considered all aspects. But his reasons rather indicate that he assumed enforcement of a solicitor's charge should go as a matter of course, provided the solicitor had recovered property. I judge that this aspect of the matter was not argued adequately before him, and undue emphasis was given by counsel to unfounded objections that distracted attention from the real point.

Even in this Court what I consider the decisive point was not raised, *viz.*, the common form of judgment in detinue. Had the point been raised before ROBERTSON, J. the appeal would probably have been unnecessary. I think, therefore, that following our ruling in *Jackson* v. *Macaulay Nicolls Maitland & Co. Ltd.*,

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[57 B.C. 492]; [1942] 2 W.W.R. 33, we should allow this appeal without costs.

MCQUARRIE, J.A.: I agree that the appeal should be allowed without costs.

SLOAN, J.A.: I would allow the appeal.

O'HALLORAN, J.A.: I agree the appeal should be allowed, and without costs.

FISHER, J.A.: I would allow the appeal without costs for the reasons given in the judgment of the learned Chief Justice.

Appeal allowed.

Solicitor for appellant: *Elmore Meredith.*
Solicitor for respondents: *Harold Freeman.*

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Sept. 16; Oct. 2.

Criminal law—Morphine—Possession—Visitors in a room where morphine was found—Knowledge and consent—Criminal Code, Sec. 5, Subsec. 2.

Apld. Rex v. Kinna 98 C.C.C 348

The two accused with one Harman Singh were charged with being in possession of morphine. Harman Singh pleaded guilty. The police entered Harman Singh's room at 11 o'clock in the morning where they found the two accused with Harman Singh. They had been there since 5 o'clock in the morning. The police found a pot boiling on a gas-heater which was about three-quarters full of a green liquid, later found to contain morphine. In a drawer they found a quart of poppy heads and on the floor a bent spoon burnt on the bottom and a parcel containing an eye-dropper and a hypodermic needle. The charge was dismissed.

Apld R. v. Porter 129 CCC 418

Held, on appeal, affirming the decision of police magistrate Wood (MCDONALD, C.J.B.C. and SLOAN, J.A. dissenting), that the facts do not disclose such consent on the respondents' part that would bring them within the meaning of section 5, subsection 2 of the Criminal Code.

Apld R. v. Tokarek 58 WWR 651 (B.C.C.A.) + [1967] 3 CCC 114

APPEAL by the Crown from the decision of police magistrate Wood, Vancouver, of the 13th of August, 1942, dismissing a charge against Robert Colvin and Colin Gladue of unlawfully

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having in their possession a drug, to wit, morphine. On the morning of the 3rd of August, 1942, three detectives of the Vancouver police force entered room 20 of the Tuckman Rooms at 207 Union Street, Vancouver, when they found Colvin and Gladue with Harman Singh, who was the occupant of the room. On a gas-burner was a pot boiling which was about three-quarters full of a green liquid, subsequently found to contain morphine. In a bureau drawer was found about one quart of poppy heads, a spoon burnt on the bottom and bent and underneath a table at which one of the men was sitting was found an eye-dropper with a hypodermic needle wrapped up with it in a parcel. The three men were arrested and tried together on the above-mentioned charge. Harman Singh pleaded guilty.

The appeal was argued at Victoria on the 16th of September, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Wismer, K.C., for the Crown: The three men were found by the police in Harman Singh's room in the Tuckman rooming-house. Harman Singh pleaded guilty but the two men said they knew nothing about the poppy heads or what was in the pot on the heater. They were arrested shortly after 11 o'clock in the morning and they had been in the room since 5 o'clock in the morning. The case turns on the interpretation to be put upon section 5, subsection 2 of the Criminal Code. The cases to be considered in this connection are *Rex* v. *Parker* (1941), 57 B.C. 117, at p. 119; *Rex* v. *Lee Chew* (1940), 55 B.C. 385; *Rex* v. *Cho Chung* (1940), *ib.* 234.

Defendants did not appear.

Cur. adv. vult.

2nd October, 1942.

McDONALD, C.J.B.C.: The respondents were found in a room with one Harman Singh under circumstances which gave rise to their being charged with unlawful possession of a drug, to wit, morphine. The tenant was Harman and the respondents were visitors. The neat point arising in the appeal is whether in acquitting, the magistrate misdirected himself. I think he did. The possession charged was based on section 5, subsection 2 of the Criminal Code, and the magistrate, though disbelieving

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the story told by the respondents and so leaving it open to himself to inquire whether the possession was with their knowledge and consent, held himself bound by various decisions which seemed to him to preclude any such inquiry.

It is not necessary to refer to more than one or two of the decisions mentioned. *Rex* v. *Parker* (1941), 57 B.C. 117 has no application here. It was a case of retaining stolen goods and section 5, subsection 2 was not up for consideration. *Rex* v. *Wong Loon* (1937), 52 B.C. 326 referred only to the effect of section 17 of The Opium and Narcotic Drug Act, 1929, and the *onus* thrown on the occupant of a room when charged with possession of a drug found in that room. The case of *Rex* v. *Cho Chung* (1940), 55 B.C. 234 did arise under the section now in question but did not lay down any rule to bind the magistrate in deciding what evidence would and what would not justify a finding of "consent and knowledge." That must in each case I think be decided on the facts proven and the inferences fairly drawn by the magistrate.

I would allow the appeal and direct a new trial.

MCQUARRIE, J.A.: This is an appeal from police magistrate Wood of Vancouver dismissing the charge that the respondents at the city of Vancouver on the 3rd day of August, A.D. 1942, [with one Harman Singh] did unlawfully have in their possession a drug, to wit: morphine, contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto.

The learned magistrate convicted Harman Singh but acquitted the respondents. The Crown's appeal is on a question of law only and involves, according to counsel for the Crown, the interpretation of section 5 of the Code and nothing more. Counsel for the Crown contends that the magistrate misdirected himself as to the law. Harman Singh who was the occupant of the room admitted that he used the poppy heads, boiled them up and drank the liquid. The respondents were visitors to the room. The magistrate found that Harman Singh was the man in possession and who had control of the place. He also found knowledge on the part of the respondents but stated that he did not think the evidence established consent within the meaning of section 5 of the Criminal Code. Said section 5, subsection 2 of the Criminal Code reads as follows:

2. If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

It will be clear, therefore, that something more than knowledge is necessary and that there must be consent on the part of the ones who are not in physical possession of the drug.

Counsel for the Crown contended that the magistrate's error consisted in holding that he was precluded by *Rex* v. *Parker* (1941), 57 B.C. 117 and *Rex* v. *Cho Chung* (1940), 55 B.C. 234, from applying the facts. He contended that *Rex* v. *Parker* has no application here. It was a case of retaining a stolen sewing-machine and *Rex* v. *Cho Chung* was quite different from the case at Bar. Cho Chung was only a visitor and called for the purpose of selling lottery tickets. The Crown asks that a new trial should be ordered.

While it may be true that *Rex* v. *Parker, supra,* has no application here as urged by counsel for the appellant, I would not go so far as to say the same thing in regard to *Rex* v. *Cho Chung.* Every case must depend on the facts there shown. There have been a number of cases in this Court under this section. Our attention was directed to *Rex v. Lee Chew* (1940), 55 B.C. 385.

No one appeared for the respondents although they had been duly served with the notice of appeal.

It seems to me that this case is pretty close to the line but I am of opinion that the appeal should be dismissed.

SLOAN, J.A.: In my view with respect, the learned magistrate misdirected himself in concluding that by the decision of this Court in *Rex* v. *Cho Chung* (1940), 55 B.C. 234, the right to exercise some kind of control over the subject-matter is an essential ingredient of "consent" as used in section 5, subsection 2 of the Code. It is my understanding of our relevant decisions that we carefully refrained from defining "consent" under the Code or "possession" under The Opium and Narcotic Drug Act, 1929. Our view has been that "consent" and "possession" must be determined according to the circumstances of each particular case. The right to exercise some kind of control over, *e.g.,* opium in a room would, no doubt, be a material element for consideration by the magistrate in reaching his conclusion upon

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the accused's possession of it within the meaning of section 5, subsection 2 of the Code. It does not follow, however, that in the absence of any proof of the right to exercise control over the article in question the magistrate is thereby precluded from finding possession when from all the other evidence in the case, direct and inferential, he is satisfied of that fact.

The learned magistrate seems to think he is precluded from finding possession in the absence of evidence of control. In that, with deference, he has in my opinion fallen into error.

I would therefore allow the appeal and order a new trial.

O'HALLORAN, J.A.: Three men were charged before magistrate Wood in the city of Vancouver with possession of morphine under section 4, subsection 1 (*d*) of The Opium and Narcotic Drug Act, 1929, and amending Acts. One of them pleaded guilty. They were all in his room when arrested. Morphine was found there. The other two, the present respondents, pleaded not guilty. The learned magistrate disbelieved their explanations, but felt himself bound to acquit them on the principle adopted in *Rex* v. *Parker* (1941), 57 B.C. 117, as he interpreted it to bear on previous decisions in *Rex* v. *Cho Chung* (1940), 55 B.C. 234 and *Rex* v. *Lee Chew* (1940), *ib.* 385. The Crown now appeals.

Rex v. *Cho Chung* and *Rex* v. *Lee Chew* concerned charges of possession under section 4, subsection 1 (*d*) of The Opium and Narcotic Drug Act, 1929. *Rex* v. *Parker* concerned a charge under section 399 of the Criminal Code of retaining possession of a sewing-machine known to have been stolen. In the *Cho Chung* case, the accused visited a friend to sell him lottery tickets. His friend was smoking opium and refused to talk business until he had finished smoking. Cho Chung sat down and waited for him to finish smoking, but the police arrived in the meantime. The magistrate believed Cho Chung's story and dismissed the charge. In dismissing the Crown's appeal this Court said the facts did not disclose "consent" on respondent's part within section 5, subsection 2 of the Criminal Code.

In the *Lee Chew* case, Lee Chew handed an opium-runner $2 for a deck of opium. The runner had the deck in hand to give it to him, but before the "transaction was quite completed" the

police intervened, and the runner threw the opium away. The magistrate dismissed the charge, but this Court with McQUARRIE, J.A. dissenting, allowed the Crown's appeal. It was held Lee Chew had the right to the custody of the opium because he had paid $2 for its immediate delivery to him. The money was accepted, the sale made, and delivery of the opium sold was in the course of completion. The Court evidently regarded what occurred after the police intervened as insufficient to deny Lee Chew's right to the custody of the opium he had purchased.

The *Parker* case did not concern the possession of opium. The charge was retaining possession of a sewing-machine known to have been stolen. It is not without significance that the charge was "retaining" and not "receiving." For if it had been the latter, then, since Parker admittedly had aided Forget in selling the sewing-machine, section 402 would have required quite a different approach to the decision of the case. This Court allowed the appeal and quashed the conviction on the facts which it then had jurisdiction to review and did review. Such jurisdiction did not exist in the Crown appeals in the *Cho Chung* and *Lee Chew* cases. It was held Parker had not exclusive or joint control of the sewing-machine, since his manual handling of it was solely under the direction of Forget who at all times had it in his exclusive control.

No examination of the *Lee Chew* and *Parker* cases is complete until it is appreciated that Lee Chew had a right to custody which Parker had not. The *Cho Chung* and *Lee Chew* decisions pointedly refrained from stating any principle of general application, and held "possession" must depend on the circumstances of each case. One may not be able to formulate an exact and exhaustive general proposition which will embrace the answer to each and every factual set-up. Certainly an attempt to do so with anything like mathematical precision is foredoomed to failure.

But speaking for myself, I think "knowledge and consent" in section 5, subsection 2 of the Criminal Code does not include situations where the association, interest, or participation of the accused, cannot reasonably be regarded as an exercise of a power of or a right to some measure of control over the subject-matter.

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No doubt, inferences of "possession" may be drawn in opium cases from circumstances rarely paralleled in cases of stolen goods. But if consorting with one who is in physical possession of opium, or who has it in his control or has the right to its custody, is sought to be regarded *eo ipso* as "knowledge and consent" within section 5, subsection 2, *supra,* sufficient to constitute joint possession, then one would expect unequivocal authority for it in The Opium and Narcotic Drug Act, 1929.

The "knowledge and consent" which is an integral element of joint possession in section 5, subsection 2 must be related to and read with the definition of "possession" in the previous section 5, subsection 1 (*b*). It follows that "knowledge and consent" cannot exist without the co-existence of some measure of control over the subject-matter. If there is the power to consent there is equally the power to refuse and *vice versa.* They each signify the existence of some power or authority which is here called control, without which the need for their exercise could not arise or be invoked. The principle of "sufficient reason" applies. For example it would be an irrational act for A to attempt to consent to or refuse B the use of C's motor-car unless A has some measure of control over it.

The sound reasons for preserving "possession" as a term of art in the criminal law need hardly be enlarged upon. Obviously that cannot be done by invoking its aid in a case which denies the applicability of its distinguishing characteristics, and which is instead essentially the subject for a distinctive offence. The learned magistrate could legitimately draw the inferences he did from the objective facts he has found to exist and which we have no choice but to accept as correct. It follows in my view at least, that the acquittal of the respondents has not offended any principle to be found in the ruling decisions of this Court.

I would dismiss the appeal.

FISHER, J.A.: The two respondents and a Hindoo had been charged before magistrate Wood, of the city of Vancouver, with possession of morphine contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto. The Hindoo pleaded guilty and the other two not guilty. After the hearing of the evidence counsel for the Crown conceded that the respondents

were not "occupiers in the sense of this section 17." Then the magistrate said in part as follows:

Now, assuming that these people knew exactly what was going on, these were poppy heads that the Hindoo was cooking these for himself to get the opium or morphine out of them; does that make consent. . . .

It seems to me that the primary possession here was by the Hindoo and that you have to rely upon section 5 of the Code. . . . .

I don't have any doubt in this case that these two men knew everything that was going on, hanging around that room; they saw this brew on the stove, a hypodermic needle on the floor; one was lying down on the bed, apparently asleep; they had been there since 5 o'clock in the morning. It is a very funny thing they would not know about this mess on the stove and find out about it, be curious about it. I do not accept their story on that at all, but I do not think, according to the decisions of the *Parker* case and the *Cho Chung* case that that amounts to consent. What consent means has not been very well defined. . . . In that *Cho Chung* case I said this: "These cases, to my mind bear out Mr. *McInnes's* contention that: 'Mere acquiescence is not sufficient, but there must be something of an active nature, either mental or physical; there must be some kind of control; there must be something upon which the consent of the accused can operate, and this consent must be effective.'"

Though the magistrate stated that he did not accept the story of the respondents he acquitted them and the Crown now appeals. If I understand aright the argument of counsel for the Crown, the appeal is apparently based on the ground that the magistrate thought he was bound by the decisions referred to and so did not direct his mind to the consideration of the facts of the case. As to this submission I have first to say that having in mind what the learned magistrate said as hereinbefore set out I have no hesitation in coming to the conclusion that he carefully considered the evidence and made his findings of fact in accordance therewith. I have next to point out that one of the grounds of appeal set out in the notice of appeal is:

That the learned magistrate erred in law in particular in his interpretation of the meaning of the word "consent" under section 5, subsection 2 of the Criminal Code, whereby he decided that mere acquiescence is not sufficient but there must be something of an active nature, either mental or physical; there must be some kind of control; there must be something upon which the consent of the accused must operate and this consent must be effective.

I think that the appeal is really based on the ground set out in the notice of appeal as aforesaid and that the Crown is asking this Court to find that the magistrate applied a wrong test in

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the meaning he assigned to the word "consent" in said section 5. I come now, therefore, to deal with the appeal on that basis.

In my view the Crown is again inviting us to do now what this Court has already twice refused to do—see the cases of *Rex* v. *Cho Chung* (1940), 55 B.C. 234 and *Rex* v. *Lee Chew* (1940), *ib.* 385. In the *Cho Chung* case at pp. 236-7 MACDONALD, C.J.B.C. said:

> Mr. *Donaghy*, for future guidance, asked us to find that the following statement by the magistrate (particularly the words "there must be some kind of control") is not an accurate test in assigning a meaning to the word "consent" in section 5, *viz.*:
>
> "Mere acquiescence is not sufficient but there must be something of an active nature, either mental or physical; there must be some kind of control; there must be something upon which the consent of the accused must operate and this consent must be effective."
>
> He asked us to substitute a better statement that could be applied like a yardstick to all similar or somewhat similar cases arising in the future. I must decline the invitation. I adhere to the salutary rule of deciding only the issue before us. I merely say, therefore, that the facts herein do not disclose such consent on respondent's part that would bring him within the meaning of section 5 of the Code. It might well be that on facts slightly different another conclusion ought to be reached. Nor is it wise I think to attempt to give one definition only of the word "consent" broad enough to cover all cases. Several meanings may be given to the word: one or the other might fit the facts of a particular case.

In the *Lee Chew* case at pp. 387-8 MACDONALD, C.J.B.C. said in part as follows:

> If any meaning is given to a literal reading of section 5, subsection 2 of the Criminal Code it must apply to this case. We held in *Rex* v. *Cho Chung* [*ante*, p. 234] that this section applies to a charge under The Opium and Narcotic Drug Act, 1929. We were asked in that case for future guidance virtually to define with particularity the cases to which this section applies. We stated that we would adhere to the salutary rule of basing the decision on the facts before us. The issue in this case is whether or not in law the facts bring it within the purview of section 5, subsection 2. . . . Here the basic feature calling for the application of the section was the "previous arrangement" and the "purpose of" the meeting. In other cases other facts may call it into play; hence the need of confining the decision to the facts of this case.

Following these cases I think that we should adhere to the salutary rule of deciding only the issue before us and basing the decision upon the facts before us. The issue in this case is whether or not in law the facts bring it within the purview of section 5, subsection 2 of the Criminal Code. As we are concerned with only a question of law we must take our facts from

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the findings of the magistrate. In my view the facts herein do not disclose such consent on the respondents' part that would bring them within the meaning of section 5 of the Code. There is no basic feature calling for the application of the section, as the majority of this Court held there was in the *Lee Chew* case. Perhaps I might repeat what was said by the Court in such case that "in other cases other facts may call it into play."

I would dismiss the appeal.

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

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Criminal law—Evidence—Deposition on preliminary inquiry of witness who died before trial—Admissibility on trial—Accused tried on different charge from that originally laid—Whether full opportunity to cross-examine—Criminal Code, Secs. 999 and 1000.

The accused was charged with unlawfully attempting to dissuade by corrupt means one Mond from giving evidence in a criminal matter, to wit, a charge against Sarwan Singh of contributing to juvenile delinquency. Upon hearing the evidence of Mond, the magistrate committed the accused for trial that he "unlawfully did attempt to pervert or defeat the course of justice, contrary to the provisions of subsection (*d*) of section 180 of the Criminal Code." The charge as laid was based on subsection (*a*) of section 180. Mond died before the trial. On the trial the charge was based on subsection (*d*) of section 180 as set out by the magistrate and when the deposition of Mond taken before the magistrate was sought to be introduced in evidence, the objection was raised that it was inadmissible because accused had not had full opportunity to cross-examine Mond as required by section 999 of the Criminal Code, that although the accused was present and his counsel had cross-examined Mond on the preliminary inquiry, the cross-examination was had in respect to the charge as originally laid and not as set out in the warrant of committal. The objection was sustained and the charge dismissed.

Held, on appeal, reversing the decision of LENNOX, Co. J., that the case comes within section 1000 of the Criminal Code, the appeal should be allowed and a new trial ordered.

APPEAL by the Crown from the decision of LENNOX, Co. J., of the 5th of June, 1942, acquitting Banta Singh on a charge of

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attempting to bribe one Jack Clifford Mond to abstain from prosecuting one Sarwan Singh against whom was then pending in the police court of the city of Vancouver the charge that he the said Sarwan Sing at the said city of Vancouver between the 16th day of March and the 22nd day of April, 1942, unlawfully did wilfully commit an act likely to make a child to wit Phyllis Mond, a juvenile delinquent, to wit, by having sexual intercourse with the said Phyllis Mond.

The charge at the preliminary hearing was of bribing Mond not to give evidence as a witness against Sarwan Singh under section 180 (*a*) of the Criminal Code, whereas at the trial before LENNOX, Co. J., it was of bribing not to prosecute under section 180 (*d*). Mond gave evidence at the preliminary hearing but he died before the trial. The application by the Crown to submit as evidence the deposition of Mond given at the preliminary hearing was refused on the ground that it was not the same charge and that counsel for accused, dealing with the charge under section 180 (*a*), did not have a full opportunity of cross-examining on matters relevant to the charge set forth under section 180 (*d*).

The appeal was argued at Victoria on the 8th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Remnant, for appellant: The charge on the preliminary hearing is technically different from that on the trial but not substantially so. The gist of the two is the same: see *Smith's Case* (1817), R. & R. 339; *Reg.* v. *Beeston* (1854), 6 Cox, C.C. 425. A mere technical difference in the charge when the facts and circumstances are the same is not enough to show that he had not full opportunity of cross-examination.

Donaghy, K.C., for respondent: Sections 999 and 1000 of the Criminal Code are a codification of the common law: see Phipson on Evidence, 6th Ed., 436. There must be full opportunity for cross-examination. The law of section 999 must be complied with. There was not, in the legal sense, full opportunity to cross-examine. The charges were based on the same facts.

Remnant, in reply, referred to *Reg.* v. *Williams* (1871), 12 Cox, C.C. 101.

Cur. adv. vult.

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McDONALD, C.J.B.C.: The respondent was charged in a preliminary hearing before the magistrate for that he did unlawfully attempt to dissuade a person, to wit, Jack Clifford Mond, by corrupt means, from giving evidence in a criminal matter, to wit, a charge of contributing to juvenile delinquency, against Sarwan Singh. Having heard the evidence of the said Mond, the magistrate committed the respondent for trial

for that he the said Banta Singh . . . , unlawfully did attempt to pervert or defeat the course of justice, contrary to the provisions of subsection (*d*) of section 180 of the Criminal Code of Canada.

It will be noted that the charge as laid is based on subsection (*a*) of said section 180.

After the preliminary hearing, and before the respondent came before LENNOX, Co. J. for trial, the witness Mond died, and on the trial the respondent was charged

for that he unlawfully did wilfully attempt to defeat the course of justice [see section 180, subsection (*d*)] by unlawfully attempting to bribe one Jack Clifford Mond to abstain from prosecuting one Sarwan Singh, . . .

When it was sought to introduce in evidence the deposition of Mond, taken before the magistrate, it was objected that this evidence was inadmissible by reason of the fact that the respondent had not had full opportunity to cross-examine Mond, as required by section 999 of the Code, the point taken being that although the respondent was present and his counsel had cross-examined Mond, such cross-examination was had in respect of the charge as originally laid and not as set out in the warrant of committal.

As at present advised and with due respect to the learned judge who took the contrary view, it appears to me that the objection is without substance. The leading case on the subject is *Reg.* v. *Beeston* (1854), 6 Cox, C.C. 425, followed by Montague Smith, J. in *Reg.* v. *Williams* (1871), 12 Cox, C.C. 101. In *Beeston's* case the original charge was one of wounding with intent to do grievous bodily harm. After the deposition had been taken the wounded man died as the result of a hammer blow, which blow was the subject of investigation. Afterwards the accused was charged with murder, and it was held on a case reserved that the deposition was admissible. The argument before us is that this case is not in point because the same hammer

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blow which caused the wound later resulted in death and the same evidence applied in both cases; and it is argued that those conditions are not present here. In *Williams's* case the deposition was taken on a charge of obtaining money by false pretences and the indictment was for uttering a forged promissory note, the charges arising out of one and the same transaction and being in fact identical though technically different. The deposition was held to be admissible.

It is strongly pressed by respondent's counsel that the evidence given by Mond and cross-examined upon was entirely irrelevant to the charge as laid before the county judge. It seems to me that this is very unlikely to have happened, but I feel unable to reach any final conclusion on this question without seeing Mond's deposition. As it was excluded by the trial judge and the charge dismissed, it is not before us. I would therefore order a new trial and rule that the trial judge admit the deposition. If it should turn out that matters are as contended for by counsel, it is quite probable that we shall hear of the matter again.

In reaching the above conclusion I am not deciding one way or the other whether section 1000 of the Code covers this case. It may very well be that it does.

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

SLOAN, J.A.: I would allow the appeal and order a new trial. In my opinion the case falls directly within section 1000 of the Code. I am in agreement with the reasons of my brother FISHER, to which I would add a reference to *Reg.* v. *Peacock* (1870), 12 Cox, C.C. 21.

O'HALLORAN, J.A.: I would direct a new trial and allow the appeal accordingly for the reasons given by my brother FISHER.

FISHER, J.A.: The respondent Banta Singh had been charged with an offence under subsection (*a*) of section 180 of the Criminal Code of Canada and, after the evidence was heard in a preliminary hearing before H. S. Wood, Esquire, police magistrate in and for the city of Vancouver, the said Banta Singh was committed for trial

for that he the said Banta Singh at the said city of Vancouver on the 27th day of April, A.D. 1942, unlawfully did attempt to pervert or defeat the course of justice, contrary to the provisions of subsection (*d*) of section 180 of the Criminal Code of Canada.

On the preliminary hearing evidence was given by one J. C. Mond who died before the trial which took place before LENNOX, Co. J. The respondent was tried upon the charge upon which he was committed, namely, that based upon said subsection (*d*) of section 180 and at the trial the prosecution sought to have read as evidence the deposition of Mond. Evidence was given by the official police court reporter that, when the evidence was given on the preliminary hearing, the accused was present and represented by counsel and opportunity was given to cross-examine the witness J. C. Mond. No evidence was introduced to contradict this but the trial judge held that the deposition of Mond should not be admitted in evidence, on the grounds that it was not the same charge and that counsel dealing with the charge under section 180 (*a*) did not have a full opportunity of cross-examining on matters relevant to the charge set forth under section 180 (*d*). In his report the learned trial judge referred to only section 999 of the Criminal Code. One must, however, also have in mind section 1000 referred to by my brother SLOAN during the argument, though in view of the wording of such section it is or must be common ground that the deposition was inadmissible unless the accused or his counsel had a full opportunity of cross-examining the witness.

The issue in this appeal therefore is whether or not in law the facts bring the case within the purview of said sections 999 and 1000, and make the deposition admissible. Some assistance may be obtained from the case of *Reg.* v. *Beeston* (1854), 6 Cox, C.C. 425; 24 L.J. M.C. 5, relied upon by both counsel, but one must have in mind the difference between the provisions of our Criminal Code and the statute dealt with in the *Beeston* case. In the *Beeston* case it is quite apparent that the judges were dealing with the provisions of the statute before them, which provided that when any person is charged with any indictable offence the magistrates are to take the statements "of those who shall know the facts and circumstances of the case," and Jervis, C.J. at p. 430 referring to this said "that is, not the

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particular technical charge, but the facts and circumstances;" and goes on to say (pp. 430-1):

> . . . "then, if upon the trial of the person so accused as first aforesaid," that is, of the person accused of an indictable offence arising out of those circumstances, it be proved that the witness is dead or too ill to travel, the deposition may be given in evidence, if it also be proved that the accused had full opportunity of cross-examination; and we should do great injustice if we were to restrict the operation of that salutary provision. The presiding judge must determine in each case whether the prisoner has had full opportunity of cross-examination; and if the charges were entirely different, he would not decide that there had been that opportunity; but where it is the same case, and only some technical difference in the charge, the accused generally has had full opportunity of cross-examining.

As reported in the Law Journal report at p. 7, Jervis, C.J. said in part:

> The Legislature has provided that the party should be charged with an indictable offence; that it must be spoken to by "persons who shall know the facts and circumstances of the case," not of the particular technical charge; and then it says, if the witnesses be dead or unable to travel, that the deposition may be admissible "on the trial of the person so accused," (the statute does not say, "on his trial for the particular offence,") if the prisoner had full opportunity of cross-examination.

Having in mind the provisions of our said section 1000 I would say without hesitation of our statute, as Jervis, C.J. said in the *Beeston* case of the statute he was dealing with, that the statute does not say "on his trial for the particular offence." It seems to me that under our statute no difficulty really arises on that phase of the matter, but the question still remains whether the facts herein disclose such a full opportunity of cross-examining the witness as to bring the case within the meaning of the aforesaid sections of the Code. This makes it necessary to consider in the present case the course which the inquiry took before the learned magistrate on the preliminary hearing and our sections 668 and 682, subsection 2 which are somewhat different from the provisions of the statute dealt with in the *Beeston* case and read in part as follows:

> 668. When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed.
>
> 682. 2. The evidence of the said witnesses shall be given upon oath and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

As I have already intimated the respondent in the present case had been accused of an indictable offence and the magistrate had proceeded with a preliminary inquiry in the course of which the evidence of one J. C. Mond was admitted and opportunity was given to cross-examine him on his evidence. It does not appear before us whether any objection was taken before the magistrate to the admission of the evidence of Mond but, whether an objection was taken or not, the evidence was admitted and we must assume, in the absence of anything to the contrary, that such evidence was properly admitted by the magistrate under the provisions of the statute providing for the inquiry as aforesaid and that the accused was committed for trial on a charge disclosed by the evidence. In such case my view is that the facts which are not really in dispute disclose such a full opportunity of cross-examining the witness Mond as to bring the case within the meaning of the aforesaid sections and make the deposition admissible. My view is that it is of no avail to argue that it is not good cross-examination to cross-examine on evidence which the cross-examiner considers too irrelevant upon the original charge to make cross-examination necessary. One must have in mind that the magistrate holding the preliminary investigation on one charge had admitted the evidence and could commit on any other one or more charges disclosed by the evidence. See *Rex* v. *Mooney* (1905), 11 Can. C.C. 333. I pause here to say with all deference that if Hall, J. meant to hold otherwise in what he says in *Reg.* v. *Lepine* (1900), 4 Can. C.C. 145, at p. 151, then I disagree, while agreeing with what he says to the effect that the expression "entitled to cross-examine" as used in Criminal Code section 590, subsection 2 (now section 682, subsection 2) implies for the accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of the witness and mark his expression and demeanour while testifying, though in *Smith's Case* (1817), R. & R. 339; 168 E.R. 834 ten of eleven judges would appear to have held against such right when dealing with the question before the passing of the statute referred to in the *Beeston* case.

With all respect to the learned trial judge, therefore, my conclusion on the whole matter is that he erred in holding that the

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deposition of Mond should not be admitted. I have only to add, though it may not be necessary to do so, that I am deciding only the issue before us, and that, as the deposition is not before us, I am expressing no opinion as to the inadmissibility of any part of it on any other ground as that is a question for the trial judge.

I would allow the appeal and direct a new trial.

Appeal allowed; new trial ordered.

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Sept. 14;
Nov. 3.

ALONZO v. BELL *ET AL.*

Negligence—Collision of automobile and bicycle at an intersection—Responsibility for collision—Care to be exercised in approaching an intersection in foggy weather—Right of way.

On the 23rd of September, 1941, at about 8 o'clock in the morning the plaintiff was riding his bicycle southerly on Nanaimo Street in the city of Vancouver. On reaching the intersection of Nanaimo Street and Grandview Highway, there being a stop sign, he stopped, looked to his right and not seeing anything, proceeded to cross the intersection. It was a foggy morning, the visibility being from 50 to 60 feet. The defendant, who was driving a light delivery truck easterly on Grandview Highway at from 15 to 20 miles an hour, saw the plaintiff when about 40 feet away and thought for a moment he was going to stop and let him pass as he was on his left side, then realizing he was not going to stop, he swerved to his right to try to avoid him but the plaintiff continuing on, ran into the rear left side of the truck. On the trial the defendant was found solely responsible for the accident.

Held, on appeal, affirming the decision of MANSON, J. (SLOAN, J.A. dissenting in part and holding both were negligent), that the plaintiff looked before entering the intersection and there was no negligence on his part beginning and continuing from the time the bicycle was set in motion at the stop sign. Before there was any negligence on the plaintiff's part, the defendant was negligent in not stopping or slowing down and in assuming that the plaintiff, who was well into the intersection in front of him, was going to give way for him when he gave no indication of doing so, and he himself was still 40 feet away from the point where he would enter the intersection. It was this negligence that was the cause of the accident.

APPEAL by defendant from the decision of MANSON, J. of the 11th of March, 1942, in an action for damages resulting from

a collision between the defendant's truck and a bicycle ridden by the plaintiff. At about 8 o'clock in the morning of the 23rd of September, 1941, the plaintiff was riding his bicycle southerly on Nanaimo Street in Vancouver. On reaching the intersection with Grandview Highway, where there is a stop sign, he got off his bicycle, looked to his right, did not see anything, then got on and proceeded to cross Grandview Highway. It was a foggy morning, the visibility being about 60 feet. The defendant Bell was driving a light delivery truck easterly on Grandview Highway. As he approached the intersection with Nanaimo Street his speed was from 15 to 20 miles an hour and when about 40 feet from the intersection he saw the plaintiff on his bicycle and thought for a moment he was going to stop as he was on his left side, then he realized he was not going to stop, so he swung to the right but the bicycle collided with the back part of his truck. It was found on the trial that the defendant was guilty of negligence and special damages were assessed at $156.80 and general damages $800.

The appeal was argued at Victoria on the 14th of September, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Tysoe, for appellant: There is a jog in Nanaimo Street at this intersection and the plaintiff in crossing the highway had to take a short turn to his right to get into Nanaimo Street on the other side. He was on the left side of the defendant and he ran into the left side of the truck: see *Gavin* v. *The Kettle Valley Rway. Co.* (1919), 58 S.C.R. 501; *Swadling* v. *Cooper,* [1931] A.C. 1; *McLaughlin* v. *Long,* [1927] 2 D.L.R. 186, at p. 191; *Cornish* v. *Reid and Clunes* (1939), 54 B.C. 137; *Harper* v. *McLean* (1928), 39 B.C. 426; *Swartz* v. *Wills,* [1935] S.C.R. 628; *Haines* v. *Williams. Williams* v. *Haines* (1933), 47 B.C. 69; *Carter* v. *Wilson,* [1937] 3 D.L.R. 92, at p. 93; *Hornby* v. *Paterson* (1929), 41 B.C. 548. Ultimate negligence must be pleaded: see *Wageler* v. *Craig and Charmbury,* [1937] 3 W.W.R. 513. Cross-examination of the plaintiff would have been different if ultimate negligence had been pleaded. In any case there was no ultimate negligence here: see *Neenan* v. *Hosford,* [1920] 2 I.R. 258, at p. 273. Where there

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is a continuing act of negligence on the part of the plaintiff there can be no ultimate negligence. In this case the plaintiff's negligence continued right up to the collision: see *Morris* v. *Hamilton Radial Electric Railway Co.* (1923), 54 O.L.R. 208, at p. 209; *Petroleum Heat & Power Ltd.* v. *British Columbia Electric Ry. Co.* (1932), 46 B.C. 462; *Dew* v. *United British Steamship Co.* (1928), 98 L.J.K.B. 88, at p. 93; *Butterfield* v. *Forrester* (1809), 11 East 60; *The Eurymedon,* [1938] 1 All E.R. 122, at pp. 126 and 131; *Admiralty Commissioners v. S.S. Volute,* [1922] 1 A.C. 129; *Ivey and Owl Cabs* v. *Guernsey Breeders' Dairy Ltd.* (1941), 56 B.C. 342; *W. L. Morgan Fuel Co.* v. *British Columbia Electric Ry. Co. Ltd.* (1930), 42 B.C. 382.

Fraser, K.C., for respondent: The defendant's car was three feet on the north side of the middle line of the road. There is no obligation on the plaintiff to keep on looking to his right: see *Green* v. *Canadian National Railways,* [1932] S.C.R. 689, at p. 697; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155, at p. 1184. The plaintiff looked before he started across and he is excused from looking again: see *Rainey* v. *Kelly,* [1922] 3 W.W.R. 346; *McDermid* v. *Bowen* (1938), 53 B.C. 98, at p. 103; *Swartz* v. *Wills,* [1935] S.C.R. 628, at p. 632; *Luck* v. *Toronto R.W. Co.* (1920), 48 O.L.R. 581; *McMillan* v. *Murray,* [1935] S.C.R. 572; *Litowitz* v. *C.N.R.,* [1934] 3 W.W.R. 520.

Tysoe, in reply.

Cur. adv. vult.

3rd November, 1942.

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

MCQUARRIE, J.A.: This is an appeal from MANSON, J. arising out of a collision between the plaintiff riding a bicycle and the defendant Bell driving a light delivery truck at the intersection of Grandview Highway and Nanaimo Street in the city of Vancouver. The date of the accident was September 23rd, 1941, and the time about 7.45 a.m. It is common ground that there was some fog with a visibility of about 60 feet. The learned trial judge has found that the defendants (appellants)

were entirely responsible for the resulting damages. We must therefore consider whether under the circumstances it is proper for us to reverse him or not. The trial judge finds that the negligence of the defendant Bell contributed to the accident, that he did not have his car under the control that he ought to have had, having regard to the condition that prevailed at the time, and continues as follows:

> Probably that was not his major error. I think that his real error was that he chose to go through the intersection, on the assumption that the plaintiff would make way, at a time when the plaintiff was well into the intersection. It was an error of judgment which amounted to negligence; and I am not to be understood as saying a mere entry into an intersection gives a superior right against a car to right or left.

He then proceeds to find that the plaintiff (respondent) was not guilty of negligence which contributed to the accident. He concludes by finding that the defendant Bell had the last chance to avoid the accident in the following words:

> After all, a driver of a car in a fog must exercise a very great deal of care. He cannot afford to take a chance. He has all the advantages as against a pedestrian or bicyclist. He must approach intersections with great caution, and he should not assume that someone in an intersection is going to give way for him when he is still some 40 feet from the point he enters the intersection.
>
> The wise thing in motor-driving is to assume the other fellow is going to do the wrong thing, and then the accident will not happen, and I think the last chance, to apply the last chance rule, to avoid the accident was that of the defendant Bell.

There is no appeal on the *quantum* of damages. I cannot say that there was no evidence to support the judge's findings and it seems to me that we have only to consider the question of law, whether on those findings the judge was right in holding the defendants wholly responsible for the damages suffered by the plaintiff. Counsel for the defendant cited a number of cases most of which have been considered in this Court on different occasions. I think it is well settled that findings of a jury or a judge alone should not be reversed unless it can be shown that such findings are perverse and clearly wrong. The facts of every case must be considered. My brother O'HALLORAN on the hearing referred to *Ivey and Owl Cabs* v. *Guernsey Breeders' Dairy Ltd.* (1941), 56 B.C. 342, at p. 344, in which he delivered the judgment of the Court, the other members being MCDONALD, J.A. (now C.J.B.C.) and myself, where the judgment of

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LENNOX, J. was reversed. In that case, however, no reasons for judgment were given by the trial judge, and the facts were very different from the facts here. The same (that the facts were different) could be said of *Lauder* v. *Robson* (1940), 55 B.C. 375, also referred to by my brother O'HALLORAN, where the Court consisting of MACDONALD, C.J.B.C., O'HALLORAN, J.A. and myself, MACDONALD, C.J.B.C. dissenting, reversed a judgment of MCDONALD, J. In the case at Bar there are the double findings of fact as to the defendants and plaintiff respectively, and there is evidence which supports those findings. The mere fact of driving a motor-vehicle in a fog does not constitute negligence, provided it is at a speed consistent with the control of the car within the limits of visibility. *McDermid* v. *Bowen* (1938), 53 B.C. 98. The finding of the trial judge that the defendant Bell

> did not have his car under the control that he ought to have had having regard to the condition that prevailed at the time

of course implies that the defendant Bell was driving too fast under the condition that prevailed at the time of the accident.

The driver of a motor-vehicle must exercise proper care at all times: see *Swartz* v. *Wills,* [1935] S.C.R. 628. In that case the decision of the trial judge dismissing the action was restored.

Even a driver who has the right of way must keep a proper look-out: *Cornish* v. *Reid and Clunes* (1939), 54 B.C. 137 (MCDONALD, J.).

It appears that the defendant Bell saw the plaintiff or should have done so when he was at least 40 feet away from the plaintiff who was then in the intersection. If Bell had been driving at a proper speed and had been exercising care he could have avoided the plaintiff. His excuse apparently is that he thought the plaintiff would give way to him. I agree with the trial judge that he was wrong in that assumption. In my opinion the plaintiff was at least just as much entitled to proceed on his way as the defendant Bell, and it was due to the negligence of the said defendant that the accident happened.

I would therefore dismiss the appeal.

SLOAN, J.A.: The learned trial judge found that the respondent's failure to keep a proper look-out "might be negligence on

his part" but was of the opinion it would not "amount to negligence which would contribute to this accident." With deference, I am unable to agree with this conclusion. In my view the evidence discloses circumstances from which it is clear that the failure of the respondent to keep a proper look-out when launching himself into the path of oncoming traffic on Grandview Highway was a very material contributing cause of the resultant collision.

His was a continuing negligence, as was that of the appellant, and in my view the case is one which falls within *Swadling* v. *Cooper* (1930), 100 L.J.K.B. 97.

I would therefore allow the appeal and applying the Contributory Negligence Act, would declare the degree of fault of the appellant to be 60 per cent. and that of the respondent 40 per cent.

O'HALLORAN, J.A.: The accident occurred on a foggy September morning in Vancouver. The visibility did not exceed 60 feet. The appellant testified he saw the respondent cyclist in time to avoid a collision at the street intersection. But despite the fog, he did not take any measures to warn or avoid the cyclist until it was too late, because "I thought he would allow me to go past."

The appellant was driving a delivery truck at a speed admittedly three or four times the speed of the cyclist. He could have avoided the collision by exercising ordinary care and judgment. He was in control of the situation but failed in his duty to avoid the risk of collision.

He is solely responsible in my view at least, because he did not avoid the consequences of the cyclist's lack of care, although he had the present ability to do so: *vide Lauder* v. *Robson* (1940), 55 B.C. 375, at p. 384.

I would dismiss the appeal.

FISHER, J.A.: The plaintiff (respondent) while riding a bicycle south on Nanaimo Street, was injured when he collided with a motor-car while it was being driven east on Grandview Highway about 7.45 a.m. on September 23rd, 1941, by the appellant Bell. The learned trial judge has found sole respon-

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sibility on the part of the defendants (appellants). Counsel for the appellants does not question, or if he does, he cannot in my opinion successfully question the finding of the trial judge that Bell was guilty of negligence. The issue, therefore, is whether by the true interpretation of the evidence Bell was solely responsible for the accident. It may first be noted that the trial judge states (very wisely if I may be permitted to say so):

I give my judgment upon the facts as they arise here, and I refrain from expressing any opinion upon the facts that might arise in another case.

What then are the facts here? I think it will be of some assistance to set out here part of the evidence of each of the said parties.

In his evidence Alonzo says as follows:

Then the stop sign is there, and I got off at the stop sign.

. . . . .

What did you do? I keep looking on both sides, pretty sharp, you know. Then I jump on my bike to go across myself. Then I seen no car coming east or west and I jump on my bike and in the middle of the road I see the car about 10 or 12 feet from me.

Which way was it coming? Coming from the west.

. . . . .

Then when I see the car it was too late for me to go through and I tried to swing east to avoid the collision but he get me right there.

Just a minute. You said "He hit me right there." Where is "there"? I was in the centre of the street when I see the car not far away from me and he was coming pretty good speed so I swung to my left.

I got that. But he hit me.

. . . . .

Were you to the west or east of the centre line when you were hit? A little west of the centre line.

Now I want you to listen to these questions that I ask you and the answers that you gave, and then I want you to tell me if they are correct.

. . . . .

"Do you remember whether you looked to your left or your right first? On both sides.

"Do you remember which way you looked first? On my right first.

"And did you take a good look? Take a good look.

"How far could you see on your right? Maybe 60 feet.

"And was there anything there? No.

"And then you looked to your left then? Yes.

"Did you take a good look to your left? Yes.

"How far could you see to your left? Same distance.

"About 60 feet? Yes.

"And anything there? No.

"Nothing there? No.

"And then was it after you looked to your right and to your left that you got on your bicycle? Yes.

"And then started to pedal across the street? Yes.

"Were you going to cross Grandview Highway and go straight down Nanaimo Street? Go straight on south on Nanaimo.

"And then after you started up on your bicycle did you look on your left or your right again? To my right.

"You looked to your right again? Yes.

"And where were you when you looked to your right the second time? On the middle of the street.

"Right on the centre of Grandview Highway? Yes."

Are those all correct there? Yes.

. . . . .

"Well, then, when you were at the centre of the highway you saw a car that you were in collision with? Yes.

"And how far away from you was it? About 15 feet, no more than that.

"No more than 15 feet? No."

. . . . .

"Well, now, what part of the car did your bicycle come in contact with? The side of the car.

"That is the left side of the car? Yes, at the left side."

In his evidence Bell said as follows:

I was driving east on the Grandview diversion at approximately ten minutes to 8, on the morning of September 23rd, delivering pies for the Olympic Pie Company, and it was quite foggy. In fact, it was very foggy with a visibility of about 50 to 60 feet, and I was travelling about 15 miles an hour, or perhaps between 15 and 20; and as I approached the corner of Nanaimo Street—when I was perhaps within 40 feet of the westerly side of Nanaimo Street, I saw a gentleman on a bicycle heading south on Nanaimo. I thought he would allow me to go past and just a split second later I realized he was not going to stop and I just swung to the right and he collided with the back part of my truck. . . .

Now, you mentioned when you first saw Alonzo you were about 40 feet west of the westerly edge of Nanaimo Street? Yes, sir.

. . . . .

And you said that when you first saw him he was 15 feet north of the travelled portion of the Grandview Highway? Yes.

. . . . .

"Did you see him when he was off his bicycle? No, not at any time.

"When you first saw him where was he? How far into the Granview Highway had he come? Well, I would say he was about 10 feet off the north pavement of Grandview Highway."

. . . . .

Now where did the actual collision take place in relation to Nanaimo and the Grandview Highway? Well, I guess it would be in the centre of the Grandview Highway—a little west of the centre of Nanaimo.

. . . . .

You were into Nanaimo Street on Grandview Highway about 15 feet when the collision took place? Yes, I see.

. . . . .

Now, when you came to the point where the accident was inevitable, you were going between 15 and 20 miles an hour, is that correct? Yes, sir.

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So from the moment you first saw the plaintiff until the moment you realized an accident was inevitable, you did not slow down? No, sir.

Now, in what distance could you have stopped at the speed you were going? I would say about 25 feet.

. . . . .

And you knew he had passed the stop sign there when you first saw him? Yes, he would be beyond the stop sign.

In fact, he had gone from the stop sign to within 10 feet of the northerly side of the highway? Yes.

And he was pedalling along when you saw him? He was in motion.

And you were 40 feet away? Yes.

. . . . .

And you could have stopped then? Well, I could have stopped, yes.

There was nothing the plaintiff did that would indicate to you that he was going to stop or slow down? No, I don't think so.

Did you appreciate that he was right on the northerly portion of the Grandview Highway or just about the—— Just on the asphalt.

. . . . .

. . . anyway the buses could go over that portion of the asphalt? They could.

How fast was the plaintiff proceeding on his bicycle? Oh, about 4 or 5 miles an hour.

On the evidence I have no hesitation in concluding that there was negligence on the part of Bell, as hereinafter set out, at the time he first saw Alonzo and in my view it is essential to determine first whether there was any negligence on the part of the respondent Alonzo at or before that time. On this question it must at once be noted that Alonzo looked before entering the intersection and there was nothing then seen or to be seen. It is not a case where he had seen a motor-car approaching on his right. Though the range of visibility then on account of fog was only 50 or 60 feet it was proper for him to go on as, if the rule were otherwise, traffic would be tied up. He therefore made a reasonable entry upon the crossing of the intersection. In my view it cannot be said that he should have continued to look to the right from the time he entered the intersection though it may be said, as the trial judge in effect said, that there might be negligence on his part if he didn't look again to the right until about the point of impact. In my view the point at which he should look again cannot be exactly determined though one might suggest the place where he would enter on the concrete pavement but in any event such point is closer to where he would enter upon the concrete pavement than was the point where he was

first seen by Bell which as hereinafter pointed out was not far from the point where he had already looked and was from ten to fifteen feet away from where he would enter upon the concrete pavement. In my opinion Alonzo under the circumstances here was wholly excused from omitting to look again at or before the point where he was first seen by Bell and there was no negligence on his part up to that time. Assuming that there was negligence thereafter on the part of Alonzo the trial judge has found that Bell was solely responsible for the accident and if we should ignore this finding and fix sole responsibility on the respondent I am inclined to think as suggested by MACDONALD, C.J.B.C. in *Lauder* v. *Robson* (1940), 55 B.C. 375, at p. 382 that this would be a departure from our proper functions. In any event, however, if I were to enter upon minute calculations as to time and distance and fix the time and place at which Alonzo exercising reasonable care under the circumstances should not only have looked again to his right but also have realized the danger, I would not conclude upon the evidence before us that, notwithstanding Bell's negligence, Alonzo could by the exercise of reasonable care thereafter have avoided the accident. I cannot therefore find that this is a case of ultimate negligence on the part of the respondent. I have also to say that it follows from my finding that there was no negligence on the part of the respondent prior to the negligence of the said appellant that this is not a case of ultimate negligence on the part of the said appellant, as the doctrine of ultimate negligence or "last chance," as it is sometimes called, is predicated on the assumption that one party could by the exercise of reasonable care have avoided the consequences of the other's prior negligence. The doctrine can be applied only where conditions make it possible to conclude that a fair chance was afforded to one party to deal with the emergency created by the negligence of the other party and avoid the accident by the exercise of reasonable care, though in some cases, as in the case of *British Columbia Electric Railway Company, Limited* v. *Loach*, [1916] 1 A.C. 719, the absence of the exercise of reasonable care at the time of the emergency arising through the negligence of the plaintiff may be due to negligence on the part of the defendant anterior in point of time

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but incapacitating him from taking reasonable care to avoid the consequences of the plaintiff's negligence and therefore deemed to be continuing and constituting ultimate negligence making the defendant liable. In the *Loach* case Lord Sumner said in part as follows, at pp. 721-3:

> The verdict [of the jury] though rather curiously expressed, clearly finds Sands guilty of negligence in not looking out to see that the road was clear. . . . There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault.

In *Morris* v. *Hamilton Radial Electric Railway Co.* (1923), 54 O.L.R. 208, at pp. 210-11 Hodgins, J.A. said in part:

> The *Loach* case, as has often been pointed out, proceeds upon the view that before the time of the accident the plaintiff's negligence was over and spent, and that there was thereafter no further act of negligence. It therefore allowed the raising of the issue of ultimate negligence, which, as I understand the case, depended upon the absence of ability or opportunity on the part of the plaintiff to do anything on becoming aware of the danger, and also upon the fact that the defendants had such a chance but failed to make use of it, because of the disability they had imposed upon themselves by the defective brake. And this inability or omission to seize the opportunity, whether due to further negligence at the moment, as the act of turning away from looking ahead (*Neenan* v. *Hosford*, [1920] 2 I.R. 258, 286, *Field* v. *Sarnia Street Railway Co.* (1921), 50 O.L.R. 260), or to the operation of an act of negligence already committed but continuing, which then becomes an immediate and effective cause, is ultimate negligence as described by the Privy Council and in many cases in our own Courts.

In *Green* v. *Canadian National Railways,* [1932] S.C.R. 689, at p. 710 Rinfret, J. said:

> . . . the doctrine of ultimate negligence is predicated on the assumption that the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff (*Tuff* v. *Warman* (1858), 5 C.B. (N.S.) 573, at 585).

Compare also *Hendrie* v. *Grand Trunk R.W. Co.* (1921), 51 O.L.R. 191, at p. 198, where Middleton, J. says:

> The obligation [of the railway servants] is precisely the same as that which arises in an emergency following the plaintiff's negligence, commonly called the question of ultimate negligence.

As I have already indicated the emergency here was not created by the negligence of the plaintiff Alonzo, as at the time the defendant Bell first saw him and was negligent Alonzo was where he was without any negligence on his part. In my view this is not a case where the negligence of one party A had brought about a state of things in which there would have been no damage if the other party B had not been subsequently and

severably negligent, which is the first case put by Viscount Birkenhead, L.C. in his judgment in *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at p. 136, and which Scrutton, L.J. says in *Dew* v. *United British Steamship Co.* (1928), 98 L.J.K.B. 88, at p. 94 is very like the donkey case, apparently referring to *Davies* v. *Mann* (1842), 10 M. & W. 546, he having previously said at pp. 93-4:

> . . . Take a donkey which is hobbled in the middle of the road and cannot move. That means that there is negligence on the part of the owner of the donkey. A stage coach comes along, and the driver sees the donkey, has ample chance of avoiding it, but drives over it. Therefore, the real cause of the accident is that driver's negligence.

With all deference to contrary opinion therefore I have to say that my opinion is that, as the plaintiff here, even if he was negligent, was not firstly negligent, this is not a case for the application of the doctrine of ultimate negligence which is applied where it has been found that, notwithstanding the negligence of the plaintiff the defendant could by the exercise of reasonable care thereafter have avoided the accident.

I come now to deal with the question as to whether this is a case of contributory negligence as submitted by counsel on behalf of the appellants. The defence of contributory negligence means not only that there has been negligence by both parties but that the negligence of each has contributed to the damage. It is or may be argued that the negligence of the parties was contemporaneous or so nearly so as to make it impossible to say that the negligence of one was the sole cause of the accident and make it necessary to say that the accident was the result of the joint or combined negligence of the two. In the present case this argument is supported by the contention that the negligence of each was continuing negligence and that the respondent's "chance" to avoid the accident continued as long as the chance of the appellants continued. This brings me back again to the facts of this case. As I find them this is not a case where the motor-car driver on the right had seen a bicycle-rider stopped at the stop sign or just reaching an intersection where there was a stop sign. It is a case where the motor-car driver had seen the bicyclist in motion in the intersection in front of him with no indication that he was going to stop or slow down. According

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to Bell's evidence he was then 40 feet from where he would enter the intersection and Alonzo had then gone from the stop sign to within 15 feet (as Bell says at first) or 10 feet (as he says later) of the north side of the concrete pavement which means that he had gone at least 17 feet and perhaps 22 feet from the stop sign (see plan, Exhibit 3). Alonzo was therefore substantially on the intersection first and reasonably so, as I have already found. The right of way which Bell would otherwise have had was therefore displaced. Bell could then have stopped in 25 feet and thereby have avoided the accident. Under the circumstances then existing I think he should have stopped as he was going at such a speed that if he continued he would enter the danger zone for himself and the bicyclist, as he did according to his own evidence, in a "split second." Bell did not stop or slow down and the collision occurred. Giving my judgment upon the facts of this particular case I have no hesitation in coming to the conclusion that Bell was solely responsible for the accident.

In *British Columbia Electric Railway Company, Limited* v. *Loach, supra,* at p. 727 Lord Sumner said:

> The object of the inquiry is to fix upon some wrong-doer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent.

As I have already intimated the present case is not a case where at the moment when the defendant was negligent the plaintiff was where he was through negligence on his own part. It is not a case where the plaintiff had entered upon a railway track without looking, in which case it might be said here of the plaintiff and his bicycle as was said by Hodgins, J.A. of the plaintiff and his motor-car in *Morris* v. *Hamilton Radial Electric Railway, supra,* at p. 212 that

> the negligence was continuing from the time the motor-car was set in motion until it got to the track, and it brought the plaintiff there just as the electric car arrived, and the crash occurred at once,

or by Ferguson, J.A. in the same case at p. 213:

> It is clear that the plaintiff's "chances" continued down to the moment he got on the track, and it is not suggested that the defendants' chance continued after that moment, . . .

In the present case the plaintiff Alonzo looked before entering the intersection and there was no negligence on his part beginning and continuing from the time the bicycle was set in motion

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at the stop sign. Before there was any negligence on Alonzo's part Bell was negligent in not stopping or slowing down and in assuming that some one who was well into the intersection in front of him was going to give way for him when he gave no indication of doing so and he himself was still 40 feet from the point where he would enter the intersection. It was this negligence that was the cause of the accident and referring again to what Lord Sumner said in the *Loach* case, *supra,* I may say that in this case I find it better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification. Bell was negligent and his negligence or fault as aforesaid caused the injury to Alonzo. If the latter was negligent his act of negligence was at such a time and of such a character that it cannot be said that it contributed to the accident. A clear line can be drawn and Bell cannot invoke the negligence of Alonzo, if any, as being part of the cause of the collision so as to make it a case of contribution.

I would dismiss the appeal.

Appeal dismissed, Sloan, J.A. dissenting in part.

Solicitors for appellants: *Craig & Tysoe.*
Solicitors for respondent: *Alexander & Fraser.*

FALLESON v. SPRUCE CREEK MINING COMPANY LIMITED.

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Sept. 17, 18;
Nov. 3.

Mining—Placer—Lay agreement—Breach of conditions—Right of re-entry by owner—Whether lay agreement a lease—Effect of breach of conditions—Equitable power to relieve against forfeitures.

The defendant's predecessor in title entered into a "lay" agreement with the plaintiff giving him the right to work certain placer claims and the plaintiff agreed to pay the owner twenty per cent. of the gold recovered. There are no words of demise in the agreement, no term is fixed, no rent payable under that name, nor provision for penalty or forfeiture. After the agreement had been in force for three years, the defendant re-entered into possession for breach of the agreement. The plaintiff brought

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action for a declaration that he was in lawful possession of the ground under the lay agreement and for an injunction restraining the defendant from interfering with his mining operations. It was held on the trial that the plaintiff had failed to work the property in a miner-like manner as required under the agreement, that the defendant was not bound to bring an action for possession but was entitled to cancel the agreement and enter into possession. The action was dismissed and the defendant was granted an injunction restraining the plaintiff from trying to retake possession.

Held, on appeal, affirming the decision of ELLIS, J., that the findings of the trial judge were justified on the evidence and the appeal should be dismissed.

Per MCDONALD, C.J.B.C.: The "lay" agreement is not a lease, as it does not give the appellant an exclusive right to possession which is essential for a lease. Even if this document were a lease, the appellant would fail. A lessor cannot re-enter for mere breach of covenant but he can always re-enter for breach of condition. In general a term that the parties mean to make the foundation of an agreement creates a condition. In an agreement where there is no time limit or definite rental, it is of the utmost importance to the owner that the claims should be continuously worked and that the rate of working be maintained. This is an inherent duty of a layman and the observance of it is a condition in any "lay" agreement which entitles the owner to re-enter on the breach of it. The respondent was not enforcing any contractual remedy; it was merely following those remedies given by the general law for breaches going to the root of the contract. It follows that the equitable jurisdiction has no application.

APPEAL by plaintiff from the decision of ELLIS, J., of the 8th of April, 1942, in an action for a declaration that he was entitled under a lay agreement to certain mining property and for an injunction restraining the defendant from interfering with the plaintiff's possession thereof. By written agreement of the 11th of May, 1938, the predecessor in title of the defendant granted to the plaintiff a lease or lay agreement over that portion of their group of placer-mining claims on Spruce Creek in the Atlin District lying downstream from a straight line drawn at right angles across the creek at the No. 4 shaft of the mining company to hold the ground until the plaintiff should have mined and recovered the gold therein and the said agreement was registered in the mining recorder's office at Atlin. The ground comprised in the agreement had been extensively worked prior thereto by the defendant's predecessors in title who had employed the plaintiff as an ordinary miner for several years and he was familiar with the workings, drains, etc., which

had been carried on and constructed during that time. The plaintiff's rights under the agreement were subject to certain conditions contained in the agreement, namely, (1) to work the property in a miner-like manner, (2) to pay the defendant twenty per cent. of the gold recovered, (3) to provide at his own cost all plant equipment and labour for working the ground (except a Diesel engine, two jack-head pumps, three mine cars and 50 lengths of rail to be furnished by the defendant, (4) to return to the defendant the above material in good order, (5) to work the said ground continuously and with diligence in so far as the ground will permit with no less than four men. In the agreement the plaintiff covenanted that he would not encumber the property and that he would not assign or sublet without the consent of the defendant and the defendant agreed to furnish the plaintiff with the material above mentioned. The defendant claimed that the plaintiff failed to repair and clean out and deepen the bed-rock drain and other drains on the ground, which was necessary in the working of the ground in a miner-like manner. He failed to provide the necessary plant equipment and labour for the proper working of the ground and he failed to work the ground continuously and with diligence. The defendant further claims that the written agreement did not contain the whole of the agreement between the parties and that it was verbally agreed that the plaintiff would clean out an old drain known as the Morse drain which would have relieved the plaintiff of water that hampered him in the proper working of the property.

The appeal was argued at Victoria on the 17th and 18th of September, 1942, before McDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

A. M. Whiteside, K.C., for appellant: The agreement in express terms gives the plaintiff the absolute right and privilege to enter upon and to possess the ground in question: see *Beaton* v. *Schulz and Colpe* (1934), 49 B.C. 1. Where the lessor's whole interest is granted, it operates as an assignment: see *Pluck* v. *Digges* (1831), 5 Bli. (N.S.) 31; *Lewis* v. *Baker,* [1905] 1 Ch. 46; *Parmenter* v. *Webber* (1818), 8 Taunt. 593. If the agreement is in law an assignment of the lease, there is no implied right of re-entry but the assignee may only be held in

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damages for breach of covenant. There was no proviso for re-entry in this agreement. The defendant alleged there was a collateral, oral agreement on the part of the plaintiff to open the Morse drain and it should be regarded as a condition the breach whereof would justify re-entry even though the principal agreement contains no proviso for re-entry. The learned trial judge held that there was no such collateral, verbal agreement between the parties. In the notice of cancellation, the defendant said the reason for cancellation was that the plaintiff had not fulfilled the covenants of the agreement and the learned judge held that there was a breach of a condition. There was no express condition, and the re-entry was not made on the strength of a failure on the part of the plaintiff in the fulfilment of a condition. The penalty for breach of a covenant in the lease is in damages: see *Shaw* v. *Coffin* (1863), 14 C.B. (N.S.) 372; *Crawley* v. *Price* (1875), L.R. 10 Q.B. 302; *Doe dem. Willson* v. *Phillips* (1824), 2 Bing. 13; *Wenzoski* v. *Klos,* [1940] 2 D.L.R. 195; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Poussard* v. *Spiers* (1876), 1 Q.B.D. 410; *Morton and Symonds* v. *Nichols* (1906), 12 B.C. 485. The defendant did not set up any implied condition in his defence but only a breach of covenants, which does not entitle him to re-entry. Assuming there was a condition broken, there should be relief against forfeiture as applied for on the trial in view of the evidence: see *Mattern* v. *Welch* (1929), 42 B.C. 111; Woodfall on Landlord and Tenant, 19th Ed., 384; *Horsey Estate, Limited* v. *Steiger,* [1898] 2 Q.B. 259; *Barrow* v. *Isaacs & Son,* [1891] 1 Q.B. 417. The defendant, without permission, dumped tailings from shaft No. 4 on the plaintiff's ground by means of a flume and the excessive amount of pumping to be done in No. 5 shaft was the result of the defendant dumping the tailings in such a manner as to impede the flow of water in the creek causing an overflow.

Donaghy, K.C. (*Gowan,* with him), for respondent: A condition may be express or implied and no precise form of words is necessary to constitute a condition: see Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 248, par. 280; *Simpson* v. *Tilterell* (1591), 1 Cro. Eliz. 242; *Sheldon* v. *Sheldon* (1863), 22

U.C.Q.B. 621; *Millette* v. *Sabourin* (1886), 12 Ont. 248; *Halpin* v. *Fowler* (1907), 12 B.C. 447, at p. 453. A lessor may re-enter for breach of a condition in a lease without any notice or demand: see Woodfall on Landlord and Tenant, 24th Ed., 914; *Doe dem. Henniker* v. *Watt* (1828), 8 B. & C. 308. The breach of a condition or undertaking that goes to the root of a contract justifies cancellation: see *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Wenzoski* v. *Klos,* [1940] 2 D.L.R. 195; *Poussard* v. *Spiers* (1876), 1 Q.B.D. 410. On the definition of a lay agreement see *Clazy* v. *Myers* (1905), 2 W.L.R. 289, at p. 292. The lay agreement in this case was not a lease because (a) it is nothing more than a contract to win gold for a percentage of the returns and gives no exclusive possession of the property, (b) there is no definite time limit to the length of the term. As to the first, it is of the essence of a lease that the lessee acquire exclusive possession: see *Naegele* v. *Oke* (1916), 37 O.L.R. 61; *Furnishers Ltd.* v. *Booth,* [1933] 1 D.L.R. 54; *Halpin* v. *Fowler* (1907), 12 B.C. 447. The case of *Beaton* v. *Schulz and Colpe* (1934), 49 B.C. 1, is not an authority for the proposition that every lay agreement is a lease. There is no definite time limit here. The term consists of such time as is necessary to work the ground out. The time limit is too indefinite and therefore it is not a lease: see *Haven* v. *Hughes* (1900), 27 A.R. 1; *The Trust and Loan Co.* v. *Lawrason* (1882), 10 S.C.R. 679; Halsbury's Laws of England, 2nd Ed., Vol. 20, pp. 5 and 6.

Whiteside, in reply.

Cur. adv. vult.

3rd November, 1942.

MCDONALD, C.J.B.C.: This case turns on the meaning and effect of a "lay" agreement covering placer claims and leases near Atlin.

By this agreement respondent's predecessors in title gave the appellant the right to work the placer properties, and appellant agreed to pay over one-fifth of all gold won. After this agreement had been in force some three years, respondent, the assignee of the original owner, re-entered for breach of the agreement. The judgment below has held that respondent was justified in

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re-entering, and has granted an injunction to prevent appellant from trying to retake possession. This judgment is based on findings that appellant did not work the properties with the number of men he agreed to employ, that he did not properly use equipment supplied to him by respondent, that he did not take adequate steps to replace outworn equipment, and thus failed to work the property in a "miner-like" manner, as the agreement required.

Appellant has asked us to reverse these findings. But after reading the voluminous record, I am satisfied that the weight of evidence is altogether against the appellant, and I reach the same conclusion on the facts as the learned judge below.

Appellant, however, contends that even on these findings the judgment against him is not warranted, since the lay agreement constituted a lease which could not be forfeited for mere breach of covenant, there being no provision for forfeiture or re-entry in the document.

That proposition of law seems to be sound. But we have to be satisfied, first, that this is a lease, secondly that the breach was a mere breach of covenant.

The document in question was apparently not drawn by a solicitor, though better drawn than most of non-professional drafting. It is noticeable that there are no words of demise, and throughout the draftsman seems to have carefully avoided any language suggesting a lease. The only exception is a covenant at the end that appellant will not "sub-let"; but this does not seem to me very weighty. No term is fixed, nor is any rent payable under that name. On the whole I am inclined to think that this is not a lease. I do not read it as giving appellant an exclusive right to possession, which is essential for a lease. The nature of these lay agreements has been considered to a certain extent by the Courts, though authority is much scarcer than one would expect, even in the United States, where one might well have hoped to find an abundance. In *Clazy* v. *Myers* (1905), 2 W.L.R. 289, *Lynch* v. *Seymour* (1888), 15 S.C.R. 341 and *Beaton* v. *Schulz and Colpe* (1934), 49 B.C. 1, lay agreements were held to be leases, but there the wording of the agreements was far stronger in favour of that construction than

it is here. In *Lynch* v. *Seymour, supra,* the Court of Appeal for Ontario and the Supreme Court of Canada divided evenly as to whether the document there in question was a lease, even though it called the parties "lessor" and "lessee," used words of demise, and fixed a definite term. In *Brown* v. *Spruce Creek Power Co.* (1905), 11 B.C. 243 it was held that the holder of a lay agreement was a lessee within the meaning of an Act allowing lessees to apply for water records; but the report does not give the wording of the contract. On the other hand, in *Halpin* v. *Fowler* (1907), 12 B.C. 447, the Full Court held that a contract that read much more like a lease than the one here was not a lease, but merely gave an interest coupled with a licence. I have a strong impression that that is all we have here.

However, even if this document were a lease, I think the appellant would still fail. Though, without an express term in the lease, a lessor cannot re-enter for mere breach of covenant, he can always re-enter for breach of condition. It is not always easy to say what is a condition and what not, where the document uses no labels. But in general, a term that the parties mean to make the foundation of an agreement, creates a condition. Here it may be noted that the agreement twice indicates, once on the first page and again on the last page, that it contains conditions, though unfortunately it does not identify them.

In an agreement of this kind, where no time limit is fixed, and where there is no definite rental, it is of the utmost importance to the owner of the claims that they should be continuously worked and also that the rate of working should be maintained. That would seem to be quite fundamental, as is pointed out in *Eastern Kentucky Mineral & T. Co.* v. *Swann-Day L. Co.* (1912), 146 S.W. 438, an American case which reaches the same conclusion as I do. Moreover in *Brown* v. *Spruce Creek Power Co., supra,* at p. 256, MARTIN, J., giving judgment of the Full Court, and defining the position of a "layman" generally, says this:

> . . . he is bound to work the claim continuously in a miner-like manner during the mining season.

If this is an inherent duty of a layman, it seems to me clear that observance of it is a condition in any lay agreement that does not exclude such duty, and that the owner is entitled to re-enter for breach of it, without any express clause to that effect.

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If this agreement is not a lease, the position seems clearer still. In general, a contract may be cancelled for breach, and the fundamental quality of the breach here makes it clear that the exceptions introduced by *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 do not help the appellant.

However, the appellant also argues that even if respondent acted within its legal rights in re-entering, the Court should still give the appellant relief, under its power to relieve against penalties and forfeitures.

I think it is impossible to say that there was any penalty or forfeiture here. The equitable jurisdiction gave relief against oppressive contracts, that is contracts that gave harsher remedies for breach than would ordinarily be the result of those breaches. Here, however, the respondent was not enforcing any contractual remedy; it was merely following those remedies given by the general law for breaches going to the root of a contract. It follows then that the equitable jurisdiction invoked (recognized by our Laws Declaratory Act, R.S.B.C. 1936, Cap. 148, Sec. 2 (14) and (15)) has no application, and gives us no ground for interference.

I would dismiss the appeal.

SLOAN, J.A.: In my opinion the learned trial judge reached the right conclusion and I would dismiss the appeal.

O'HALLORAN, J.A.: I am in such substantial agreement with the reasons given by the learned trial judge in support of the judgment dismissing the action, that it is unnecessary for me to add anything. I would dismiss the appeal accordingly.

Appeal dismissed.

Solicitor for appellant: *A. M. Whiteside.*
Solicitors for respondent: *Hancox & Gowan.*

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Lunacy—Person of unsound mind not so found—Person "lawfully detained" —Order appointing quasi-committee of estate—Expiry of period of detention—Release from mental home—Application to revest estate in applicant—Lunacy Rule 33.

On the 8th of January, 1936, Mrs. Mann was committed to the mental hospital at Essondale as a person of unsound mind not so found. On the 8th of February following, an order was made appointing The Toronto General Trusts Corporation *quasi*-committee of her estate. Two weeks after entering the Essondale Hospital, she was removed to the Hollywood Sanitarium at New Westminster and about one year later she was taken to a sanitarium in Guelph, Ontario, where she remained until the 23rd of December, 1937, when she was released. Shortly after she went to Toronto where she occupies an apartment of her own and has since lived there without restraint. Her estate is valued at about $200,000, and in May, 1939, an order was made that the *quasi*-committee pay her $500 per month. On the 12th of July, 1941, she applied for an order that The Toronto General Trusts Corporation be discharged of and from its duty as *quasi*-committee of her estate and for an order revesting the estate in her. The application was dismissed.

Held, on appeal, affirming the order of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), that when the appellant's detention has ceased, she is not entitled to have the order discharged as of right. An order is needed to discharge it, which the Court will not make unless satisfied that the person in question is no longer subject to the delusions that led to the detention. Although the evidence discloses that the appellant has greatly improved in all respects, the Court is not satisfied that she has the steady capacity to manage her property and rule 33 of the Lunacy Rules is in accord with this conclusion.

APPEAL by Mrs. Mann from the order of SIDNEY SMITH, J. dismissing her application under the Lunacy Act to restore to her, her estate and to discharge The Toronto General Trusts Corporation from its duties as committee in lunacy. Mrs. Mann is the wife of Alexander Robert Mann of Vancouver. She has two daughters and an adopted son. On the 8th of January, 1936, at the instance of her husband she was committed under the Mental Hospitals Act, R.S.B.C. 1936, Cap. 172, to the mental hospital at Essondale. After about two weeks she was removed to the Hollywood Sanitarium at New Westminster where she remained until early in 1937, when she was transferred to the Homewood Sanitarium at Guelph, Ontario. She remained there

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until the 23rd of December, 1937, when she was released on probation and after being at the General Hospital in Owen Sound for ten days, she went to Toronto where she has since lived without restraint and occupies an apartment of her own. She has an estate of nearly $200,000 from which there is an annual revenue of about $9,500. In May, 1939, MURPHY, J. made an order that the *quasi*-committee pay her a fixed sum of $500 per month.

The appeal was argued at Victoria on the 9th and 10th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Bull, K.C., for appellant: After being in mental hospitals for two years, Mrs. Mann was released and she has been living by herself without restraint for nearly five years in Toronto. Under the laws of Ontario and British Columbia she is not a lunatic as she is no longer detained. Section 27 of the Lunacy Act, R.S.B.C. 1936, Cap. 162, defining the powers of the Court to administer the affairs of lunatics is limited to persons who are lunatics as defined by the Act. Not being a lunatic, she is entitled to have her estate restored to her. As to the case of *In re B. A. S.*, [1898] 2 Ch. 392, the circumstances surrounding this case are entirely different and is not a binding authority in this case. There is a lapse in England; under our law there is no lapse: see *Robins* v. *National Trust Co.*, [1927] A.C. 515; *City of London* v. *Holeproof Hosiery Co. of Canada Ltd.*, [1933] S.C.R. 349. Once it is shown she is no longer a lunatic within the meaning of the Act, the order restoring her estate should have gone *ex debito*: see *In re Watkins*, [1896] 2 Ch. 336. If it is open to Mr. Mann to contest this application, the *onus* being on him to establish that she is incapable of managing her own affairs see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 544, par. 614. If the *onus* is on Mrs. Mann, this *onus* by the affidavits in support is amply and completely satisfied. They claim she is suffering from paranoia, that it is an incurable disease and she is therefore incapable of managing her affairs. The only question is whether she is a lunatic within the meaning of the Act and whether she is capable of looking after her own affairs. She was released in Guelph. This is a public Act and it

is presumed it was done properly: see *McMillan* v. *Guest (Inspector of Taxes)* (1942), 111 L.J.K.B. 398.

Bruce Robertson, for respondent: The order appointing the *quasi*-committee remains in force, although she is no longer detained. She must show she has made a complete recovery. Our Lunacy Act is substantially the same as the English Act: see *Trimble* v. *Hill* (1879), 5 App. Cas. 342; Craies's Statute Law, 4th Ed., 305 and 307. *In re B. A. S.,* [1898] 2 Ch. 392, applies and the fact that Mrs. Mann is no longer detained does not of itself entitle her to a discharge of the *quasi*-committee. She was suffering from paraonia and she had delusions as to her husband's and children's conduct. She has improved but she is not cured. It is not in the best interests of Mrs. Mann that the control of the estate be restored to her: see *In re Cathcart,* [1893] 1 Ch. 466, at p. 471; *Re Robinson* (1910), 1 O.W.N. 893. Insanity once established it is presumed to continue: see *Harper* v. *Cameron* (1893), 2 B.C. 365, at p. 406; Halsbury's Laws of England, 2nd Ed., Vol. 21, p. 304, par. 523. The order appointing a committee remains unaffected by the fact that she is no longer detained. She must satisfy the Court she has made a complete recovery. She has not recovered and the prospects of her doing so are remote, if they exist at all. If the Court proceeds to consider the advantage and disadvantage of discharging the committee, it must bear in mind not only the interests of Mrs. Mann but also the interests of the community and of her next-of-kin.

Bull, K.C., replied.

Cur. adv. vult.

28th September, 1942.

MCDONALD, C.J.B.C.: This appeal is from an order of SIDNEY SMITH, J. refusing an application to discharge the *quasi*-committee of the appellant's property, which was appointed by order of FISHER, J. under the Lunacy Act, dated 8th February, 1936. The appellant thus asks for an order that would give her full control of her property.

The evidence shows that the appellant Mrs. Mann was committed to the mental hospital at Essondale in 1936 for a very short time, then was removed to the Hollywood Sanitarium at

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New Westminster for approximately a year, after which she was in a sanitarium in Guelph, Ontario, for nearly a year, but after a few days spent in a hospital in Ontario, has since been living in Toronto with friends or in her own apartment. She has been receiving $500 a month from the income of her property for several years.

Appellant's counsel has argued that she is entitled to the order sought (1) as a matter of right, (2) in the exercise of the Court's sound discretion.

The order of FISHER, J. was made under section 27 of the Lunacy Act. This section in terms applies to "lunatics," and appellant's counsel argues that she was treated as a lunatic because she was then under detention; that this detention having ceased, she became entitled, *ipso facto,* to have the *quasi*-committee discharged, and management of her property restored as of right. The weakness in this argument is that "lunatic" as defined by section 2 of our Act includes not only every person lawfully detained as a lunatic (subsection (*c*)), but also, by subsection (*d*) includes

> Every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved, to the satisfaction of the Judge in lunacy, by affidavit or otherwise, that such person is, through mental infirmity . . , incapable of managing his affairs.

Actually FISHER, J.'s order recited:

> And it appearing that the said Jane Quinn Mann is a person lawfully detained as a lunatic though not so found by inquisition, and it having been proved to the satisfaction of the [trial] judge that she is through mental infirmity arising from disease incapable of managing her affairs, . . .

Appellant's counsel argued in effect that we must ignore the latter part of this recital, and that since the appellant was detained at the time, that alone must be deemed the basis of the order. I cannot follow this reasoning. I can see no reason whatever why, if more than one ground exists for making an order, it should not be based on all of them. If one ground has ceased to exist, that is no reason why the order should lapse. The evidence that was before FISHER, J. is not before us, but in any case we could not now examine what findings it justified.

I cannot, therefore, accept the argument that because the appellant's detention has ceased, the appellant is entitled to have the order discharged as of right.

Even if the detention had been the sole basis of FISHER, J.'s order, I think the argument would still be wrong and in the teeth of the English Court of Appeal's decision in *In re B. A. S.*, [1898] 2 Ch. 392, which held that an order based on detention did not necessarily come to an end when the reception order expired but that an order was needed to discharge it, which the Court would not make unless satisfied that the person in question was no longer subject to the delusions that led to detention. Appellant's counsel sought to distinguish this decision but I do not think he succeeded.

He next argued that even if continuance of incapacity to manage affairs prevented the discharge of the order, the *onus* of proving incapacity lay on those who alleged it. This view, I think, is negatived by *In re B. A. S., supra,* and I think it is against common sense. I do not think the term *"onus"* applies here at all. Though the husband opposed the discharge of the *quasi*-committee, this is really not a *lis inter partes;* the Court would equally be concerned to protect the appellant's property if no one appeared to oppose her, and would equally have to be "satisfied" that she was competent to manage her property. Lunatics, or persons whose sanity is under any question, are in a sense wards of Court, and in a position somewhat analogous to infants. The Court cannot treat them as ordinary litigants but often has to protect them against themselves.

Appellant's counsel next argued that assuming she had to satisfy the Court of her capacity, her evidence established this.

A good deal of evidence was before SIDNEY SMITH, J. in the form of affidavits, mostly by neurologists and psychiatrists, and cross-examinations thereon. This evidence was conflicting, and some point was made of the fact that the affidavits for the appellant were based on later examinations than those for the husband. This was almost necessarily so, since appellant is now in Ontario, and it was difficult for anyone but herself to obtain evidence based on recent examinations. Even so, Dr. Farrar's evidence, which was against the appellant, was based on examinations as late as 1940 as well as earlier ones. However, even on the evidence adduced by the appellant herself, I am not satisfied that SIDNEY SMITH, J. was wrong; indeed, if I were to decide the

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case *de novo* I think I should have reached the same conclusion. Many factors enter in, and I do not propose to analyze them. The appellant is undoubtedly greatly improved in all respects, and in most respects normal; certainly she is not a lunatic in the popular sense. I am not, however, satisfied that she has the steady capacity to manage her property.

Though, in view of the above decision, it is not of great importance, I should say as at present advised, that rule 33 of the Lunacy Rules is in accord with the conclusions I have reached.

I would dismiss the appeal.

MCQUARRIE, J.A.: I agree that the appeal should be dismissed. In my opinion it has not been proved by the appellant that she has entirely recovered from the condition which justified the appointment of the *quasi*-committee. She has been able to manage her own affairs in the East since residing in Toronto where she has had an income sufficient to keep her in comfortable circumstances. I am afraid, however, if the whole estate were returned to her the responsibility would be too great for her and would be disastrous to her and to her property. Then there would always be the chance that she would return to Vancouver and have the opportunity to ask certain explanations from her husband which she seems to have in mind. In that event it might mean a recurrence of her trouble. In that connection it is only necessary to refer to the medical evidence adduced on her behalf. Although there is a conflict of medical testimony I think it is perfectly clear that The Toronto General Trusts Corporation should not be discharged as the *quasi*-committee of the estate of the said Jane Quinn Mann. I think, therefore, that the judgment appealed from should be affirmed.

SLOAN, J.A.: There was ample evidence adduced to support the finding of the learned judge below. I cannot say he reached a wrong conclusion. It follows I would dismiss the appeal.

O'HALLORAN, J.A.: I do not think it is in harmony with our system of jurisprudence that a person should be adjudged mentally incapable of managing his affairs unless the evidence

is conclusive in that respect. That is a rule of reason dictated by considerations affecting the liberty of the person, stigma on the name of the subject and his children, as well as the general good of society. Such considerations are to be regarded as implicit when the Courts are asked to impose or continue protective or corrective disciplinary measures. In particular if in such a case there is a divergence of medical opinion regarding the progressive development of a real or hypothetical mental ailment, then the subject is manifestly entitled to the benefit of that cleavage of opinion, and any uncertainty as to his sanity should be resolved in his favour.

In this case, the Court order vesting the appellant's estate in a committee was made in January, 1936, on the ground she was then under detention in a mental hospital. I have taken pains to examine the file of material in support of that order. There was no evidence whatever of mismanagement of her $200,000 estate, although she had been in the sole control and management of it for nearly six years prior to her detention. It must be accepted, therefore that the declaratory recital in that order reading:

> and it having been proved to the satisfaction of the said Judge that she is through mental infirmity arising from disease incapable of managing her affairs,

was founded entirely upon the fact that she was then detained as a lunatic, although not so found by inquisition.

As her detention was the sole ground for devesting her of the management of her affairs, it should follow that when that detention came to an end in January, 1938, the reasons for the devesting order came to an end also. In the absence of new facts to support its continuance, the devesting order ceases to have any reason to support its existence. That is not to say it would lapse automatically. But it is to say that no Court acting judicially could properly refuse to discharge it in the absence of new evidence of the subject's mental incapacity. New facts of that nature were quite evidently brought to the Court's attention in *In re B. A. S.*, 67 L.J. Ch. 453; [1898] 2 Ch. 392. That case is inadequately reported, and I am unable to find it since referred to in any reported decision. But in the Law Report thereof it appears at p. 393 that after argument:

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The Court then adjourned with the counsel engaged in order to consider a report which was not made public, and on returning delivered judgment.

In its distinguishing and essential circumstances that decision has no application to the case at Bar and cannot be accepted as an authority against the appellant. But the case for the appellant does not rest there. Four and a half years elapsed after her release from the mental home before she applied to the Court to revest her estate in her. In that period she was not under detention or restraint, and had entire control of a monthly income of $500. She maintains an apartment in Toronto, she drives a motor-car, and the record indicates she lives a normal life. Four well-known physicians examined her in Toronto during that period and not one of them suggests the contrary. In fact Dr. Clarence B. Farrar the only one of the four who doubts the advisability of revesting her estate in her, testified there is no occasion to consider hospital or sanitarium care in her case and that she should be permitted to carry on independently as at present. So stated, it seems to me the facts present a clear case in support of the revesting order.

Not only was no evidence of mental incapacity advanced against the appellant as must have plainly occurred in *In re B. A. S., supra,* but compelling, and I would say conclusive evidence based on trained personal observation is presented, that her mentality and personality are normal for a woman of her age and position. It must be obvious that her condition when the revesting order was refused in June, 1942, was vastly different from what it was when the vesting order was made in January, 1936. In 1936 she was detained as a lunatic, while in 1942 she had been free from any necessity for restraint for four and a half years with every indication of reasonable recovery from the mental ailment which had originally caused her detention. I must therefore hold that the learned judge's finding that the conditions had not so changed as to justify the revesting order is a vital misdirection fatal to the order appealed from.

But counsel for the 80-year-old respondent husband submitted that if given control of her estate, the appellant is apt to take legal proceedings against him and the two physicians who certified her to be of unsound mind in January, 1936. That possibility has been conjured up as an indication of the likely

recurrence of her mental ailment. It is regarded by the New Westminster physicians who support the husband (but none of whom has seen her since early in February, 1937) as a fixation characteristic of the mental ailment from which they maintain she still suffers. They quite evidently do not regard their lack of observation of the appellant during the four and a half years since her release from the mental home as placing any obstacle in their way to pass a final and rigid opinion upon her present condition and its future development.

Their reasoning analyzes itself thus: When we saw her in 1936-7 she was suffering from a defined mental ailment; that ailment is incurable, and for that reason alone she is mentally incapable of managing her affairs, no matter how shrewd or able a business woman she may now appear to be; for it is a characteristic of that mental disease that she will attempt to punish her husband as soon as she is in a position to do so. None of the Toronto physicians permits himself to be carried to that extreme. It is obvious that if they had subscribed to the rigid New Westminster theory they could not justify their opinions that she is now capable of managing her own affairs. Even Dr. Clarence B. Farrar, who had first examined her in New Westminster in 1936, and to whom I have referred before, testified regarding his subsequent observation of her in Toronto:

> One would not be justified in saying categorically that she would take unsuitable action or get into difficulty if she had control of her business affairs, . . .

But Dr. Farrar then takes a middle course and says the discharge of the committee "would involve risks which cannot be left out of account." No ground is suggested for this general observation except that the appellant is a "very determined woman," and if she obtained control of her estate, she "might take some active steps" in the direction of proceedings against her husband, which would again lead her into difficulty. That is not expressed as a scientific opinion. It frankly enters the realms of speculation even if tempered largely by the balances of expediency. He does not specifically adopt or reject what I have referred to as the New Westminster theory. Moreover his expression of view is not supported by present tangible circumstances which point to probability as distinct from possibility.

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But a Court cannot reach a conclusion in matters pertaining to the future because certain things might possibly happen. It reaches that conclusion because the evidence is such that in the ordinary experience of mankind those things may reasonably be expected to happen.

The other three Toronto physicians Dr. Goldwin W. Howland, Dr. E. F. Brooks, and Dr. Herbert H. Hyland were not impressed with the "risks" to which Dr. Farrar referred, and gave their separate opinions in favour of the appellant resuming control of her estate. Dr. Farrar's doubts are of too speculative a character in my view at least, to be accepted either as factual evidence or scientific opinion. The opinions supporting the New Westminster theory are premised on certain strongly held views concerning the type of mental ailment from which the appellant suffered when she was under observation prior to her going to Toronto five years ago. Those views were postulated as scientific facts finally established and universally accepted, instead of being recognized for what they are, *viz.*, working hypotheses which have not yet reached (and perhaps may never reach) the *status* of scientific facts.

That this is demonstrably so appears from paragraphs 3, 4 and 5 of the affidavit of Dr. Goldwin W. Howland sworn 15th January, 1942, now quoted, and referring to a recognized modern school of scientific thought in that respect:

3. That in my opinion passed on my examinations of Mrs. Mann and the history of the case there is a very definite doubt as to whether she ever had an established paranoia, and I further state that under the term "Paranoia" and "paranoid" conditions, there are all grades, from normal people to people with systemized delusional insanity to which Dr. Manchester refers. The most modern authority is Dr. Muncie of Baltimore, who writes under the direction of Dr. Adolf Meyers, who is himself considered the greatest authority on mental diseases at the present time. Dr. Meyers writes in "Psychobiology and Psychiatry," page 323, as follows:

"The fact is that ideas of reference, false beliefs, rigidity of make-up and proud sensitivity are very near the normal complement of mankind in general."

4. That in my opinion from this basis in normal people passing through the division of mild phychopathic cases, there is finally a gradual development of a true systemized type at the one extreme namely paranoia, and a degenerate type such as occurs in dementia præcox on the other. In my opinion, based on my said examinations, and the history of the case, Mrs. Jane Quinn Mann is not at present exhibiting the symptoms of the estab-

lished form of paranoia, nor is there any proof of deterioration so that she may be considered as a case falling into a much milder group.

5. Persons falling within these milder groups can and often do recover to an extent that they are fully competent to manage their affairs and to live normal lives.

Attention is directed also to an observation by Dr. Howland in the course of his cross-examination upon a previous affidavit:

You see you have got to realize that a good many normal people are paranoiad individuals who are not mental cases at all: you meet very clever people who are paranoiadal.

The cited statements in Dr. Howland's affidavit were not answered or cross-examined upon. They disclose a marked divergence in medical opinion as to the nature of the mental ailment from which the appellant suffered when she was detained in New Westminster in 1936. If there is such uncertainty as to the nature of the mental illness from which she then suffered, there must be even greater uncertainty as to its future developments. For reasons stated in the opening paragraph of this judgment the appellant is entitled in this Court to the full benefit of those uncertainties. It may be *apropos* to observe that the human mind is not fit subject-matter for a test-tube analysis. Nor does it lend itself easily to being compartmentalized, even if training, experience, or habit should narrow the exercise of its faculties to a point which may seem to support a superficial conclusion in that respect.

Perusal of the record before this Court does not impress one with the probability of the appellant taking steps to punish her husband if she should regain control of her estate. The evidence reflects her to be too shrewd a business woman to waste her money in profitless and vindictive litigation even against an 80-year-old husband. She had no such litigious proclivities during her illness prior to the detention. It has the appearance of a bogey conjured up out of a scientific vacuum with little regard to the real and existing conditions. It seems to have been confused with what the Toronto physicians emphasize as her anxiety to remove the stigma of lunacy under which she now lives, so long as a revesting order is denied her. She regards the continuance of the vesting order as a reflection upon her, which in all fairness she is now entitled to have removed. In Ontario she is a person of sound mind and understanding, but in British

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Columbia where her considerable property lies, the law still regards her as a lunatic.

A determined effort on her part to remedy that curious anomaly cannot be indicative of a deteriorated mentality. One would almost think that the opposition to her application was more concerned with the control and ultimate destination of her $200,000 than with her own well being and improvement in health. I do not think I can sum up the matter better than to quote Dr. Herbert H. Hyland (now on overseas service) who reported on 11th September, 1939, and was specifically confirmed therein by Dr. E. F. Brooks in his affidavit sworn 30th June, 1941:

> Considering all the circumstances, however, I would not feel justified in withholding an affidavit that she is competent to manage her affairs at the present time in view of the fact that there is no evidence that she is unable to do so satisfactorily.

With respect, on the evidence before this Court that is the only conclusion now open. Whatever may be the state of the appellant's mentality, three things appear conclusive: (1) She is not in need of hospital or sanitarium care, and is quite capable of looking after herself physically and mentally; (2) there is no evidence whatever that she is not capable of managing her business affairs just as well as innumerable people of her age and position in life. In fact there may be room for inference that she is more capable than average in that respect, and *vide* the affidavits of A. T. Bowlby, K.C. of Toronto, and *G. E. Housser,* well-known Vancouver barrister and solicitor; (3) It is a reasonable and understandable action on her part to attempt to remove the stigma of lunacy which attaches to her so long as she is deprived of the control of her estate by the order of January, 1936.

For the reasons stated I would allow the appeal, discharge the *quasi*-committee of appellant's estate, and revest her estate in her with all consequential directions.

FISHER, J.A.: In my view SIDNEY SMITH, J. reached the right conclusion and I would dismiss the appeal.

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

Solicitors for appellant: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

Solicitors for respondent: *Robertson, Douglas & Symes.*

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Sept. 23, 24, 25; *Nov.* 3.

Railways—Negligence—Man run down when standing on track—Whether "thickly-peopled" locality—Speed of train—Trespasser—Contributory negligence—Ultimate negligence—Written reasons for judgment changing views orally expressed.

While on his way to work north of defendant's railway tracks in East Vancouver, the plaintiff's husband was killed by an east-bound train. The railway was double-tracked. He approached the track by a path which was in common use for years by employees of industrial plants on the north side of the railway and also by children and others on their way to and from a park and a swimming-pool. When deceased reached the track, a long west-bound train on the northern track barred his way and while waiting for it to pass he stood on the southern track, facing the east, and was struck by an east-bound passenger train, which was travelling at 25 miles an hour. There was no fence on the south side of the tracks. There was a fence on the north side which contained gaps at intervals. On the south side at this point was a large park and golf grounds and on the north side was a recreation ground and swimming-pool, beyond which were some industrial plants near the waterfront. An action for damages by the wife of deceased was dismissed.

Held, on appeal, affirming the decision of MANSON, J. (O'HALLORAN, J.A. dissenting), that the appeal be dismissed.

Per MCDONALD, C.J.B.C.: In standing on a track watching a train go by on another track, deceased was a trespasser even if he had a licence to cross and only "wilful or reckless disregard of ordinary humanity" could make the defendant liable to a trespasser. At the close of the argument the trial judge intimated orally that he was of opinion that the locality was a "thickly-peopled" one. In his written reasons he stated that he was then satisfied that his original conclusion on that point was wrong. Any expression that fell from him cannot be distinguished from interlocutory remarks which are often made and modified later.

Per FISHER, J.A.: Assuming that the speed of the east-bound train should be restricted to a maximum speed of 10 miles per hour in the vicinity where the accident occurred and there was negligence on the part of the railway company consisting of excessive speed; assuming that it was customary for people in the neighbourhood to cross the railway tracks at the point in question, that the company was aware of this practice and the plaintiff's husband was in the habit of crossing the tracks with leave and licence of the company, nevertheless he knew of the passing of the east-bound train at the same hour each morning, namely, at approximately the hour at which he reached the track on his way to work and he was grossly negligent in standing on the east-bound track looking to the north-east instead of in the direction from which he knew the east-bound train was likely to come. On the facts of this case, the decision of this Court in *Jacobson* v. *V.V. & E. R. & N. Co.* (1941), 56 B.C. 207, settles the issue in favour of the respondent.

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APPEAL by plaintiff from the decision of MANSON, J. of the 25th of March, 1942, in an action by the plaintiff as administratrix of the estate of Oiva M. Lind, deceased, under the Administration Act and the Families' Compensation Act for damages for the death of her husband, who was struck and killed by a train of the defendant near Windermere Street in Vancouver on the 25th of April, 1941. Deceased worked for the Harbour Boat Yards Limited on Windermere Street, north of the railway tracks, and had been working there for 5 years. He lived south of the railway tracks and left his house every morning at about 7.20 o'clock. The railway has two main-line tracks at this point, the southerly tracks being the east-bound track and the regular train left Vancouver at 7.30 a.m. reaching the Windermere crossing at about the same time as the deceased every morning. About 100 feet west of the Windermere subway there was a foot-path on the south side of the tracks leading up to the railway rails made by people crossing the railway at this point. On the morning of the 25th of April, 1941, the deceased with a man named Greening came along the path and on to the south-bound track where they stood waiting for a very long west-bound train to pass. While standing there, they were struck and killed by the east-bound train. The evidence disclosed that both men were looking in a north-easterly direction when they were struck. There was a curve in the track at this point and owing to the west-bound train passing, the east-bound train could not be seen until it reached a point about 300 feet west of where they were standing. The fireman on the east-bound train saw the two men when about 125 feet away, gave warning to the engineer, who put on the brakes. The train was going at about 25 miles an hour. The east-bound train blew its whistle when about one-quarter of a mile away and the bell was ringing continuously.

The appeal was argued at Victoria on the 23rd, 24th and 25th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Eades, for appellant: The train's speed was 25 miles an hour. This was a thickly-populated portion of the city. The path used

by the deceased was in common use. There was no fence on the south side of the tracks but an open gateway on the north side. He was a licensee: see *Barrett* v. *Midland Railway Company* (1858), 1 F. & F. 361; *Lowery* v. *Walker,* [1911] A.C. 10; *Mourton* v. *Poulter,* [1930] 2 K.B. 183; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Robert Addie & Sons (Collieries)* v. *Dumbreck,* [1929] A.C. 358, at pp. 371-2; *Green* v. *C.P.R.,* [1937] 2 W.W.R. 145; *Hiatt* v. *Zien and Acme Towel & Linen Supply Ltd.* (1939), 54 B.C. 17. When the fencing is absent the limitation in speed applies: see *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81; *Bell* v. *Grand Trunk Rway. Co.* (1913), 48 S.C.R. 561. The excessive speed was the proximate cause of the accident: see *Critchley* v. *Canadian Northern R. Co.* (1917), 34 D.L.R. 245. It was the duty of the engineer to observe the statutory speed limit: see *Jacobson* v. *V.V. & E. R. & N. Co.* (1941), 56 B.C. 207. The failure of the deceased to see the approaching train was not negligence in the circumstances. It was unusual for trains to pass at this point: see *Janke* v. *C.P.R. and Simpson,* [1942] 1 W.W.R. 310; *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380, at p. 398; *G.T. Ry. Co.* v. *Hainer* (1905), 36 S.C.R. 180, at p. 185. Even if the deceased was negligent, the defendant could have avoided the accident by the exercise of reasonable care: see *Critchley* v. *Canadian Northern R. Co.* (1917), 34 D.L.R. 245; *Gray* v. *Wabash R.R. Co.* (1916), 35 O.L.R. 510; 20 C.R.C. 391; *Frame* v. *C.N.R.,* [1939] 1 W.W.R. 62. On the question of damages under the Families' Compensation Act see *Pettit* v. *Canadian Northern Ry. Co.* (1913), 15 C.R.C. 272; *Powell* v. *Canadian Pacific Railway* (1914), 7 Sask. L.R. 43; *Janke* v. *C.P.R. and Simpson,* [1942] 1 W.W.R. 310. For assessment of damages under the Administration Act see *Benham* v. *Gambling,* [1941] 1 All E.R. 7; *Cope* v. *Boroski and Sherbrook Motors Ltd.,* [1941] 2 W.W.R. 259.

McMullen, K.C. (*Wright,* with him), for respondent: The learned judge determined that it was not a thickly-peopled portion of the city of Vancouver. The deceased was a trespasser. To afford ground for implying consent, the practice of crossing

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at this point must be a long and continuous one and must be a practice known to an officer of the defendant who has authority to give consent: see *The Grand Trunk Railway Company* v. *Anderson* (1898), 28 S.C.R. 541, at p. 552. The United States cases are found in 33 Cyc. 760. There was no evidence of knowledge even of trainmen of people crossing the track: see *Lowery* v. *Walker*, [1910] 1 K.B. 173, at p. 192; [1911] A.C. 10; *De Vries* v. *Canadian Pacific Ry. Co.* (1916), 20 C.R.C. 375; *Cunningham* v. *Michigan Central Ry.* (1912), 4 D.L.R. 221; *Robert Addie & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358, at p. 370; *Grand Trunk Railway of Canada* v. *Barnett*, [1911] A.C. 361; *The Maritime Coal, Railway and Power Co.* v. *Herdman* (1919), 59 S.C.R. 127, at pp. 147-8; *Bettles* v. *Canadian National Railway Co.* (1929), 64 O.L.R. 211; *C.N.R.* v. *Laterreur* (1941), 52 C.R.T.C. 223, at p. 237; *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253, at p. 274. Where the dangers are obvious, a licensee must run the risk of them: see *Fairman* v. *Perpetual Investment Building Society*, *ib.*, 74 at p. 96; *Coleshill* v. *Manchester Corporation*, [1928] 1 K.B. 776, at p. 797; *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134. The accident was solely due to the negligence of the deceased: see *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Coyle* v. *Great Northern Railway Co.* (1887), 20 L.R. Ir. 409; *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70; *Jewell* v. *Grand Trunk Railway Co. of Canada* (1924), 55 O.L.R. 617; *Highley* v. *Canadian Pacific Railway Co.* (1929), 64 O.L.R. 615; *Skelton* v. *London and North Western Railway Co.* (1867), L.R. 2 C.P. 631; *Gauley* v. *Canadian Pacific Ry. Co.* (1930), 36 C.R.C. 365; *Jacobson* v. *V.V. & E. R. & N. Co.* (1941), 56 B.C. 207.

Eades, in reply.

Cur. adv. vult.

3rd November, 1942.

MCDONALD, C.J.B.C.: Plaintiff appeals from a dismissal of her action brought to recover damages for the death of her husband, who was run down by respondent's train.

The accident took place in East Vancouver, where Winder-

mere Street crosses the railway. Deceased lived south of the railway, and when killed was on his way to work at a place north of the railway. The railway is here double-tracked. As deceased and a companion reached it, a long west-bound freight train, passing on the northern track, barred their way. As they waited for it to pass, the two men were guilty of the gross folly of standing on the southern track, where they were struck by an east-bound train and both killed.

The evidence is that as this train approached it was travelling about 25 miles an hour. The engineer was keeping a look-out from the right-hand side, and the fireman from the left. The tracks curve to the left here; so the fireman had the better view. He says he was watching continuously, and first saw the two men when about 125 feet away. At the sight he called out "Hey!" but the engineer did not feel justified in putting on the emergency brake until he himself took a look; by then the men were only some 80 feet away. He then put on the brake, shut off steam, and tried to blow the whistle, but could not grasp the cord which was swaying. All these efforts came too late; actually it took some 210 feet to bring the train to a stop.

Appellant argues that the men should have been seen sooner; but the evidence on this point is unsatisfactory, and the appellant's own witnesses differ widely in their estimates of how far back the men would have been visible, in view of the curve and the box-cars on the west-bound track.

Appellant also relies greatly on the point that this was a "thickly-peopled" locality within section 309 of the Dominion Railway Act, which reads:

> 309. No train shall pass at a speed greater than ten miles an hour
> (*a*) in or through any thickly peopled portion of any city, town or village, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission is given by some regulation or order of the Board; . . .

There was considerable evidence on this point; and the learned trial judge at the conclusion of the argument expressed an opinion which, though tentative, rather favoured the appellant. Later, on handing down written reasons, he stated that he had modified his views and held that the locality was not "thickly-peopled." Appellant complains that it was not competent for the judge to change his mind, and that his first view must govern.

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I cannot accept this argument; I do not think any expression that fell from the learned judge can be distinguished from interlocutory remarks that are often made and modified later. Even if he could not change his opinion, we should still have to decide what was the effect of the evidence.

The railway, at the site of the accident, was not fenced at all on the south side. On the north side there was a fence, but this contained gaps and was apparently quite ineffectual. Appellant argues that as a result the train was travelling at an illegal speed, and that had it been travelling at the legal rate of ten miles per hour, it could have stopped in time, or given warning to the deceased by whistling. The learned trial judge, however, refused to accept this argument even if he accepted all the premises; he said there was no evidence to show that the lower rate of speed would have prevented the accident. Appellant's answer is that this is the reasonable inference from the evidence.

In order, however, to find this question relevant at all, we have to see that the respondent owed the deceased a duty.

At the place of the accident the street passes under the railway embankment (there 6 to 10 feet high) by a subway. For several reasons, pedestrians have not favoured this subway, and have preferred to climb the embankment and cross the tracks. They have done this for several years, so that several defined trails lead up the embankment in this vicinity, and deceased was killed opposite one. Appellant asks us to infer from this that deceased had the leave and licence of the respondent to cross the tracks, thereby escaping the *status* of a trespasser on respondent's property. The trial judge made no finding on this point. We find ourselves in an unusual position for an appellate Court. If, as is usual in these cases, appellant had a jury's finding of leave and licence, then on the authorities we should have to hold that there was sufficient evidence to support it. But it is rather another matter for us to draw the inference from the evidence ourselves. There is no evidence that anyone but engineers, firemen, conductors and brakemen knew that pedestrians were constantly crossing, and employees of this type could not grant leave and licence, even had they purported to, which no one suggests. Is it the only reasonable inference that knowledge of these pedes-

trians' user came to those officials who alone could grant leave and licence by their acquiescence?

This is a difficult question, which I do not think we need answer. For at most the only leave and licence that could conceivably be inferred would be leave and licence to pass and repass. The deceased was not passing or repassing; he was standing on the track watching another train go by. Since this folly was outside any conceivable leave or licence, in committing it deceased was, in my view, a trespasser, even if he had a licence to cross. An analogy can be found in the use of a highway; any member of the public has a right to use it for passing and repassing; but as soon as he ceases to do that and loiters, then he becomes a trespasser as against the owner of the soil.

If the deceased was a trespasser on the railway, then the whole compass of this case becomes very narrow. It becomes immaterial whether the trainmen kept a proper look-out, whether the district was thickly-peopled, and whether the train was travelling at a legal speed. Breach of a statute is only evidence of negligence, and even if respondent was negligent (as to which I express no opinion) there was certainly no "wilful or reckless disregard of ordinary humanity," which is the very least that could make it liable to a trespasser: see *Grand Trunk Railway of Canada* v. *Barnett,* [1911] A.C. 361; *The Grand Trunk Railway Company* v. *Anderson* (1898), 28 S.C.R. 541. On the effect of breach of statutory regulations see *The Maritime Coal, Railway and Power Co.* v. *Herdman* (1919), 59 S.C.R. 127.

I have been pressed with some of my *dicta* in *Hiatt* v. *Zien and Acme Towel & Linen Supply Ltd.* (1939), 54 B.C. 17, where I was the trial judge. Looking back at these, I feel I probably put the duty towards a trespasser too high. But at all events, I was not there dealing with railways, and the duties of railway companies towards trespassers are clearly settled in the above cases, which are binding on us. Here there was no breach of the respondent's only duty.

The Contributory Negligence Act, in my view, when applied to a defendant, refers only to actionable negligence; otherwise there is no legal "fault" of the defendant. The Act cannot therefore be applied here, and the appeal should be dismissed.

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MCQUARRIE, J.A.: I have gone carefully over the authorities cited to us by counsel on both sides in their able arguments, but so far as I can see this Court is bound by *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207. In principle I cannot distinguish that case from the one at Bar. I must, therefore, agree that the appeal should be dismissed.

SLOAN, J.A.: In my opinion the learned trial judge reached the right conclusion and I would dismiss the appeal.

O'HALLORAN, J.A.: With great respect, the evidence leads one unavoidably to conclude that the scene of the accident is in a "thickly-peopled portion" of the city of Vancouver, in the sense that term is employed in section 309 of the Railway Act, Cap. 170, R.S.C. 1927. It is well within the city, some thirteen minutes' run from the main C.P.R. depot and western terminus. It is true houses do not literally line the railway tracks at the particular point. But the evidential description of the area and its immediate surroundings, points convincingly to its use by great numbers of people for purposes of work and recreation. On the north side of the railway (the harbour side), there is a swimming-pool and playground used by the people of the neighbourhood. There is also on the north side a shingle mill, a few boat-houses, a grain elevator, some shacks, a small wood-yard and the premises of the Harbour Boat Yards Limited, where the deceased were employed.

Two, if not three paths were used to cross the unfenced railway tracks in the vicinity of Windermere Street to reach these places of work and recreation. The deceased were using one of the paths on their accustomed way to work when they met their death. Those paths have been in well-known common use for years by employees of the various commercial projects on the north side of the railway, and by children and others in the district going to and from the Windermere Park and Windermere Swimming Pool. The railway tracks are not enclosed or protected from the public.

Close to the railway on the south side, and between it and the exhibition grounds there are houses. West of Windermere Street are the exhibition grounds which extend to Renfrew Street, a

distance of two blocks. The area from Renfrew Street westward is densely populated to the centre of the city. East of Windermere Street is a small golf course which extends two blocks to Cassiar Street. And easterly from Cassiar the area is densely populated to the outskirts of the city and beyond. South of the exhibition grounds the area is thickly populated for a considerable distance.

With respect, as I see it, the only finding consistent with the recited evidence is, that the accident happened in a "thickly-peopled portion" of the city. And once that is found it follows, the train should not have exceeded the statutory speed of ten miles an hour, which section 309 of the Railway Act, *supra,* then imposes. But its speed was not less than 25 miles an hour. In the given conditions of place and circumstance it was travelling far too fast for public safety. Were it not for that excessive speed, the respondent by proper care could have avoided running down the deceased. In the circumstances the respondent is liable for the consequences of its negligence, even though the deceased were improperly where they were: *per* Lord Abinger, C.B., and Parke, B., in *Davies* v. *Mann* (1842), 10 M. & W. 546; 152 E.R. 588, approved by the House of Lords in *Radley* v. *London & North Western Rail. Co.* (1876), 46 L.J. Ex. 573 and *Swadling* v. *Cooper* (1930), 100 L.J.K.B. 97.

In this Court, counsel for the respondent as I understood him, did not seriously dispute that the area in question is "thickly peopled" within the meaning of section 309 of the Railway Act, *supra.* He relied mainly if not entirely upon this Court's decision in *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207. But on examination its distinguishing facts excluded the application of the *Davies* v. *Mann* principle, which I think ought to govern the decision of this case. The scene of accident in the *Jacobson* case was not as here, in a "thickly-peopled" area demanding a speed not in excess of ten miles an hour. Mrs. Jacobson was walking in the middle of the railway track facing the oncoming train which she could see at least 220 feet away. Here the two men had their backs to the east-bound oncoming train.

They were waiting for a long west-bound train of "empties"

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to pass. Its end was in sight, and according to the evidence it made so much noise it was not surprising the deceased did not seem to hear the oncoming east-bound train which hit them. In addition, the engineer in the *Jacobson* case was blowing his whistle. In this case the engineer did not blow his whistle anywhere near the scene of the accident. On his fireman's warning he looked and saw the men 80 feet away. He then applied the brake and next tried to blow his whistle, but could not find the whistle cord. The fireman seemed to think the engineer first tried to blow his whistle, and being unable to do so, then applied his brake.

In the *Jacobson* case the speed of the train was 38 to 40 miles an hour, and it was clear it could not have stopped within 220 feet. But there was no evidence as to the rate of speed which would have enabled it to stop within that distance. In this case according to the evidence of the engineer and the conductor, the train actually stopped within 250 to 300 feet when going at the rate of 25 miles an hour. The fireman testified that he first saw the men when they were 125 feet away. But it appears from measurements taken and other evidence that he could have seen them at a greater distance if he had been keeping a sharper look-out. The learned trial judge accepted 200 feet as a minimum distance in that respect. There is no verbal evidence within what distance this particular train could have stopped if it had been proceeding at the statutory speed of ten miles an hour. But it must be apparent that if it could stop within 250 to 300 feet at 25 miles an hour, it could have stopped within 200 feet at ten miles an hour.

In the *Jacobson* case the deceased could not reasonably have avoided both seeing and hearing the oncoming train in time to enable her to step clear of the track. But in the circumstances of the present case, it is quite understandable how the deceased neither saw nor heard the oncoming east-bound train, and how accordingly they had no comparable opportunity to step clear of the track. That they were at the time wrongly and carelessly on the respondent's railway track may be conceded. But that did not in law permit the respondent to run them down while travelling at an excessive and dangerous rate of speed at a point where people had long been in the habit of crossing its tracks by

well-used paths to reach industries and recreation grounds on the harbour side.

As Baron Parke said at p. 549 in *Davies* v. *Mann, supra*:

> Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

In this case, if the respondent had been travelling within the statutory rate of speed and had been maintaining the sharp look-out that constant use of the place by the public demanded, the deceased could have been seen in time to have avoided the collision. But even travelling at the excessive rate of speed, if the fireman and the engineer had been as observant as the constant use of the place by the public called for, the men should have been seen long before they were, and in time to have warned them of the approaching danger, by blowing the whistle. The whistle was not blown because the engineer, curiously enough, could not find his whistle cord when he needed it. That the deceased were in fault did not excuse the respondent from using ordinary care to avoid a collision in the place and circumstance. It did not do so when it had the present ability to do so. As I view it, with respect, the accident happened entirely from its own fault.

In *Butterfield* v. *Forrester* (1809), 11 East 60; 103 E.R. 926 followed in *Davies* v. *Mann, supra,* Lord Ellenborough, C.J. said at p. 61:

> One person being in fault will not dispense with another's using ordinary care for himself.

There was lack of care on the part of the deceased. But the respondent could nevertheless have avoided the consequences of that lack of care if it had exercised reasonable care in the given conditions of place and circumstance. The men were killed because the train was travelling too fast for public safety at that point. The responsibility for the collision and resulting damage must therefore fall solely on the respondent under the *Davies* v. *Mann* principle.

There is no evidence here as I see it, nor was it so contended for the respondent, that the mutual lack of care was so nearly contemporaneous that neither party could have avoided the consequences of the other's fault. I would allow the appeal

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accordingly, and refer the case back to the learned trial judge for assessment of damages.

FISHER, J.A.: In this matter I have first to say that I am substantially in agreement with the findings of fact and reasons for judgment of the learned trial judge except as hereinafter indicated.

It would appear that at the trial certain oral findings of fact were made and then judgment reserved for further consideration of certain questions. In his oral findings the learned trial judge said in part as follows:

> . . . I think I must find that, under the statute, the south side of the right of way should have been fenced at the point in question; that in the absence of fencing trains should proceed by that point at no greater speed than 10 miles per hour.

Later on he said as follows:

> Since the trial I have had an opportunity of reviewing my notes and of considering further the question of the liability of the defendant. I would vary my remarks of the other day by saying that the speed of train No. 810 was not 20 to 25 miles per hour but approximately 25 miles per hour.
>
> I have given further consideration to what I said at the trial with regard to the density of the population in the vicinity where the accident occurred. Section 309 (*a*) of the Railway Act, R.S.C. 170, reads as follows:
>
> "No train shall pass at a speed greater than 10 miles an hour
>
> "(*a*) in or through any thickly peopled portion of any city, town or village, unless the track is fenced or properly protected in the manner described by this Act, or unless permission is given by some regulation or order of the Board."
>
> . . . . .
>
> Effect must be given to the word "thickly" used in the statute, and I am now satisfied that my original conclusion in this connection was wrong. The railway tracks do not pass through a thickly-peopled portion of a city. It was therefore not necessary that the speed of train No. 810 should be restricted to a maximum speed of 10 miles per hour.

I am not satisfied that the original conclusion of the trial judge in this connection was wrong but, as I am of the opinion for the reasons hereinafter stated that the appeal must be dismissed even on the assumption that the speed of the east-bound train No. 810 should be restricted to a maximum speed of 10 miles per hour in the vicinity where the accident occurred, I have to say that in dismissing the appeal I am assuming, without holding, that the speed of such train should be so restricted and that there was therefore negligence on the part of the respondent railway company consisting of excessive speed. I am also

assuming that it was customary for people in the neighbourhood to cross the railway tracks at the point in question and that the company was aware of this practice. In other words, I am assuming without reaching a decision on the question, that the deceased husband of the plaintiff was in the habit of crossing the respondent's railway tracks with the leave and licence of the respondent. I have to add, however, that while making this assumption I am accepting, *inter alia,* the findings of the trial judge that the said deceased knew of the passing of the east-bound train at the same hour each morning namely at approximately the hour at which he reached the track on his way to work, that he was grossly negligent in standing on the east-bound track looking to the north-east instead of in the direction from which he knew that an east-bound train was likely to come at any moment, that if he had been looking in such direction he could have seen the front end of an east-bound locomotive 296 feet away and that if he had turned to look at the oncoming train he could have stepped to safety in a couple of seconds.

Even on the assumptions I have made, however, I think that on the facts of this case the decision of this Court in *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207, settles the issue in favour of the respondent. In such case this Court found the deceased wife of the plaintiff solely responsible and reversed the trial judge who had found joint negligence. If I may be permitted to say so, I was never quite satisfied with the decision, perhaps because I was the trial judge, but nevertheless it is my duty to give due effect to it and I agree with the submission of counsel on behalf of the respondent that the present case is governed by such decision. The same question arises here as arose in the *Jacobson* case, *viz.,* whether negligence on the part of a pedestrian on a railway track consisting of failure to look when he could have seen an approaching train at a distance of at least 200 feet and negligence on the part of a railway company consisting of excessive speed of the train in approaching the point of impact should be considered as a case of joint or contributory negligence, in which the negligence of each was continuing up to the time of the accident and so the chance of one party to avoid the accident continued as long as the chance of the other party continued, or as a case of ultimate negligence

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in which one party had a last chance to avoid the accident and was therefore solely responsible. The cases cannot be distinguished on the ground that the negligence here was a breach of a statutory requirement and in the *Jacobson* case a breach of only a common-law obligation, for as Middleton, J. said in *Hendrie* v. *Grand Trunk R.W. Co.* (1921), 51 O.L.R. 191, at p. 198:

> There is no question as to the law. It is not enough for the railway employees to obey the requirements of the statute—these are an irreducible minimum—but over and above these requirements there is the common law obligation to exercise due care in the transaction of business of necessity dangerous, even when it is fully authorized by law.

In an article in 16 Can. Bar Rev. the writer referring to the case of *British Columbia Electric Railway Company, Limited* v. *Loach*, [1916] 1 A.C. 719 says as follows at p. 141:

> . . . It is interesting to observe that since the adoption of the principle of apportionment in negligence cases in Ontario, the *Loach* case, essentially a decision expanding the doctrine of ultimate negligence, has been invoked to favour apportionment by using it as an authority only "to extend" the effect of some anterior negligence up to the time of impact. See, for example, *Topping* v. *Oshawa Street Railway Co.* (1931), 66 O.L.R. 618; *McLean* v. *McCannell*, [1938] O.R. 37, at p. 39.

In the *McLean* case Masten, J.A. said in part as follows at p. 39:

> . . . the defendant's truck was left on the travelled portion of the highway without a protecting light . . . his negligence is thus established. Moreover, like the negligence in *British Columbia Electric Railway Company, Limited* v. *Loach*, [1916] 1 A.C. 719, the breach of the statutory duty constituted continuing negligence which lasted up to the moment of impact.

In *Morris* v. *Hamilton Radial Electric Railway Co.* (1923), 54 O.L.R. 208 where the jury had found excessive speed on the part of the defendant railway company and failure to look on the part of the plaintiff motorist, Hodgins, J.A. said in part as follows at pp. 210-12:

> The *Loach* case, as has often been pointed out, proceeds upon the view that before the time of the accident the plaintiff's negligence was over and spent, and that there was thereafter no further act of negligence. It therefore allowed the raising of the issue of ultimate negligence, which, as I understand the case, depended upon the absence of ability or opportunity on the part of the plaintiff to do anything on becoming aware of the danger, and also upon the fact that the defendants had such a chance but failed to make use of it, because of the disability they had imposed upon themselves by the defective brake. And this inability or omission to seize the opportunity, whether due to further negligence at the moment, as the act of turning away from looking ahead (*Neenan* v. *Hosford*, [1920] 2 I.R. 258,

286, *Field* v. *Sarnia Street Railway Co.* (1921), 50 O.L.R. 260), or to the operation of an act of negligence already committed but continuing, which then becomes an immediate and effective cause, is ultimate negligence as described by the Privy Council and in many cases in our own Courts.

. . . . .

The appellant's negligent act did not end a sufficient time before the collision to leave opportunity for the respondents to do anything to avoid the accident. Here the negligence was continuing from the time the motor car was set in motion until it got to the track, and it brought the plaintiff there just as the electric car arrived, and the crash occurred at once. This indicates concurrent negligence in both parties, and excludes the idea of ultimate negligence, . . .

In the same case Ferguson, J.A. said in part as follows at p. 213:

It is clear that the plaintiff's "chances" continued down to the moment he got on the track, and it is not suggested that the defendants' chance continued after that moment, which circumstance, I think, distinguishes this case from the *Loach* case, [1916] 1 A.C. 719, on which the appellant relied.

. . . . .

In my opinion, this is not a case for the application of the "last chance" rule.

In *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512, at pp. 522-26, MACDONALD, J.A. (later C.J.B.C.) pointed out that the finding of a jury in the case of *Gillingham* v. *Shiffer-Hillman Clothing Manfg. Co. et al.*, [1933] O.R. 543; [1934] S.C.R. 375, that the plaintiff could by the exercise of reasonable care have avoided the accident, when taken with the other findings, was not regarded by either the Court of Appeal for Ontario or the Supreme Court of Canada as a finding of ultimate negligence barring the plaintiff's right to recover. In the *Whitehead* case it was held by a majority of this Court according to the head-note (p. 512) that

the negligent act of the deceased in not maintaining a proper look-out continued until the end, when in conjunction with the continuing negligence of the defendant in not maintaining a guard, the accident occurred. At common law each would properly have been guilty of negligence which contributed to causing the accident so the Contributory Negligence Act applies. The accident could not possibly occur without the two concurrent acts of negligence.

MACDONALD, J.A. said at pp. 530-1:

I am not convinced that the negligent act of the deceased was subsequent in time to that of the appellant. The latter's negligence in failing to erect a barrier was a continuing act extending as a general act of neglect up to the last moment when the accident occurred. It became at that time—and only then—in respect to the deceased, not a failure to carry out an "abstract

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obligation" to erect a barrier for the general protection of the public but rather a concrete breach of duty, or an act of negligence, an efficient cause of the accident. In this view the negligent acts of the deceased and appellant were contemporaneous.

I think one might have inferred from these authorities that, since the Acts allowing apportionment in negligence cases, the Courts in British Columbia as well as in Ontario (the legislation being substantially the same—see *Whitehead* case, *supra,* at p. 525) had in effect been invoking the *Loach* case to favour apportionment by using it "as an authority only to extend the effect of some anterior negligence up to the time of impact" and that the Courts would not regard a finding that a deceased pedestrian by the exercise of reasonable care could have avoided the accident by stepping aside as a finding of ultimate negligence on the part of the deceased in a case, where it had found that there was not only negligence on the part of the pedestrian in failure to look but also negligence on the part of the defendant in excessive speed in approaching the point of impact continuing up to the time of the impact, but would regard the negligent acts of the plaintiff and of the defendant as contemporaneous and so the case one of joint or contributory negligence. In the *Jacobson* case, however, MACDONALD, C.J.B.C., with whom my brother O'HALLORAN agreed, said in part as follows at pp. 210-12:

> 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. . . .
>
> 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. . . . Assuming negligence by both, *viz.*, excessive speed and failure to look, deceased alone could have averted the accident.
>
> . . . . .
>
> 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 only possible findings in this case are joint negligence or 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.

McDONALD, J.A., now C.J.B.C., said in part as follows at p. 213:

. . . 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 head-note reads in part as follows:

Held, . . . , 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.

As the Earl of Halsbury, L.C. said in *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506

every judgment must be read as applicable to the particular facts proved, or assumed to be proved,

and I agree that a finding of joint negligence or one of ultimate negligence by one or the other must be dependent upon the facts of each case. I think, however, that one must observe any principle which would appear to have been applied recently by this Court in reaching the finding. I have already indicated the nature of the question, which in my view arose in the *Jacobson* case, *supra*, and arises also in the present case, and I am of the opinion that the decision in the *Jacobson* case cannot be read to mean anything else than a finding of ultimate negligence on the part of the deceased pedestrian. I have also cited authorities justifying the inference that the test of the last opportunity is subject to qualification in favour of the negligent plaintiff (or deceased) through the *Loach* case being used

as an authority only to extend the effect of some anterior negligence up to the time of impact.

After careful consideration of the decision in the *Jacobson* case I have now to say that I can only conclude that this Court

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reached its finding of ultimate negligence as aforesaid in such case by applying the test of last opportunity without any such qualification. I think that this is the principle to be extracted from the *Jacobson* decision, that it must be applied here and that its application necessarily involves a finding that the deceased husband of the plaintiff was guilty of ultimate negligence barring the right of the plaintiff to recover in the present action.

I would, therefore, dismiss the appeal.

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

Solicitors for appellant: *Collins, Green & Eades.*
Solicitor for respondent: *J. E. McMullen.*

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L. & C. LUMBER COMPANY LIMITED v. LUNDGREN AND LUNDGREN.

Real property—Land Registry Act, Sec. 34—Sale of timber with right to cut —Assignment thereof—Neither document registered—Interest in land— Assignee refused entry—Breach of contract—R.S.B.C. 1936, Cap. 140, Sec. 34.

By written agreement, Mrs. L. sold M. the standing timber on her land with the right to enter and cut the same. M. assigned his rights under the agreement to the plaintiff company, written notice of which was given to the vendor. Neither the agreement nor the assignment was registered in the Land Registry office. Upon the plaintiff company attempting to cut the timber, Mrs. L. and her husband refused to allow entry on the land on the ground that the two documents had not been registered, as under section 34 of the Land Registry Act, no instrument becomes operative to pass any estate or interest either in law or in equity until the interest is registered. It was held on the trial that the company as M.'s assignee had the same rights under the agreement that M. had and that said section 34 did not bar the enforcement thereof.

Held, on appeal, affirming the decision of WHITESIDE, Co. J. (SLOAN, J.A. dissenting), that the appeal should be dismissed.

Per MCDONALD, C.J.B.C.: M. not only acquired an interest in land, he acquired contractual rights. Mrs. L. has not only interfered with his property rights, she has broken her contract by which she agreed to let the purchaser enter and cut. Plaintiff, as assignee, is in direct privity with her and has a right to sue for breach of contract quite apart from

its property rights. L. is equally liable for having assisted a breach of contract.

Per O'HALLORAN, J.A.: The words employed in section 34 ought not to be read as enabling the vendor to deny her vendee's assignee the benefit of the equities existing between the vendee and herself. This view is more consistent with the general purpose of the statute, since the assignment springs from Mrs. L.'s title and no conflicting registered interest is involved.

Per FISHER, J.A.: Upon the authorities, I can only reach the conclusion in the present case that upon the execution of the agreement and the assignment purporting to charge the lands as aforesaid, some beneficial interest therein vested in the respondent and that though the instruments were not registered, the respondent was not a trespasser as against the appellants and Mrs. L., after she had in effect transferred the timber to M., was not justified under said section 34 of the Land Registry Act in preventing the respondent company from entering on the lands and enjoying and enforcing the rights which M. had transferred to it.

APPEAL by defendants from the decision of WHITESIDE, Co. J. of the 26th of March, 1942, in an action for damages and an injunction restraining the defendants from interfering with certain logging operations of the plaintiff. The defendant, Mrs. Lundgren, entered into an agreement on the 19th of December, 1940, with one Roy A. MacDonald for the sale of all the merchantable timber on certain lands owned by her in the District of New Westminster for the sum of $900, of which $200 was paid in cash, the balance to be paid at the rate of $2 per thousand feet as the logs were sold, the timber to be removed within 18 months. The agreement was not registered in the Land Registry office. On September 23rd, 1941, MacDonald assigned the agreement to the plaintiff company and gave notice of the assignment to Mrs. Lundgren. The plaintiff commenced logging operations on the 1st of December, 1941, but was prevented by the defendant Frank Lundgren (the husband of Mrs. Lundgren) who blocked the road to the timber by parking his automobile thereon and refused to move the same and sought to provoke a breach of the peace so that the plaintiff was obliged to discharge certain of the workmen hired by it for road repair work. He also erected a fence across the road in order to prevent the plaintiff from having access to the timber. The plaintiff recovered judgment for $100 in damages and an injunction restraining the defendants from obstructing the road giving access to the timber and interfering with the plaintiff in its logging operations.

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L. & C. LUMBER CO. LTD. v. LUNDGREN

The appeal was argued at Victoria on the 25th of September, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Garfield A. King, for appellants: The original agreement for the sale of the timber was between the defendants and one MacDonald, who assigned to the plaintiff. There is no right of assignment in the agreement and it is not assignable without the consent of the defendants. It is admitted that the timber is an interest in land. The agreement was not registered as required by section 34 of the Land Registry Act and is therefore not operative: see *Carlson* v. *Duncan* (1931), 44 B.C. 14. Registration is a condition precedent to the passing of the property.

Sullivan, K.C., for respondent: Section 37 of the Act has a bearing on this case. In the circumstances the action of the defendants is close to fraud. The consideration for the sale of the timber to MacDonald was $900 and the defendants were paid $200 when the agreement was entered into. See also section 38, subsections (*a*) and (*d*) of the Act. We do not have to rely on the agreement as there is the evidence of the defendants that the agreement was entered into. Mrs. Lundgren admitted the contract was entered into: see Hogg on Registration of Titles, 111 and 114-5. This is an equitable interest and an equitable interest is assignable: see *Gregg* v. *Palmer* (1932), 45 B.C. 267; Chitty on Contracts, 19th Ed., 280; *Torkington* v. *Magee,* [1902] 2 K.B. 427.

King, replied.

Cur. adv. vult.

3rd November, 1942.

McDONALD, C.J.B.C.: This seems to me a hopeless appeal. The female appellant by agreement in writing sold to one MacDonald standing timber on her land with the right to enter and cut. MacDonald assigned all his rights under the agreement to the respondent company, who gave due notice in writing to the vendor. Neither the agreement nor the assignment was registered in the Land Registry office. When respondent attempted to cut under the agreement, appellants, who are the vendor and her husband, refused it entry, and try to justify this refusal under section 34 of the Land Registry Act, because

of the failure to register the documents of title. Section 34 reads:

> Except as against the person making the same, no instrument . . . , purporting to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land . . . until the instrument is registered. . . . . .

I shall assume that the right to cut standing timber is an interest in land within this section. It is rather curious that this section has stood as it is so many years; for the Courts have long held that reasonable restrictions must be read into its irrationally wide provisions.

Other sections in the Act itself show that section 34 cannot be taken literally. Thus section 35 shows that unregistered instruments can be used as evidence to question the title of a registered owner on the ground of fraud in which he has participated. That clearly implies the right to set up some outstanding unregistered interest. Similarly section 37, which defines the effect of an indefeasible title, by subsection (1) (*f*) says that such a title does not exclude the right of any person to show fraud, participated in by the registered owner, or by his predecessor in title, when the owner is not a *bona fide* purchaser for value. Section 38 (2) similarly allows an action of ejectment to be brought against the registered owner in such a case. Moreover, section 37 (2) makes an indefeasible title void as against an adverse occupier rightly entitled at the time title was applied for, obviously even though the occupier does not appear on the register at all.

All these sections show that section 34 cannot be taken literally, that it does not rule out unregistered titles, and that its real purpose is merely to protect purchasers and encumbrancers for value without notice, and enable them to rely on the state of the register when they search the title.

Apart from the internal evidence of the Legislature's intention, there are decisions in point. Such cases as *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282; *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334; and *Loke Yew* v. *Port Swettenham Rubber Company, Limited,* [1913] A.C. 491, show that even a stranger cannot ignore unregistered documents of title of which he has notice. Moreover, in *Thompson* v. *McDonald*

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and Wilson (1914), 20 B.C. 223, this Court repudiated the present appellants' contentions by holding that a vendor of land shows a good title to land by showing an unregistered title; and that decision was followed in *McDonnell* v. *McClymont* (1915), 22 B.C. 1. The decision in *Carlson* v. *Duncan* (1931), 44 B.C. 14 creates some difficulty; for the Court apparently saw so many objections to the unregistered title that they did not go into any of them very thoroughly. None of the above decisions was cited and this fact may have affected the result. But at all events, the decision is distinguishable here, for the purchaser of the fee had no knowledge of the unregistered assignment of the cutting rights.

But apart from these authorities, there is a further consideration that shows the appeal to be entirely baseless. Appellants have argued throughout as though respondent had to show a "title," that is a right of property, in order to succeed. That is obviously wrong; MacDonald not only acquired an interest in land; he acquired contractual rights. The female appellant has not only interfered with his property rights; she has broken her contract, by which she agreed to let the purchaser enter and cut. Respondent, as an assignee, is in direct privity with her, and has a right to sue for breach of contract, quite apart from its property rights. The male appellant is equally liable for having assisted a breach of contract.

I would dismiss the appeal with costs.

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

SLOAN, J.A.: With deference, I am unable to understand why on the facts of this case, the express language of section 34 of the Land Registry Act should not be given its full effect.

The unregistered agreement between Lundgren and MacDonald is effective against Lundgren as "the person making the same." Similarly the unregistered agreement between MacDonald and the L. & C. Lumber Co. Ltd. is effective against MacDonald "as the person making the same." But in my view the unregistered agreement between MacDonald and the L. & C. Lumber Co. Ltd. is ineffective against Lundgren. She is a stranger to it;

there is no privity of contract between her and the company. By section 34 MacDonald's unregistered agreement with the company is inoperative and cannot pass any "estate or interest, either at law or in equity in the land" to the company as against Lundgren.

With respect I would therefore allow the appeal.

O'HALLORAN, J.A.: Section 34 of the Land Registry Act, Cap. 140, R.S.B.C. 1936, reads in material part:

> Except as against the person making the same, no instrument . . . , shall become operative to pass any estate or interest, . . . , in the land . . . until the instrument is registered . . . ; but every such instrument shall confer on each person benefited thereby, and on every person claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the instrument registered, . . .

The section then empowers the use of the names of all parties to the instrument for the purpose of registration. This appeal concerns the interpretation of the opening exceptive clause, "except against the person making the same," which was added in 1921.

Mrs. Lundgren had agreed in writing to sell MacDonald certain timber for $900 payable $200 in cash, and the balance at a fixed rate per thousand feet "as logs are sold," but stipulating the timber should be removed within eighteen months. In September, 1941, when the agreement had some nine months to run, and there was a balance of $553.50 yet to come due, MacDonald, not being in default, assigned the agreement and all his rights thereunder to the respondent company. The latter covenanted therein to pay Mrs. Lundgren the balance under the agreement and to indemnify MacDonald accordingly. MacDonald forthwith gave Mrs. Lundgren written notice of the assignment.

Neither the agreement nor the assignment was registered in the Land Registry office. In October, 1941, when the respondent sought to proceed with cutting and removing the timber, the appellants (Mrs. Lundgren and her husband) prevented its entry upon the lands. The learned trial judge upheld the respondent's right to enter upon the land and cut the timber. He held that the respondent as MacDonald's assignee, had the same rights under the agreement as MacDonald, and that section 34, *supra,* did not deny it those rights. I am in accord with

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the learned judge's conclusion and also with his supporting reasons.

In this Court counsel for the appellants in opening advanced two grounds (1) the agreement was not assignable, and (2) the assignment was not registered in the Land Registry office. The first ground was not pressed with much confidence. I understood counsel had abandoned it and concentrated on the second ground. However that may be, in my view at least the first ground could not be sustained, and *vide, inter alia, British Waggon Co.* v. *Lea* (1880), 49 L.J.Q.B. 321, Cockburn, C.J. at pp. 322-3. And if what is involved is a "right or title of entry into land of which a person is disseised" *vide* Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 425, note (*t*), then *Torkington* v. *Magee* (1902), 71 L.J.K.B. 712 would seem to apply.

But the point upon which our decision is now sought, concerns non-registration of the agreement and its assignment. Counsel for the appellant conceded MacDonald could enforce the unregistered agreement against Mrs. Lundgren, but submitted section 34 debarred his assignee from doing so, notwithstanding the authority in the section to the assignee to apply to register both the agreement and the assignment. It should be noted at the outset, the respondent is not confronted by a claim on behalf of a registered mortgagee or judgment creditor as happened in *Gregg* v. *Palmer, infra,* and other such cases. Here we have the straight case of a vendor attempting to deny the contractual rights of her vendee's assignee, and on the sole ground of failure to register the assignment.

Counsel for the appellant relied on *Carlson* v. *Duncan* (1931), 44 B.C. 14. But that decision, as the learned trial judge remarked, turned wholly upon whether the unregistered transfer was or was not an interest in land. It appears from the judgment of MACDONALD, J.A. (later C.J.B.C.) with whom MACDONALD, C.J.B.C. and GALLIHER, J.A. concurred, that the effect of the exceptive clause on the facts there present, was not raised or considered. It is our duty now, when the point has been raised, to examine anew the application of section 34 to the instant facts and *vide Gentile* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 307, at pp. 309-310, and *Rex* v. *Gartshore* (1919), 27 B.C. 175, at p. 179.

The unregistered instrument in the *Carlson* case was not an assignment of a cutting agreement as here, but a transfer of timber by the heirs of an intestate. The intestate had received a conveyance of the timber in 1908 and it had been registered as a charge against the land as such. Whatever might have been the effect of the exceptive clause if it had then been raised, the *Carlson* case did not involve the position of a vendee's assignee under section 34, *supra*. The assignee of a contract takes "subject to equities." That is to say, subject to all such defences as might have prevailed against the assignor.

Prior to the addition of the exceptive clause in 1921, the present section 34 was more imperative in its language. It bluntly provided that no instrument should pass any estate in land in law or equity unless it was registered. Although in *Levy* v. *Gleason* (1907), 13 B.C. 357, HUNTER, C.J. held in regard to "a stranger" that the registered owner was the only owner, he added significantly at p. 359:

> . . . , although no doubt rights capable of enforcement by the Courts may be created *inter partes* by unregistered instruments.

Mrs. Lundgren is not a "stranger" in that sense. The contract here was assigned to the respondent company which thereby acquired the right to enforce it against her *inter partes*.

As I read it, that principle governed the decision of this Court in *McKenzie* v. *Goddard* (1912), 17 B.C. 126. It concerned an action by the assignee of a vendee against the vendor, and the rights involved were treated as *inter partes*. It distinguished *Goddard* v. *Slingerland* (1911), 16 B.C. 329 in that very respect. Again in *In re Land Registry Act and The Standard Trust Co.* (1916), 22 B.C. 538, MACDONALD, J. said at p. 540:

> It seems to me that the holder of a mortgage, duly registered, can assign such mortgage to another party, and such assignment would not require to be registered. It would be perfectly valid between the parties without registration. Then the assignee might make a further assignment, and his assignee could utilize the first assignment without its registration.

That decision recognized the existence of rights *inter partes* under an unregistered agreement and did so at a time when the statute expressly said an unregistered instrument should not pass any estate or interest in land.

Read in the light of those decisions, the exceptive clause which the section has contained since 1921, presents itself as a statutory

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restatement of the exception our Courts have found inherent in the section as it stood originally although then couched in more imperative language. MACDONALD, J.A. (later C.J.B.C.) in *Gregg* v. *Palmer* (1932), 45 B.C. 267 said of the exceptive clause at p. 282,

> that as against the maker, . . . , some estate right or interest at law or in equity in the land passes to the holder of an unregistered instrument. The latter acquired the beneficial right to the fee with a statutory right to apply to register it.

MacDonald as the holder of the unregistered agreement acquired a beneficial right, which he, of course, could assign to the respondent. The latter thereby acquired it "subject to all the equities" existing between Mrs. Lundgren and MacDonald. There is nothing in section 34 to deny or qualify that right in the respondent, which was held to exist even when the section was more imperative in its terms before the exceptive clause was added in 1921. I prefer the view that section 34 can have no application to the facts of this case.

We are truly concerned not with a conflict in title, or indeed with a question of title at all, but with the performance of an agreement *inter partes*. MacDonald's contract with Mrs. Lundgren, like the agreement in *British Waggon Co.* v. *Lea, supra,* was one which he could perform vicariously—that is through his assignee the respondent. Mr. Lundgren as vendor cannot refuse acceptance of that performance by her vendee's assignee. And *vide* Atkin, J. in this respect in *Fratelli Sorrentino* v. *Buerger* (1914), 84 L.J.K.B. 725, at p. 729.

Adopting the principle of *Stradling* v. *Morgan* (1560), 1 Plowd. 199; 75 E.R. 305, at pp. 311 and 315, the words employed in section 34 ought not, I think, to be read as enabling the vendor to deny her vendee's assignee the benefit of the equities existing between the vendee and herself. Indeed this view is more consistent with the general purpose of the statute, since the assignment springs from Mrs. Lundgren's title, and no conflicting registered interest is involved.

I would, therefore, dismiss the appeal.

FISHER, J.A.: As pointed out by the learned trial judge in his reasons for judgment the defendants in and by subclause (*g*) of paragraph 10 of their dispute note set up the defence that

if the plaintiff, its servants and/or agents attempted to enter the property of the defendant Mary Ruth Lundgren, it and they were trespassers, and the said defendants were justified in preventing such entry on to the lands in question.

In support of the plea as aforesaid counsel for the (defendants) appellants relies upon section 34 of the Land Registry Act, R.S.B.C. 1936, Cap. 140 and the case of *Carlson* v. *Duncan* (1931), 44 B.C. 14. Counsel for the appellants, however, admits or must admit that notwithstanding such section the agreement dated the 19th of December, 1940, between one of the appellants Mary Ruth Lundgren and one Roy A. MacDonald for the sale of all the merchantable fir and hemlock timber situate, lying and being upon certain lands of which the said Mary Ruth Lundgren was the registered owner, was as against the said Mary Ruth Lundgren, making the same, operative to pass an estate or interest in the land. Counsel for the appellants also admits or must admit that notwithstanding such section, the assignment made the 23rd of September, 1941, by which the said Roy A. MacDonald sold, assigned and set over to the plaintiff respondent all his right, title and interest in and to the said agreement, and in and to the timber thereby agreed to be sold, was as against the said Roy A. MacDonald, making the same, operative to pass the said estate or interest in the land.

The admissions as aforesaid are or have to be made in view of said section 34 of the Land Registry Act containing the words "except as against the person making the same" which words were added in 1921 after the decision of the Supreme Court of Canada in *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338. Counsel for the appellants nevertheless argues that by virtue of said section 34 the said assignment from Roy A. MacDonald was not operative to pass any estate in the land to the plaintiff as against Mary Ruth Lundgren and so it is argued the plaintiff was a trespasser. This argument has to be considered, however, in the light of the many cases in which said section has been considered including the case of *Gregg* v. *Palmer* (1932), 45 B.C. 267, in which case this Court considered the effect of the addition of the words as aforesaid and of alterations in other sections of the Land Registry Act. In the *Gregg* case the plaintiffs were the holders of a mortgage duly executed on the

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24th of January, 1931. Judgments held by the defendants against the mortgagor were registered against his lands on the 16th, 20th and 24th of February following. On the 3rd of March, 1931, the plaintiffs applied for registration of their mortgage, claiming registration in priority to the judgments. In an action for a declaration that the plaintiffs as holders of said mortgage were entitled to registration in priority to said judgments it was held on appeal reversing the decision of the trial judge, MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting, that in view of the amendments to the Land Registry Act since the decision in *Bank of Hamilton* v. *Hartery, supra,* that is sections 34, 42, 175, 176 and 177, Cap. 127, R.S.B.C. 1924, applications to register of this class do not come within that case but are governed by the decision in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 and that the plaintiffs' mortgage was therefore entitled to be registered as a charge in priority to the defendants' judgments. In the *Gregg* case, MACDONALD, C.J.B.C. said in part as follows, at pp. 270-1:

> To begin with *Jellett* v. *Wilkie* [(1896), 26 S.C.R. 282] was displaced by the Supreme Court of Canada in *Bank of Hamilton* v. *Hartery* and priority according to priority of application for registration was declared to be the rule under the Land Registry Act. The Legislature of this Province set out to protect purchasers and chargees against just such a rule as was enunciated in *Jellett* v. *Wilkie*. The Act is based upon notice of application to register an instrument or the actual registration of it to all other persons who might by want of such notice or protection be entrapped. All legal or equitable rules with regard to the transfer of real estate were made subservient to the statutory rules laid down in the said Act. . . . The fundamental principle is retained that in general priority of registration gives priority of right as it must if full effect is to be given to the doctrine of notice and certainty of protection among those concerned with the stability of titles. It makes no difference under the Act whether the applicant for registration in priority is a judgment creditor or a mortgagee. . . . . . The judgment creditor is entitled to rely on the declaration that "no instrument executed . . . and taking effect after the 13th day of June, 1905, purporting to transfer, charge, deal with or affect 'land' or any estate or interest therein shall become operative to pass any 'estate' either at law or in equity . . . until the instrument is registered in compliance with the provisions of this Act," but it gives the grantee gratuitously the right to apply for registration.

MARTIN, J.A. (later C.J.B.C.) at pp. 276-7 said in part as follows:

> After a careful consideration of all these new and elaborate statutory proceedings carried on in the special tribunals created to adjudicate there-

upon, I can only reach the conclusion that as regards applications to register of the class now before us the decision in the *Hartery* case has ceased to have application and they are governed by the decision in *Entwisle* v. *Lenz* (1908), 14 B.C. 51, the result being that the plaintiff's mortgage is entitled to be registered as a charge in priority to the defendants' judgments.

MACDONALD, J.A. (later C.J.B.C.) said in part as follows at pp. 282 and 284:

What alteration, if any, was effected by the addition of the words in 1921, after the decision referred to, [that is the *Hartery* decision, *supra*] "except as against the person making the same" in section 34 of Cap. 26? It means that as against the maker, *i.e.*, the judgment debtor, some estate right or interest at law or in equity in the land passes to the holder of an unregistered instrument. The latter acquired the beneficial right to the fee with a statutory right to apply to register it. That the debtor under his hand and seal parted with some interest is I think indisputable. It is equally clear that whatever interest passed to the appellant by grant from the debtor cannot also pass to someone else except by the act of appellant. The judgment creditor can only sell the property of his debtor as he finds it. He cannot "take A's land to pay B's debt" (*Entwisle* v. *Lenz & Leiser*, *supra*, pp. 55-6). I think the Legislature intended to restore the law as it stood before the decision in *Bank of Hamilton* v. *Hartery*, *supra*, when we consider all the relevant sections. . . .

I think it was always intended by the Legislature that equitable principles originally accepted should be preserved and if section 73 (Cap. 127, R.S.B.C. 1911) as interpreted by the Courts interfered with those principles it was felt that the old rule should be restored by substituting section 42 in the 1921 Act containing the exception referred to and by adding the amendment found in section 34.

I think the decision and what was stated in the *Gregg* case as aforesaid must be carefully considered in the present case where in my opinion apart from the said Land Registry Act both law and equity would support the action of the respondent in view of the agreement and assignment as aforesaid and the question arises whether all legal or equitable rules with regard to the transfer of an estate or interest in land have been made subservient to the statutory rules laid down in said Act. I think the majority decision in the *Gregg* case means that "equitable principles originally accepted should be preserved" and that in certain cases the rights of the parties with regard to an estate or interest in land may now be governed by the decision in the *Entwisle* case rather than by the decision in the *Hartery* case. In the *Entwisle* case the old Full Court reversed MARTIN, J. (as he then was) who had ruled that section 74 of the Land Registry Act, making registration of conveyances a *sine qua non* to the passing of any title, at law or in equity, to lands governed. Said

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section 74 and the present said section 34 are in like terms except that the latter section has the words added in 1921 as aforesaid. It may be noted that MARTIN, J.A. says in the *Gregg* case at p. 277 that the *Entwisle* case was blown upon by two of the judges of the Supreme Court in *Hartery's* case, *supra,* at p. 345, but as that Court did not go to the length of actually overruling it he was once more constrained to follow it. The *Entwisle* case dealt with an unregistered deed or transfer and undoubtedly held that notwithstanding said section 74 (re-enacted in the same words in the revision of 1911 as section 104) the entire beneficial interest was vested in the transferee. In the present case we are dealing with two unregistered instruments as aforesaid and, as MARTIN, J.A. said of the case before the Court in *Bank of Hamilton* v. *Hartery* (1918), 26 B.C. 22, at p. 24, so I would say of the present case, that:

> Logically, it is hard to distinguish the case from the principle that may be extracted from *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51.

The result of the application of such principle in the *Entwisle* case was that the judgment creditor could not "take A's land to pay B's debt" (pp. 55-6 quoted apparently with approval by MACDONALD, J.A. in the *Gregg* case, *supra,* at p. 282) and in my view the same principle must be applied here with the result that A cannot take from C what A has transferred to B and B has transferred to C. Upon the authorities as aforesaid I can only reach the conclusion in the present case that, upon the execution of the agreement and the assignment purporting to charge the lands as aforesaid, some beneficial interest therein vested in the respondent and that, though the instruments were not registered, the respondent was not a trespasser as against the appellants and the said Mary Ruth Lundgren, after she had in effect transferred the timber to the said Roy A. MacDonald, was not justified under said section 34 of the Land Registry Act in preventing the respondent company from entering on the lands and enjoying and enforcing the rights which MacDonald had transferred to it as aforesaid. I am satisfied that this Court did not hold otherwise in the *Carlson* case, *supra.*

I would dismiss the appeal.

Appeal dismissed, Sloan, J.A. dissenting.

Solicitor for appellants: *Garfield A. King.*
Solicitors for respondent: *Sullivan & McQuarrie.*

POPE v. POPE.

S. C.
In Chambers
1942
Sept. 17;
Oct. 19.

Practice—Judgment debtor—Examination of—Right of debtor to have counsel—Liberty of the subject—Rule 610—Arrest and Imprisonment for Debt Act, R.S.B.C. 1936, Cap. 15, Sec. 19.

On the examination of a judgment debtor, held pursuant to an order made under rule 610 of the Supreme Court Rules, 1925, and under section 19 of the Arrest and Imprisonment for Debt Act, as the liberty of the person is involved and there is no provision in the Act or Rules that a judgment debtor shall not be entitled to the assistance of counsel, there is an inherent right in the judgment debtor to have counsel represent him if he so chooses.

APPLICATION by plaintiff by way of appeal from the district registrar at Victoria in holding that a judgment debtor on his examination pursuant to an order made under rule 610 and under section 19 of the Arrest and Imprisonment for Debt Act, is entitled to be represented by counsel who may take part in the examination. Heard by COADY, J. in Chambers at Victoria on the 17th of September, 1942.

McKenna, for the application.
Clearihue, K.C., contra.

Cur. adv. vult.

19th October, 1942.

COADY, J.: On the examination of the defendant Marie Pope as a judgment debtor, held pursuant to an order made herein under rule 610 of the Supreme Court Rules, 1925, and under section 19 of the Arrest and Imprisonment for Debt Act, Cap. 15, R.S.B.C. 1936, the district registrar ruled that the judgment debtor was entitled to be represented by counsel who was entitled to take part in the examination. This application is by way of an appeal from that ruling.

Counsel for the judgment creditor relies on *Bank of Montreal* v. *Major et al.* (1896), 5 B.C. 156, where on a similar examination DRAKE, J. held:

The examination of a judgment debtor is a personal examination and he is not entitled to the assistance of counsel to take part in such examination, but he can have counsel to privately advise him.

Rule 486 then in force was substantially the same as our present

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rule 610, and section 11 of the Execution Act then in force was in effect the same as our present section 19 of the Arrest and Imprisonment for Debt Act.

This decision counsel submits has governed the practice since that time and should be followed—see *Sale* v. *East Kootenay Power Co.* (1931), 43 B.C. 336. Counsel for the judgment debtor submits that the judgment debtor is entitled to the fullest assistance of counsel on the examination for the reason that on any subsequent application made to the Court for an order, based on the evidence given on the examination the liberty of the subject is directly involved, and to a greater degree now than when the above decision was given by reason of the amendment to section 53B of the Supreme Court Act—see section 2, B.C. Stats. 1922, Cap. 16. This amendment gave an additional power to commit which the Court did not previously possess. See *Royal Bank of Canada* v. *McLennan* (1918), 25 B.C. 183. In support of the general submission he cites *Morse* v. *Parr*, [1934] 1 W.W.R. 139, a decision of the Court of Appeal of Manitoba. In this case reference is made to the *Bank of Montreal* judgment which had theretofore been followed, at least in the county court practice in that Province. While the Court holds that under the Manitoba Act and rule, which are somewhat different from ours, the judgment debtor is entitled to be represented by counsel, yet in dealing with the matter generally the Court says (p. 143):

> Stronger than any other reason is the broad ground that the liberty of the person is involved. The right of examination, though wide within the scope set out by the statute, is limited to such scope. The debtor might refuse to answer questions which the thought, honestly but mistakenly, were not within the statute and be liable to a committal order if the Judge thought fit. There being no provision in the County Courts Act that the judgment debtor shall not have the assistance of counsel, he was, I think, entitled to such assistance.

Similarly there is no provision in our Act or Rules that a judgment debtor shall not be entitled to the assistance of counsel, and it appears to me, that, where there is no specific provision denying such representation, there is an inherent right in the judgment debtor to have counsel represent him if he so chooses. While it is desirable to follow a long-established practice, yet there is, in my opinion, a matter of greater importance involved

here, namely, the liberty of the subject, and under the circumstances, I feel I must uphold the ruling of the district registrar and dismiss the application.

As counsel was entitled to rely on a long-established practice in making this motion there will be no costs to either party.

Application dismissed.

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1942

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YIP CHUN *ET AL.* v. W. R. CARPENTER (CANADA) LIMITED *ET AL.*

S. C.
In Chambers
1942
Oct. 13, 20.

Practice—Security for costs—Plaintiffs Chinese seamen ordinarily resident in China—Held at Canadian Immigration office in Vancouver.

The plaintiffs, Chinese seamen ordinarily resident in China, had been previously employed by the defendants, other than the B.C. Motor Transportation Company Limited, on the S.S. Edna and owing to a dispute were ordered off the boat at San Francisco. They were brought to Vancouver, B.C., on the assurance of early transportation to China. They brought this action for wages and damages. On the application of the defendant, the B.C. Motor Transportation Company Limited, for security for costs:—

Held, that the plaintiffs did not come within the jurisdiction for the purpose of bringing the action as the action arose as a result of their having been brought within the jurisdiction. Moreover, it would seem most probable, owing to war conditions, that they will be here for the trial. In such a case no order for security should be made.

APPLICATION by defendant, B.C. Motor Transportation Company Limited, that the plaintiffs give security for costs on the ground that they are ordinarily resident without the jurisdiction. Heard by COADY, J. in Chambers at Vancouver on the 13th of October, 1942.

W. S. Owen, and *A. H. Douglas,* for the application.
Adam Smith Johnston, contra.

Cur. adv. vult.

20th October, 1942.

COADY, J.: This is an application by the defendant B.C. Motor Transportation Company Limited that the plaintiffs give

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1942

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Coady, J.

security for costs on the ground that they are ordinarily resident without the jurisdiction. The plaintiffs are Chinese seamen ordinarily resident in China, and are now held at the Canadian Immigration office in Vancouver awaiting removal from Canada to China. They have been so held since March, 1942, when they entered Canada from the United States. The delay in removal is due to the war conditions at present prevailing.

The plaintiffs allege that they were previously employed by the defendants other than the defendant applicant herein on the S.S. "Edna," and that due to some dispute with the owners they were ordered off the boat at San Francisco and were brought to Vancouver on the assurance of early transportation from this port to China. Here they were denied their freedom contrary, they allege, to representations made to them by these defendants, and they now sue for wages which they allege owing, and for damages. I am not entitled to go into the merits of the action upon this application, but I am not prevented, as I understand it, from looking at the statement of claim to ascertain the cause of action. It is clear the plaintiffs did not come within the jurisdiction for the purpose of bringing the action. The action arises as a result of their having been brought within the jurisdiction, and it would appear that the cause of action arose after they were brought here. Moreover, it would seem most probable, owing to war conditions, that they will be here for the trial, and, if so, no order for security should be made: see *de Schelking* v. *Zurbrick* (1918), 26 B.C. 386. The order is a discretionary one, and on the special circumstances here, I feel that I should exercise that discretion in favour of the plaintiffs. The application is, therefore, dismissed.

Application dismissed.

ROGERS v. THE COUNCIL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA *ET AL.*

S. C.
1942
Oct. 13, 29.

Medical Act—College of Physicians and Surgeons of B.C.—Charge of unprofessional conduct against member—Executive committee conducting inquiry — County judge included in committee — Whether properly included—R.S.B.C. 1936, Cap. 171, Sec. 50—B.C. Stats. 1940, Cap. 26, Secs. 13 to 19.

The executive committee of The College of Physicians and Surgeons of British Columbia associated with themselves a judge of the County Court of Vancouver as a member of the committee in conducting an inquiry into a charge against one Dr. Rogers, and found him guilty of unprofessional conduct and the Medical Council of the College ordered his name to be erased from the register. On appeal by Dr. Rogers:—

Held, that section 50 of the Act, as re-enacted by B.C. Stats. 1940, Cap. 26, Sec. 13, provides that the executive committee may ascertain the facts relating to the matter by a "committee of inquiry" which shall consist of three members of the executive committee appointed by the executive committee from amongst its members. This is a tribunal separate and distinct from the executive committee. Section 53 prior to the 1940 amendment provided that the executive committee may on the hearing of a complaint associate with themselves as a member of the committee one of the judges of the county court, but section 53 as re-enacted by section 15 of the 1940 amendment provides that a "committee of inquiry" may on the hearing of a complaint associate with themselves as a member of the committee one of the judges of the county court, but does not provide for the executive committee doing this. There are, therefore, two tribunals provided for under the Act to conduct an inquiry, one, the "executive committee," the other, a "committee of inquiry." The committee of inquiry only is authorized to associate with themselves a judge of the county court. The executive committee associated with themselves, as a member, a judge of the county court. There is no authority under the Act for such a tribunal and it is without jurisdiction. The findings of the committee are set aside and the name of the appellant is restored to the register.

Apld Hollenberg v. B.C. Optometric Assoc. 61 D.L.R. (2d) 295 (B.C.C.A.)

Ref'd to Pottinger v. Council of College of Dental Surgeons of B.C. [1973] 3 W.W.R. 183 (B.C.S.C.) & 34 D.L.R. (3d) 746

APPEAL by Dr. Everly Eldon Rogers from the decision of the executive committee of The College of Physicians and Surgeons of British Columbia on an inquiry into a charge against Dr. Rogers, when it was found that he was guilty of unprofessional conduct. The Medical Council ordered that his name be erased from the register of The College of Physicians and

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ROGERS v. THE COUNCIL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA

Surgeons of British Columbia. Argued before COADY, J. at Vancouver on the 13th of October, 1942.

A. G. D. Crux, for appellant.
Willa E. Williams, for respondent.

Cur. adv. vult.

29th October, 1942.

COADY, J.: The executive committee of The College of Physicians and Surgeons of British Columbia, associated with themselves Judge A. M. HARPER, a Judge of the County Court of Vancouver, as a member of the committee in conducting an inquiry into a charge against Dr. Everly Eldon Rogers, and found him guilty of infamous or unprofessional conduct. Thereupon the Medical Council of the College ordered his name erased from the register. This is an appeal from the decision of the committee.

The Medical Act, being Cap. 171, R.S.B.C. 1936, and amending Acts, provides for an inquiry of this nature. Section 50 of the Act before amendment provided in effect as follows:

> The Council shall, for the purpose of exercising in any case the powers of suspending the registration of any person, . . . , ascertain the facts of the case by the executive committee; and a written report of the executive committee may be acted upon as to the facts therein stated, for the purpose of the exercise of the said powers by the Council.

This section was repealed in 1940 and a new section substituted to provide that the executive committee may ascertain the facts relating to the matter by a committee of inquiry which shall consist of three members of the executive committee appointed by the executive committee from amongst its members. This is a tribunal separate and distinct from the executive committee. That this is so, is abundantly clear, it appears to me, from the amendments also made in 1940 to section 57, and also to sections 54, 55 and 56 of the Act to provide for the addition of the words "the committee of inquiry" or "a committee of inquiry" immediately following the words "executive committee" in the three last-mentioned sections. Section 53 of the Act prior to amendment in 1940 provided that the Council or the executive committee may in the hearing of complaints or making inquiries associate with themselves as a member of the committee one of the judges of the county court. Section 53 was repealed and a new section substituted to provide that in all cases, other than

cases falling under subsection (3) of section 45, which have no application here, a committee of inquiry may in the hearing of complaints or making of inquiries associate with themselves as a member of the committee, one of the judges of the county court, but does not provide for the Council or the executive committee doing this, although the repealed section did so provide. There are, therefore, two tribunals provided for under the Act to conduct the inquiry—one, the executive committee, the other a committee of inquiry. The committee of inquiry only, is authorized to associate with themselves a judge of the county court. The executive committee has no such authority.

But counsel for the respondent submits that the words "a committee of inquiry" in section 53 should be read as meaning "any committee of inquiry" and should be understood as including the "executive committee." I cannot agree with this submission. In the first place there is in my opinion no ambiguity in the section, but if ambiguity exists we can have recourse to other sections of the Act to see in what sense the expression is used. By referring to sections 54, 55, 56 and 57 it seems clear that the Legislature did not intend the expression "a committee of inquiry" to include the executive committee. To hold that the use of the phrase in section 53 is broad enough to include the executive committee would be to place an entirely different construction on it than can be placed upon it where used in the other sections. It would, in my opinion, be unreasonable to hold that the Legislature used the expression in this one section in one sense and in all the other sections above mentioned in a different sense.

The inquiry here, as stated, was made by the executive committee, not by a committee of inquiry. The executive committee associated with themselves as a member of the committee a judge of the county court. There is no authority under the Act for such a tribunal and it was entirely without jurisdiction. Where as here, special jurisdiction is given by the Legislature to a body to hold an inquiry of this nature, and where serious consequences may flow from the findings in that inquiry, the Act must be strictly complied with. The statutory tribunal as provided by the Act did not function. Counsel agree that if I came to the

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conclusion that the statutory tribunal did not function that the findings cannot stand. The findings of the committee will therefore be set aside and the name of Dr. Everly Eldon Rogers restored to the register.

Appeal allowed.

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Sept. 17; *Oct.* 30.

McFALL v. VANCOUVER EXHIBITION ASSOCIATION: MARBLE, THIRD PARTY. (No. 3).

Practice—Discovery—Examination of past officer of company—Application made during the trial—An officer of the company had previously been examined—Rule 370c (1) and (2).

A party has no right to examine a past officer or servant of a corporation as of right whether any officer or servant has been examined or not. He may examine such officer only by order of the court or a judge, and there is no limitation placed on the court or judge's jurisdiction to grant such order whether an officer of a company has already been examined or not. Rule 370c (2) does not add to or take away from the power contained in rule 370c (1) to examine a past officer of the company. An examination for discovery cannot be ordered during the course of a trial.

APPLICATION during the trial to examine a past officer of the defendant company, an officer of the company having previously been examined. Heard by FARRIS, C.J.S.C. at Vancouver on the 17th of September, 1942.

McAlpine, K.C., and *W. C. Thomson*, for plaintiffs.
Bull, K.C., and *Ray*, for defendant.
Locke, K.C., and *Guild*, for third party.

Cur. adv. vult.

30th October, 1942.

FARRIS, C.J.S.C.: This was an application made during the trial to examine a past officer of the defendant company under Order XXXIA, r. 370c (1). An officer of the company had been previously examined.

Rule 370c (1) reads as follows:

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

Rule 370c (2) reads as follows:

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

The case of *Harrison Mills Ltd.* v. *Abbotsford Lumber Co. Ltd.* (1934), 49 B.C. 301, being a judgment of McDONALD, J. (now C.J.B.C.), and in opposition thereto a case of *Des Brisay* v. *Canadian Government Merchant Marine Ltd.* (1936), 51 B.C. 57, being a judgment of MORRISON, C.J.S.C. were cited to me. At first glance it would appear that these judgments are in direct conflict, but on closer examination this would not appear to be correct. Apparently, for some reason, in the *Harrison Mills* case the application was made under rule 370c (2) above quoted, and the learned judge held that under this rule he had no power to grant the application. The application in the *Des Brisay* case, however, was apparently made under rule 370c (1), and the learned Chief Justice distinguished that case from the *Harrison Mills* case by finding that in the *Des Brisay* case he was not limited to rule 370c (2), as the learned judge in the *Harrison Mills* case had found himself so limited, and he accordingly granted leave for the examination of a past officer when an officer of the company had already been examined. In following the judgment of the late Chief Justice, which was the later of the two judgments, in my opinion the judgment of the late Chief Justice in granting leave was sound. As of right, in the case of a corporation an officer or corporation may be examined without special order, and where an officer has been examined under such right further another officer of the corporation may be examined, but this is not as of right, but only on the order of a Court or judge.

A party has no right to examine a past officer or servant of a corporation as of right whether any officer or servant has been

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examined or not. He may examine such officer only by order of the Court or a judge, and there is no limitation placed on the Court or judge's jurisdiction to grant such order whether an officer of a company has already been examined or not. In my opinion rule 370c (2) does not add to or take away from the power contained in rule 370c (1) to examine a past officer of the company.

The second point which came up was whether or not an examination for discovery could be asked for during the course of the trial. It was my opinion that an order for examination for discovery could not be made during the course of the trial, but if there was discretion in the judge to order such examination that the discretion should only be exercised in most exceptional circumstances, and I did not find that in this matter there were such exceptional circumstances as would justify the granting of the application. I, therefore, refused to order the discovery during the trial. Since the matter came on I have had a greater opportunity to study this question. Rule 370c says:

> A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial. . . .

It is clear to me that the whole intention of the provisions for examination for discovery was that the parties before trial should have opportunity for the full disclosure to meet any issues which might arise on the trial, and it was not intended that the orderly conduct of a trial should be interrupted by ordering discovery after the trial commences. Rule 327 of the Ontario practice is similar to our rule as above quoted, as to examinations before trial. Holmested & Langton's Ontario Judicature Act, 5th Ed., at p. 981 says:

> But the words "before the trial" in R. 327 do not prevent the examination of a party after a trial which proves abortive by reason of a disagreement of the jury, and before a second trial within the meaning of R. 327.

It would seem clear to me that the effect of these words is to inferentially draw the conclusion that an examination cannot be ordered during the course of a trial, and in my opinion such is the case.

Application refused.

ROBILARD v. ROBILARD.

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Sept. 25;
Oct. 31.

Costs — Divorce action — Divorce granted — Application for costs against co-respondent—Costs not asked for in prayer of petition.

Where costs have not been asked for in the prayer of a petition for divorce against either the respondent or co-respondent and no one appearing for the respondent or co-respondent, it is not within the competency of the Court to grant the petitioner costs against either the respondent or co-respondent.

APPLICATION by the successful petitioner in a divorce action for costs against the co-respondent. Costs were not asked for in the prayer of the petition. The facts are set out in the reasons for judgment. Heard by FARRIS, C.J.S.C. at Victoria on the 25th of September, 1942.

Bullock-Webster, for petitioner.
Co-respondent did not appear.

Cur. adv. vult.

31st October, 1942.

FARRIS, C.J.S.C.: Costs against the co-respondent were not asked for in the prayer of the petition, and the co-respondent did not appear. While granting the divorce I reserved judgment as to the question of costs. There would appear to be no reported cases in British Columbia on this point, but the records produced from the Court registry show that in the past it has been the practice of certain members of this Court to grant costs and other members of the Court to refuse to grant costs against the respondent or co-respondent, as the case might be, when costs were not asked in the prayer of the petition and the respondent or co-respondent did not appear. Since the hearing of the case, in order to establish a uniform practice in this Court I have had the benefit of conference with my brother judges.

Latey on Divorce, 12th Ed., at p. 900 says:

A claim for costs against a wife or woman named (or any other party) must be made in the prayer of the petition. [Rule 4 (3).]

Rule 4 (3) found in Latey, p. 1084, and particularly at p. 1085, says:

(3) The petition shall conclude with a prayer setting out the particulars of the relief claimed including:—

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(a) The amount of any claim for damages;
(b) Any claim for custody of the children of the marriage;
(c) Any claim for alimony pending suit;
(d) Any claim for costs; and
[(e) Certain other specific claims for relief.]

It is to be noted that in this rule practically every possible claim for relief is enumerated. Rule 1 (*b*) of our Divorce Rules, 1925, differs slightly from the English rule in that while it requires that the petition shall conclude with a prayer setting out the particulars of the relief being claimed, it only enumerates to be included in the particulars of the relief the amount of any claim for damages. It must be noted, however, that neither in the Divorce and Matrimonial Causes Act nor in the Divorce Rules is there any provision for general relief, and in fact the rule above mentioned indicates a contrary intention in that it requires the prayer to set out particulars of the relief claimed. It would seem clear to me that the mere fact that damages is the only relief enumerated under our rules does not negative the requirements of the rule that particulars of any other relief claimed must be set out in the prayer of the petition. In the English Rules costs are recognized as a particular relief in the same manner as are other particular reliefs enumerated, and while these reliefs are not enumerated in our rules, nevertheless the English Rules may be at least taken as a guide as to what particulars must be included in the prayer of the petition in addition to damages.

The English Rules above cited were only, however, passed in 1937, replacing the Rules of 1924. Rule 1 (B) of the 1924 English Rules is as follows:

> The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children which is sought, and shall be signed by the petitioner, and in the case of a minor or other person who is not *sui juris* by his or her guardian.

This is similar to our rule 1 (*b*) with the exception that it requires in addition to damages the inclusion in the prayer of a claim for the custody of the children when this is sought. Rayden and Mortimer on Divorce, 3rd Ed., 147, sec. 9 says:

> The petition concludes with a prayer setting out the relief claimed. This need not ask for costs, [and cites in support thereof] *Finlay* v. *Finlay and Rudall* (1861), 30 L.J. P.M. & A. 104; *Goldsmith* v. *Goldsmith and others* (1862), 31 L.J. P.M. & A. 163.

Brown and Watts's Divorce and Matrimonial Causes, 9th Ed., 224, says:

> The Court may order the costs of the proceedings to be paid by the co-respondent where the adultery is established, although the petitioner may not have prayed for such costs,

and cites the two above referred cases in support thereof. In the case of *Finlay* v. *Finlay and Rudall* which was tried on March 13th, 1861, the Judge Ordinary held:

> The amendment may be made; but it is unnecessary, for the matter of costs is by the statute 20 & 21 Vict. c. 85 (1) left entirely to the discretion of the Court, and it may, therefore, order them to be paid, though they are not asked for in the petition.

In the *Goldsmith* v. *Goldsmith* and other parties, which was tried on May 16th, 1862, where the costs had not been claimed in the petition the Judge Ordinary held:

> I may condemn the co-respondent in costs notwithstanding.

Apparently the learned judges in both of these cases exercised this power under section 51 of 20 & 21 Vict. c. 85, which is similar to section 35 of our Divorce and Matrimonial Causes Act. It would therefore appear at first glance that the question of allowing costs when not claimed in the prayer of the petition has been well settled. However, the rules and regulations governing the practice at that time must be considered. The rules as to what was to be included in the prayer were not similar to the English Rules of 1924, or as amended in 1937. They were very general at that time and not specific. What was then required as to the commencement of proceedings before the Court for Divorce and Matrimonial Causes and what should be contained in the petition is as follows:

> 1. Proceedings under the Matrimonial Causes Acts or any of them shall be commenced by filing a petition.
>
> 2. Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavit shall be with the petition.
>
> 3. In cases where the petitioner is seeking a decree of nullity of marriage or of dissolution of marriage, or of judicial separation, or a decree to a suit of jactitation of marriage the affidavit of the petitioner, filed with his or her petition, shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage.

No requirements are set out as to the prayer of the petition, and the rules did not in any way limit the general right of the Court to deal with costs.

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The Act itself also deals in most general terms with the petition except to require particulars of the facts on which is sought a dissolution of the marriage.

When Brown and Watts, as before cited, laid down the rule that costs were not necessary to be included in the prayer of the petition, the rules at that time were the same as when the cases were decided in 1861 and 1862. However, in 1924 the rule was modified and for the first time a direction was made as to what the prayer of the petition should contain. Rayden and Mortimer, above quoted, apparently failed to note the change in the rules by the amendment in 1924 under which rules, as before pointed out, for the first time it was made mandatory that the petition should conclude with a prayer setting out particulars of the relief claimed.

It would seem to me that if costs are relief, then they should be claimed in the prayer, and the result of the Rules of 1924 in such case would have the effect of modifying the general discretion of the Court to grant costs only when the same are claimed in the prayer of the petition. It would therefore seem that the decisions in *Finlay* v. *Finlay and Rudall* and *Goldsmith* v. *Goldsmith and others* were no longer effective after the passing of the amendment to the Rules in 1924, and the opinion of Rayden and Mortimer is valueless, as it was apparently based upon the two quoted cases, that is, unless the English Rules (1924) could not limit the general discretion given to the Court. If this be so, it would also appear that the English Rules of 1937 cannot affect the Court's discretion as to costs, but there would appear to be no decision to this effect.

It may be suggested that there is no particular rule in our Divorce Rules dealing with costs, and we must therefore rely on rule 97 which directs in the absence of any express rule in any practice or procedure the Rules of the Supreme Court shall be deemed to apply, and rule 230 which says:

> Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given, as the Court or a Judge may think just, to the same extent as if it had been asked for

applies and that costs therefore may come under the head of

general relief. It would seem to me that rule 97 does not apply in this case, as there is no similar practice under the Supreme Court Rules as is provided for in the Divorce Court Rules, and in addition to which section 35 of the Divorce and Matrimonial Causes Act, Cap. 76, R.S.B.C. 1936, gives the Court jurisdiction to make such order as to costs as may seem just, which would conflict with the Supreme Court Rules if these are to apply, as under the Supreme Court Rules, except in limited cases, costs follow the event unless for just cause the Court or a judge otherwise orders. It would seem to me that rule 97 cannot be used to invoke rule 230, as rule 1 (*b*) of the Divorce Rules specifically sets out the practice to be followed in the preparation of a divorce petition, and occupies the same field in divorce proceedings as does rule 230 in Supreme Court proceedings. To my mind an entirely different principle is involved in costs in Divorce and Matrimonial Causes than in ordinary civil cases. In ordinary civil cases costs follow the event, unless the Court or a judge otherwise for just cause orders. This is not so under the Divorce and Matrimonial Causes Act. As before pointed out, section 35 of that Act places the matter of costs in the discretion of the Court. Secondly, it has been long recognized that when the wife is the respondent she may claim her costs, although unsuccessful, unless it is established she has ample means of her own to provide for costs. And in the third place, until 1918 it was the recognized practice in the English Courts and, so far as I know, in our own Courts to grant no costs against a co-respondent if he did not know that the respondent was a married woman. This strict rule was somewhat modified in the case of *Norris* v. *Norris and Smith* (1918), 87 L.J. P. 119, in which Hill, J. held that under certain circumstances he had discretion in awarding costs against the co-respondent. This case was applied by Dysart, J. in the Court of King's Bench, Manitoba, in the case of *Kleman* v. *Kleman and Wilson,* [1940] 1 W.W.R. 382. In this case, however, the learned judge exercised his discretion and refused costs against the co-respondent. An illuminating paragraph of his Lordship's judgment in this case is found at p. 383, and is as follows:

> There is no evidence that the co-respondent knew that the respondent was a married woman when he began the adulterous relationship, for all that

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appears to the contrary, his first knowledge of the fact may have been brought to him when the petition herein was served upon him. The petition contains no allegation that he possessed such knowledge, and therefore may have lulled him into a false sense of security.

The inference from his Lordship's statements is that it is necessary to allege in the petition the co-respondent possessed the knowledge that the respondent was a married woman in order for the petitioner to obtain costs against the co-respondent. The report in this case does not indicate whether costs were sought in the prayer of the petition, but as no reference is made to the fact that they were not asked, I would infer that the prayer of the petition did ask for costs in the usual way. It would seem to me that costs in a Divorce and Matrimonial Cause must be placed in the same category as damages, and is a particular relief claimed against the party to the action, and such party is entitled to notice of the relief claimed against him and must have notice of this particular relief claimed against him or her. To illustrate this point, a co-respondent is cited in a divorce petition and the service upon him of the petition would be the first intimation to him that the respondent was a married woman. He would look at the petition, and note that there was no allegation that he had knowledge that she was a married woman and that no costs were being claimed against him, and knowing that he was guilty of adultery and no specific claim being made against him he would have no reason to appear in Court, and would thereby be lulled to sleep. Had costs been asked against him under the circumstances, he, on the other hand, would have had every reason to appear to show cause why he should not be mulcted in costs. It is my opinion, therefore, that where costs have not been claimed in the prayer of the petition against either the respondent or co-respondent, as the case may be, and no one appearing for the respondent or co-respondent, it is not within the competency of the Court to grant the petitioner costs against either the respondent or co-respondent. It would seem that even if the English Rules cannot limit the general discretion as to costs as vested in the Court under the English Act this is not so with us in that by virtue of the Court Rules of Practice Act, R.S.B.C. 1936, Cap. 249, Sec. 4 (3), the Divorce Rules of 1925 became a legislative enactment and, being specific in its nature

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and passed subsequent to the Divorce and Matrimonial Causes Act, must when in conflict override the general provisions in that Act. The *Finlay* v. *Finlay and Rudall* and *Goldsmith* v. *Goldsmith* cases therefore cannot be considered as authorities in the interpretation of our Act and rules. I would add, however, that if I am wrong in my conclusions of law and the Court has jurisdiction in its discretion to grant costs against a respondent or co-respondent although not claimed in the prayer of the petition, that this discretion in view of the trend of the times, which is indicated by the 1937 amendment to the English Rules, should not be exercised without notice to the respondent or co-respondent, as the case may be.

I would dismiss the application for costs.

Application dismissed.

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Sept. 29; *Nov.* 10.

Negligence — Compensation in respect of death — Measure of damages— Administration Act—Families' Compensation Act—R.S.B.C. 1936, Caps. 5 and 93.

The wife and infant daughter of the plaintiff were killed when run down by a motor-car belonging to one of the defendants and negligently driven by the other. The plaintiff, as administrator, sued the defendants for damages and on the trial damages were awarded as follows: "Under the Administration Act for loss of wife's expectation of life $1,000; under the Families' Compensation Act for loss of wife's services $125. The above amounts are without abatement."

Held, on appeal, affirming the decision of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), that the addition of the phrase "without abatement" after his awards under the Administration Act and Families' Compensation Act must mean that the learned trial judge assessed the damages under the Families' Compensation Act at $1,125 and then, applying *Davies* v. *Powell Duffryn*, [1942] 1 All E.R. 657, deducted therefrom the $1,000 awarded under the Administration Act leaving a balance of $125 for which judgment was to be entered under this head. On the evidence one is unable to say that in awarding $1,125 the learned judge was obviously in error or had overlooked some relevant element in his assessment of the damages.

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APPEAL by plaintiff, as administrator of the estate of Anna Ponyicky, deceased, from the decision of SIDNEY SMITH, J., of the 4th of June, 1942, in an action for damages under the provisions of the Administration Act and of the Families' Compensation Act. The loss and damage were caused on the 23rd of February, 1942, near the intersection of Hastings and Glen Streets in the city of Vancouver by the negligence of the defendant Takashi T. Sawayama in the operation of a motor-car owned by the defendant Gonzo Sawayama and driven with the knowledge and consent of the said Gonzo Sawayama, which said car was proceeding west upon Hastings Street and ran down and killed the said Anna Ponyicky and her infant daughter, Betty Anna Ponyicky. The plaintiff recovered judgment as to the estate of Anna Ponyicky for the sum of $1,125. The appellant claims the amount awarded is inconsistent with or not in accord with the evidence and is insufficient.

The appeal was argued at Victoria on the 29th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Bray (*Fleishman,* with him), for appellant: Mrs. Ponyicky died shortly after the accident and the child died four days later. Under the Families' Compensation Act, nothing was awarded to the daughter for the loss of the mother. The father was awarded only $125 and nothing was allowed for medical expenses. The award of $125 is absurdly small: see *The St. Lawrence & Ottawa Railway* v. *Lett* (1885), 11 S.C.R. 422.

McAlpine, K.C., for respondents: There is no proof of damages under Lord Campbell's Act and there is no claim for loss of *consortium.* It is merely loss of services computable in money: see *Berry* v. *Humm & Co.,* [1915] 1 K.B. 627; the loss of pecuniary benefit only. The learned judge held there was no proof of any damages: see *Meddam* v. *Minnis* (1893), 37 Sol. Jo. 253; *Millard* v. *Toronto R.W. Co.* (1914), 31 O.L.R. 526, at p. 528; *Grand Trunk Railway of Canada* v. *Jennings* (1888), 58 L.J.P.C. 1; *Sykes* v. *The North Eastern Ry. Co.* (1875), 44 L.J.C.P. 191; *Quin* v. *Greenock and Port-Glasgow Tramways Co.* (1926), S.C. 544. On the cross-appeal the husband is the sole beneficiary under the two Acts. He cannot recover

under the two Acts. He can only have judgment under the one that is the greater of the two. There must be an abatement. The $125 must be abated as there is the same beneficiary: see *Davies* v. *Powell Duffryn,* [1942] 1 All E.R. 657; *McGinnes* v. *Murphy* (1939), 54 B.C. 460; *Cretzu* v. *Lines* (1941), 56 B.C. 214; *Itoku Murakami* v. *Henderson et al.* (1942), 57 B.C. 244; *Benham* v. *Gambling* (1940), 110 L.J.K.B. 49, at pp. 52-3. The older one is, the less expectation of life arises and the amount allowed is less. He is only entitled to the larger amount: see *Ellis* v. *Raine* (1939), 187 L.T. Jo. 100.

Bray, in reply: There is no evidence that there is one beneficiary only. There may be creditors and debtors. The two Acts are not the same. They are in watertight compartments. We are bound by our own decisions: see *Dallas* v. *Hinton and Home Oil Distributors Ltd.* (1937), 52 B.C. 106, at p. 123.

Cur. adv. vult.

10th November, 1942.

MCDONALD, C.J.B.C.: Appellant, as representing his deceased wife's estate, recovered $1,000 for her loss of expectation of life, and, as her husband, recovered $125 compensation for her death.

Neither party presses an appeal against the award of $1,000, but both parties appeal against the smaller award, the appellant on the ground that it is too small, the respondents on the ground that nothing should have been allowed.

Several important points have been raised, but all seem to be well covered by authority.

The recent decision of the House of Lords in *Davies* v. *Powell Duffryn,* [1942] 1 All E.R. 657 makes it clear that a plaintiff cannot recover twice for the death of a relative, so that if he recovers as administrator of the deceased, at the same time taking the estate beneficially, under the intestacy, that factor reduces the damage he suffers as an individual from the death, so that if the latter is separately assessed, he can only recover the larger sum of the two, and not both.

Appellant argued that here there is nothing in the record to show that appellant took the deceased's property beneficially. I

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cannot agree. We have the letters of administration, which show that deceased died intestate. We have also proof that there are no surviving children. It is true that the deceased child survived its mother by a few days, and became entitled under section 112 of the Administration Act, R.S.B.C. 1936, Cap. 5 (taken with section 126) to one-half of her estate, the appellant taking the other half. But on the child's death, appellant became entitled to the whole: *ibid,* section 115.

Appellant complains of the inadequacy of the award of $125 to him as husband, on the ground that it takes no account of his loss of *consortium* and generally that it gives no real compensation for his loss.

We have several times allowed husbands damages for loss of *consortium* in cases of mere injury. No case has been brought to our attention where damages for *"consortium"* as such have been assessed where the accident was fatal. But it seems to me perfectly clear that nothing can be recovered under such a head. In *Blake* v. *Midland Railway Co.* (1852), 18 Q.B. 93, it was said that nothing can be given for *"solatium"* and the Privy Council in *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800 and *Royal Trust Company* v. *Canadian Pacific Railway Company* (1922), 38 T.L.R. 899, laid down in the most sweeping terms that no compensation could be given for any but pecuniary loss. See likewise *Berry* v. *Humm & Co.,* [1915] 1 K.B. 627, where as here the plaintiff's wife was killed. I see nothing to the contrary in *The St. Lawrence & Ottawa Railway* v. *Lett* (1885), 11 S.C.R. 422, so strongly relied on by respondents.

It may seem peculiar that loss of *consortium* is remediable where the injured wife lives, but not where she dies. Probably the distinction turns on the theory that a bereaved husband may remarry, whereas, if his wife is incapacitated but living, he cannot. Whatever the reason, it seems to be settled that nothing can be given, except for pecuniary loss, where the wife is killed.

Apart from the element of *consortium,* the appellant complains that $125 is inadequate to meet his pecuniary loss. But where a married man has no children, it can be only rarely that he suffers pecuniary loss by his wife's death; for in most cases the

wages of a housekeeper would be less than it would cost a husband to feed and clothe his wife, and keep her supplied with spending-money. Most childless men, when they become widowers, either remarry or give up keeping house. The present appellant appears to have only kept a housekeeper for a month after his wife's death. All the cases that I have seen where a husband recovered substantial damages for the death of his wife are cases where he had children. I can easily see that there a husband might be put to a good deal of expense by his wife's death. I have not overlooked that the appellant's child survived his wife by four days, nor the argument that we must take the facts as at the date of the accident. If that is correct, it does not help us. It might if there was some conventional way of arriving at damages; but where we can consider only pecuniary loss, it seems clear that the survival of the infant for four days cannot affect the *quantum* of loss caused by the wife's death.

Appellant tried to show damage by setting up that he and his wife had planned to set up a hairdressing business in which they would be partners, and that he expected to make a good profit out of this. It is, however, a novel idea that one partner can recover damages for the killing of his business partner. And the estimate of profit cannot be taken seriously. It seems to me that this evidence is, if anything, damaging to the appellant, as showing that the wife would have very little time to give to her housekeeping.

However, I do not think it necessary to consider whether the allowance of $125 for loss of the wife's services is adequate, for at all events I would not be prepared to increase this to $1,000; and unless more than that amount were allowed, appellant could not benefit by an increase, in view of the decision in *Davies* v. *Powell Duffryn, supra.* In fact, he can recover nothing under this head.

This appeal, therefore, substantially fails. And for the reasons given, the cross-appeal against the award of $125 succeeds.

On the argument before us, it appeared that an item of $40 for disbursements by appellant was not allowed by the judgment below. So far as appears this was an oversight. When the point was raised before us, respondents' counsel at once objected

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that it was not raised by the notice of appeal, saying that if it had been, he would probably have yielded the point. He further stated that he did not object to the allowance provided it did not affect costs. As the point was not raised until the hearing before us, I do not see how the appellant can claim to have succeeded on that point; it is yielded as a matter of indulgence. So as to the costs of the appeal and cross-appeal, I do not see how the appellant can escape liability.

Since writing the above I learn that my brothers, other than O'HALLORAN, J.A. would dismiss the appeal and cross-appeal with a set-off as to costs. I am therefore withholding any dissent and judgment will go accordingly.

MCQUARRIE, J.A.: I agree that the appeal and cross-appeal should be dismissed with a set-off as to costs.

SLOAN, J.A.: The appellant seeks to increase the amount of damages awarded him under the provisions of the Families' Compensation Act, R.S.B.C. 1936, Cap. 93 for the death of his wife. The respondents cross-appeal from the judgment below, alleging that the appellant is not entitled to any damages because he failed to prove that he had sustained any pecuniary loss by her death.

Prior to the passage of the Families' Compensation Act the husband could not at common law have recovered anything for the death of his wife. As Sir W. J. Ritchie, C.J. said in *Monaghan* v. *Horn* (1882), 7 S.C.R. 409, at pp. 420-22:

> The death of a human being, though clearly involving pecuniary loss, is not at common law the ground for an action for damages, . . .

It was to remedy this situation that the said Act was passed, but the right conferred upon the surviving spouse to recover damages is restricted to the actual pecuniary loss sustained by him. *Pym* v. *The Great Northern Railway Company* (1863), 32 L.J.Q.B. 377 and *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800. There may be included in the assessment of damages future pecuniary benefits lost to him by reason of the death of his wife. *Hetherington* v. *North Eastern Rail. Co.* (1882), 51 L.J.Q.B. 495.

In the present appeal the appellant sought to have his damages increased, claiming a present and potential pecuniary loss in

excess of the $125 awarded by the learned trial judge. If the matter stood there I am of the opinion that something might be said in favour of his submission. I do not, however, interpret the findings of the learned trial judge as awarding that sum. In my view the addition of the phrase "without abatement" after his awards under the Administration Act and Families' Compensation Act must mean, unless it be ignored as meaning nothing at all, that the learned trial judge assessed the damages under the Families' Compensation Act at $1,125 and then applying *Davies* v. *Powell Duffryn,* [1942] 1 All E.R. 657, deducted therefrom the $1,000 awarded under the Administration Act, leaving a balance of $125 for which judgment was to be entered under this head.

On the evidence I am unable to say that in awarding $1,125 the learned trial judge was obviously in error or had overlooked some relevant element in his assessment of the damages. *Stroud* v. *DesBrisay and Colgan* (1930), 42 B.C. 507.

I would, therefore, dismiss both the appeal and cross-appeal.

O'HALLORAN, J.A.: The twenty-seven-year-old wife and fifteen-month-old daughter of the appellant were killed when run down by a motor-car belonging to one of the respondents, and negligently driven by the other. Damages were awarded in the Court below in the sum of $1,125 ($1,000 under the Administration Act and $125 under the Families' Compensation Act) in respect to his wife, and $750 (under the Administration Act only) in respect to his infant daughter. This appeal relates to the wife only, and is confined to the *quantum* of damages. It raises questions of general importance.

The respondents cross-appealed on the ground that damages allowed under the Families' Compensation Act should take into consideration any award made under the Administration Act; in short that the two awards should not be added together in this case. That also involves a principle of general importance. The appellant is 42 years of age, is a millwright and carpenter by trade, and appears to be in moderate circumstances. He owns a furnished six-room home, and at the time of his wife's death they were planning an annex to cost between $1,000 and $1,500 in order to open a lunch-counter and a hairdressing establish-

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ment. His wife was young, active and healthy. They had been married only two years and two months and had the one child. The evidence portrays them as responsible citizens, happily married, well settled in life and to whom the future held out favourable prospects.

In view of the 1942 amendment to our Administration Act no ground was advanced upon which to increase the sum of $1,000 awarded under that Act. But in my view the award of $125 to the husband under the Families' Compensation Act is wholly insufficient, and has no intelligible relation to the realities of a normal married life. In particular it bears no relation whatever to the favourable marital conditions the evidence discloses in the case under review. While damages under the Families' Compensation Act are founded on a reasonable expectation of pecuniary benefit which the death has terminated, that does not mean that only special damages are recoverable, or that the damages are calculated on the basis that marriage must be regarded as a business relationship and *vide Taff Vale Railway* v. *Jenkins,* [1913] A.C. 1, Lord Atkinson at p. 7.

In addition to her management of the household, a wife does numberless things which add to the husband's comfort, convenience, health and actual saving of money, as well as helping him in improving his business prospects. Those varied services, while essentially of pecuniary value, seldom admit of complete reduction to precise figures. In *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800 Lord Watson said in this respect at p. 804 that often,

> the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture.

Evidence of loss of pecuniary benefit does not appear here with such meticulous particularity that the assessment of damages is resolved into a matter of almost automatic computation. But the evidence does show her general capacity and relation to her family. It shows her a loyal, competent, active wife who performed her household and conjugal duties efficiently and satisfactorily. That such services are of pecuniary value cannot be doubted. Their value is a matter of estimate, even though some of it, as Lord Watson said, may be a matter of conjecture.

Her death obviously imposed a monetary loss upon the husband in respect to those services rendered gratuitously by the wife at the time death interrupted the certain prospect of their being continued freely reasonably in the future; and *vide* Scrutton, J. in *Berry* v. *Humm & Co.*, [1915] 1 K.B. 627, at p. 633.

The St. Lawrence & Ottawa Railway v. *Lett* (1885), 11 S.C.R. 422 related to a statute described as a copy of Lord Campbell's Act. A 63-year-old husband (and therefore with an actuarial life expectation of some twelve years) was apportioned $1,500 damages arising from the death of his 53-year-old wife. The point taken and to which the Court did not accede, was that the loss of a wife, no matter how industrious, careful or attentive she might have been in looking after her husband's domestic affairs, was still sentimental, and not of sufficient pecuniary character to support the action. Sir W. J. Ritchie, C.J. with whom the majority of the Court agreed, pointed out that the term pecuniary is not used in the statute and that damages for the injury should not be limited only to an immediate loss of money or property.

He explained the principle of the English decisions to be, that if there is a reasonable expectation of pecuniary advantage, the destruction by death of such expectation by the negligence of a third party, will sustain the action.

The judgment proceeded at p. 433:

> I am free to admit that the injury must not be sentimental or the damages a mere *solatium*, but must be capable of pecuniary estimate; but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation. The injury must be substantial; . . . It may be impossible to reduce such an injury to an exact pecuniary amount.

And further at p. 434:

> There are abundant cases in our law where there is the same difficulty in reducing the injury to a pecuniary standard; . . . slander . . . ; libel, breach of promise of marriage, and many others where substantial injury is complained of, but the amount of damage is left to the discretion and judgment of the jury; there are no judicial tables by which the amount of such damages can be ascertained, nor any judicial scales on which they can be weighed, yet pecuniary damages are, without difficulty awarded, assessed by the good sense and sound judgment of the jury, upon and by reference to, all the facts and circumstances of each particular case, and who are, as Lord Campbell expresses it, to take a reasonable view of the case and give a fair compensation.

Applying what has been said, I am of the view, with respect,

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that an award of $7,500 damages under the Families' Compensation Act, would represent a just appreciation of the substantial nature of the injury suffered. The 42-year-old husband has an actuarial expectation of life of 26.14 years, *vide* Schedule B of the Succession Duty Act, Cap. 270, R.S.B.C. 1936. In the *Lett* case, *supra,* $1,500 was apportioned the husband in 1885, when the purchasing power of a dollar in Eastern Canada was certainly several times as great as it is today in Vancouver. The wife there was 53 compared to 27 here. The husband's actuarial expectation of life there was twelve years compared to 26 here. The deceased's wife's actuarial expectation of life there was eighteen years compared to 36 years here. In *Price* v. *Glynea and Castle Coal &c. Co.* (1915), 85 L.J.K.B. 1278, Bankes, L.J. said at p. 1282 that in a claim under Lord Campbell's Act the expectation of life of the claimant as well as that of the deceased must be taken into consideration.

If for that period of 26 years his much younger wife would have contributed services to him and to his household to the extent of $25 per month, or $300 per year, we would have here the figure of $7,800. And that would not include special services, such as, for example, nursing in illness. As conditions of living have existed on this coast for many years, such an estimate for cooking, washing, sewing, nursing, cleaning and generally looking after a household and a husband, month in and year out, cannot be considered out of the way, in the condition of home life the evidence discloses. It contemplates not an eight-hour day, but virtually a 24-hour day. It includes care and thought in the carrying out of duties, which the husband could not expect or receive from a month-to-month employee. It includes an eye to the prevention of waste and the saving of money in the repair and maintenance of clothes, furniture, house and household effects. While many of those services may be described as routine, yet they would not be of a perfunctory or casual nature. The management of the home virtually fell on her shoulders. All that, of course, terminated with her death and represents a real monetary loss to the husband. Such a computation is not referred to as a conclusive method of calculating the loss of pecuniary benefit. It is an illustration how that loss may be

estimated in everyday terms, if emphasis is sought to be placed upon some precise method of calculating the reasonable expectation of loss of pecuniary benefit to the husband.

It is recognized, of course, that figures calculated to represent the actuarial expectations of human life are based on averages. But under modern conditions the great assistances to be derived from such figures is an element which cannot be ignored in claims under the Families' Compensation Act. It is to be observed also that the willingness, intelligence and enthusiasm with which a happily-married woman may perform her numerous duties is necessarily an element which enters into the value of her services. For certainly the services of a wife are pecuniarily more valuable than those of a month-to-month employee. The frugality, industry, usefulness, attention and tender solicitude of a wife surely make her services greater than those of an ordinary servant, and therefore worth more.

During the wife's lifetime they received $26 per month from roomers. After her death the husband discontinued that and instead rented the four downstairs rooms furnished for $25 per month. It seemed to be argued before us therefore that any loss the husband incurred by the death of his wife was offset by the rental of $25 per month. That submission is obviously untenable. It excludes entirely the real basis of the husband's claim, *viz.*, loss of services his wife rendered him as a wife in the conduct and management of his home. The comforts and conveniences a married man has in his own home are something more than is available to him living as a bachelor in a single room. As was said by Cockburn, C.J. in *Pym* v. *The Great Northern Railway Company* (1862), 31 L.J.Q.B. 249, at p. 252, the enjoyment of greater comforts and conveniences of life depend on pecuniary means to procure them, and hence their loss is one which is capable of being estimated in money.

It further omits from consideration that the husband is now either buying his meals, or if he prepares them himself, he is deprived of his wife's services in that respect. This extends also to his laundry, cleaning and repairing his clothes and dozens of things for which a husband depends on his wife. The $25 rental now received has only this effect, that if he did not have

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it or could not get it, the basis of his claim would be increased by the $26 received from roomers before her death. It is in effect the same as if he had kept the roomers and had hired a housekeeper at $25 per month for that purpose. Reduced to its proper perspective his pecuniary loss in that respect alone arising from the wife's death would then be the $25 a month he would pay the housekeeper to do the work his wife had been doing to maintain the monthly roomer rental of $26. But quite apart from the roomers and the subsequent rental which may be said to set off each other, there is the basic ground of the claim, *viz.*, loss of his wife's services. Sir W. J. Ritchie, C.J. observed in the *Lett* case, *supra,* at p. 435:

> I must confess myself at a loss to understand how it can be said that the care and management of a household by an industrious, careful, frugal and intelligent woman, . . . , is not a substantial benefit to the husband . . . ; or how it can be said that the loss of such a wife . . . is not a substantial injury but merely sentimental, is, to my mind, incomprehensible.

On the facts of this case there is an actual and substantial loss, independent of any sentimental feeling, grief, or loss of society, and clearly independent also of any benefit accruing from the $25 monthly rental after death. The latter when viewed in its true perspective, can have no greater effect at best, than to balance the loss of revenue from roomers received before her death. In any event, to my mind it would make a mockery of the Families' Compensation Act to hold, that if a man should be able to rent his furnished home monthly for more than the estimated monthly value of his deceased wife's services, that he should be held for that reason alone, to have suffered no substantial loss from his wife's death. It would, of course, be contrary to the inherent nature of damages as such, to require the surviving husband to adopt a lower scale of living, in order to reduce the amount of damages payable by a third party whose negligence has brought about the interruption in his accustomed and appropriate mode of life.

This brings us to the cross-appeal. I think counsel for the respondent was right in principle in his cross-appeal, although I must reject the result based on the figures in the Court below. For reasons stated earlier I must regard them as wholly erroneous estimates of the damages suffered by the husband, bearing no true relation to the factual conditions under review. It is true

that the claims under the two statutes are distinct and independent, although they arise out of the same act of negligence. Under the Administration Act the benefit goes to the estate of the deceased. Under the Families' Compensation Act the benefit goes to the dependants of the deceased. In this case it happens the husband is the sole dependant of the deceased and also the sole beneficiary of the estate of the deceased.

In *Rose* v. *Ford,* [1937] A.C. 826 it was stated there might be some overlapping in the damages awarded under the two statutes. In *Feay* v. *Barnwell,* [1938] 1 All E.R. 31, Singleton, J. held an award under Lord Campbell's Act (the equivalent of our Families' Compensation Act) should be reduced *pro tanto* by the amount of the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934 (the equivalent of our Administration Act), even though the "rights" given under the latter statute were expressed to be "in addition to and not in derogation of" any rights conferred on dependants of a deceased person by the former statute. That view was approved by the House of Lords in *Davies* v. *Powell Duffryn Associated Collieries, Ltd.* (1942), 111 L.J.K.B. 418.

It was there explained that in calculating the damage "proportioned to the injury" under Lord Campbell's Act, gains as well as losses should be taken into account, so as to ascertain on balance the compensation to be awarded under that statute. It was the view that the language of the Law Reform (Miscellaneous Provisions) Act, 1934, was not specific enough to make any change in that method of assessment. Accordingly it was decided that any benefit received indirectly under the Law Reform (Miscellaneous Provisions) Act, 1934, by a dependant under Lord Campbell's Act, should be taken into account in estimating the damages to be awarded that dependant under the latter statute.

Our Administration Act (section 71 (6) thereof) provides that

> nothing in this section shall prejudice or affect any right of action under . . . the provisions of the Families' Compensation Act.

In 1942 section 71 (2) was amended by adding the words

> provided that nothing herein contained shall be in derogation of any rights conferred by the Families' Compensation Act.

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That language cannot be read as any wider in meaning than "shall be in addition to and not in derogation of" which appears in the English Act. It seems to me the applicable reasoning in *Davies* v. *Powell Duffryn* cannot be escaped. It must be concluded, that if the Legislature had intended that damages which may be awarded under the Administration Act should not be taken into account in assessing damages under the Families' Compensation Act, it would have said so in unequivocal terms.

To recapitulate: $7,500 is found to be a proper award to the husband dependant under the Families' Compensation Act subject to any gains from the wife's death which may reduce that amount *pro tanto*. The wife's estate was awarded $1,000 under the Administration Act and the husband dependant is the sole beneficiary of her estate. The award of $7,500 should therefore be reduced *pro tanto* to $6,500. In the result the awards stand (a) $1,000 under the Administration Act plus (b) $6,500 under the Families' Compensation Act.

I would allow the appeal with costs and in the circumstances would dismiss the cross-appeal but without costs.

FISHER, J.A.: I would dismiss both the appeal and the cross-appeal for the reasons given by my brother SLOAN.

Appeal and cross-appeal dismissed, O'Halloran, J.A., dissenting, except as to cross-appeal.

Solicitor for appellant: *A. H. Fleishman.*
Solicitors for respondents: *Farris & Co.*

MACDONALD v. STAR CABS LIMITED AND VAN BLARCOM.

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Nov. 9;
Dec. 19.

Negligence—Blackout—Pedestrian walking from street-car to kerb of sidewalk—Struck by car going fifteen miles an hour—Small slit lights from masked parking-lights on car—Driver could not see beyond hood of car, unless something appeared directly in front of slit lights—Liability.

The plaintiff got off a street-car in a blackout as it stopped when going south on Main Street just before it reached 2nd Avenue. He paused for a second or two and then proceeded towards the kerb on the west side of the street (about 24 feet from the car). When slightly over half way across, he was struck by a car going south on Main Street owned by the defendant company and driven by an employee when travelling about fifteen miles an hour. The car had masked parking-lights only and the driver could not see anything beyond the hood of his car, unless something got right in front of the small slit rays from the masked parking-lights. The driver saw the plaintiff a few feet from him when he came directly in front of the slit rays.

Held, that the defendant driver going at fifteen miles an hour on a car-line street, knew that passengers were getting off street-cars and admitted he could not tell when he was approaching an intersection. The statute imposes on him a special duty where street-cars stop to take on or let off passengers and the *onus* is on him to establish that he has observed that duty. In driving at such a speed when there was practically no visibility, he was guilty of gross negligence and there was not a failure on the part of the plaintiff to take reasonable care under the circumstances.

ACTION for damages, the plaintiff while going from a street-car to the kerb during a blackout being struck by an automobile owned by the defendant company and driven by an employee of said company. The facts are set out in the head-note and reasons for judgment. Tried by COADY, J. at Vancouver on the 9th of November, 1942.

Crux, for plaintiff.
L. St. M. Du Moulin, and *W. H. K. Edmonds,* for defendants.

Cur. adv. vult.

19th December, 1942.

COADY, J.: The plaintiff sues for damages for injuries sustained by him on the evening of December 7th, 1941, at the corner of 2nd Avenue and Main Streets, Vancouver, when struck

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by a motor-car owned by the defendant Star Cabs Limited, and driven by the defendant Van Blarcom, an employee of the defendant company.

There was on that evening a blackout in the city, called by the Western Air Command. The defendant Van Blarcom was driving with parking-lights only, and these masked so that the only uncovered portion thereof consisted of a small slit one-half an inch wide and three or four inches in length. The rate of speed of the motor-car was from ten to fifteen miles an hour. I quote from the examination for discovery of the defendant Van Blarcom:

What speed were you travelling at as you went up Main Street? Oh, ten or twelve miles an hour was as good as I could do that night—around fifteen.

You think then it would be around ten to fifteen miles an hour on this trip? Yes.

The driver could not see beyond the hood of his motor-car. Quoting again from his examination for discovery:

How far ahead could you see when you were driving in this blackout? You could not see ahead at all. You could see about your radiator and that is about all.

You say you were just feeling along in the darkness? Yes.

And that is about the way you were driving this trip when the accident happened? Yes.

I mean so far as you were concerned you were simply driving along, as you might say blind? Yes, I could see the radiator ahead, the engine hood, a portion of it, and that is all I could see unless something is right in front of the parking-lights.

And you were depending for your safety on the fact that other people could see you? That is all you could, yes.

The plaintiff was a passenger on a street-car proceeding south on Main Street. He got off at the corner of 2nd Avenue. His intention was to get off at the corner of 7th Avenue, five blocks beyond, but he mistook the conductor's announcement. He testifies that he paused for a second or two and then proceeded to the kerb on the west side of Main Street when he was hit by a motor-car. The distance from the street-car track to the kerb is 24 feet, and it would appear that he covered more than half that distance before he was struck by the right front fender or bumper of the motor-car then proceeding south. The driver saw him, when only a few feet from him, when he came directly in front of the rays from the masked parking-light on the right front fender of the motor-car.

In an effort to discredit the plaintiff's evidence there was a good deal of evidence submitted on the part of the defence, to the effect that there was in reality no street-car at or near the scene of the accident at the time, that the plaintiff could not have got off the street-car as he stated, and that no street-car had proceeded along that street for some considerable time before the accident. I do not accept this evidence as reliable, even though supported to some extent by the evidence of George Palmer, a witness for the plaintiff. I see no reason to doubt the plaintiff's evidence in this regard. I must find as a fact, therefore, that the plaintiff had been a passenger on, and got off this street-car at the point in question, and proceeded to the kerb, as above stated. The accident occurred at about 40 feet back from the intersection at a point where the plaintiff would be expected to be after alighting from the street-car.

The question then arises, was the defendant Van Blarcom guilty of negligence? He was driving in a blackout. He could not see anything ahead of him beyond the hood of his car unless something appeared directly in the feeble rays of one or other of his masked parking-lights. He was driving at a rate of speed of between ten to fifteen miles an hour. He chose to drive in this way, disregarding entirely the rights of others and hoping that others on the street would see his lights and avoid him. He was on a car-line street and must have known that passengers would be getting on and off street-cars, yet he admits that he could not tell when he was approaching an intersection. The statute imposes special duty on him where a street-car stops to take on or let off passengers. The *onus* is on him to establish that he observed that duty. See *Macdonald* v. *Bailey,* [1934] 1 W.W.R. 342; *Rolland* v. *Warsaba,* [1937] 2 W.W.R. 706. It appears to me that in driving under such conditions at such speed and with practically no visibility he was guilty of the grossest negligence.

The next question is, was there negligence on the part of the plaintiff? I do not think that there was. I am referred, however, to the case of *Franklin* v. *Bristol Tramways Co.,* [1941] 1 All E.R. 188. While the facts are different, the submission was there made by counsel that (p. 192):

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In blackout conditions, there is imposed on a person in the road the new duty of bearing in mind the difficulty which the driver of an oncoming vehicle will have, of seeing a person or a vehicle bearing no light and of realizing that it is his duty as a person in the road to take all reasonable steps to minimize such difficulty.

The learned judge makes this observation on that submission:

> That broad argument appeals to me as being well-founded and reasonable, and, if, through the absence of some precaution or through the failure to take some step which could be taken, the difficulty of the driver of the oncoming vehicle is increased, in my view, it cannot be said that that breach of duty or failure to take reasonable care does not contribute causually to the accident.

That establishes with clearness the necessity for the exercise of greater care on the part of the pedestrian under blackout conditions than is required under ordinary conditions. This necessity to exercise greater care on the part of the pedestrian under similar conditions, that of dense fog, has been dealt with in our own Courts where in effect the same principle has been enunciated. (See *Beauchamp* v. *Savory* (1921), 30 B.C. 429, and *Pearson* v. *Read* (1925), 34 B.C. 524. The principle is not new; it is a question after all as to whether there has been a failure to take reasonable care under all the circumstances. Keeping all this in mind, I cannot find any negligence here on the part of the plaintiff. His failure under the circumstances to see the lights such as the defendant was carrying would not, I think, be evidence of negligence. There is no evidence to show at what distance such lights could be seen. He looked before proceeding to the kerb but the defendant's car would be some considerable distance from him at that time. His pause for a second or two before proceeding to the kerb would not be negligence in that having alighted from the street-car he would probably require a few seconds to become adjusted to the surroundings. He had a right to expect that the defendant would obey the law. I cannot find, therefore, under all the circumstances that there was any negligence on his part which contributed to the accident.

As to damages, the plaintiff is a man 58 years of age, and up until the time of the accident he had been a motorman in the employ of the British Columbia Electric Railway Company for 32 years. A few days following the accident it was discovered by the doctor in charge that the plaintiff had diabetes. The medical evidence clearly establishes that this was a pre-existing

condition although the plaintiff was unaware of it. His injuries were serious. He was in the hospital until the 11th of April, 1942. He had recovered sufficiently by July to go back to work but was refused employment in his former position by reason of his diabetic condition, and not by reason of the injuries that he had received. How long he could have continued to work at his regular employment, assuming that he had not suffered the accident, is difficult to say, and we have no evidence thereon. He has certain permanent disabilities resulting from the accident. The injury to his back has left him round-shouldered and somewhat stooped; his left ankle is permanently weakened; his earning power is reduced; his earnings before the accident amounted to $1,500 a year; he will not be able to perform services where he has to stand for any longer period of time. He was offered employment as a watchman by his former employer, but refused this at the time for the reason that he could not remain standing for long periods. Special damages as proven amount to the sum of $1,116.90. There will be general damages for $4,000. Costs follow the event.

Judgment for plaintiff.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* ESTATE OF HUBERT SHADFORTH, DECEASED.

Testator's Family Maintenance Act—Petitions for relief by widow and adopted step-daughter—Provision in will for mother of illegitimate child—Moral aspect—Effect of—R.S.B.C. 1936, Cap. 285.

The widow and the adopted step-daughter of the testator petitioned for relief under the Testator's Family Maintenance Act on the ground that the will fails to make adequate provision for them. The estate was valued at $24,033. The life-insurance policies, amounting to $12,577, were made payable to the widow, also household furniture valued at $1,005. She was also entitled to certain life pensions, amounting to $134 per month. These amounts gave her an income of $182 per month. The step-daughter received under the will $789.56. She was educated and maintained by deceased until she graduated as a nurse and thereafter

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up to the time of his death he paid her $15 per month, which he continued to pay after her marriage. In November, 1939, the testator entered the Naval Service of Canada with headquarters at Halifax, his wife remaining at their home in Vancouver. To Willena Wilson, with whom it appeared the testator lived at Halifax prior to his death and by whom he had an infant child born March 8th, 1941, he left the house which the owned in Vancouver, formerly occupied by himself and his wife, also stocks, shares and mortgages amounting to about $9,000. Executors' fees, administration expenses and succession duty would reduce the net amount payable to Miss Wilson to $6,000.

Held, that the moral aspect of the relationship existing between them is not an element to be considered if adequate provision has been made for those in whose favour the Act is intended to operate. A basic condition for the exercise of jurisdiction under the Act requires that the Court be of the opinion that reasonable provision has not been made in the will for the dependant to whom the application relates; if the condition fails, the provisions for relief do not come into operation. Under the circumstances here adequate provision within the meaning of the Act has been made for the petitioners and the petitions are dismissed.

PETITION by Georgina Shadforth, widow of Hubert Shadforth, deceased, also by Wanda Dickie, adopted step-daughter of the deceased for relief under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by COADY, J. at Vancouver on the 22nd of January, 1943.

A. G. D. Crux, for petitioner Georgina Shadforth.
A. H. Ray, for petitioner Wanda Dickie.
W. C. Thompson, for Willena Wilson.
Tysoe, for executors.

Cur. adv. vult.

10th February, 1943.

COADY, J.: This is a petition under the Testator's Family Maintenance Act, by Georgina Shadforth, widow of the above named deceased whose death occurred on or about the 10th of February, 1942, while on active service with the Royal Canadian Navy. Wanda Dickie, wife of Douglas Dickie (formerly Wanda Shadforth) described in the will as the adopted step-daughter of the deceased, also applies on the ground that the will fails to make adequate provision for her.

The net estate of the deceased is valued at the sum of $24,033.33. This includes the proceeds of life-insurance policies

amounting to the sum of $12,577.79 payable to the widow as the beneficiary named therein. The widow in addition is entitled under the will to the household furniture valued at $1,005.50, and a life interest in the residuary estate, but as this residuary estate is of small value nothing will be received by her from that source. The widow on the death of the deceased also became entitled to certain life pensions amounting to the sum of $134 a month. The insurance moneys, counsel agree, would purchase a life annuity that would pay her the sum of approximately $48 per month. This would give her a total income of $182 per month.

The deceased was formerly engaged as a pilot on this Coast and left the pilotage service in November of 1939 and entered the Naval Service of Canada with headquarters at Halifax, Nova Scotia. While engaged as a pilot the petitioner's income was somewhat in excess of $182 a month, but after he joined the Naval Service his earnings were reduced and, consequently, her income from and after November, 1939, was much less than that sum. During that period her income consisted of an allowance of $75 per month, the free use of the home in Vancouver, and small additional payments made from time to time estimated in all at the sum of $100. Wanda Dickie is entitled under the will to the sum of $789.56. The evidence shows that she was educated and maintained by the deceased until she graduated as a nurse, and thereafter up to the time of his death he paid her an allowance of $15 per month, which he continued to pay after she was married. To Willena Wilson with whom it appeared the deceased lived at Halifax prior to his death, and by whom he had an infant child, William Hubert Shadforth Wilson, born March 8th, 1941, is left the house which the deceased owned in Vancouver, formerly occupied by himself and his wife, and still occupied by the widow, also stocks and shares and mortgage moneys amounting in all to the sum of approximately $9,000. The residuary estate, after the payment of debts, amounts only to the sum of $470.67 and is quite insufficient to make payment of the executor's fees and administration expenses and, consequently, the share in the estate to which Miss Wilson is entitled will be charged with a great portion of these and also

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with succession duties which are on that portion of the estate going to her quite substantial. Counsel for the executor of the estate estimates that these succession duties may total a sum of $2,000, and that the net estate to which Miss Wilson will become entitled will probably not amount to more than $6,000.

The deceased evidently felt under obligation to make some provision for Miss Wilson who has no property or income whatsoever, and for her infant child. The moral aspect of the relationship existing between them is not apparently an element to be considered if adequate provision has been made for those in whose favour the Act is intended to operate. In this connection my attention is directed by counsel to the case of *Re Joslin, Joslin* v. *Murch,* [1941] 1 All E.R. 302. A basic condition for the exercise of jurisdiction under the Act as set out in *Shaw* v. *Toronto General Trusts Corporation et al.,* [1942] S.C.R. 513, at p. 514,

> requires that the court be of the opinion that reasonable provision has not been made in the will for the dependant to whom the application relates; if the condition fails, the provisions for relief do not come into operation.

Applying that in this case, I am of the opinion that under the circumstances here adequate provision within the meaning of the Act has been made for the petitioner, likewise for Wanda Dickie. The petition will therefore be dismissed. The executor's costs of these proceedings will be paid out of the estate. Each of the other parties will pay her own costs.

Petition dismissed.

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War Measures Act—The Merchant Seamen Order, 1941—Seaman—Deserter—Board of inquiry—Order for detention—Habeas corpus—Whether judicial or administrative tribunal—R.S.C. 1927, Cap. 206.

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The respondent, a Greek who was a fireman on a Greek ship which arrived in Vancouver, B.C., on the 18th of December, 1941, left the ship without leave. The ship left Vancouver without him and on the 28th of January, 1942, on the complaint of the district superintendent of Canadian immigration, he was brought before a Board of Inquiry appointed by the Minister of Justice by authority of The Merchant Seamen Order, 1941 (order in council P.C. 2385), passed under the War Measures Act. The complaint alleged that he, a seaman, employed on the S.S. Boris, deserted from the ship. He was represented by counsel. The respondent was sworn and gave evidence through an interpreter in answer to questions. He did not volunteer to give evidence but neither he nor his counsel objected to his examination. He admitted he was a deserter. After hearing his evidence, the Board ordered that he be detained at an immigration station for three months. Just before the expiration of said period, the Board sat in review of the inquiry at Oakalla prison and when the respondent refused to sign on a ship, the Board ordered that he be detained in an immigration station, gaol or other place of confinement for a further period of six months. On *habeas corpus* proceedings the respondent was released on the ground that he should not have been compelled to give evidence.

Held, on appeal, reversing the decision of ROBERTSON, J. (O'HALLORAN and FISHER, JJ.A. dissenting), that the respondent attacked the detention orders on two grounds: (1) That he was not allowed counsel at the Board's hearing; (2) that the Board improperly called him as a witness and by questioning made him incriminate himself. As to the latter, it is expressly indicated that the Board is to carry out a departmental policy; a policy due to emergency and designed to further "efficient prosecution of the war." The Board is given power to deal with desertion, not because it is a crime, but solely because desertion is detrimental to the allied war effort. In other words, the Board is authorized to coerce a deserting seaman, not because of his criminal or civil liability, but because it is expedient in the public interest. The Board is not designed to punish and is not a criminal tribunal. Having the power to invade the liberties and rights of individuals, the Board is meant to be governed, not by legal liability, but by policy and expediency, and is not a judicial but an administrative tribunal. The Board is empowered to interrogate the seaman and act on his answers. As to the first ground, this is an administrative tribunal and tribunals that are not Courts are not bound by the methods of Courts, but may adopt whatever methods are best suited to carry out their functions. Both objections to the Board's orders are unfounded and effect should not have been given to either.

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APPEAL from the order of ROBERTSON, J. releasing the defendant on an application by way of *habeas corpus* and *certiorari* heard by him in Chambers at Vancouver on the 8th and 15th of July, 1942. Defendant was detained in an immigration station by reason of orders of a Board of Inquiry made pursuant to paragraphs 17 and 18 of The Merchant Seamen Order, 1941, made and established by order in council P.C. 2385 under the provisions of the War Measures Act. The Board met on the 28th of January, 1942, and Pantelidis was examined on the complaint of the district superintendent of immigration, Vancouver, that he, a seaman employed on the S.S. Boris, had deserted from the said ship. He was called by the Board and sworn. His evidence was sufficient to show that he was employed on the steamship Boris and deserted. Without further evidence, the board decided that he be detained at an immigration station for three months. The day before the expiration of the three months he was again called by the Board and sworn. He was asked certain questions, including "Was he willing to sign on a ship for deep sea if the Board could find employment for him?" He said he was not. Without further evidence, it was ordered that he be detained for a further period of six months. On neither occasion was Pantelidis a voluntary witness. It was held that sections 4 and 5 of Part I. of the Inquiries Act have no application to the case of a person who is charged with an offence and he was released.

McLelan, for the application.
Donaghy, K.C., contra.

Cur. adv. vult.

18th July, 1942.

ROBERTSON, J.: This is an application by way of *habeas corpus* and *certiorari* for the release of Pantelidis who has been and is detained in an immigration station by reason of orders of a Board of Inquiry made pursuant to paragraphs 17 and 18 of The Merchant Seamen Order, 1941, which was made and established by Dominion order in council 2385, under the provisions of the War Measures Act. The Board met on the 28th of Jan-

uary, 1942, and the chairman, addressing Pantelidis, said as follows:

You are about to be examined by this Board of Inquiry under the provisions of The Merchant Seamen Order, 1941, on a complaint signed by Fred W. Taylor, District Superintendent, Canadian Immigration, Vancouver, that you a seaman employed on the S.S. Boris, have deserted from the said ship. . . . .

A barrister, Mr. *McLelan* was there to represent Pantelidis. He says he was not allowed to do so. The Board says he was. In the view I take it made no difference on the facts of this case, whether he was represented by counsel or not.

Pantelidis was called by the Board and sworn. His evidence is sufficient to show that he was employed on the steamship Boris and deserted.

Without hearing any further evidence the Board decided that Pantelidis "be detained at an immigration station for a period of three months," and he was so detained. On the day before the expiration of the three months' sentence the Board again met pursuant to paragraph 18 to review Pantelidis's case. The chairman stated to the accused as follows:

Constantinos Pantelidis, you are about to be examined by this Board of Inquiry, sitting in Review under the provisions of The Merchant Seamen Order, 1941 (order in council P.C. 2385), for the purpose of reviewing your case. On January 28th, 1942, you were examined by Board of Inquiry and ordered detained for a period of three months. This period expires tomorrow.

Again Pantelidis was called by the Board and sworn. He was not represented by counsel. He was asked certain questions amongst them "Was he willing to sign on a ship for deep sea if the Board could find employment for him?" but he said he was not. There was no other evidence. He was then ordered to be detained for a further period of six months. On neither occasion was Pantelidis a voluntary witness. No explanation was made to him that he was not bound to give evidence. The Board of Inquiry apparently relied upon Paragraph 15 which says that the Board shall have all the powers and authorities of a Commissioner appointed under Part I. of the Inquiries Act. In Part I. there are two sections bearing upon this question. Section 4 gives Commissioners power to summon before them any witness who is required to give evidence on oath as they

may deem requisite to the full investigation of the matters into which they are appointed to examine.

Section 5 says that they shall have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any Court of Record in civil cases. I think these

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sections have no application to the case of a person who is charged with an offence. If there is no charge then the Commissioners may call anyone they please as a witness and that person can object to give evidence and may claim protection under section 5 of the British Columbia Evidence Act or section 5 of the Canada Evidence Act. But where the person who is charged is called as a witness by the Board which is trying him these sections are no protection to him because the evidence which he gives is evidence against him in that proceeding. The sections only prevent the evidence of a witness given under compulsion being used against him in other proceedings.

At common law a person charged with an offence was not considered a competent or compellable witness at any stage of the proceedings; and if examined on oath any conviction would be void—see Archbold's Criminal Pleading, Evidence & Practice, 29th Ed., 464. In Canada he was not a competent witness until 1893. As section 4 of the Canada Evidence Act now stands he is a "competent witness for the defence only."

Counsel for the Crown says that this was an inquiry and therefore the rule which I have mentioned does not apply. I can see no room for this distinction. In this case a complaint was made and an inquiry, which was really a trial, was held, and Pantelidis was and is confined as a result. I am of the opinion that Pantelidis should not have been compelled to give evidence. His conviction is wrong and he must be released. There will be an order protecting the Board of Inquiry from any proceedings against them.

From this decision the Crown appealed.

The appeal was argued at Victoria on the 28th of September, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Donaghy, K.C., for appellant: The Board of Inquiry is in the way of a military tribunal set up for regulating the conduct of sailors on merchant ships. By desertion they injure the war effort. This is not a criminal proceeding. The regulations give the board the powers of a commissioner under the Dominion Inquiries Act, that is, the powers of a Supreme Court judge on a civil trial. This is a civil proceeding. There is no evidence as to whether he was a voluntary witness or not or whether he was

compelled to testify. The order in council expressly excludes the Criminal Code and the Canada Shipping Act, 1934. There was no conviction. The proceedings are designed to discipline and regulate the conduct of seamen. It is not a trial but an inquiry. There is no power to convict or to punish. It is an administrative board. As to what is a crime see Blackstone's Commentaries, Book 4, Lewis's Ed., 5, also 2 Hawk. P.C., 8th Ed., Cap. 25, Sec. 4, p. 289. In the 3rd Supplement to Snow's Criminal Code, 5th Ed., 105, the Defence of Canada Regulations, 1941, deal with crimes and contain the idea of commanding or forbidding. There is nothing here whatever, either commanding or forbidding any act. Regard should be had to the purpose of the statute: see *Ex parte Cook* (1860), 9 N.B.R. 506. The object of the Act is not to punish the commission of a crime: see *Local Government Board* v. *Arlidge*, [1915] A.C. 120, at p. 126; *Wilson* v. *Esquimalt and Nanaimo Ry. Co.*, [1922] 1 A.C. 202; *Bartley & Co.* v. *Russell. St. John* v. *Fraser* (1935), 49 B.C. 502; *St. John* v. *Fraser*, [1935] S.C.R. 441. Looking at the Inquiries Act, the powers there referred to are civil powers. The order in council expressly says the Board shall have all the powers of a civil Court, one of which is to compel anyone to give evidence. Even if this is a criminal proceeding, the Board has the same powers as a civil Court.

McLelan, for respondent: We say the procedure was wrong. He signed on for six months in New York in March, 1940, and he left the boat in 1941. He is not a competent or compellable witness: see Archbold's Criminal Pleading, Evidence & Practice, 29th Ed., 464 and 477. He is not a compellable witness on "any criminal charge or penalty or forfeiture of any nature." This ship was loaded with scrap iron for Japan. The action of the Board is against all the tenents of British justice: see *Allhusen* v. *Labouchere* (1878), 3 Q.B.D. 654. There is no provision as to what happens at the end of the six months.

Donaghy, in reply: He was a fireman and the learned judge found he had deserted the ship. Tribunals of an unusual nature may act on hearsay evidence and can take their own procedure. That the Board acted in accordance with natural justice see Halsbury's Laws of England, 2nd Ed., Vol. 26, p. 285, par. 606;

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Local Government Board v. *Arlidge,* [1915] A.C. 120. No committee hearing was required: see *Richardson* v. *Mellish* (1824), 27 R.R. 603.

Cur. adv. vult.

3rd November, 1942.

McDONALD, C.J.B.C.: This case requires examination of fundamental principles that are now being developed more rapidly than ever before.

The order appealed from was made in *habeas-corpus* proceedings, and ordered the release from Oakalla prison of the respondent, a Greek seaman from a Greek ship formerly in Canadian waters. Respondent, by his own admission, is a deserter from his ship. Two orders were made for his "detention" or imprisonment (I draw no distinction), the first on 26th January, 1942, ordering three months, the second on 27th April, 1942, ordering six months.

These orders were made by a Board of Inquiry set up by a Dominion order in council, passed under the War Measures Act, and known as The Merchant Seaman Order, 1941. The validity of the order in council has not been questioned; the contest has been as to its effect, particularly as to what procedure it authorizes for the Board.

The respondent attacked the detention orders on two grounds: (1) That he was not allowed counsel at the Board's hearings, or at least not the full services of counsel, and (2) that the Board improperly called him as a witness, and by questioning made him incriminate himself.

The learned judge below gave effect to the second objection, holding he need not rule on the other.

I note here that no *certiorari* was issued, though the learned judge's reasons refer to one. It was apparently dispensed with by consent. But the result was that no order was made for quashing either of the Board's orders.

In ordering the respondent's release, the learned judge below dealt with these orders as though they were convictions, and clearly regarded the Board as a judicial body. For reasons that I will examine later, I cannot take this view; but even if I did,

I should have difficulty in agreeing with the learned judge's course.

The true principle, though it has been too often slighted, is that a prisoner can only be released on *habeas corpus*, because of defects in a conviction, where these make the conviction null and void, and not merely voidable, since *habeas corpus* is a form of collateral attack. In my view nothing can make a conviction void except want or excess of jurisdiction, and that is a matter of a tribunal's going outside its province, not of its following an improper procedure within that province. Here the objection to the Board's first order was that the Board had followed an improper procedure, by swearing the respondent as a witness, and then obtaining from him an admission that he was a deserter. Objections to the second order are left more vague.

There is an indication that the learned judge held the first order to be void, since he cites Archbold's Criminal Pleading, Evidence and Practice, 29th Ed., 464 as stating that if an accused person were put in the box as the prosecutor's witness, this would make a consequent conviction void. Actually, however, what Archbold says is that the conviction would be "bad," which is quite a different matter. Moreover, the only case cited by Archbold to support his proposition, *viz., Reg.* v. *Sullivan* (1874), I.R. 8 C.L. 404, is not in point at all, but deals with a defendant's being wrongly sworn as his own witness, and thus escaping liability for perjury.

It may well be (though it does not seem to me self-evident) that if a prisoner allowed himself to be put in the box by the prosecutor and without protest admitted guilt under oath, he could reverse or quash a consequent conviction. But I can see no ground for saying that the conviction would be void. However, I do not think that either of these detention orders was analogous to a conviction.

I accept the principle that a tribunal which is to decide questions of fact, and *a fortiori* one that can invade the liberty of the subject, is *prima facie* meant to act as a judicial tribunal. But the presumption can be rebutted; and in war time it is common enough for persons to be "detained" or imprisoned by executive action or administrative order. What we have to see is whether

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there is anything in the composition of this Board or in the powers given to it that rebuts the presumption that it is to hold judicial trials of supposed deserters. I think there are indications that trials in the ordinary sense were never intended.

The main order in council provides that "it shall be administered by the Minister of National Defence for Naval Services" (section 29), that each Board shall consist of officials of the Department of National Defence for Naval Services, the Department of Transport, and the Immigration Branch of the Department of Mines and Resources (section 12). Such officials would not ordinarily have legal training; they would be well qualified to deal with matters of national expediency, but not with the requirements of judicial proceedings.

Next, the first preamble to the main order in council recites that

> present conditions [in] shipping . . . make desirable the adoption of a comprehensive policy that will avoid delays in the departure of merchant ships

and that members of crews have also been suspected of subversive activities. Another recital is:

> That in the present emergency it is essential to the public interest and to the efficient prosecution of the War that the departure of merchant ships . . . be not delayed.

Another recital shows that the concern felt is as to British merchant ships and those of "other powers allied or associated with His Majesty."

All the above elements indicate to me that the Board was meant to be and act as an administrative, not a judicial, tribunal. It is expressly indicated that the Board is to carry out a departmental "policy"; a policy due to "emergency" and designed to further "efficient prosecution of the war." Restriction of the application of the order to ships furthering the allied war effort is also most significant. There is nothing whatever here to suggest that the purpose is to secure public order and good government, which is the aim of criminal legislation. The whole aim is to effect what is politic and expedient in a war emergency. Justice, which is a judicial tribunal's sole concern, has nothing to do with the matter.

It appears to me that much of the difficulty felt in this case arises from the pure coincidence that desertion by a seaman is

a criminal offence. Desertion is also a breach of contract; and to my mind both facts are equally irrelevant to this case. The Board is given power to deal with desertion, not because it is a crime, any more than because it is civilly actionable, but solely because desertion is detrimental to the allied war effort. In other words, the Board is authorized to coerce a deserting seaman, not because of his criminal or civil liability, but because it is expedient in the public interest. That is, the Board is not designed to punish, and is not a criminal tribunal; its purpose is to enforce a species of conscription.

This seems to me to be shown by the Board's power, not only to detain a seaman who deserts, but also to enquire, when his detention period is ended, whether he is willing to embark on another ship, and if he refuses, then to detain or imprison him for a further period of six months. There can be no suggestion that a seaman is under any legal liability to embark on a ship he has not signed on, or that his failure is in any sense a crime. Yet the Board's power to imprison him on refusal is clearly implied. So the Board can make orders that have no relation whatever to legal liability. Such orders can only be based on policy and expediency. In my view both the first and second orders made against the respondent fall into the same class, and the fact that the respondent has incidentally committed a criminal offence is irrelevant.

I think it is clear on the authorities that a tribunal whose power to invade the liberties and rights of individuals is meant to be governed, not by legal liability, but by policy and expediency, is not a judicial but an administrative tribunal: *Re Ashby et al.*, [1934] O.R. 421, at p. 428.

That being so, the objection taken to the Board's procedure, an objection largely based on the supposition that the Board acts judicially, ceases to have much force.

The learned judge below thought that the provision in the main order in council which gives the Board the powers of a commissioner under the Inquiries Act (Dominion) restricted the Board as to evidence and witnesses to the same extent as a Court of justice. That is not my view. I think this provision is not restrictive but enabling; it merely gives the Board power to

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compel witnesses to attend and be sworn, over whom otherwise it would have no power. But it can still obtain evidence in other ways. Moreover, I do not think the provision has any bearing on the Board's relations with a seaman proceeded against. Though the Board on the first hearing swore the respondent, presumably so that he would be more truthful, that really did not go to the root of the legality of their actions. The gravamen of the complaint against the Board's course is not that they swore him as a witness against himself, but that they made him incriminate himself by interrogation. So far as his admissions were concerned, they were equally weighty and equally damaging whether he was sworn or not. It follows then that the question whether he was a competent or compellable "witness" has no real bearing on this matter. The question is whether the Board had any right to interrogate him and to act upon his incriminating answers. This question arises equally whether he was treated as a witness or not. The decision in *Rex* v. *Demark*, 47 Man. L.R. 225; [1939] 2 W.W.R. 501, which holds that a defendant commits no contempt in refusing to give evidence that might incriminate himself, does not, I think, help us here.

Even if I felt the force of the contention that on the first hearing the Board could only proceed against respondent by depending on the sworn evidence of competent and compellable witnesses, I would find it impossible to apply that principle to the second hearing. The scope of a second hearing, after a seaman's detention has once been ordered, is left to inference, but the proper inference is fairly clear. By the main order in council, on or before the expiration of the detention period, the Board may cause the seaman to be brought before it, and "review his case," then do one of several things, one of which is to order his further detention for a longer period than the original detention. This power implies that on the further hearing the seaman would have somehow aggravated his original desertion. A clue as to how he could do this is furnished by the alternative orders that can be made. One, according to the original wording, is that the seaman may be "released to his ship." An amending order in council, after reciting that release of a seaman to his ship was often impossible, because his ship had sailed during his

detention, substituted "released to a ship" for "released to his ship," thus enabling the Board to send a seaman to another ship than the one deserted, as an alternative to ordering his further detention. I think the only conclusion from this is that which the Board drew, *viz.*, that they are empowered to ascertain from the seaman whether he is willing to go on another ship, and if he refuses, then to order his further detention. What can this mean but that the Board are authorized to interrogate him, and to act on his answers? Can it be suggested that the Board are impotent until a competent witness can be produced who can swear to statements of intention by the seaman? Obviously that would lead to the planting of spies and stool pigeons by the Board, which would be far more objectionable and subversive of justice than direct and open questioning by the Board. Admittedly, there are no equally strong indications that the Board may question a seaman to ascertain whether he has deserted. But there is nothing to show that it should not, and when such a method is contemplated for one hearing, the presumption is that it is sanctioned for all.

I point out that though interrogation of persons proceeded against by any criminal tribunal has come to be considered un-British, the popular belief that this is altogether foreign to the common law is not borne out by legal history. It was formerly the established practice, even in the highest criminal Courts in England, at a time when prisoners could not give evidence on their own behalf, for judges to interrogate them with a view to getting incriminating answers. This practice continued at least down to the time of Lord Holt: see Holdsworth's History of English Law, Vol. 6, p. 518. I mention this, not to approve of the revival of such a practice, but to show that even in judicial tribunals, it is not as unheard of as is often supposed. So its authorization for a tribunal that is not supposed to dispense justice, but to act upon policy and expediency, is not really surprising.

Even in a coroner's court, which is at least *quasi*-judicial, persons suspected of homicide are often examined, and though they may now, by claiming the benefit of the Canada Evidence Act, prevent their answers from being used to convict them later,

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these answers may be made the basis of an inquisition, which at common law constitutes an indictment.

Respondent further complains that he was not allowed the assistance of counsel. Apparently on the first hearing he had counsel present who was told he could not act in the ordinary way, though later he was allowed to put questions. I shall assume that he was not given the same scope as in an Assize Court. We have very little evidence as to what happened on the second hearing, but I should infer from the respondent's rather evasive statement in his affidavit, that the second order was made "without my counsel being present," that respondent never tried to obtain representation by counsel.

Even, however, had he been refused this, it would not have been a decisive objection. Though no doubt accused persons have a legal right to counsel in all ordinary Courts of law and in police courts by statute in Canada, I point out that this is by no means an inherent right in all judicial tribunals, even in those with criminal jurisdiction. The authorities indicate that this is only a legal right in tribunals resembling the ordinary Courts of law, and even by implication the right may be excluded in judicial tribunals whose powers are at all unusual. Thus in England it has been held that there is no legal right to counsel before justices, and their being allowed to act rests with the justices, who are entitled to consider that hearings before them will be cheaper and more expeditious without counsel: *Collier* v. *Hicks* (1831), 2 B. & Ad. 663.

If the Board is not a judicial but an administrative tribunal, then the matter is even clearer. In *St. John* v. *Fraser*, [1935] S.C.R. 441 it was held that even a party directly interested in the result of an administrative tribunal's hearing, nearly as directly as the respondent here, was not entitled to have his counsel cross-examine hostile witnesses. It was also laid down there, as well as in *Local Government Board* v. *Arlidge*, [1915] A.C. 120 and *Wilson* v. *Esquimalt and Nanaimo Ry. Co.*, [1922] 1 A.C. 202 that tribunals that are not Courts are not bound by the methods of Courts, but may adopt whatever methods are best suited to carry out their functions.

I conclude then that both objections to the Board's orders are

unfounded, and that effect should not have been given to either. So I would allow the appeal.

McQUARRIE, J.A.: This is an appeal from ROBERTSON, J. by the Minister of Naval Services from an order discharging the respondent from detention in Oakalla Prison Farm under an order made by a Board of Inquiry. The facts are not complicated and I think may be stated as follows: [after setting out the facts his Lordship continued].

Counsel for the appellant submitted that this is not a criminal matter and referred to the 3rd Supplement to Snow's Criminal Code, 5th Ed., at p. 108 *et seq.*, Defence of Canada Regulations 1941; *Ex parte Cook* (1860), 9 N.B.R. 506, *Local Government Board* v. *Arlidge,* [1915] A.C. 120; *Wilson* v. *Esquimalt and Nanaimo Ry. Co.,* [1922] 1 A.C. 202; *Bartley & Co.* v. *Russell. St. John* v. *Fraser* (1935), 49 B.C. 502; *St. John* v. *Fraser,* [1935] S.C.R. 441, at p. 453 (Davis, J.) and Inquiries Act, Cap. 99, R.S.C. 1927, Part I. He also submitted that on his own admission the respondent is a deserter. The object of the inquiry is not to punish as in a criminal matter but to compel. As stated in the preamble it is desirable to facilitate departure of ships and avoid delay in shipping.

Counsel for the respondent submitted that the procedure in this case was wrong. He referred to paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of the said order in council. Respondent was not a deserter, not a member of the crew, only signed on for 6 months and had not renewed although time had expired. Respondent was not a competent or compellable witness at common law: Archbold's Criminal Pleading, Evidence & Practice, 29th Ed., 464, 477; Canada Shipping Act, 1934, Can. Stats. 1934, Cap. 44, Secs. 244-248—desertion—liable to punishment. *Allhusen* v. *Labouchere* (1878), 3 Q.B.D. 654. Civil action—witness required to answer questions unless answer might tend to incriminate him. He also referred to section 163 of the Canada Shipping Act, 1934—employment of seamen—section 166 agreement for voyage and sections 707 and 708 dealing with foreign ships. He stated that the respondent was still confined in Oakalla gaol. He contended that there was no jurisdiction on the part of the Board as respondent was not a deserter. He urged that there are no good grounds for reversal

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of the order of ROBERTSON, J. and that the appeal should be dismissed. In reply counsel for the appellant referred to natural justice and cited Halsbury's Laws of England, 2nd Ed., Vol. 26, p. 285, par. 606; *Local Government Board* v. *Arlidge, supra,* Lord Shaw of Dunfermline—boards must be fair and subject to that, may regulate their own procedure—may even admit hearsay evidence. He submitted that the manifest should have been admitted. He cited *Richardson* v. *Mellish* (1824), 27 R.R. 603, a decision on a section along the same lines as here.

With due deference to contrary opinion, I am inclined to think that the appeal should be allowed. No question of the invalidity of the order in council was raised. Paragraphs 16, 17 and 18 in my opinion authorize the two orders which were made by the Board for detention of the respondent for three and six months respectively. In this appeal it seems to me we need only consider the question of whether the Board had jurisdiction to examine the respondent on oath and detain him on the admissions he made. On the hearing of this appeal counsel and the judge below appear to have been under the impression that the main question was whether the matter before the Board was of a criminal or civil nature. It seems to me, however, that the question involved was whether the functions of the Board were judicial or administrative. In my opinion they were strictly administrative.

The distinguishing mark of an administrative tribunal is that it possesses a complete, absolute and unfettered discretion and, having no fixed standard to follow it is guided by its own ideas of policy and expediency:

Masten, J.A. (Judge of Court) in *Re Ashby et al.,* [1934] O.R. at p. 428 and again on the same page quoting from 49 L.Q.R. at pp. 106-108:

"A tribunal that dispenses justice, *i.e.*, every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.

"In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.

"*Leeds Corporation* v. *Ryder*, [1907] A.C. 420, at 423, 424, *per* Lord Loreburn, L.C.; *Shell Co. of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275, at 295; *Boulter* v. *Kent Justices*, [1897] A.C. 556, at 564.

"A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself."

In *Re Ashby et al., supra,* was an appeal from an order of Jeffrey, J. dismissing a motion for an order prohibiting the board of examiners in Optometry (created by The Optometry Act, R.S.O. 1927, Cap. 215) from further proceeding in a matter pending before the board. It was held that the appeal should be dismissed with costs and that an order of prohibition should not be made because under the Act it was plain that the function exercisable by the board in relation to the proceedings in question was judicial and not administrative.

See also *St. John* v. *Fraser,* [1935] S.C.R. 441, which arose out of an investigation authorized by the Attorney-General under section 10 of the Securities Act, B.C. Stats. 1930, Cap. 64, Sec. 29, also discussed. There the judgment of the Court of Appeal (49 B.C. 502), affirming the judgment of MORRISON, C.J.S.C. was affirmed. It was held the investigator could not be restrained from proceeding with the investigation. There the right to cross-examine witnesses was refused and it was submitted that that was contrary to natural justice. It was also held that the functions of the investigation were primarily administrative under the statute. The *Ashby* case was followed by the Judicial Committee in *Wilson* v. *Esquimalt and Nanaimo Ry. Co.,* [1922] 1 A.C. 202.

In my opinion if the right of the Board of Inquiry to question the respondent on oath is granted, the admissions made by respondent prove clearly that he was a deserter and the Board had jurisdiction under the order in council to make the order for detention for three months. I think that the Board had the right on the inquiry to question the respondent under the circumstances hereinbefore stated. The jurisdiction of the Board to make the order for further detention for six months depends on the validity of the first order and if I am right as to the first order, I think the second order was properly made.

I would, therefore, allow the appeal.

SLOAN, J.A.: This is an appeal from the order of ROBERT-

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SON, J. releasing the respondent from the custody of the warden of Oakalla gaol, upon the short ground, as I understand it, that the respondent was compelled to give self-incriminatory evidence before a tribunal exercising criminal jurisdiction, in consequence of which he was "convicted" as a deserter from his ship and ordered confined.

With deference, I am unable to agree with the learned judge below.

In order to support my conclusions it is necessary to record certain essential facts.

Under the provisions of the War Measures Act, Cap. 206, R.S.C. 1927, the Governor-General in Council made an order affecting the discipline of merchant seamen, which is termed "The Merchant Seamen Order, 1941." Under this order a Board of Inquiry was constituted and vested with powers (*inter alia*):

> 16 . . . to inquire into the conduct of a seaman, . . . (*b*) who deserts . . . from his ship; (*c*) who refuses to sail on his ship."

(In the original order in council (P.C. 2385) clause (*b*) read "his ship." By an amending order in council (P.C. 7891) this was changed to read "a ship").

The Board may, after inquiry, order (*inter alia*) that such seaman be released to a ship or detained in an immigration station, gaol or other place of confinement for a period not exceeding three months. On or before the expiration of this period of incarceration the seaman is brought before the Board for the purpose of having his case reviewed, and upon such review proceedings the Board may order (*inter alia*) that he be released to a ship or detained for a further period not exceeding six months.

The respondent was a deserter from a Greek ship and was brought before the Board on the 28th of January, 1942, so that an inquiry could be had into his conduct. He was represented by counsel and upon being questioned concerning his actions, no objection was taken on his behalf to that course of proceeding. The decision of the Board was that he be detained at an immigration station for a period of three months.

Upon the review proceedings held on the 27th of April, 1942, the following decision was rendered by the Board:

Whereas consideration has been given to the proceedings and the order of the said Board of Inquiry, and whereas the evidence adduced before this Board shows that Constantinos Pantelidis a seaman lately employed on the S.S. Boris refuses to sign on a ship stating he has been suffering from rheumatism and cannot stand a long voyage. He will be examined by the medical doctor of Naval Services and a full medical report submitted for consideration.

IT IS HEREBY ORDERED that Constantinos Pandelidis be:—detained in an immigration station, gaol, or other place of confinement for a further period of six months.

It seems clear to me that whatever might be said about the first inquiry and the consequent order of detention dated January 28th, 1942, which had, of course, expired long before this application, the present order of detention dated April 27th, 1942, is clearly in a different category and suffers from none of the alleged infirmities of the first. By the second order respondent is confined to gaol for six months by the Board for refusing to sign on a ship when requested by the Board so to do. His detention is therefore in the exercise of a disciplinary jurisdiction exercised by the Board pursuant to the powers conferred by the relevant statute and orders in council. It is the exercise of a jurisdiction, civil, and not criminal in character, and the fact of the desertion becomes merely a part of the history of the seaman and is not the cause of the detention from which he was released by the order below.

With deference, I would therefore allow the appeal with all necessary consequential directions.

O'HALLORAN, J.A.: The respondent is a forty-two year old merchant seaman of Greek nationality who had been serving on the S.S. Boris a ship of Greek registry. He was arrested shortly after that ship left Vancouver, and on 28th January, 1942, was brought before a Board which appears to have been constituted under P.C. 2385 and its additions 5088, 6954 and 7891, all relating to merchant seamen. Through an interpreter he was then charged with desertion from the S.S. Boris on the complaint of the district superintendent of Canadian Immigration at Vancouver. The Board, without stating any reason for so doing, or finding that he was a deserter as charged, ordered him "detained at an immigration station for a period of three months."

Instead he was taken to Oakalla prison where he served three

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months' imprisonment. On 27th April last, one day before that term of imprisonment had expired, he was brought before the same Board sitting at Oakalla prison. He was then sentenced to a further period of six months' imprisonment in Oakalla prison. The Board's judgment or decision reads as follows: [already set out in the judgment of SLOAN, J.A.].

Pantelidis invoked *habeas-corpus* proceedings with *certiorari* in aid. The return of the keeper of Oakalla prison to the writ of *habeas corpus*, and by which the appellant is now bound, reads:

> By virtue of the within order, I, W. Owen, the keeper of the common gaol, commonly known as Oakalla Prison Farm, in the County of Westminster, in the Province of British Columbia, do hereby return to the said Court, that Constantinos Pantelidis No. 44484 is a prisoner in the said common gaol under two orders for detention hereto annexed. That the said prisoner was committed to the said common gaol under and by virtue of the said orders for detention on the 27th day of January, 1942 and the 28th day of April, 1942 and is now detained in the said common gaol by virtue of the said orders.

(N.B. An error appears in the dates of the detention orders. They should read respectively 28th day of January and 27th day of April).

Mr. Justice ROBERTSON discharged him from custody on the ground he was imprisoned as a public offender without due process of law. No evidence whatever against the respondent was produced on either hearing, by the complainant or the appellant Minister of National Defence for Naval Services, but the Board called the respondent to testify against himself. That was the ground of decision in the Court below and counsel's argument was chiefly directed to it in this Court. However, I shall refer first to more immediate grounds supporting the order made. No question of the constitutionality of the orders in council brought to our attention was raised. Consideration is first given to two jurisdictional objections, either one of which in my opinion is sufficient to sustain the order discharging the respondent from custody.

On the first hearing (28th January) the respondent was charged with desertion. The Board's judgment or decision did not, however, find that he was a deserter. It is significant that its judgment or decision on the second hearing (27th April), in referring to the first order, does not describe the respondent as

a deserter, but as a "seaman lately employed on the S.S. Boris." The six-month sentence on the second hearing was imposed because it is there stated "he refuses to sign on a ship." That becomes important because examination of paragraphs 16, 17 and 18 of the order in council discloses that the Board's jurisdiction to hold a second hearing, or "review" as it is termed in paragraph 18, is confined to cases where detention has been previously ordered under paragraphs 16 and 17.

The validity of the Board's second order for imprisonment must therefore depend upon the validity of its first order. But its first order cannot be supported. The respondent was then charged with desertion under paragraph 16 (*b*). But the Board did not then find he was a deserter, and there is nothing in the second order to show that it did. If he had been found a deserter on the first hearing that should have so appeared in the second order, since the Board's jurisdiction to review depended on its jurisdiction at the first hearing. Furthermore the Board had no jurisdiction in its second order to find he "refuses to sign on a ship" for it cannot be shown there is any such offence under paragraph 16, or that he had been so charged on the first hearing, and that the Board had then found that charge proven. In the circumstances the Board had no jurisdiction to make the second order and its lack of jurisdiction appears on its face.

It is an inferior tribunal and its jurisdiction cannot be presumed in examining its orders. Nothing is within its jurisdiction but that which is so expressly alleged, *vide Kennedy* v. *MacKenzie* (1941), 57 B.C. 94, at p. 98 and cases there cited; also *In re Robert Evan Sproule* (1886), 12 S.C.R. 140, Sir William Ritchie, C.J. at pp. 193-7. In *Samejima* v. *The King*, [1932] S.C.R. 640, Lamont, J. in delivering the majority judgment of the Court said at p. 646:

> It is established law that jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised. Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest.

There is another jurisdictional objection of the same nature. The offence in paragraph 16 (*c*) is refusing "to sail on his ship," and not refusing "to sign on a ship" as it appears in the second

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order. The respondent could not at either hearing refuse to "sail on his ship" for the S.S. Boris had sailed before either hearing took place. Furthermore, the Board had no jurisdiction to punish the respondent for refusing to "sign on a ship" since that is not an offence under paragraph 16, which is the source of the Board's jurisdiction. It is true that by subsequent P.C. 81/6954 "released to his ship" in paragraphs 17 (*b*) and 18 (*b*) was changed to "released to a ship," but paragraph 16 (*c*) was not amended. The respondent has been imprisoned for something which is not an offence under the order in council. In this respect as well the second order discloses lack of jurisdiction on its face: *vide Kennedy* v. *MacKenzie; In re Robert Evan Sproule* and *Samejima* v. *The King, supra.*

The above grounds are ample to dispose of this appeal. But as intimated I shall also examine the ground for decision in the Court below in the light of the argument before us. It has been said that neither the complainant nor the appellant Minister for Naval Services produced any evidence to support the charge or any evidence whatever against the respondent at either hearing.

Instead the Board called him as a witness against himself on both occasions. The Board did not inform him he was not compelled to give evidence against himself, nor warn him that what he said would be used in evidence against him. Nor did the Board inform him he was liable to imprisonment if found to be a deserter. In my view with respect ROBERTSON, J. reached the right conclusion. The respondent was charged with an offence against the State, before a tribunal of the State, and he was entitled to have a case made out against him before being called upon for an answer; that is to say before the Board was competent in the circumstances to receive any evidence from him. I agree that what occurred was an unfortunate departure from the observance of a fundamental principle of the common and statute law.

As far back as 1765 Lord Camden said in *Entick* v. *Carrington* (1765), 19 St. Tri. 1030, at p. 1073:

> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; . . .

In *Woolmington* v. *Director of Public Prosecutions* (1935),

104 L.J.K.B. 433, Viscount Sankey, L.C. in delivering the judgment of the House of Lords observed at pp. 439-40:

> 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, . . . No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Counsel for the appellant Minister for Naval Services submitted, however, that the order in council does not create a criminal offence or any offence; that the respondent was not charged with or convicted of any offence; in effect that the Board was exercising a civil and not a criminal jurisdiction. Two questions emerge for determinative consideration: (1) Was the respondent punished or imprisoned for a "crime"; and (2) if the proceedings could be regarded as civil or *quasi*-civil, is the legality of the resultant detention to be tested by the same protective principle which applies in criminal proceedings?

The first question necessitates an examination of the "true nature and character" of the order in council, to use the words in *Atty.-General for Ontario* v. *Reciprocal Insurers* (1924), 93 L.J.P.C. 137, at p. 141. Obviously its substance and not its form must govern, *vide Lower Mainland Dairy Products Board et al.* v. *Turner's Dairy Limited et al.*, [1941] S.C.R. 573 affirming this Court's decision in 56 B.C. 103. If the order in council declares certain conduct to be an offence against the State, the Board cannot ignore the inherent safeguards with which the law has surrounded persons so charged. The Board cannot sentence a person for an offence against the State created by the order in council, and then deny such an offence has been created.

Privy Council Order 2385 in precise language makes desertion and other acts specified in paragraph 16 offences against the State. It does not use those exact words, but study of its text and its lengthy preamble together with its parent statute the War Measures Act, Cap. 206, R.S.C. 1927, leaves no room for doubt as to its purpose and object. It is aimed at preventing delays in the departure of merchant ships from Canadian ports arising from rebellious, antagonistic and non-co-operative conduct of seamen on those ships. Such conduct is described to be contrary to "the public interest and the efficient prosecution of the war."

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Seamen guilty of such conduct are to be dealt with in a manner "which will serve as a deterrent to members of the crews of any other such ships who might be contemplating like activities."

Such conduct, in those apt words is revealed to be an offence against the State for which punishment by imprisonment is specifically provided in paragraphs 17 (*d*) and 18 (*d*). These are new crimes created by the order in council. They are not merely offences against the order in council or its parent statute. They appear as offences which imperil the national security. That is why they were created. Lord Camden's expression "offences against the State" is adopted as an appropriate description of that type of offence. In *Entick* v. *Carrington* (1765), 19 St. Tri. 1030 Lord Camden refused to accept an argument distinguishing offences against the State from other crimes, observing at p. 1073:

> And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

In re Clifford and O'Sullivan (1921), 90 L.J.P.C. 244, at p. 248 and again in *Nadan* v. *Regem* (1926), 95 L.J.P.C. 114, at p. 117 Viscount Cave, L.C. laid down two essentials to constitute a "crime" *viz.,* (1) an offence against the public law; (2) for which a sentence of imprisonment could be imposed. Commission of an offence under paragraph 16 of P.C. 2385 has led to imprisonment in this case. The return of the keeper of Oakalla prison to the writ of *habeas corpus* is conclusive in that respect. And P.C. 2385 is put forward by counsel for the appellant as part of the "public law." It is an order in council passed under The War Measures Act, Cap. 206, R.S.C. 1927, and has the "force of law" in time of war under sections 3 (2) and 6 of that statute.

Breach of paragraph 16 being an illegal act which is a wrong against the public welfare, contains the necessary elements of a crime, *vide* Lord Esher, M.R. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 58 L.J.Q.B. 465, at p. 475. It sounds in crime and leads to punishment. The conclusion properly follows that the respondent was imprisoned for a "crime" in the sense that term has been interpreted in the guid-

ing decisions. Clothed in the form of a board of inquiry and purporting to act as a board of investigation, the Board is nevertheless given a jurisdiction far beyond the powers ordinarily attached to boards of that nature. For it is given power of punishment and imprisonment.

Counsel for the appellant relied on *Ex parte Cook* (1860), 9 N.B.R. 506. On analysis it is found instead to give additional support to the view I have expressed. Cook was charged before the General Sessions of the Peace with the paternity of a bastard child. The proceedings were of a criminal character; they were carried on in the name of the Queen and a warrant had been issued to apprehend him. Nevertheless the Court ruled the proceedings were not criminal. Sir James Carter, C.J. in delivering the judgment of the Court (which included Ritchie, J. subsequently Sir William Ritchie, Chief Justice of Canada), said the object from first to last down to the affiliation order, was not to punish Cook for the commission of any crime, but to compel him to provide for the support of his bastard child and thus save the parish from that expense.

In the case at Bar, on the other hand, the object was to punish the respondent for commission of what has been described as an offence against the State, and *vide* also *The Queen* v. *Tyler* (1891), 61 L.J.M.C. 38, Bowen, L.J. at p. 41. The *Cook* case illustrates that proceedings criminal in form may yet be civil in essence. The present proceedings may (if, contrary to my view, they can be regarded as civil in form) afford a converse example, *viz.*, proceedings described as civil or *quasi*-civil in form but yet which are criminal in their essence. Although "desertion" and "refusing to sail on his ship" on the part of an alien seaman of a foreign ship, may not be crimes at common law or within the Criminal Code, yet by operation of the order in council as part of the public law of Canada, and the provision therein for imprisonment in punishment thereof, they have been thereby created "crimes." It may be observed also that those acts if done by a seaman on a ship registered in Canada are constituted punishable offences by section 244 of the Canada Shipping Act, 1934, Cap. 44, Can. Stats. 1934.

Then as to the second branch of this aspect of the appeal, *viz.*,

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if the proceedings could be regarded as civil or *quasi*-civil in nature, does the same test apply as in admittedly criminal proceedings when imprisonment is imposed? In my view the answer must be in the affirmative. No person may be imprisoned or detained unless the legal right therefor is conclusively established. It is a rule of reason dictated by considerations affecting the liberty of the person which reaches back to Magna Carta. The liberty of the person is the overriding consideration. It matters not whether the custody of the person arises because of imprisonment under criminal process or detention under civil process. They are but mechanical divisions of the common law subject always (except for express statutory variation) to its inherent fundamental principles.

In *London Life Ins. Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.*, [1929] S.C.R. 117, Mignault, J. (with whom Anglin, C.J. and Rinfret, J. concurred) in giving the leading judgment of the Court, after observing that in criminal cases the crime imputed must be proved to the exclusion of reasonable doubt, said at p. 126:

> There is authority for the proposition that the same presumption of innocence from crime should be applied with equal strictness in civil as well as in criminal cases [refers to Taylor on Evidence] . . .

The learned judge then cited and approved the following excerpt from the judgment of Middleton, J.A. in the Ontario Court of Appeal:

> " . . . While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or *quasi*-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed. See Alderson, B., in *Rex* v. *Hodge* (1838), 2 Lewin, C.C. 227."

Mr. Justice Mignault also accepted the authorities cited by Riddell, J.A. in the same case, appearing in [1928] 2 D.L.R. 449, at p. 462 now quoted in part:

> "There is a general presumption that all acts and conduct are in accordance with law and morality. A party, therefore, who charges another with any description of wrong-doing must always give at least *prima facie* evidence of guilt before the party accused can be called on for an answer": 13 Hals., p. 499, para. 691. [2nd Ed., p. 628, para. 700] . . . The presumption of innocence is not, as is sometimes said, "merely another form of expression for a part of the accepted rule for the burden of proof in criminal

cases": 5 Wigmore on Evidence, p. 503, s. 2511. It is equally a rule constantly and consistently applied in civil cases.

The above case was, of course, quite different from the one at Bar. But I regard the principle there stated and applied to be equally applicable here if (contrary to the view I hold) the proceedings before the Board could by an manner of means, be described as civil. The respondent was charged with wrongdoing (*viz.*, desertion or for that matter refusing to sail on his ship is punishable by P.C. 2385). Therefore *prima-facie* evidence of his commission of that wrong was required before the respondent could be called upon for an answer. The presumption of his innocence threw that burden upon those seeking to establish his commission of the wrong.

In addition to the vital considerations to which I have referred, it is observed as well in the Board's decision quoted, *supra*, that the respondent "refuses to sign on a ship stating he has been suffering from rheumatism and cannot stand a long voyage." Instead of having him medically examined, or at least receiving medical evidence of his physical condition before reaching a decision, the Board promptly sentenced him to six months' imprisonment in total disregard of the merit or demerit of that defence of illness and consequent incapacity. In sentencing him the Board said "he will be examined by the medical doctor of Naval Services and a full medical report submitted for consideration." But that examination and report were obviously to take place some time after the sentence had been imposed. That was a harsh and inhumane way of treating the respondent. The Board could not in such circumstances reach a judicial decision. It refused to take into account a vital element without which a judicial decision was impossible.

If he were really suffering from an ailment incapacitating him from deep-sea service it could not be said he was guilty of an act for which he should be punished. It could not then be said in the eyes of the law that he "refuses to sign on a ship." And certainly such an ailment would not constitute conduct empowering action to be taken by the Board "which will serve as a deterrent to members of the crews of any other such ships who might be contemplating like activities." What occurred was a violation of an essential of justice within the meaning of decisions of

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this Court in *In re Low Hong Hing* (1926), 37 B.C. 295, at p. 302 and *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, at pp. 549, 551 and 555; *vide* also the judgment of MARTIN, J.A. (later C.J.B.C.) in *In re Immigration Act and Munetaka Samejima* (1932), 45 B.C. 401, at p. 405 upheld by the Supreme Court of Canada in [1932] S.C.R. 640.

Counsel for the appellant argued also that the Board was not a Court of law, and therefore was not required to adopt the regular forms of procedure. But in the *Arlidge* case (1914), 84 L.J.K.B. 72, Lord Parmoor at pp. 86-7, and in *St. John* v. *Fraser,* [1935] S.C.R. 441, Davis, J. at p. 452 emphasized boards must act in accordance with the principles of substantial justice. That, of course, is necessarily another way of saying no departure is permitted from the observance of fundamental principles of the common law.

Perhaps I should refer also to a suggestion thrown out during the argument that in time of war "state necessity" justified what the Board did. But until it is found necessary in time of war to displace the civil power by martial law, imprisonment or detention without due process of law is an anachronism. The establishment of boards without judicial personnel but with powers of detention and imprisonment must render it very difficult to prevent the gradual substitution of totalitarian negation of law for the rule of law; and *vide* Viscount Simon, L.C., and "The Fifth Freedom," 86 Sol. Jo. 127. In *Entick* v. *Carrington* (1765), 19 St. Tri. 1030, at p. 1073, *supra,* Lord Camden disposed shortly of the argument of state necessity. Nor is it forgotten that the respondent is the subject of a friendly and allied nation.

In *Rex* v. *Brixton Prison (Governor)* (1916), 86 L.J.K.B. 62, a case involving the deportation of an alien during the last war, Low, J. said at p. 66:

> I do not agree that it is for the Executive to come here and simply say, "The man is in custody, and therefore the right of the High Court to interfere does not apply, because the custody is at the moment technically legal." I say that that answer of the Crown will not do if this Court is satisfied that what is really in contemplation is the exercise of an abuse of power. The arm of the law would have grown very short, and the power of the Court very feeble, if that were the case.

Those observations were approved and added to by the Judicial Committee in *Eshugbayi* v. *Nigeria Government (Officer Administering)* (1931), 100 L.J.P.C. 153, at p. 157, where it is also of some importance to note the Governor of Nigeria had acted solely under executive powers and in no sense as a Court.

If the proper authority had reason to believe the respondent had deserted from his ship as charged, one would have thought such proper authority would have presented its evidence before the Board to that effect, when the Board would have called upon the respondent for his answer thereto. Quite apart from legal procedure that was the ordinary well known and only fair way of dealing with the respondent.

I would, therefore, dismiss the appeal.

FISHER, J.A.: I am of the opinion that ROBERTSON, J. reached the right conclusion. It may be that the orders of the Board of Inquiry should not be called convictions but the return to the writ of *habeas corpus* shows that the respondent Constantinos Pantelidis is held under two orders made by the Board for his detention or imprisonment and the question arises whether the orders are invalid and the imprisonment wrongful. The orders have been attacked by counsel on behalf of the respondent on the ground that the Board improperly called him as a witness and made him incriminate himself. In reply it is argued that the Board had the right to interrogate Pantelidis and to act upon his incriminating answers. The argument is first supported by the contention that the Board is not a judicial tribunal dealing with criminal offences but an administrative one conducting an investigation into the conduct of a seaman within the provision of The Merchant Seamen Order, 1941. It is necessary therefore to consider carefully the effect of the said order but before doing so I wish to refer to the procedure followed by the Board in the present case.

It is common ground that when the Board met on the 28th of January, 1942, the chairman addressing Pantelidis said as follows: [already set out in the judgment of ROBERTSON, J.]. Pantelidis was then called by the Board as a witness and his evidence under oath showed that he was a seaman employed on the S.S. Boris and had deserted from the said ship. Without

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hearing any further evidence the Board decided that Pantelidis be "detained at an immigration station for a period of three months." I agree with ROBERTSON, J. that Pantelidis was not a voluntary witness and I also agree with my brother O'HALLORAN that the validity of the Board's second order dated April 27th, 1942, for detention for a further period of six months must depend upon the validity of its first order in accordance with which Pantelidis was detained at Oakalla Prison Farm for three months commencing the 28th of January, 1942.

It may be said that at the inquiry Pantelidis was the seaman under investigation, pursuant to the provisions of the said The Merchant Seamen Order, 1941 made and established by order in council P.C. 2385, but I think that, unless there is clear indication to the contrary in the order in council, Pantelidis was entitled under the circumstances to the benefit of the rule that no one shall be bound to criminate himself. The history of the rule is interesting and in this connection reference might be made to Phipson on Evidence, 8th Ed., 198-9, from which it is apparent that the rule did not originate in order to protect only persons charged with a criminal offence in a Court of law but in order to protect all persons charged with an offence before any tribunal and for some time amounted to a mere claim as to the burden of proof, *i.e.*, that due presentment on oath should first be made by the accuser before the accused was even called upon to answer. Though the rule has since become a general one its history shows that it should not now be confined to criminal trials. I agree that it may be confined to trials but I do not agree that the inquiry in question herein was not a trial. I think it was and that any argument to the contrary ignores certain provisions of the said order in council as well as its purpose and the procedure followed by the Board in the present case. In *Board of Education* v. *Rice*, [1911] A.C. (H.L.) 179, at p. 182 Lord Loreburn, L.C. did say:

> But I do not think they are bound to treat such a question as though it were a trial,

but it must be noted that Lord Loreburn immediately added:

> They have no power to administer an oath, and need not examine witnesses.

The order in council as aforesaid, however, gives the Board power to summon witnesses and administer an oath. Moreover, in my

view, the order in council created an offence against the State (see especially the recital and paragraph 16 (*b*)). It may be noted that some of the words of the recital are as follows:

> That in the present emergency it is essential to the public interest and to the efficient prosecution of the war that the departure of merchant ships from Canadian ports be not delayed and that if delay occurs or is anticipated as being likely to occur by reason of the activities of a member or members of the crew of any such ship, provision should be made whereby there can be taken in respect of such member or members of any such crew such action as will prevent delay in the departure of any ship and which will serve as a deterrent to members of the crews of any other such ships who might contemplate like activities.

It is clear from these words that provision was being made for punishment of the offender by detention or imprisonment as a deterrent to others and it may be noted that the said order in council obviously recognizes that the alleged offender had some rights, paragraph 22 reading as follows:

> At all inquiries the seaman under investigation shall be entitled to be present and to be heard.

It is also clear that in the inquiry in the case of Pantelidis the Board proceeded to decide a question based upon a complaint charging him with an offence and gave a decision which meant imprisonment for Pantelidis. The Board undoubtedly treated the matter as a trial based upon a complaint as aforesaid and proceeded to call Pantelidis as a witness and examine him under oath.

Having carefully perused said order in council I cannot see any clear indication in it that it was intended thereby to deprive the seaman under investigation of the privilege he would otherwise have of refusing to incriminate himself under the circumstances as aforesaid. As pointed out by ROBERTSON, J. the Board of Inquiry apparently relied upon paragraph 15 of the said order in council which says that the Board shall have all the powers and authority of a commissioner appointed under Part I. of the Inquiries Act, R.S.C. 1927, Cap. 99. For the reasons stated in the Court below I agree that sections 4 and 5 of said Part I. have no application to a person who is charged with an offence. It is or may be argued, however, that the powers given under paragraph 15 were in addition to the other powers of the Board and that it had the power to obtain evidence in any way it thought best. In reply to this argument I have only to

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say that I think the authorities are clear that in any event the law is that such a board must act fairly and impartially. In this connection reference might be made to what was said by Lord Parmoor in *Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72, at p. 87:

> . . . Whether the order of the Local Government Board is to be regarded as of an administrative or of a *quasi*-judicial character, appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice,

and to what was said by Davis, J. in *St. John* v. *Fraser*, [1935] S.C.R. 441, at pp. 452-3, in part as follows:

> The investigator was not a Court of law nor was he a Court in law, but to say that he was an administrative body, as distinct from a judicial tribunal, does not mean that persons appearing before him were not entitled to any rights. An administrative tribunal must act to a certain extent in a judicial manner, but that does not mean that it must act in every detail in its procedure the same as a court of law adjudicating upon a *lis inter partes*. It means that the tribunal, while exercising administrative functions, must act "judicially" in the sense that it must act fairly and impartially. In *O'Connor* v. *Waldron*, [1935] A.C. 76, at 82, Lord Atkin refers to cases where tribunals, such as a military court of enquiry or an investigation by an ecclesiastical commission, had attributes similar to those of a Court of justice.
>
> "On the other hand (he continues) the fact that a tribunal may be exercising merely administrative functions though in so doing it must act judicially, is well established, and appears clearly from the *Royal Aquarium* case, [1892] 1 Q.B. 431."
>
> In the *Royal Aquarium* case, [*supra*] "judicial" in relation to administrative bodies is used in the sense that they are bound to act fairly and impartially.

In any event, therefore, the Board was bound to act fairly and in the present case where Pantelidis was charged with an offence by the district superintendent as aforesaid and the decision might mean imprisonment for him the only fair way of dealing with the matter in my view was to insist that the person making the complaint should give at least *prima-facie* evidence of the wrong-doing before the seaman was called upon to answer. In this connection reference might be made to the authorities cited by my brother O'HALLORAN on this phase of the matter.

For the reasons aforesaid I reach the conclusion that the Board proceeding as it did acted contrary to law. Under the circumstances it had no right to interrogate Pantelidis and to

act upon his incriminating answers. The order imposing imprisonment was therefore not an exercise by the Board of its function at all and was invalid. *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, particularly at p. 158, does not apply. See *The Children's Aid Society of the Catholic Archdiocese of Vancouver* v. *City of Salmon Arm* (1940), 55 B.C. 495, at p. 500 *per* O'HALLORAN, J.A. with whom SLOAN, J.A. and MCDONALD, J.A. (now C.J.B.C.) agreed. See also *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, especially at pp. 548-9 showing that when the imprisonment is wrongful there is a remedy by way of *habeas-corpus* proceedings.

I would, therefore, dismiss the appeal.

Appeal allowed, O'Halloran and Fisher, JJ.A. dissenting.

Solicitor for appellant: *Dugald Donaghy.*
Solicitor for respondent: *T. G. McLelan.*

BLOEDEL, STEWART & WELCH LIMITED v. STUART *ET AL.*

Employer and employees—"Dispute"—Industrial Conciliation and Arbitration Act—Arbitrators designated as a board—Statement of dispute delivered by employees—Agreement between employer and union proposed—Employer refuses to accept—Action for injunction restraining arbitrators from making award—For declaration that no dispute exists —B.C. Stats. 1937, Cap. 31.

A committee of employees of the shingle division of the plaintiff company were elected by a majority vote of the employees to negotiate with the plaintiff. No agreement having been reached by their negotiations, under section 10 of the Industrial Conciliation and Arbitration Act, a conciliation commissioner was appointed. He failed to bring about a settlement of the alleged dispute and the Minister of Labour referred the matter to arbitration. The statement of dispute was filed with the Minister by the committee and was directed to be delivered to the board of arbitrators. The statement of dispute recited that the employees, through their representatives, submitted to their employer a proposed union agreement between the employer and the International

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Woodworkers of America as the union which included, *inter alia*, a provision that the company recognizes the union as the sole collective bargaining agency of all the employees in the Burnaby plant and agrees to negotiate with a committee selected by the union any differences that may arise between the company and its employees. The employer refused to accept the proposed agreement. In an action for an injunction restraining the defendants (arbitrators) from hearing any evidence, making any award or performing any functions in connection with an alleged dispute between the employer and its employees and for a declaration that no dispute exists between the company and its employees, it was held that the action be dismissed.

Held, on appeal, affirming the decision of COADY, J. (MCDONALD, C.J.B.C. and MCQUARRIE, J.A. dissenting), that the definition of "dispute" in section 2 of said Act is wide enough to include the question at issue between the plaintiff company and its employees, as it is the privilege and right of employees to belong to a trade-union and as it is lawful for an employer to enter into an agreement with such trade-union with respect to the working conditions of such trade-union employees, it follows that the refusal of the employer to enter into such an agreement at the request of the bargaining committee of employees is a matter which affects or relates to the rights and privileges of the employees and therefore is one falling within the definition of "dispute."

APPEAL by plaintiff from the order of COADY, J. of the 27th of October, 1942, in an action for an injunction restraining the defendants, who were appointed as a board of arbitrators under the Industrial Conciliation and Arbitration Act, B.C. Stats. 1937, Cap. 31, from proceeding with the arbitration and for a declaration that no dispute exists between the plaintiff and its employees in the shingle division of the said plaintiff. A committee of employees was elected by a majority of the employees of the company to negotiate with the plaintiff. No agreement was reached and under section 10 of the said Act, the committee applied for the appointment of a conciliation commissioner under section 11 of the Act. A commissioner was appointed by the Minister of Labour but he failed to bring about a settlement and the Minister referred the matter to arbitration. An order in council was passed on October 6th, 1942, and the statement of dispute filed with the Minister by the committee was directed to be delivered to the board. The statement of dispute reads in part as follows:

Certain shingle mill employees employed by Bloedel, Stewart and Welch Ltd., Red Band Shingle Mill, Vancouver, British Columbia, through their elected representatives, submitted to their employer a proposed union agree-

ment in terms of the copy of the union agreement attached hereto and marked Schedule "A."

The employer has refused to accept the proposed agreement.

Then follows as Schedule "A" the proposed agreement wherein the plaintiff was set out as the party of the first part and International Woodworkers of America, District 1, Local 1-217, as the union of the second part. The proposed agreement dealt with many matters relating to the conditions of employment, including a provision that the company recognized the union as the sole collective bargaining agency for all employees in the Burnaby plant and agreed to negotiate with a committee selected by the union any differences that may arise between the company and its employees. The plaintiff submitted that this proposed agreement did not constitute a "dispute" within the meaning of the Act.

The appeal was argued at Vancouver on the 20th of November, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for appellant: The employees of the company demanded the right to bargain. The company met this but no agreement was arrived at. The Minister ordered an arbitration and the employees tendered an agreement between the company and the International Woodworkers of America, which included a clause that the company recognized the union as the sole collective bargaining agency for the employees. This was not a dispute within the meaning of the Act. They cannot make us enter into a contract with the union. It is not lawful for employees to bargain with their employer with a view to force the employer to bargain with anyone else except themselves as employees. To ask us to enter into a contract with a third person is not a "dispute." We are not concerned with any contract except with our employees. On the canon of construction see *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *Chorlton* v. *Lings* (1868), L.R. 4 C.P. 374, at p. 387.

MacDougall, for respondent: It is the duty of the Court to attach a rational and beneficial meaning to the legislation: see *Mersey Steel and Iron Company* v. *Naylor* (1882), 9 Q.B.D. 648, at p. 660; R.S.B.C. 1936, Cap. 1, Sec. 23 (6). The Act

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is for the purpose of preventing strikes, lock-outs and litigation. The definition of "dispute" is sufficiently wide to include the matter in controversy.

McAlpine, in reply: It is not a privilege, right or duty of an employee to make an employer enter into a contract with someone else.

MCDONALD, C.J.B.C.: This is an appeal from COADY, J. who refused an injunction restraining the defendants from proceeding with an arbitration under the Industrial Conciliation and Arbitration Act, B.C. Stats. 1937, Cap. 31. The learned judge dealt with the matter upon a special case agreed upon by counsel, and we are called upon to decide whether he is right in his construction of the Act. In a matter involving a difference between an employer and his employees it is particularly important that a judge should remember that he is sworn to determine, not according to his private judgment, but according to the law of the land, and that the ancient maxim *judicis est jus dicere, non dare* is still sound. We are called upon here to construe a statute, and we must be guided by its plain meaning, having due regard to well-established rules of construction. It has long been the law that a Court of law will not make any interpretation contrary to the express words of a statute, where its words are plain. These rules are so well known that I see no purpose in repeating them. Most of them were carefully collected by the late Chief Justice Anglin in *Hirsch* v. *Protestant Board of School Commissioners,* [1926] S.C.R. 246, at p. 265 *et seq.*

The legislation in question is, of course, remedial, and that fact must be kept in mind. There is, however, the further fact which must be remembered, and that is that this legislation, passed in 1937, for the first time gave to employees in British Columbia the legal right to bargain collectively with their employer, and the statute must not be carried further than the import of its language will justify. Section 5 of the Act as originally drawn was in the widest terms, in that it provided that it should be lawful for employees to bargain collectively

with their employers, and to conduct such bargaining through representatives of employees duly elected. Such representatives might or might not have been a union. It will be noted that there is no limitation whatever on the rights thus bestowed. Any employer or employee refusing to bargain was made liable to a heavy fine. In 1938 this section 5 was amended and as applicable to the facts now before us, may be read as follows:

It shall be lawful for employees to bargain collectively with their employer and to conduct such bargaining through representatives of employees duly elected; but inasmuch as the employees in this case were not organized into a trade-union on 7th December, 1938, there is no declaration that it shall be lawful to conduct such bargaining through the officers of a trade-union; and it is not lawful for employees collectively or otherwise to bargain with their employer with a view to forcing him to make an agreement with anyone else but themselves as employees.

To my mind the application of the provisions of section 5 with its amendment is basic to a decision in this case, and I think it is clear that the amendment restricts the rights previously given in 1937. If there be a union of the employees, such union shall be the bargaining agent. If there be no union, the bargaining agents shall be the employees or their elected representatives.

The board of arbitration was appointed ostensibly to settle a "dispute" which had arisen between the plaintiff company and its employees. Admittedly the only quarrel which had arisen was whether the company should be compelled to enter into an agreement, not with its employees or their representatives, but with Local 1-217 of District 1 of International Woodworkers of America. The Act gives no power to the Lieutenant-Governor in Council, to the Minister of Labour, nor to any board of arbitrators to call that a "dispute" which is not a "dispute" as defined by section 2 of the Act. True, the words of the definition are very wide, but in my opinion they must be limited in some way, and I am satisfied they refer to rights, privileges, wages and conditions of employment; but they do not refer to a right in the employees to force their employer to enter into a contract with some third party.

To put it in another way (and I shall now use words which

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Roget and other authorities suggest as synonyms for the word "dispute"), no wrangle, contention, argument, quarrel, disagreement, difference or controversy has arisen between the plaintiff and its employees within the meaning of section 2 of the statute. There was no room therefore, within the words of the statute, for the appointment of the defendant board. If the Legislature had intended to include any such right as is now contended for it would have been a very simple matter so to state.

I would therefore allow the appeal and order an injunction to issue, as asked.

MCQUARRIE, J.A.: I would allow the appeal and direct an injunction to issue for the reasons stated by the Chief Justice.

SLOAN, J.A.: This appeal from the judgment of COADY, J., dismissing the plaintiff's action on a special case stated for the opinion of the Court, presents to my mind, with deference, little, if any, difficulty in its solution.

The whole question, as I see it, turns upon the meaning of the word "dispute" as defined by section 2 of the Industrial Conciliation and Arbitration Act, B.C. Stats. 1937, Cap. 31.

Before considering that question it is necessary to glance at the facts upon which it has arisen for decision. Section 5 of the said Act, in so far as it is relevant herein, reads as follows:

> It shall be lawful for employees to bargain collectively with their employer and . . . to conduct such bargaining through representatives of employees duly elected by a majority vote of the employees affected, . . .

It is clear from a perusal of the Act as a whole that "bargaining" in said section 5 is not used in the sense of "contracting" but as "negotiating."

The employees of the shingle division of the plaintiff company, pursuant to said section 5, duly elected by a majority vote certain employees as a bargaining or negotiating committee to discuss with the company the desirability of the company entering into an agreement with a trade-union affecting or relating to union recognition, the employees' wages, hours of work, conditions of employment and matters of a like and related character. The company refused to accept the proposed agreement.

A conciliation commissioner was thereupon appointed by the Minister of Labour but (in the words of the special case)

he was unable to bring about a settlement or an adjustment of the dispute and recommended the matter be submitted to arbitration under the provisions of the aforesaid Act.

A board of arbitration having been selected and appointed pursuant to the said Act, the Lieutenant-Governor in Council directed that a statement of the dispute be delivered to the said board. That statement of dispute is, in part, as follows:

Certain shingle mill employees employed by Bloedel, Stewart and Welch Ltd. Red Band Shingle Mill, Vancouver, British Columbia, through their elected representatives, submitted to their employer a proposed union agreement in terms of the copy of the union agreement attached hereto and marked Schedule "A."

The employer has refused to accept the proposed agreement.

The plaintiff company at this stage of the proceedings commenced this action seeking, according to the endorsement on the writ of summons, a declaration

that no dispute exists between the plaintiff company and its employees in the shingle division of the said company.

The sole question therefore is whether or not the difference or dispute between the company and its employees over the said union agreement is a dispute within the meaning of the Act.

"Dispute" is defined by section 2 of the Act in the following relevant terms:

"Dispute" means any dispute or difference between an employer and . . . a majority of his employees in any separate plant or department of his operation as to matters or things affecting or relating to work done or to be done by him or them, or as to the privileges, rights, and duties of employers or employees, and, without limiting the general nature of the above definition, includes all matters relating to:—

(*a.*) The wages, allowance, or other remuneration of employees or the price paid or to be paid in respect of employment:

(*b.*) The hours of employment, sex, age, qualifications, or status of employees and the mode, terms, and conditions of employment:

. . . .

(*d.*) Claims on the part of an employer or an employee as to whether and, if so, under what circumstances preference of employment should or should not be given to one class over another class of persons being or not being members of labour or other organizations, British subjects, or aliens;

. . . .

That appears to me to be a definition deliberately designed to be comprehensive in scope. I have no hesitation in expressing the opinion that it is wide enough to include as a "dispute" the question or questions at issue between the plaintiff company and

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its employees. In that I am in agreement with the reasons of the learned trial judge. I would, however, add to his reasons this additional ground: By section 7 (2) of the Act an "organization of employees" may enter into an agreement with an employer

> whereby all the employees of the employer . . . are required to be members of a specified organization of employees.

By section 2 (1) "organization of employees" includes a trade-union. As it is the privilege and right of the employees to belong to a trade-union and as it is lawful for an employer to enter into an agreement with such trade-union with respect to the working conditions of such trade-union employees, then it seems to me to follow that the refusal of the employer to enter into such an agreement at the request of the bargaining committee of employees is a matter which affects or relates to the rights and privileges of the employees, and therefore is one falling within the definition of "dispute."

I refrain from expressing any opinion as to the merits or demerits of the position assumed by the company, because in my view the matters in question, including the propriety of the company entering into the agreement in dispute, are for the decision of the board of arbitration. That is the tribunal which must pass upon the proposed contract in all its relevant aspects both as to the parties to it and the scope and extent of its covenants.

I would therefore dismiss the appeal.

O'HALLORAN, J.A.: The learned judge of first instance decided that the subject-matter of the dispute included not only the terms of the proposed agreement, but also the proposal of the committee representing the employees, that the proposed agreement should be between the appellant company and a union. Before the Court below the question was raised as to whether the Industrial Conciliation and Arbitration Act prevents the agreement being entered into with the union. The learned judge, however, refrained from deciding that question, and I shall refer to that phase of the matter later on.

At first, counsel for the appellant company generalized his submission thus: that the board of arbitration has no jurisdic-

tion to force the company to contract with a union. But no doubt recognizing the flimsy foundation for statement of the issue in that bold form, he readily conceded there was no question of forcing the company into a contract, since for one thing, under section 43 of the statute, any party is at liberty to reject or accept the award which the board of arbitration may eventually make.

That left his proposition in this form, *viz.*, that section 5 of the statute prohibits the company from negotiating with the union, and requires it to negotiate only with the duly-elected representatives of the majority of its employees. But it is common ground—and so appears in paragraphs 4, 5 and 6 of the special case—that the negotiations were being conducted throughout, not by the union, but by the duly-elected representatives of the majority of the company's employees.

In my opinion at least, the foregoing brief analysis is sufficient to dispose of the appeal so far as it is based on the generalized submission as aforesaid. It became apparent during the argument, however, that the submission of counsel for the appellant, that the dispute as set forth in paragraph 10 of the special case is not a dispute within the meaning of the Industrial Conciliation and Arbitration Act, is really based on three points, and I will deal with them point by point as argued: (1) That there was no "dispute" as defined in section 2 of the said Act; (2) that in any event the union is a third party without interest in the subject-matter of the dispute between the company and its employees; and (3) that section 5 of the Act empowers the company to contract with the elected representatives of the majority of its employees, but not with their union.

It was urged on the first point, that the issue does not come within any of the specific headings (*a*) to (*g*) found at the end of the definition of "dispute" in the statute. This asks us, however, to ignore the supplemental nature of said sub-paragraphs, and to pass over their introductory limitation which provides that they shall not limit the "general nature" of "dispute" as already there defined: [already set out in the judgment of SLOAN, J.A.].

I think this definition is wide enough to include the dispute set forth as aforesaid.

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"Privileges and rights" of employees certainly include the right to form a union of their own, or to form or join themselves into an existing local union which may be a branch or part of an established larger union. Trade-unions have been legalized long since: *vide Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1901), 70 L.J.K.B. 905 (H.L.), and also the Trade-unions Act, Cap. 289, R.S.B.C. 1936, and *Hollywood Theatres Ltd.* v. *Tenney* (1939), 54 B.C. 247, at p. 277. It is also the right and privilege of employees when so organized, to negotiate and contract with their employer through the medium of their union. It appears to me that right must be recognized as running through the structure of the Trade-unions Act, *supra,* and the Industrial Conciliation and Arbitration Act, unless it is shown to be modified by section 5 of the latter statute to which I shall shortly refer.

Turning next to the second point, I can see little to support an argument that the union is a third party without interest in the subject-matter. It is conceded the majority of the employees seek to have this union represent them as a party to the proposed agreement. It is their choice and their right. Their elected representatives have put that request forward as one of the terms of the bargaining. The proposed agreement provides that the "grievance committee" therein proposed, shall be composed of three members "actually then in the employ of the company" (article 8, section 4).

It must follow that the interest of the employees is the interest of the union. It is definitely not an uninterested third party. It may be appropriately described as the collective or composite *alter ego* of the employees, enabling their wishes to be represented by one responsible and authoritative voice in the proposed contract. I do not think this second point needs further discussion to justify its rejection.

The appellant's third point concerns the effect of section 5 as amended in 1938. It reads:

> It shall be lawful for employees to bargain collectively with their employer and if the majority of the employees are, on the 7th day of December, 1938, organized into a trade-union to conduct such bargaining through the officers of such trade-union, and if not on that date organized into a trade-union, to conduct such bargaining through representatives of employees duly elected by a majority vote of the employees affected, and any employer or employees

refusing so to bargain shall be liable to a fine not exceeding five hundred dollars for each offence.

It was argued that section means the company cannot contract with its employees through their union, because they had not been "organized into a trade-union" on the 7th of December, 1938.

But with respect that is reading words into the section which are not there. The term used is "bargain" and not "contract." It is freely admitted that the "bargaining" on behalf of the employees has been conducted, not by the union, but by the duly-elected representatives of the majority of the employees affected. One of the terms of bargaining advanced by those representatives, is, that the company shall enter into the contract with their union as fully representing their interests. The distinction between "bargaining" and "contracting" is substantive and not purely verbal.

"Bargain" may have several meanings. And in one sense it may sometimes be interchangeable with "contract." But the context of section 5 does not permit it to receive that meaning. The expression "conduct such bargaining" occurs twice in section 5. That shows clearly that "bargain" is there used in the sense of negotiation, and not in the sense of a contract. One may conduct a negotiation, but obviously one cannot conduct a contract. Read in the sense the context demands, there is nothing in section 5 which hinders the company from entering into a contract with a union. That is particularly so here, since the negotiations have been conducted not by the union, but by the representatives of the majority of the company's employees.

But even if section 5 should be capable of other constructions, then that construction which produces the greatest harmony and the least inconsistency ought to prevail: *vide Reid* v. *Collister* (1919), 59 S.C.R. 275. As Lord Shaw said in *Shannon Realties, Lim.* v. *Town of St. Michel* (1923), 93 L.J.P.C. 81, at p. 84, that construction is to be chosen which will be consistent with the smooth working of the system which the statute is regulating, and that construction should be rejected which will introduce uncertainty, friction, or confusion into the working of the system.

The statute is to be construed according to its "cause and

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necessity," and according to that which is "consonant to reason and good discretion," *vide Stradling* v. *Morgan* (1560), 1 Plowd. 199; 75 E.R. 305, at pp. 311 and 315. The interpretation of section 5 must be subordinated thereto. The "cause and necessity" of the statute is the effecting and maintenance of industrial peace and goodwill. It contemplates mediation and conciliation, which necessarily imply discussion and negotiation without undue delay, between responsible and authoritative representatives of organized management and organized employees.

It is "consonant to reason and good discretion" that employees should form themselves into unions, and that such unions should contract with employers on their behalf. That seems to be particularly so here, for it is stipulated in the proposed agreement that the grievance committee shall be composed of members "actually then in the employ of the company." In my view, with respect, the statute does not prevent the company entering into the proposed contract with the union. The union has been designated for that purpose by the majority of the company's employees in the course of the bargaining between the company and the duly-elected representatives of those employees. In my view the appeal should be dismissed accordingly.

Before parting with the appeal, it is advisable to consider whether the learned judge of first instance was right in refraining from deciding the competency of the board to entertain the question on which this appeal centred. He held it was a matter for the board to determine. He said:

> The board may find that the agreement cannot be entered into with the union, but rather with the representative committee elected by the employees. But that is a matter for the board. We cannot assume that the board will not be guided by the provisions of the Act, and if under the Act the employees are not entitled to have the agreement made with the union, no doubt the board will be guided by that in its findings.

Counsel for the appellant contended, however, that was an erroneous view, and submitted the board of arbitration is not competent to determine matters relating to its own jurisdiction.

It is true as observed in *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, at p. 162, that if a statute says a tribunal shall have jurisdiction if certain facts exist, then such tribunal is competent to enquire into those facts in order to ascertain and determine its jurisdiction (subject to *certiorari*). But that

related to a judicial tribunal. It did not and could not relate to a tribunal such as the board of conciliation and arbitration in this case, which cannot be said to possess judicial or administrative powers. For it has been brought into being for the purpose of investigating and exhausting all avenues which may lead to conciliating and settling the differences between the company and employees, but is without any final powers since its award may be accepted or rejected by any party.

In *National Trust Company, Ltd.* v. *The Christian Community of Universal Brotherhood Ltd.* (1940), 55 B.C. 516, the National Trust Company Limited commenced an action, as here, for a declaration with a consequential injunction, and succeeded in establishing in effect that the Board of Review was not competent to decide a question relating to its own jurisdiction. The Board of Review there consisted of a judge of the Supreme Court as chairman with laymen members. One of the judgments in this Court at p. 537 supported the Board's jurisdiction alternatively in that respect, on the authority of the *Nat Bell* case, *supra.* But the Supreme Court of Canada, *vide* [1941] S.C.R. 601, was not influenced by that view in reversing this Court's decision.

In the *National Trust* case, *supra,* the Board of Review had very wide and final powers, even to the extent of altering written contracts and taking away existing rights, *vide* p. 529 of 55 B.C., *supra.* Nevertheless the Supreme Court of Canada did not recognize the Board's competency to determine matters relating to its own jurisdiction. The Court held the language of the statute was not sufficiently precise and imperative in its terms to oust the jurisdiction of a superior Court. The board in this case has no such extensive or final powers. Its jurisdiction is confined to conciliation and adjustment of differences, and no one need accept the award it may ultimately make. That award, realistically viewed, can contain nothing more than suggestions as to how the board thinks those differences may be equitably adjusted: refer section 39 (1) of the Act.

For these reasons—to which could be added what Lamont, J. said upon another aspect in *Segal* v. *City of Montreal,* [1931] S.C.R. 460, at pp. 472-3—I am of the view, with respect, the

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board of arbitration is not competent to determine judicially a question affecting its own jurisdiction. I do not feel it necessary to refer to the constitutional aspect.

But even if it could be said that the board of arbitration may possess concurrent jurisdiction with the Supreme Court in this respect, it should nevertheless be held in the fitting exercise of our discretion, that the matter is essentially one for determination by a superior Court. The board here is not a judicial tribunal. And although one of its members happens to be a learned judge of the Supreme Court, yet the other two members, who may constitute the majority, are laymen, and with every respect, do not claim to possess that legal training and knowledge of the law to enable them to decide a purely legal question touching their jurisdiction.

It follows in my view the appellant adopted a proper course in seeking a judicial decision upon the board's jurisdiction in the premises. But for reasons stated earlier, it must be held that the right of the employees to designate a union to enter into the proposed agreement on their behalf is not denied by the statute. The board may therefore properly consider the employees' proposal in that respect. It is, of course, for the board to decide what ought or ought not to be done.

I would dismiss the appeal.

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

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

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for respondents: *A. Reg. MacDougall.*

IN RE CHAMPION & WHITE LIMITED AND *IN RE* AJAX HOLDINGS LIMITED.

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Oct. 19;
Nov. 19.

Company—Private company—Restriction on sale of shares—Memorandum and articles of association—Sale of block of shares—First offer to members—R.S.B.C. 1936, Cap. 42, Secs. 78 and 89.

By the memorandum of association of the C. company, a private company, no share of the company shall be transferred to a person who is not a member of the company so long as any existing member is willing to purchase the same at a fair value. The articles of association provide that the directors may also decline to register any transfer of shares unless such shares have been offered through the secretary to the existing members of the company by a notice given at least 30 days before a sale is to be completed. Such notice shall state the price and terms at which the shares are to be sold. If the company shall, within a space of 28 days after being served with such notice, find a member willing to purchase the shares and shall give notice thereof to the proposing transferor, he shall be bound, upon payment of a fair value, to transfer the shares to the purchasing member. On the 28th of October, 1940, the N. company, through its authorized agent, notified the C. company that it desired to sell 3,006 ordinary shares of the C. company of which it is the registered holder and offered through the C. company to sell to the existing members thereof said shares for $60,000. No reply was received from the C. company and on the 12th of December, 1940, the N. company sold the shares to the A. company and executed a transfer of the shares to the A. company. The N. company then notified the C. company of the sale and requested transfer thereof on the books of the company. The company declined to transfer the shares. On petition by the A. company for an order that the register of the C. company be rectified by entering therein the name of the petitioner as owner of 3,006 shares of the capital stock of the company, the C. company based its objections to transfer upon four grounds: First, that no transfer can be made by the N. company of any share so long as there is a present shareholder willing to purchase any portion of said shares; second, the provisions of the articles of association have not been complied with; third, another party claimed to be owner of these shares, the endorsements on the share certificates showing transfer to him; fourth, the sale to the petitioner was at a price less than the price offered to the present shareholders.

Held, as to the first objection, that the notice of intended sale states that the offer relates to the sale of the whole number of shares offered and not to a part thereof and must be accepted, if at all, in that way. As to the second, the notice was given. No reply was received within 28 days, and the notice, as required by the articles, states the price and terms. There has been compliance in every respect. As to the third, section 89 of the Companies Act states: "A certificate under the common seal of the company, specifying any shares held by any member,

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shall be *prima facie* evidence of the title . . . to the shares." Where, as here, the company raises any question of ownership in another, the burden of establishing that is on the company and this objection fails. As to the fourth, there being no restriction in the articles of association, the shareholder, having made an offer which has not been accepted, may then sell at any price. An order in the prayer of the petition for rectification of the register of the company is granted.

PETITION under section 78 of the Companies Act by the Ajax Holdings Limited for an order that the register of members of Champion & White Limited be rectified by entering therein the name of the petitioner as the owner of 3,006 shares in the capital stock of the company. The facts are set out in the reasons for judgment. Heard by COADY, J. at Vancouver on the 19th of October, 1942.

Locke, K.C., and *Lundell*, for plaintiff.
Donaghy, K.C., for defendant.

Cur. adv. vult.

19th November, 1942.

COADY, J.: This is an application by way of petition under section 78 of the Companies Act by Ajax Holdings Limited, for an order that the register of members of Champion & White Limited, hereinafter called the company, be rectified by entering therein the name of the petitioner as the owner of 3,006 shares in the capital stock of the company. The company is a private company, incorporated under the laws of the Province of British Columbia in 1920. It has certain restrictions on the transfer of its shares. Section 5 of the said memorandum reads in part as follows:

No share of the company shall be transferred to a person who is not a member of the company so long as any existing member is willing to purchase the same at a fair value, as may be decided upon by the auditor for the time being of the company, . . .

The pertinent part of the articles of association of the company dealing with this matter of transfer, reads as follows:

(b). The directors may also decline to register any transfer of shares unless such shares have been offered through the secretary to the existing members of the company by a notice given at least thirty days before a sale is to be completed, such notice shall state the price and terms at which the shares are to be sold. If the company shall within a space of twenty-eight (28) days after being served with such notice, find a member willing to purchase the share or shares, and shall give notice thereof to the proposing

transferor, he shall be bound, upon payment of the fair value, to transfer the share or shares to the purchasing member, and in case a difference arises between the proposing transferor and the purchasing member as to the fair value of a share the company's auditor on the application of either party shall certify in writing the sum which in his opinion is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the auditor shall be considered to be acting as an expert and not as an arbitrator, and the said purchasing member shall accept the value thereof as so given, and the share shall be transferred accordingly.

On October 28th, 1940, The London & Western Trusts Company, acting under a power of attorney from National Paper Box Limited at that time the registered owner of 3,006 shares in Champion & White Limited, wrote to the company as follows:

We deliver to you herewith Power of Attorney executed by National Paper Box Limited in our favour authorizing us to dispose of the shares in your Company of which National Paper Box Limited is the registered holder.

Pursuant to the Articles of Association and Memorandum of Association of your Company, we accordingly offer, through you, to sell to the existing members of Champion & White Limited the 3,006 ordinary shares of that Company of which National Paper Box Limited is the registered holder, at the price of $60,000.00, all cash.

We find on referring to your last audited balance sheet that these shares have a book value of about $104.00 each. You will thus observe that our present offer represents a substantial reduction.

The offer hereby made relates to a sale of the whole number offered and not to a part thereof.

Please advise us in due course as to the acceptance or refusal of this offer by the present members of the Company, and in the meantime will you kindly acknowledge receipt of this letter and the enclosure.

No reply was received to this letter. On December 12th, 1940, National Paper Box Limited through its authorized attorney agreed to sell the said 3,006 shares to the petitioner herein (Exhibit 10), and on the same day executed a transfer of the said shares to that company (Exhibit 5). By letter dated December 23rd, 1940, National Paper Box Limited, by its authorized attorney, gave notice to the company that the said shares had been sold to the petitioner herein, and requested transfer thereof on the books of the company, and that a new certificate be issued in the name of the petitioners. The share certificates and a form of transfer duly completed were enclosed. On February 13th, 1941, the directors of the company, by resolution declined to transfer the said shares on the ground that a notice in compliance with the provisions of the articles of association had not been given. This resolution refers also to certain

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documents then before the directors, which included documents to the effect that one James E. Taylor had at some prior time claimed to be the owner of the said shares. While the only ground as set out in the operative part of the resolution for refusal to transfer is non-compliance with the articles of association, and while counsel for the petitioner herein argued that the company is now restricted to that one ground of refusal, nevertheless, counsel for the company submits that he is not so restricted, and that other grounds of objection are open to the company on this application, although not taken specifically in the resolution. See *Winter* v. *Capilano Timber Co.* (1927), 38 B.C. 401; *Phillips* v. *Whitsed* (1860), 29 L.J.Q.B. 164; *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339. I am of the opinion that the company is not precluded from advancing other grounds of refusal, and I propose to deal with the matter on that basis.

Counsel for the company bases his objections to transfer upon four grounds: First, that the memorandum of association must govern and that no transfer can be made by National Paper Box Limited of any share so long as there is a present shareholder willing to purchase any portion of the said shares. Second, the provisions of the articles of the association have not been complied with. Third, another party had claimed to be the owner of these shares, and the endorsements on the share certificates show transfer to him. Fourth, the sale to the petitioner was at a price less than the price offered to the present shareholders.

Dealing with the first ground of objection, I do not think there is any prohibition here as urged by counsel, nor do I think that if a shareholder is desirous of selling all or some definite number of his shares that his sale can be defeated by an offer on the part of one or more of the present shareholders to purchase any number less than the number of shares offered for sale. The offer here is an offer to sell 3,006 shares. There was no acceptance but two existing shareholders now indicate their willingness to purchase some 26 of the shares offered. The notice of intended sale states that the offer relates to the sale of the whole number of shares offered and not a part thereof, and must be accepted, if at all, in that way. (See *Ocean Coal Co.* v. *Powell Duffryn*

Steam Coal Co. (1931), 101 L.J. Ch. 253. While the memorandum imposes the restriction, it is silent as to how the sale is to be carried out, and the articles of association, section 9 (b), provides the procedure to be followed by the selling shareholder. Counsel points out that the memorandum must govern, and any provision in the articles inconsistent with the memorandum is invalid. However, I find no inconsistency. The articles state in what manner the shares may be offered for sale by the selling shareholder, and in that respect supplement but do not conflict with the memorandum when the two are read together. If, however, any ambiguity or inconsistency appears, then as stated in *Anderson's Case* (1877), 7 Ch. D. 75, at p. 99 by Jessel, M.R.:

> Where there are two contemporaneous documents executed and assented to by the same persons at the same time . . . , it appears to me that the ordinary rule applies, according to which contemporaneous documents are to be read together, so that if there is any ambiguity in one it may be explained by the other; and even if there is any inconsistency, you must take the two documents together and see how you can explain the inconsistency.

This ground of objection therefore fails.

The second objection raised by counsel—and this is the particular ground of refusal set out in the resolution above referred to—is that there has not been compliance with section 9 (b) of the articles of association. I think there has been compliance in every respect. The notice was given. No reply was received within the period of 28 days. The notice as required by the article states the price and terms. The price here clearly means the price at which the selling shareholder is willing to sell. It is not the price, as urged by counsel for the company, that the selling shareholder can obtain from a third party on a deal that he has in view. He may have no deal in view at the particular time that notice is given. It is the price at which he is willing to sell to the present shareholders of the company. They are not obliged to accept that price. If any members are willing to purchase, and if the price at which the offer is made is considered too high, then there is provision in the article for the determination of a fair value. The fair value might conceivably be more or less than the price at which the shares are offered. If no shareholders are found willing to purchase the shares offered by the selling shareholder within the time specified, then the selling

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shareholder is at liberty to sell to a person who is not a shareholder. This ground of objection likewise fails.

The third ground of refusal to transfer is that a claim was advanced at some prior time by a third party to the ownership of these shares. It would seem extremely doubtful in view of the judgment in *Hunter* v. *Hunter,* [1936] A.C. 222, that the company is bound to recognize any equitable or other interest claimed by any person, other than the registered owner of the shares, in view of the provisions of the memorandum and articles of association regarding transfer. While it seems to me that the company is not so bound and such notice would not constitute a just ground for refusal to transfer, I do not think I am called upon to decide the point in the particular circumstances of this case. Here the only person who has claimed ownership is one James E. Taylor. There is no proof of his ownership submitted. There is evidence only that the company had notice that he made such claim at one time. But it will be noticed in referring to Exhibit 5, the document transferring the shares from the National Paper Box Limited to the petitioner, that Taylor signs as a director of the petitioner. Clearly if he had any valid claim to the ownership of the shares at any prior time, he had then abandoned that claim, and is a consenting party to the transfer to the petitioner. He would thus, in my opinion, be estopped from advancing any such claim at any subsequent time. In addition counsel for the petitioner points to section 89 of the Companies Act, R.S.B.C. 1936, which reads:

> A certificate under the common seal of the company, specifying any shares held by any member, shall be *prima facie* evidence of the title . . . to the shares

and submits that where as here the company raises any question of ownership in another, the burden of establishing that is on the company. That would appear to me to be sound. This ground of objection therefore fails.

The fourth ground of objection is that the sale to the petitioner was at a price less than the price offered to the present shareholders. This is, in my opinion, of no consequence. The offer made was not accepted and the vendor is thereupon at liberty to sell for a greater or less sum. There is nothing in the articles to prevent this. A provision is sometimes inserted in the articles

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of private companies to the effect that no sale shall be made at a lower price than the price offered, until there has been a new offer made to the existing shareholders at the reduced price, but no such provision appears in the articles here. There being no such restriction the shareholder having made an offer which has not been accepted may then sell at any price.

There will be an order in the prayer of the petition for rectification of the register of the company.

Petition granted.

THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA, AND CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CITY OF VANCOUVER.

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Nov. 10, 11, 12;
1943
Jan. 12.

Taxation—Crown interests—Tax in question levied on Crown interests in land leased to Crown—Vancouver Incorporation Act—"Held by" the Crown—"Occupied"—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 46—R.S.B.C. 1936, Cap. 67.

App. Allowed [1944] S.C.R. 23.

The plaintiff, the Canadian Northern Pacific Railway Company, owner of lot G, plan 1341, situate in the city of Vancouver, leased a vacant portion of said lot on the 1st of January, 1923, to His Majesty represented by the Minister of Agriculture for the Dominion and the Minister of Agriculture of British Columbia jointly and subsequently, as required by said lease, His Majesty, represented as above, erected thereon a building known as the "Vancouver Fumigation Station Building." The said building thereafter was and still is used and occupied jointly by the Department of Agriculture of the Federal and British Columbia Governments for fumigation of imports against insect life. By lease of the 1st of May, 1940, His Majesty, represented by the Minister of Munitions and Supply of the Dominion, leased from said railway company another vacant portion of said lot G and subsequently a building known as the "Boeing Aircraft Building" was erected thereon for and at the expense of the Crown pursuant to a contract made between the Crown and the Boeing Aircraft of Canada Limited. The building thereafter was and still is used by the Boeing company in the manufacture of airplane parts under its contract with the Crown. In an action by the Dominion and Province for a declaration that these buildings were not subject to taxation and by the railway company for a declaration that it was not liable to be assessed or taxed in respect of the buildings and that it was entitled to recover back taxes already paid by it thereon,

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it was held that the plaintiffs were entitled to all the relief claimed, except that the railway company was only entitled to repayment of one year's taxes, that is, those that had been paid under protest, whereas the earlier taxes had not. The decision was based partly on the Crown's ownership of the two buildings, also on the ground that the buildings were "held by" His Majesty within the meaning of section 46 of the Vancouver Incorporation Act, 1921, which exempted all property vested in or held by His Majesty.

Held, on appeal, affirming the decision of COADY, J. (SLOAN, J.A. dissenting), that the appeal should be dismissed.

Per MACDONALD, C.J.B.C.: The lease of the Boeing Aircraft Building is from the railway company to the Dominion alone. This provides that at the end of the lease the lessee shall forthwith remove his buildings from the demised premises, failing which, the lessor may remove them at the lessee's expense or keep them without compensation. The necessary inference is that the buildings put up by the lessee belong to him. The lessee has an equitable title at least and the Crown's equitable estate is as exempt from taxes as its legal estate. As far as the Boeing Aircraft Building is concerned the Crown's title is established. With respect to the provision in the lease on which the Vancouver Fumigation Station Building was erected, namely, as to its removal by the lessee as the lessor may direct, it is insufficient to support the trial judge's finding. But the lands "held by" the Crown within the meaning of section 46 of the Vancouver Incorporation Act, 1921, include its leaseholds. The city contends it did not tax the buildings but only the land in respect to the buildings. Even if this were a sound argument, in view of the Crown's holding of leaseholds, it is not borne out by the facts. The statement that the buildings are not themselves taxed is inconsistent with the Act and the building is exempt from taxation. The Crown Costs Act, R.S.B.C. 1936, Cap. 67 does not apply to the Crown (Dominion).

Per FISHER, J.A.: Under the Vancouver Incorporation Act, 1921, taxes are imposed on buildings as improvements, not as land, and before the total amount of taxes imposed is set down in the tax roll with respect to any particular property (this being the amount to be paid) the Act requires consideration of the exemptions and deductions. In view of all the provisions of the Act, it cannot be said that if and when the name of the assessed owner of any parcel of land goes on the collector's roll, the improvements necessarily go on, and are taxed as part of, or as included in the land. Therefore, since the buildings in question or interests therein belong to the Crown and the buildings are occupied by the Crown, the city is faced with the obstacle that it is precluded from taxing such Crown property without express legislative authority therefor. *Attorney-General for Canada* v. *Montreal* (1885), 13 S.C.R. 352 applied.

Per MACDONALD, C.J.B.C. and FISHER, J.A.: Taxes paid under protest can be recovered by action if they were not legally due.

APPEAL by defendant from the decision of COADY, J. of the 23rd of April, 1942, whereby he declared that the building

known as the Boeing Aircraft Building situate on lot G, plan 1341, city of Vancouver, is the property of His Majesty the King in the right of the Dominion of Canada and is not liable to taxation by the defendant and he declared that the plaintiffs are not liable to be assessed and are not liable for payment of taxes in respect of said buildings; and he declared that the building known as the Vancouver Fumigation Station Building situate on said lot G is the property of His Majesty the King as in right of the Dominion of Canada and as in right of the Province of British Columbia, and is not liable to taxation by the defendant, and that the plaintiffs are not liable to be assessed and are not liable for payment of taxes in respect of said building, and he declared that the plaintiff, Canadian Northern Pacific Railway Company should recover against the defendant the sum of $1,178.40. The action was brought mainly for a declaration that said buildings are not liable for assessment or taxation and incidentally for recovery of taxes paid under protest in respect of said buildings by the plaintiff Canadian Northern Pacific Railway Company. The facts are similar in respect of the two buildings. On May 1st, 1940, said railway company leased to His Majesty the King in right of the Dominion of Canada a portion of said lot G, and pursuant to an agreement in writing of May 20th, 1940, a building known as the Boeing Aircraft Building was erected on said land by the Boeing Aircraft of Canada Limited for and on behalf of His Majesty the King in right of Canada. The agreements provided for the manufacture of airplane parts for His Majesty the King by the Boeing Company. After the completion of the building, the city assessed the same as part of the improvements on lot G and required the said railway company to pay taxes in respect thereof. The value of the building for assessment and taxation purposes was $42,500. On January 1st, 1923, said railway company leased another portion of said lot G to His Majesty the King in the right of the Dominion and of the Province, and His Majesty the King in the right of the Dominion and of the Province erected thereon a building known as Vancouver Fumigation Station Building. Said building was erected as a fumigation plant and station for the use of the public of the Dominion and the Prov-

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ince. After the completion thereof, the building was assessed as part of the improvements on said lot and required the plaintiff, the railway company, to pay taxes in respect thereof. The assessed value of the building was $6,600. The said railway company paid all the taxes in respect of said buildings.

The appeal was argued at Vancouver on the 10th, 11th and 12th of November, 1942, before MCDONALD, C.J.B.C., SLOAN and FISHER, JJ.A.

McTaggart, K.C., for appellant: The statutory provisions with respect to taxation in the city of Vancouver contemplate a system different in many respects from that which obtains in other jurisdictions, for example, as that embraced in the Ontario Assessment Act: see Manning on Assessment and Rating, 2nd Ed., 567 and 569. The learned judge has found that these buildings, which are admittedly fixed to lot G, are the property of the Crown. This ignores a long line of rules on "fixtures" that such fixtures are the property of the owner of the land on which they are affixed and the parties cannot vary the rule by agreeing that the fixtures shall remain the property of the affixer: see *Bain* v. *Brand* (1876), 1 App. Cas. 762; *Hobson* v. *Gorringe*, [1897] 1 Ch. 182; *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174; *Reynolds* v. *Ashby & Son*, [1904] A.C. 466; *Canadian Bank of Commerce* v. *Lewis* (1907), 12 B.C. 398; *Dominion Trust Co.* v. *Mutual Life Assurance Company of Canada* (1918), 26 B.C. 237; *Hoppe* v. *Manners*, [1931] 2 D.L.R. 253. Until severed from the freehold, they are the property of the owner: see Williams on Landlord and Tenant, 1st Ed., 522; Manning on Assessment and Rating, 2nd Ed., 73 *et seq.* He has gone against the effect of the common-law principle of ownership in the case of fixtures. The Crown should be declared to have only a leasehold interest therein. It cannot be said that an interest is not assessable under section 40 of the Vancouver Incorporation Act, 1921, merely because it happens to be a trustee interest only: see *Riesbech* v. *Creighton* (1913), 12 D.L.R. 363; *Attorney-General of Canada* v. *City of Montreal* (1885), 13 S.C.R. 352; *City of Halifax* v. *Fairbanks' Estate*, [1928] A.C. 117, at p. 122; *Calgary & Edmonton Land Co.* v. *Attorney-General of Alberta* (1911), 45 S.C.R. 170; *Smith* v.

Rural Municipality of Vermilion Hills (1914), 49 S.C.R. 563; [1916] 2 A.C. 569; *City of Montreal* v. *Attorney-General for Canada,* [1923] A.C. 136; *North West Lumber Co., Ltd.* v. *Municipal District of Lockerbie, No. 580,* [1926] S.C.R. 155. The fact that the Crown may be indirectly affected if the Crown is not directly taxed does not afford exemption: see *City of Vancouver* v. *Chow Chee* (1941), 57 B.C. 104. The language of section 125 of the B.N.A. Act is no stronger than that of section 46 (1) of the Vancouver Incorporation Act, 1921, which contains the exempting provisions with respect to the Crown. The plaintiff railway company, being the registered owner of lot G including improvements situate thereon, is liable for payment of the taxes under section 63 of the Vancouver Incorporation Act, 1921.

J. B. Roberts, on the same side: The taxes paid by the railway company were paid voluntarily and are not saved by payment under protest: see *Liverpool Marine Credit Co.* v. *Hunter* (1868), 3 Chy. App. 479; *Slater* v. *Mayor, &c., of Burnley* (1888), 59 L.T. 636; *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265; *Colwood Park Association Limited* v. *Corporation of Oak Bay* (1928), 40 B.C. 233; *National Pari-Mutuel Association, Limited* v. *Regem* (1930), 47 T.L.R. 110; *William Whiteley Limited* v. *The King* (1909), 101 L.T. 741. Costs were allowed the Attorney-General of Canada. This is contrary to the provisions of the Crown Costs Act.

W. H. Campbell, for respondents: The Crown own both buildings and they are attempting to tax the railway company for property they do not own. The effect of section 125 of the B.N.A. Act is that the interests of the Crown are not liable to taxation: see *Calgary & Edmonton Land Co.* v. *Attorney-General of Alberta* (1911), 45 S.C.R. 170, at pp. 191-2. The exemption under section 125 must always be read into any Dominion or Provincial taxing Act which does not expressly exclude it: see *Smith* v. *Vermilion Hills Rural Council,* [1916] 2 A.C. 569; *Attorney-General of Canada* v. *City of Montreal* (1885), 13 S.C.R. 352; *City of Montreal* v. *Attorney-General for Canada,* [1923] A.C. 136, at p. 140; *City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117; *City of Halifax* v. *Halifax Commis-*

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sioners, [1935] S.C.R. 215. The Courts have segregated different interests in land: see *Smith* v. *Vermilion Hills Rural Council* [*supra*]; *The Attorney-General of Canada* v. *Baile and City of Montreal* (1919), 57 D.L.R. 553. It is submitted that this case cannot be decided on the rules of fixtures: see Manning on Assessment and Rating, 2nd Ed., 70-1; *Re City of Ottawa and Ottawa Electric Railway Co.* (1922), 52 O.L.R. 664. The Vancouver Incorporation Act, 1921, contemplates and provides for taxation of separate interests in land and separate and distinct ownerships. Two persons may each hold lands in distinct rights and with distinct interests so that each may be assessable: see *Southern Alberta Land Co.* v. *Rural Municipality of McLean* (1916), 53 S.C.R. 151. The railway company is entitled to a refund of $1,178.40, being the amount paid under protest, such payment not being voluntary: see *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384; *Pillsworth* v. *Town of Cobourg* (1930), 65 O.L.R. 541; *Aylesworth et al.* v. *City of Toronto* (1936), O.W.N. 361; *Saskatchewan Co-operative Elevator Co.* v. *Town of Ogema* (1917), 36 D.L.R. 398; *Bourkes Syndicate* v. *Olson & Knutson,* [1940] 4 D.L.R. 641; [1941] S.C.R. 419; *The City of London* v. *Watt & Sons* (1893), 22 S.C.R. 300. That we are entitled to a declaratory judgment see *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384; *National Trust Co.* v. *Christian Community,* [1941] 3 D.L.R. 529, at p. 560.

McTaggart, replied.

Cur. adv. vult.

12th January, 1943.

MCDONALD, C.J.B.C.: This case involves the validity of municipal taxes on land owned by the respondent railway and leased to the Dominion and Province. In particular we are concerned with taxes relating to two buildings on this land, known as the Boeing Aircraft Building and the Vancouver Fumigation Station Building.

The Dominion and Province sued for a declaration that these buildings were not subject to taxation, and the railway company sued for a declaration that it was not liable to be assessed or taxed in respect of the buildings, and also claimed to recover back taxes

already paid by it thereon. The judgment appealed from granted all the relief claimed, except that it ordered repayment to the railway company of only one year's taxes. These had been paid under protest, whereas earlier taxes had not.

COADY, J. based his decision for the respondents partly on the Crown's ownership of the two buildings, but also on the alternative ground that these buildings were "held by" His Majesty, within the meaning of section 46 of the Vancouver Incorporation Act, 1900, B.C. Stats. 1900, Cap. 54, Sec. 46 (amended 1921), which exempted "all property vested in or held by Her Majesty." The respondents also relied on section 125 of the B.N.A. Act, by which

> No lands or property belonging to Canada or any Province shall be liable to taxation.

I do not attribute much importance to this legislation, except so far as section 46 may extend the common law by the words "held by," since, apart from statutory exemptions, the city could not tax Crown property without very express authority.

The appellant attacks the trial judge's finding that the Crown owned these buildings. As they are held under different leases, they must be considered separately.

The lease of the Boeing Aircraft Building is from the railway company to the Dominion alone. This provides (paragraph 15) that at the end of the lease the lessee shall forthwith remove "his" buildings from the demised premises, failing which the lessor may remove them at the lessee's expense or keep them without compensation. I think the necessary inference from this is that the buildings put up by the lessee belong to him, even though his title may be defeasible.

Against this, appellant argues that in law the buildings are fixtures and so part of the land, and that though the parties may by contract change their rights *inter se,* they remain unchanged as against a third party, *i.e.,* the taxing authority. A number of cases have been cited, which I do not think are in point. They are cases of contracts made between the claimant of fixtures and someone who had only a partial interest in the land, the decisions holding that the latter could not give a right to sever as against the owner of the fee. But here it is the owner of the fee who

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gives the right, and I see no reason why any outsider should challenge it.

I have not overlooked the cases that have held an agreement by the owner of the fee for severance of fixtures to be invalid as against a purchaser of the fee, where the claimant of the fixtures had failed to register in the Land Registry. There the claimant loses out, not because his agreement is insufficient, but because the Land Registry Act gives a purchaser for value prior rights over unregistered instruments. That element does not enter in here.

Appellant also argues that even if the lessee will own the building when he severs it, in the meantime it is part of the land and must belong to the owner of the land. That is, the lessee's right is not a right of property, but only a contractual right. I cannot accept this view. It may be, though I doubt it, that the lessee has no legal ownership; but at least I think it clear that it has an equitable title (see *e.g., Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523) and I see no reason why the Crown's equitable estates should not be as exempt as its legal estates.

So far as the Boeing Aircraft Building is concerned, then, I think the Crown's title is established.

The situation is, however, different as to the fumigation building. The lease of that is to the Dominion and Province jointly, but I look in vain for any clause to indicate that the building shall belong to the lessees. All I find is provision that during the term of the lease buildings shall be "moved, removed," etc., by the lessees at their own expense as the lessor may instruct. This seems entirely equivocal, and quite insufficient to support the judge's finding. Respondents called the general superintendent of the railway, who stated that the railway disclaimed all interest in the building. That, however, hardly advanced matters. A right of property can hardly be established in that way. In my view, then, the learned judge's ruling as to the fumigation building cannot be supported on the ground of the Crown's ownership of the building. We have to see, however, whether it can be supported on some other ground.

So far as the Crown is concerned, its exemption from taxation extends to its leasehold interests, no less than to its freeholds, and

for several reasons I think that lands "held by" the Crown under section 46 extend to its leaseholds. Obviously there must always be difficulty in enforcing a tax *in rem* against lands in which the Crown has an interest, because tax sale is the only remedy *in rem*, and it is inconceivable that the Crown should be so deprived of land, without the most express legislation allowing that course, legislation that is entirely wanting here. Of course I realize the feasibility, where the Crown is not the only party interested, of the Crown's interests being segregated from those of others, and only those latter interests being taxed and proceeded against. However, that process requires special authority, for it involves special machinery, and we have to consider whether the authority is given here.

If land leased to the Crown were not land "held by" the Crown, it seems difficult to give those words any meaning, especially where the Crown is in possession, as it certainly is of the fumigation building.

However, appellant argues that even if one building is owned by the Crown and the other held by it, it is still entitled to impose taxes in respect of them, not only a tax on the railway company's interest in the building, but a tax on the railway company itself, a tax *in personam* that is not dependent on the legal ownership of land, but only referable to land in that the land is the basis of computation.

Appellant has cited a number of cases in the Supreme Court of Canada and the Privy Council, in which individuals have been taxed in respect of land which the Crown owned or had some estate in. Perusal of these cases shows that one of the crucial points is the incidence of such a tax.

It may be well to recall that a tax may be directed entirely *in rem;* and if ownership of land is divided into more than one interest, one may be taxable and another exempt. On the other hand, a tax may be directed entirely *in personam,* even though the reason for the tax may be that the person taxed owns land, and though the tax may be computed according to the value of the land. Or again, a person may be subject to a tax *in personam* because he is an occupier of land, or has any other arbitrary relation to land, land that itself may be exempt from a tax *in rem.*

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Or both the owner of land and the land itself may be taxed for the one sum, the tax being enforceable both *in rem* and *in personam*. Again personal liability in such a case may be imposed directly, or the person may be declared to be liable because his land is liable.

In examining the Vancouver City Act to see what type of taxation it authorizes, we should recall that municipal taxation in connexion with land involves two processes: first an assessment is made, and then a rate is imposed. One often hears loose language suggesting that assessment amounts to taxation; but clearly there is no tax until the rate is imposed, even though assessment is a necessary preliminary. In effect when the municipality prepares its assessment roll, it declares: "We assert that the lands taxable by us are those set out, and that the persons whom we will treat as owners for the purposes of appeal and taxation are those set out; unless our roll is disturbed in the meantime, these are the persons and the lands whom our rate will tax." Then comes the rate to fix the amount, based on the values in the assessment roll.

However, the mere appearance of a person's name in the assessment roll is equivocal; it may be put there only for convenience in sending tax notices, and does not necessarily impute personal liability. We have to look to the governing statute to see exactly the significance of entering the name on the roll, and the type of tax that is authorized.

The city's Act shows singular inaptitude in the drafting. We find the words "rateable" and "assessable" used as though they were interchangeable, language is constantly used that implies that mere assessment imposes liability, which it obviously cannot, and it everywhere appears that the draftsman did not appreciate the distinction between taxation *in rem* and *in personam*. It does become clear that owners (or persons treated as owners for the purpose) have their names put on the assessment roll so that they may be "assessed." But it does not follow that they are "rated," and rating is what imposes liability. Section 57 is the one that deals with rating, and all it provides for is

levying a rate or rates on all the ratable property on the said roll.

If this stood alone, I should think it clear that the tax was one

merely *in rem*. However, section 58 requires the city clerk to make up a tax roll; in section 59 it is implied, though not stated, that the persons whose names appear in the tax roll shall be "liable" for the taxes; but it is not even shown whence these names are obtained. By section 60 the collector is to send demands for taxes to all persons whose names appear on the tax roll; and by section 61, as supplemented by the amendment of 1921, Cap. 69, Sec. 4, the collector is later to collect the "rates or taxes" by suit, and

> production of a copy of the Collector's roll showing such rates, taxes, or assessments to be due by such person so sued shall be *prima facie* evidence of the debt, and that the notices required . . . to be sent to the person liable . . . were duly sent.

The "Collector's roll" presumably means the "tax roll"; such uncertainty of language is characteristic of this Act. We can hardly escape the conclusion, even from such a collection of ineptitudes, that an assessed owner, after rating, becomes personally liable for taxes legally imposed on his land; but I can see no reason to go farther and hold that he is liable, apart from the liability of his land.

Has the land here been legally assessed? Appellant argues that by section 40 (1) (*d*) the assessor is authorized to assess the registered owner, and can and should ignore mere charges, such as leases. That is all very well, where the charges are not exempted from taxation by provisions that general language cannot cut down. But section 40 cannot derogate from the Crown's rights. However, the appellant argues that it can tax the railway company's interests, severing them from the Crown's. I doubt whether there is any machinery in the Act for doing this, where the Crown holds the charges. It is true that section 46 (2), (3) and (3*a*) provides for taxing a charge separately where the Crown is the owner of the land and the subject owner of the charge. But there is no provision for the converse situation, and express provision seems to me necessary.

Even if this were not so, appellant is faced with the difficulty that it never attempted to tax the railway company's interests only; it has proceeded to tax the interests of all parties, ignoring the fact that the Crown is one of the parties. Appellant has attempted to justify this by claiming that it did not tax the build-

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ings, but only the land in respect to the buildings. Even if this was a good argument, in view of the Crown's holding leaseholds, I do not think it is borne out by the facts. The statement that the buildings are not themselves taxed is inconsistent with the Act. By section 45

> the Council may by by-law exempt from taxation, wholly or in part, any improvements, erections, and buildings. . . .

This necessarily implies that buildings are themselves taxable.

I do not think the appellant is assisted by any of the decisions before the Supreme Court of Canada or the Privy Council, wherein taxation of a subject in respect of his charge on Crown lands was upheld. These are mostly cases where the subject was taxed on his particular interest only, as in *Calgary & Edmonton Land Co.* v. *Attorney-General of Alberta* (1911), 45 S.C.R. 170; *Smith* v. *Vermilion Hills Rural Council,* [1916] 2 A.C. 569; *City of Montreal* v. *Attorney-General for Canada,* [1923] A.C. 136; *Southern Alberta Land Co.* v. *Rural Municipality of McLean* (1916), 53 S.C.R. 151, and *North West Lumber Co., Ltd.* v. *Municipal District of Lockerbie, No. 580,* [1926] S.C.R. 155 (see p. 161).

The case of *City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117 raises other points, and is one of the few in which the Crown is owner of the charge, not of the fee. There it was held that a "business tax" imposed in respect of property leased to the Crown was valid. Loose language in the judgment raises a little difficulty but after careful consideration I am satisfied that this decision turned on the fact that the tax was directed *in personam,* even though computed on the value of land, and that the head-note stating that the tax was a tax on property is misleading.

The actual language of the taxation statute is given in the report of the case in [1926] S.C.R. 349, at p. 351, and reads:

> . . . , such property shall be deemed to be in the occupation of the owner thereof . . . , and he shall be assessed and rated for household tax or business tax. . . .

That language leaves no doubt that the tax was a tax *in personam.* It is also plain that that was seen in the Privy Council. Both counsel so argued. Viscount Cave, L.C. who gave the judgment, said at p. 120:

> The substantial question . . . is whether a tax imposed . . . on the estate of John P. Fairbanks as the owner of certain premises in the city is valid, . . .

Again at p. 121 he said, quoting from the statute:

> . . . property let to the Crown . . . , shall be deemed to be in the occupation of the owner . . . , and he shall be assessed and rated . . .

Again at p. 122:

> . . . their Lordships do not consider that a tax on the owner of premises let to the Crown in right of the Dominion can be held to be a tax on the property of Canada.

And on the same page "the owner is made liable for a tax." Similiarly on p. 124 he referred to "the business tax imposed on an owner."

The only difficulty (apart from the misleading head-note) is occasioned by Viscount Cave's saying at pp. 125-6:

> It may be true to say of a particular tax on property, such as that imposed on owners by s. 394 of the Halifax charter, that the taxpayer would very probably seek to pass it on to others; but it may none the less be a tax on property and remain within the category of direct taxes.

Here it may be observed, all within one sentence Lord Cave describes the tax twice as a tax on property and once as a tax on the owner, a tax that he has already described five times as a tax on the owner. For good measure, lower on the same page of the report, he refers again to "the business tax imposed on an owner."

This welter of inconsistencies is apparently to be explained by the fact that Lord Cave was concerned only with the point whether the tax was direct or indirect, and for that purpose it did not matter whether it was a tax *in rem* or *in personam*. At all events, the wording of the statute, as seen, leaves no doubt at all that it was a tax *in personam*.

In view of the authorities, it can hardly be denied that the Legislature could, by apt words, have authorized the city to impose a personal tax on the railway company, even one based on the value of buildings and leaseholds owned by the Crown. But the appellant's difficulty is that the Legislature has not done this. No section empowers the city to impose any tax that relates to Crown interests, except section 46 (2), (3) and (3*a*), and these are not wide enough to embrace the situation here, which remains *casus omissus*. Moreover, as I have pointed out, the Act, especially section 57 and following sections, appears to me to make all personal liability conditional on the valid charging of the land. The difference in the governing legislation thus appears to me to distinguish this case from *City of Halifax* v. *Fairbanks'*

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Estate, supra. There the statute expressly authorized the city to impose a direct tax on the owner for the entire value of the land, notwithstanding that the Crown owned one interest in it. Here the statute does not, and the governing authority would seem to be *Attorney-General of Canada* v. *City of Montreal* (1885), 13 S.C.R. 352, a decision which I do not regard as overruled by *City of Halifax* v. *Fairbanks' Estate, supra.*

I next consider the argument that even if the tax is illegal the remedy by action is not open, and respondents should have proceeded by appealing the assessment to the various courts of revision. This is completely answered by *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384, a case in which the same point was raised. All these assessment tribunals, including tribunals for review, possess only truncated jurisdiction, a power to consider only questions of *quantum* and not of taxability. Their decisions can only create estoppel as to points into which they can enquire. *Shannon Realties* v. *St. Michel (Ville de),* [1924] A.C. 185 and *Municipality of the Town of Macleod* v. *Campbell* (1918), 57 S.C.R. 517 are decisions on *quantum.*

The railway company, which had paid taxes for several years before beginning this action, sued to get them back. COADY, J. held it could only get back those for the last year, which alone it had paid under protest. Appellant argues that it should not have recovered back any, that all the taxes were paid voluntarily and the protest did not make the last payment any less voluntary. Were it not for the case of *Sifton* v. *City of Toronto,* [1929] S.C.R. 484, I think I should have taken this view. That is not a very satisfactory case since it fails to deal with the many decisions inconsistent with it; but there it stands so far as I can see, a general decision that taxes paid under protest can be recovered if they were not legally due. Until the Supreme Court of Canada explains it away I feel I must follow it.

I cannot accept the appellant's argument that the Crown Costs Act applies to the Dominion. And from the foregoing it follows that both the Dominion and Province were entitled to sue for the declarations claimed. There was nothing in the appellant's proceedings to show that it was not claiming charges on the Crown's interests, charges to be enforced by tax sale. I would, therefore, dismiss the appeal.

SLOAN, J.A.: The question herein for decision may be shortly stated as follows: Is a municipal tax imposed upon the land of a private owner an attempt to tax the Crown when that land is leased to and occupied by the Crown? With deference I would answer that question in the negative.

In my view this case falls within and is governed by *City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117. Viscount Cave, L.C. in delivering the judgment of the Board said (at p. 122) in answer to a similar question:

> . . . their Lordships do not consider that a tax on the owner of premises let to the Crown in the right of the Dominion can be held to be a tax on the property of Canada.

The learned judge below considered that *City of Halifax* v. *Fairbanks' Estate, supra,* was distinguishable from this case because herein the Crown erected the buildings it occupied on the leased premises. He said in his reasons:

> Here, the Crown, as the owner of the buildings, is the owner of an interest in land and, in addition, is in occupation thereof. When the defendant endeavours to tax these premises, *viz.*, the buildings, it is in effect taxing property of the Crown.

With respect I am unable to agree with that proposition for the primary reason that the city of Vancouver is not endeavouring to tax the buildings, *qua* buildings. Under the relevant provisions of the city's Act of incorporation the buildings are assessed as improvements in order to fix the *quantum* of the tax to be imposed upon the "rateable" land.

The assessor is not concerned with whatever rights of ownership may be created by contract between proprietor and tenant. He is concerned with the simple fact of registered title to the land and with the legal incidents of such title.

Ownership of the land is the only interest the taxing authority is permitted to recognize. Were this not so the result would be that buildings in Vancouver might be regarded, in law, and for taxation purposes, as severed from the freehold when by contract subject to a separate ownership than the land upon which they are erected. Such a situation could never have been within the contemplation of the framers of the city's statutory charter, nor in my view does the city's Act contain any provisions which can be properly construed as supporting such a conception.

The jurisdiction of the city to levy its tax on land stems from

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the title thereto recorded in the Land Registry office as of the 20th of November in each year (section 40). That jurisdiction does not vest and divest with each change in the character of the tenant of the owner, even if, as Strong, J. said in *Attorney-General of Canada* v. *City of Montreal* (1885), 13 S.C.R. 352, at p. 362:

> [The] proprietors . . . may happen to have the good fortune to have the Crown as tenants. . . .

The registered owner of the land in question is the Canadian Northern Pacific Railway Company. It is upon the land of the railway company that the contested taxes have been imposed. The city has made no claim against the Crown for these taxes or any part thereof. There has been no attempt made by the city to impose any of the taxes in question upon Crown property as such.

In my opinion, therefore, the taxes in question imposed by the city upon the land of the private owner—the railway company—are not a violation of either section 125 of the B.N.A. Act or section 46 (1) of the Vancouver Incorporation Act, 1921, and amending Acts.

I would in consequence and with deference allow the appeal and dismiss the action.

FISHER, J.A.: This is an appeal by the defendant the city of Vancouver from the judgment of COADY, J. whereby it was declared, *inter alia,* that certain buildings known as the Boeing Aircraft Building and the Vancouver Fumigation Station Building, situate on lot G, plan 1341 in the city of Vancouver, British Columbia, are the property of His Majesty the King or held by His Majesty the King within the meaning of section 46 of the Vancouver Incorporation Act, 1921, and are not liable to taxation by the defendant and that the plaintiffs are not liable to be assessed and are not liable for payment of taxes in respect of the said buildings.

By lease dated the 1st of May, 1940 (Exhibit 2), still in full force and effect, His Majesty, represented by the Honourable the Minister of Agriculture for the Dominion of Canada and the Honourable the Minister of Agriculture of British Columbia, jointly, leased from the plaintiff (respondent) railway company

a vacant portion of said lot G and subsequently, as required by the said lease, erected thereon a building known as the "Vancouver Fumigation Station Building" or "Fumigation Building." The said building thereafter was and still is used and occupied jointly by the Department of Agriculture of the Federal and British Columbia Governments (Plant Protection Division) for the inspection and fumigation of imports against insect life.

By lease dated the 1st of May, 1940 (Exhibit 2), still in full force and effect, His Majesty, represented by the Honourable the Minister of Munitions and Supply of the Dominion of Canada, leased from the plaintiff (respondent) railway company another vacant portion of lot G, aforesaid, and subsequently a building known as the "Boeing Aircraft Building" was erected thereon for and at the expense of the Crown pursuant to a contract made between the Crown and the Boeing Aircraft of Canada Limited. The said building thereafter was and still is used by the said Boeing Aircraft of Canada Limited, in the manufacture of airplane parts under its contract with the Crown.

The main issue in the appeal is whether the taxation in question herein imposed by the appellant is legal or in other words duly authorized under its Act of incorporation. It is contended by the respondents that the Crown is the owner and occupant of the said buildings and also holds an interest in the land on which they stand and that the buildings are therefore exempt from taxation.

Some admissions were made by the parties which materially reduced the issues of fact. The appellant admits that the two buildings in question were included in the assessment of lot G aforesaid against the respondent railway company but not that the assessor was entitled to or did in fact assess either of the said buildings separately from the rest of the improvements on lot G aforesaid and the respondents admit that the buildings in question are substantial structures affixed to the freehold and that the respondent railway company is the registered owner under indefeasible title of lot G aforesaid, being the unsubdivided lot on which said buildings are situate.

Counsel for the respondents relies upon the leases as aforesaid and it must first be noted that the Boeing Aircraft Building

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lease contains a clause (paragraph 15), not contained in the fumigation building lease, providing that at the termination of the lease the lessee shall remove his buildings failing which the lessor shall be entitled to remove the same at the expense of the lessee or retain them without compensation. The fumigation building lease only provides, that all buildings, etc., placed upon the said demised premises shall during the existence of the lease be "removed," etc., by the lessees at their own cost and in accordance with the instructions of the lessor. Under both leases, however, the buildings have been erected upon portions of said lot G for and at the cost and expense of the Crown itself. I also find as a fact that the fumigation building since its completion has been continuously used and occupied solely by the Crown and has been for the public use of the Dominion of Canada and the Province of British Columbia. I agree also with the learned trial judge that the Crown is in occupation of the Boeing Aircraft Building, the occupancy of the Boeing company being the occupancy of the Crown in the carrying out of such a contract with the Crown. See *City of Halifax* v. *Halifax Harbour Commissioners,* [1935] S.C.R. 215. Having carefully considered the leases and contract as aforesaid I have no hesitation in holding as I do that the Crown is not only in occupation of the said buildings but also either owns them or holds an interest in them and also holds a leasehold interest in the lands on which they are situate.

I cannot see that the authorities cited with regard to fixtures and relied upon by counsel for the appellant govern a case such as this where the owners in fee of the land enter into such leases as aforesaid and taxation by the municipality is the issue. I propose to deal at length, however, with what I think are substantial submissions on behalf of the appellant, *viz.,* that, until the buildings are in fact severed from the freehold, they are the property of the owner of the freehold for the purposes of assessment and taxation or in other words are assessed and taxed as land and that in any event it is not the Crown that has been assessed or taxed but a subject, *viz.,* the respondent railway company. These submissions bring up the questions of what is taxed and who is taxed under the provisions of the Vancouver Incor-

poration Act, 1921, and amendments thereto. It thus becomes necessary to consider what such statute authorizes the city to do and what the city has attempted to do thereunder with regard to the taxation in question herein.

Reference may be made first to section 40 in connection with which it is submitted by counsel on behalf of the appellant that the words "registered owner thereof" in section 40 (1) (*d*) do not mean the registered owner of the improvements referred to in section 40 (1) (*c*) but the registered owner of the "rateable parcel of land" referred to in section 40 (1) (*a*). In other words, it is argued that this subsection does not require that all or any of the improvements should be actually owned by the registered owner of the rateable parcel. It is submitted by counsel for the appellant that said section 46 should be read with said section 40 and that when they are read together it is apparent that the assessor is not required to and cannot go beyond the Land Registry records, so that in the case of lands registered in the name of a subject the registered owner goes on the assessment roll for taxation and therefore pursuant to the said statute the respondent railway company is taxed as registered owner of the land which includes all buildings affixed to the land. The submission amounts to this, that the buildings themselves have not been taxed, or, if so, they have not been taxed as buildings or improvements but as land and that once the buildings have been affixed to the freehold in the way admitted by the respondents they are land for the purposes of taxation. It is also submitted that the assessor's valuation of the improvements on lot G is in accordance with the statute and in accordance with the definition of "rateable parcel" as contained in section 2, subsection (22*a*) of the Act which is as follows:

"Rateable parcel of land" shall mean any lot or parcel of land, and may include two or more lots or parcels of land on which improvements have been constructed so as to form a single unit situate upon such lots or parcels.

I agree that the sections that would appear to have any bearing on the matter should be read together and each in the light of the others before one reaches a conclusion as to the legality of the taxation. Reading the sections in this way, however, I have to say that the sequence of the sections should be noted and the use of certain expressions therein. It should be noted that section 40

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which uses the expressions "assessment roll," "rateable parcel of land," "improvements" and "registered owner thereof" is preceded by section 39 which uses the expression "all rateable property, or any interest therein," and provides for all of it being estimated in a certain way

> the value of the improvements (if any) being estimated separately from the value of the land on which they are situate.

Sections 45 and 46 read as follows: [His Lordship set out the sections and continued].

Then section 57 provides for "levying a rate or rates on all the rateable property" on the assessment roll. The rateable property in any year is property legally liable to taxation and may thus vary from year to year. Compare what was said by MACDONALD, J.A. (afterwards C.J.B.C.) in the case of *Macdonald-Buchanan* v. *Corporation of District of Coldstream* (1934), 49 B.C. 163, at pp. 169-70 in referring to the words "rateable property" as used in certain by-laws passed under the Municipal Clauses Act. There is thus a clear distinction made between the process of assessment and that of imposing rates. Then we have certain sections beginning with section 59 providing for the collection of rates. Under section 59 the collector of taxes makes out a tax roll which in section 60 is called the "collector's roll." It is apparent that the names of the owners or those treated as owners of a rateable parcel of land on the assessment roll reach the collector's roll. The difference, however, between the provisions of the sections of the statute relating to collection of rates and those of section 40 must be noted. It is apparent from subsection (10) of section 40 that the assessor sets down on his roll in addition to each and every rateable parcel of land "every exempt parcel of land" and with respect to such the same particulars as are required in respect to every rateable parcel of land. Then intervening sections having provided for the rating and the exemptions we find in section 59 instead of the words "each and every rateable parcel of land" and "every exempt parcel of land" the words "each parcel of land upon which taxes have been imposed" and instead of subsections (*b*) and (*c*) as in section 40 (1) we have as (*c*) in section 59:

> The value at which the land and improvements (exclusive of exemptions) are assessed.

The collector therefore in making out the collector's tax roll pursuant to section 59, sets down only the taxed parcels of land and the exempt parcels of land do not appear. It is quite apparent therefore that the expression "exclusive of exemptions" which occurs in both sections 59 (*c*) and 60 (*c*) refers only to improvements and that there may be improvements wholly exempt upon land upon which taxes have been imposed. Some assistance may be obtained from the case of *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384 where Lord Atkinson dealing with sections of the Municipal Act (British Columbia) somewhat similar to those we have here, said at pp. 388-9:

> Mr. *Robertson* in his forcible argument on behalf of the appellants, insisted much upon the fact that under the system of taxation set up by this Act of 1914, and earlier statutes, "land" and "improvements" in the sense defined, which includes buildings, were separately assessed (s. 199) and rates were levied on the land and improvements so assessed (s. 201). That, no doubt, is so, . . .

After careful reading of all the sections I have come to the conclusion, with all deference to contrary opinion, that under the statute as aforesaid taxes are imposed upon the buildings as improvements and not as land and before the total amount of taxes imposed is set down in the said tax roll with respect to any particular property (this being the amount to be paid—see section 60) the Act requires consideration of the exemptions and their exclusion. Having in mind all the provisions of the statute itself I do not think it can reasonably be contended that, if and when the name of the assessed owner of any parcel of land goes on the collector's tax roll, the improvements necessarily go on and are taxed as part of or as included in the land. In other words I do not think that the city is authorized under section 40 to place the registered owner on the assessment roll for taxation with respect to the improvements irrespective of any other consideration. The other sections must be considered and these show that the improvements may or may not be taxed. Section 40 is concerned with assessment and valuation specifically and not taxation even though assessment is a necessary preliminary to taxation. I am satisfied that the improvements may be exempt even though the land on which they are is not and though the name of the assessed or registered owner of the land has been set down on the collector's roll.

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I hold therefore that the buildings are separately assessed and taxed as so assessed under the statute as aforesaid and, if I am right in this and in also holding that the buildings in question herein or interests therein belong to the Crown and that the buildings are occupied by the Crown, the appellant is faced with the difficulty that it is precluded from taxing such Crown property without express legislative enactment. See *Attorney-General of Canada* v. *City of Montreal* (1885), 13 S.C.R. 352 especially at p. 355. If I understand aright the argument of counsel for the appellant, he seeks to meet this difficulty by contending that the Crown is not taxed here but the subject, the respondent railway company, is personally taxed with respect to Crown property or its interest therein. Counsel relies especially upon *City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117 and contends that the Privy Council in such case overruled the decision in the *Montreal* case, *supra,* and made it clear that taxing a subject with respect to Crown property (in other words making Crown property the yardstick as counsel puts it) was not taxing the Crown. In my view, however, the *Fairbanks* case did not overrule the *Montreal* case, *supra,* but only held that express authority could and had been given by certain sections of the Halifax charter to impose a "business" tax, that was payable by the occupier of real property according to its capital value, upon the owner personally though the property was occupied by the Crown under a lease. This is apparent from the legislation itself and also from what Viscount Cave said in allowing the appeal from the Supreme Court of Canada especially at p. 122 and from what Duff, J. (dissenting in the Court below) said in the case as reported in [1926] S.C.R. 349, at pp. 367-70 as follows:

> The question mainly discussed in the courts below was whether or not the legislation in question, s. 394 of the charter of Halifax, offends against the prohibition of s. 125 of the British North America Act. This question is much the same as that which was passed upon in the *Montreal* case [1923] A.C. 136. There, the legislation provided for the assessment of proprietors of land, and, subsidiarily, enacted that where land exempt from taxation, including Crown land of the Dominion or of the Province, was occupied by a private person for industrial or commercial purposes, the occupant should be deemed, for the purposes of assessment to the property tax, to be the proprietor, and should be assessed accordingly.
>
> It was contended on behalf of the Dominion that this in effect amounted to an assessment of Crown lands, where the lands assessed in virtue of such

occupancy were the property of the Dominion, and that it was consequently obnoxious to s. 125. This contention was rejected on the authority of the previous decision in *Smith* v. *Vermilion Hills*, [1916] 2 A.C. 569.

In principle, this decision, in so far forth as concerns the suggestion that the legislation now before us infringes upon s. 125, seems to govern the present case.

. . . . .

In the legislation in question in the *Montreal* case, the occupier of exempt property for industrial or commercial purposes was held as if proprietor. Under the legislation before us, the owner of property in occupation of an exempt occupier is held as if he were occupier.

Sections 371 (1) and 394 of the Halifax Act read as follows:

371. (1) The business tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by the occupier whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

394. Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property shall be deemed to be in the occupation of the owner thereof for business or residential purposes as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied.

I pause here to point out that in the case of *City of Montreal* v. *Attorney-General for Canada*, [1923] A.C. 136 (followed by this Court in *City of Vancouver* v. *Chow Chee* (1941), 57 B.C. 104; [1942] 1 W.W.R. 72 and referred to by Duff, J., as he then was, in the passage from his judgment in the *Fairbanks* case hereinbefore set out) the legislation before the Court was article 362-a of the city of Montreal charter, which provided that persons occupying for commercial or industrial purposes Crown buildings or lands should be taxed as if they were the actual owners and should be held liable to pay the taxes, and it was held by the Privy Council that, as the tenant was liable only so long as his occupancy continued, the taxation was in respect of his interest as lessee and accordingly was not a tax on Crown lands so as to be *ultra vires* under section 125 of the British North America Act. At pp. 140-1 Lord Parmoor, delivering the judgment of their Lordships, said:

On the other hand the respondent does not allege that persons occupying Crown property for commercial or industrial purposes are not liable to Provincial taxation in respect of their tenancy or occupation, provided that the taxation is imposed in such a form that it is in reality a taxation on the interest of the tenant or occupant, and not on the property of the Crown.

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It would not be possible after the decision of their Lordships in *Smith* v. *Vermilion Hills Rural Council*, [1916] 2 A.C. 569 to contend that tenants who occupy Crown property, not as officials of the Crown, but for commercial or business purposes, are not liable to Provincial taxation so long as the assessment is based on their interest as occupants.

Reverting now to the present case I have to say that I find the situations before the Courts in the *Fairbanks* and *City of Montreal* cases as aforesaid much different from that here and also the legislation quite different. In the said *Montreal* case the city was taxing the subject in respect of his interest in property owned by the Crown but occupied by the subject. In the *Fairbanks* case the city was taxing the subject in respect of property owned by the subject but occupied by the Crown. In the present case the appellant city is attempting something altogether different, *viz.*, to tax the subject, not in respect of property occupied or owned by the subject, but in respect of property, or in respect of an interest therein, as if the subject were the actual owner of the property, which the Crown occupies and which it either owns or has an interest in as I have found. It may be that the Legislature could have authorized the city to tax the subject personally in such case but in my view it has not done so but on the contrary has inserted in section 46 of the city charter a subsection (1) which recognizes such a case as an exemption. Counsel relies upon subsections (2), (3) and (3*a*) of said section 46. Dealing with subsection (3) first, I have to say that I do not think such subsection enables the appellant to do what it is doing here, as it is not purporting to tax the railway company as the owner simply of some possible reversionary interest in the buildings as suggested by counsel but as if it were the actual owner of the buildings. As to said subsections (2) and (3*a*) I think these subsections authorize the city to assess and tax the subject personally in respect of exempt property only when and so long as it is "occupied" by the subject (subsection (2)) or in respect of an interest in exempt property as if the subject were the actual owner of such property only when and so long as the subject "shall continue to occupy, use, hold, possess or enjoy the same for any commercial purpose" (subsection (3*a*)). In my view the buildings in question herein cannot be said to be "occupied" by the respondent railway company nor can the said railway company be said to be continuing to "occupy, use," etc.,

them within the meaning of the subsections in the absence of a provision similar to that in the city of Montreal charter or that in the Halifax charter. As Duff, J. (afterwards C.J.) intimated in the *Fairbanks* case above, the Montreal charter provided in effect that the occupier of exempt property should be deemed to be the owner though in fact he was not and should be taxed accordingly and the Halifax charter provided in effect that the owner of property in occupation of an exempt occupier should be deemed to be the occupier though in fact he was not and should be taxed accordingly. In the present case, as I have already intimated, we have as a matter of fact an exempt occupier owning or having an interest in exempt buildings and we have no enabling legislation taking care of the situation and saying in effect that the situation shall be deemed to be otherwise than it is in fact and treated accordingly.

My conclusion therefore is that, though the name of the subject, the respondent railway company, may have appeared on the collector's roll, there was no authority given to the city to tax the respondent railway company with respect to the said buildings or any interest therein under the circumstances existing here and the taxation imposed was illegal. In the result I am thus in agreement with the learned trial judge on the main issue in this appeal.

As to the contention of the appellant that this Court is without jurisdiction herein I have only to say that in my view the contention is without foundation as this is a question of the taxation being illegal and the case of *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384 applies.

As to the appeal against that part of the judgment whereby the trial judge directed that the respondent railway company should recover against the appellant the sum of $1,178.40 and that the appellant should pay the Attorney-General of Canada and Canadian Northern Pacific Railway Company certain costs I have only to say that I think the learned trial judge reached the right conclusion on these matters.

I would, therefore, dismiss the appeal.

Appeal dismissed, Sloan, J.A. dissenting.

Solicitor for appellant: *A. E. Lord.*
Solicitor for respondents: *W. H. Campbell.*

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Nov. 5;
Dec. 1.

CONSOLIDATED TUNGSTEN-TIN MINES LIMITED *ET AL.* v. MACCULLOCH AND THE LONDON & WESTERN TRUSTS COMPANY LIMITED. (No. 2).

Costs—Taxation—Trust company bare trustee a defendant—Action dismissed with costs—Trust company's costs taxed under column 2, Appendix N—"Amount involved"—Construction—Order LXV., r. 10.

In an action for a mandatory injunction to compel the defendants to transfer certain property and mining claims to the plaintiff, the defendant company pleaded it was a bare trustee and had no interest in the matters at issue. The action was dismissed with costs. The registrar taxed the costs of the Trust Company under column 2 of Appendix N. On review, at the instance of the Trust Company on the ground that the claims in question in the action were worth over $25,000, and the taxation should be under column 4, it was held that there was no "amount involved" as between the Trust Company and the plaintiff and the costs were properly taxed under column 2.

Held, on appeal, affirming the decision of ROBERTSON, J., that the appellant cannot say that the mining claims were in issue in any sense when it had pleaded that it had no interest in them and had said in effect that it did not care what disposition the Court made of them.

Per SLOAN, J.A.: That Order LXV., r. 10 should be construed as if it read " . . . the value of the subject-matter in question between the parties to the taxation."

APPEAL by defendant The London & Western Trusts Company Limited from the order of ROBERTSON, J. of the 3rd of July, 1942 (reported, *ante*, p. 18) on review of said defendant's costs in an action for a mandatory injunction, *inter alia*, to compel the defendants to transfer to the plaintiff company certain premises and certain mineral claims alleged for certain reasons to form part of the mining property in question. The said defendants, The London & Western Trusts Company Limited pleaded that it was a bare trustee and had no interest in any of the matters in issue. The action as against the Trust Company was dismissed with costs. The registrar taxed its costs under column 2 of Appendix N. The Trust Company contended that its costs should have been taxed under column 4 as the "amount involved" in the action was over $25,000. It

was held that there was no "amount involved" as between the plaintiff and the Trust Company and the application was dismissed.

The appeal was argued at Vancouver on the 5th of November, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

McAlpine, for appellant: The action was dismissed with costs. The action was for a mandatory injunction to compel the Trust Company to assign the properties in question to the plaintiff. We say the learned trial judge was wrong in saying that there was no amount involved. The claims are worth $79,000. We were taxed under column 2 and should have been taxed under column 4: see *Andler* v. *Duke* (1933), 47 B.C. 282; *The Canada Life Assurance Co.* v. *McClellan* (1933), *ib.* 438.

G. J. A. Hutcheson, for respondent: The "amount involved" means the amount involved as between the two parties to the taxation: see *Davies* v. *Schulli* (1927), 39 B.C. 321. Whether there is anything involved depends on the attitude of the parties. He was a bare trustee. Whatever happens in the action, he neither gains nor loses anything. We seek nothing and nothing is claimed from us: see *Attorney-General for B.C.* v. *Kingcome Navigation Co.,* [1933] 3 W.W.R. 157, at p. 158; *McLean* v. *Vancouver Harbour Commissioners* (1936), 51 B.C. 74.

McAlpine, replied.

Cur. adv. vult.

1st December, 1942.

McDONALD, C.J.B.C.: This appeal is from the taxation of the appellant's costs of a trial before ROBERTSON, J., who also later affirmed the registrar's taxation.

Appellant with one MacCulloch, was defendant in an action brought in respect of mining claims. Plaintiffs claimed an injunction order against appellant to transfer these claims to them. Appellant pleaded that it was a bare trustee, that it had "no interest in any of the matters in issue" and that it had always been and was still willing to abide by any order of the Court.

Plaintiffs also claimed "damages for trespass" and "damages

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for conversion," without specifying whether it sought to make both defendants liable. But the only trespass and conversion alleged in the statement of claim were alleged against MacCulloch; so it seems clear enough that damages were not sought against appellant. Obviously appellant, by pleading as it did, showed that it took this view too.

The action was dismissed as against the appellant, which was awarded its costs. On taxation, appellant claimed that the "amount involved" in the action was the value of the mining claims, admittedly over $25,000, which would have brought the costs under column 4 of the scale. The registrar held that there was no amount involved between appellant and the plaintiffs, and taxed the costs under column 2. ROBERTSON, J. affirmed this view.

I am satisfied that the appellant's view is untenable. It is impossible for the appellant to say that the mining claims were in issue in any sense, when it had pleaded that it had no interest in them, and had said in effect that it did not care what disposition the Court made of them. So I would simply dismiss the appeal without more, except that I feel my action would be construed as a ruling that in every case of this kind a stakeholder's costs are to be taxed under column 2 as of course. I wish to guard against this inference, and to keep the point open until we are called on to decide it expressly.

I point out that some curious anomalies could result if a stakeholder was entitled to costs in every case under column 2. Thus if he held, say, $1,100, we would have the curious result that he would get higher costs by disclaiming than by successfully claiming the stake. This may be a necessary result of our regulations and block scale; but I am not entirely convinced of it.

In the present case, the appellant had, and in most cases any stakeholder would have, some interest in the outcome of the trial. The appellant was interested in being awarded costs, however disinterested in the property. These costs did not follow as of course, because the plaintiffs might have disproved its plea of bare trusteeship. What was involved, then, between appellant and plaintiffs was these costs. However, in arriving at "amount involved" under the scale, it has never been the practice

to take taxable costs into account, and I do not wish to throw doubt on this practice. So though these costs would be below $3,000, I do not suggest that their being the real issue would throw this case under column 1.

I point out, however, that if we eliminate costs as an issue, then there is not only a case where there is "no amount involved"; it is a case where there is nothing involved. These phrases do not mean the same thing. An action may involve merely a negative injunction, so that clearly no ascertainable amount is involved, and still the result may have the utmost pecuniary importance to the party. It would then be impossible to say that nothing was involved. That would clearly be a case for applying column 2 to the taxation of costs. But the distinction is obvious between a case where the subject of contest cannot be valued, and a case where there is no contest.

I am not clear what the solution would be if this point had been raised by cross-appeal. An argument might conceivably be raised that a case where nothing (or nothing but costs) is involved, comes under column 1. I express no opinion on the point, which is certainly not easy of solution. Fortunately it does not arise here, and need not be decided. So I would simply dismiss the appeal.

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

SLOAN, J.A.: Rule 10 of Order LXV. as amended reads in part as follows:

> "Amount involved," where used in . . . Appendix N, includes the value of the subject-matter in question in the cause or matter.

In my view that rule must be construed as if it read

> . . . the value of the subject-matter in question between the parties to the taxation. . . .

The learned trial judge has found herein that there was no "amount involved" as between the respondents and the appellant and that column 2 of Appendix N applied to the taxation.

In my view he was right, and I would dismiss the appeal.

O'HALLORAN, J.A.: I agree in dismissing the appeal.

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FISHER, J.A.: I think ROBERTSON, J. reached the right conclusion and I would dismiss the appeal.

Appeal dismissed.

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

Solicitors for respondents: *Courtney & Elliott.*

REX *EX REL.* WARD v. NATIONAL CAFE LIMITED.

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1942
Oct. 13;
Nov. 19.

Criminal law—Intoxicating liquors—Having liquor in restaurant—Case stated—Defective conviction—R.S.B.C. 1936, Caps. 271, Sec. 89 (3) and 160, Secs. 90, 96, 97, 101 and 102.

Apld Marchiden v R [1971] 4 WWR 23 (SASK DC)

The police found liquor being consumed on the premises of the National Cafe Limited and the National Cafe Limited was convicted on a charge "that the National Cafe Limited on the 21st of August, 1942, at Vernon in the county of Yale did unlawfully permit a person, to wit, Captain Louis Jacques Cote, to have liquor in a restaurant, to wit, the National Cafe Limited, in the city and county aforesaid." On appeal by way of case stated:—

Held, that a person can only be convicted for permitting liquor to be consumed in a restaurant if he is either the keeper thereof or the person in charge of such restaurant. There is nothing in the conviction to show this essential ingredient of the offence (not even reference is made to the Act itself) nor is the ingredient contained in the information upon which the conviction is founded. The information and complaint is defective.

Held, further, that the offence charged is not one of the offences specified in either sections 96 or 97 of the Government Liquor Act and these sections are not applicable to the present case. Therefore, there is no evidence that the appellant company was at the time of the alleged offence the keeper or person in charge.

APPEAL by way of case stated by William Morley, Esquire, police magistrate of the city of Vernon from the conviction of the National Cafe Limited on a charge

that the National Cafe Limited on the 21st of August, 1942, at Vernon in the county of Yale did unlawfully permit a person, to wit, Captain Louis Jacques Cote, to have liquor in a restaurant, to wit, the National Cafe Limited in the city and county aforesaid.

The facts are set out in the reasons for judgment. Argued before FARRIS, C.J.S.C. at Vernon on the 13th of October, 1942.

Lindsay, for appellant.
Morrow, for respondent.

Cur. adv. vult.

19th November, 1942.

FARRIS, C.J.S.C.: This came before me by way of an appeal on a case stated as follows:

Case stated by William Morley, Esq., police magistrate of the city of

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Vernon, in the county of Yale, under the provisions of section 89 (3) of the Summary Convictions Act, being chapter 271 of the Revised Statutes of British Columbia, 1936.

On the 25th day of August, 1942, an amended information was laid under oath before me by the above-named Percy Frank Ward for that the National Cafe Limited on Friday, August 21st, 1942, at Vernon in the county of Yale, did unlawfully permit a person, to wit, Captain Louis Jacques Cote, to have liquor in a restaurant, to wit, the National Cafe Limited in the city and county aforesaid, contrary to the form of statute in such case made and provided.

On the said 25th day of August, 1942, September 8th, 1942, and on the 11th day of September, 1942, the said charge was duly heard before me in the presence of both parties, and after hearing the evidence adduced, and the statement of Corporal W. L. Hodgkins for the said Percy Frank Ward, the informant, and *Gordon Lindsay* of counsel for the said National Cafe Limited, on the said 11th day of September, 1942, I found the said National Cafe Limited guilty of the said offence and convicted it thereof, and imposed a penalty of $1,000 and costs, and in default of payment distress. At the request of the said National Cafe Limited, I state the following case for the opinion of this Honourable Court:

1. Captain Louis Jacques Cote, a captain in the St. Lawrence Fusiliers, Canadian Army, deposed that he was in Vernon August 21st, 1942; that he visited the National Cafe at about 11 p.m. of that day; that a man named Curly, identified by him in Court as Thomas Pulos, whom he described as a waiter in the cafe, gave him a bottle of rye whisky, sealed and wrapped in paper; Cote opened the bottle in a booth in the cafe, and had a drink with Pulos, who also had a drink; later he was having a drink from the same bottle with one Lieutenant Barlow in this booth when the police entered the cafe and confiscated the bottle.

2. Hartley M. Barlow, a Lieutenant in the Canadian Army (active) deposed that he was in the National Cafe in Vernon between 10 p.m. and 11 p.m. on August 21st, 1942; that he saw Captain Cote alone in a booth, that Captain Cote beckoned him to the booth and invited him to have a drink and that he Barlow, had just poured a drink, and was sipping same when the police entered the cafe and confiscated the whisky.

3. Provincial constable Charles James Cooper deposed that the National Cafe is situated on Barnard Avenue in the city of Vernon, county of Yale. He further deposed that at about 11.35 p.m. on August 21st, 1942, with constable Ward, he entered the National Cafe, and found Captain Cote and Lieutenant Barlow in a curtained booth drinking liquor, and that on the table at the time was a large bottle of Hudson's Bay rye whisky and partly filled glasses in front of Captain Cote and Lieutenant Barlow; that he seized the bottle and glasses of liquor and produced same in Court as Exhibits. Pulos made the statement that the bottle was his and later at 12.10 p.m. admitted to constable Cooper that he owned the bottle of whisky and that he was caught and would have to take it. He also deposed that on August 18th, 1942, at 11.30 p.m. in company with constable Ward, Thomas Pulos was warned and told that there was a complaint came in about liquor being drunk in the National Cafe, and if this was not stopped he was liable to prosecution (this latter statement was objected to by

counsel, and the objection was noted). He further deposed that Thomas Pulos was one of the owners of the cafe, and stated on cross-examination that he said this because Pulos had stated to him that he was an owner but did not state the names of the other owners.

4. Provincial constable Percy Ward deposed that on August 21st, 1942, at approximately 11.30 p.m. in company with constable Cooper he was in the National Cafe on Barnard Avenue in the city of Vernon. He went to the back and in a curtained booth saw an army officer identified as Captain Cote pouring a drink out of a bottle. The other officer, Lieutenant Barlow, sat at the table with a glass of liquor in front of him; he identified exhibits 1, 2, 3, He took a statement from the two officers; at 12.10 p.m. he and constable Cooper returned to the National Cafe and Thomas Pulos stated the bottle in question was his and asked if a charge was being laid, if he could get it over with and pay the fine without appearing in Court. He further deposed that on the 18th of August, in company with constable Ward, at about 11.30 p.m. he walked through the National Cafe and warned Thomas Pulos with regard to drinking intoxicating liquor in the cafe and that if anyone was found drinking liquor on the premises a charge would be laid. (This last statement was objected to by counsel, and the objection was noted.)

5. There was filed also as Exhibit 4, at the hearing a copy of the certificate of incorporation of the National Cafe Limited, certified by the registrar of companies.

6. There was also filed as Exhibit 5 at the hearing a copy of the annual report of the National Cafe Limited, dated December 14th, 1940, certified by the registrar of companies showing that on December 14th, 1940, Thomas Pulos was a director of the National Cafe Limited.

7. The defendant did not call any evidence.

8. On behalf of the defendant it was contended, (a) that there was nothing to connect the National Cafe Limited with the operation of the National Cafe referred to in the evidence as the National Cafe; (b) the charge does not contain the essential element that the accused was the keeper or person in charge; (c) that the annual report No. 9435 Companies Act, merely shows the membership of the corporation on December 31st, 1940, and is not applicable today.

9. I overruled the said objections and convicted the accused upon the evidence as above summarized.

10. In his formal request for a case stated, counsel for the accused questioned the conviction on the following grounds:

(a) That the information does not disclose any offence; (b) that there was no evidence to show that the defendant was either the keeper or person in charge of a restaurant; (c) that the accused could not have been convicted unless knowledge of the presence of liquor in the restaurant on the part of the accused was proved, and that there was no evidence to show that the accused had any knowledge of the presence of liquor; (d) that the accused, being a corporation could not have been convicted of the offence charged.

11. Counsel for the Crown has objected to the conviction being attacked on any grounds other than those advanced at the hearing.

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12. Subject to paragraphs 10 and 11, the questions for the opinion of this Honourable Court are:

(a) Does the information herein disclose any offence? (b) Does the charge as drawn comply with the statute? (c) Was I right in ruling that there was evidence of knowledge on the part of the defendant of the presence of liquor in the restaurant? (d) Could the defendant, being a corporation, be convicted of the offence charged? And, if my determination in law overruling said objections was incorrect, what should be done in the premises?

Farris, C.J.S.C.

This case came on for hearing before me at Vernon on the 13th of October, and owing to the absence in the Vernon library of the authorities cited to me, I reserved judgment on all points raised.

Mr. *Morrow* for the respondent took a preliminary objection to the appeal being heard on the ground that an affidavit of merits had not been filed under section 104 of the Government Liquor Act, Cap. 160, R.S.B.C. 1936. This point has been settled by the Appeal Court of British Columbia in *Rex* v. *Carmichael* (1940), 55 B.C. 117, which I follow and overrule the preliminary objection. Counsel for the appellant contended:

(1) The information and complaint is defective in that it only did allege that the appellant did unlawfully permit a person to have liquor in a restaurant and did not allege that the appellant was either the keeper or person in charge, and cited in support of this contention *Re Rex* v. *Ing Yick Ing* (1924), 43 Can. C.C. 392, and *Rex* v. *Shewchuk,* [1924] 3 W.W.R. 376. (2) There was no evidence to prove that the appellant was the keeper or person in charge of the restaurant at which the alleged offence was committed. (3) (a) To convict the appellant *mens rea* is an essential element, and there was no evidence that the appellant had knowledge, and relied upon cases of *Somerset* v. *Wade,* [1894] 1 Q.B. 574, and *Rex* v. *Fane Robinson Ltd.,* [1941] 2 W.W.R. 235; (b) that there can be no *mens rea* on the part of an incorporated company and therefore an incorporated company on an offence as charged in this case cannot be convicted.

Counsel for the respondent in answer to the first contention of the appellant, relied upon section 90 of the Government Liquor Act, and upon the second point relied upon sections 96 and 97 of the Government Liquor Act, and upon the third point contended that under sections 101 and 102 of the Act *mens rea*

or knowledge on the part of the accused when an incorporated company did not have to be proved.

The questions submitted to the Court by the magistrate are peculiarly worded and are set out in paragraph 12 of the case stated which says prior to putting the questions, this:

> Subject to paragraphs 10 and 11 the questions for the opinion of this Honourable Court are . . .

It would therefore appear necessary, in order to answer the questions, that consideration must be given to paragraphs 10 and 11 of the case stated.

First, dealing with the respondent's contention that the omission to allege in the information and complaint that the appellant was a keeper or person in charge of the restaurant is not a defect and, if a defect, is cured by section 90. In my opinion section 90 is not helpful to the respondent. The description of the offence in the information and complaint is not in the words of the Act or in similar words. A person can only be convicted for permitting liquor to be consumed in a restaurant if he is either the keeper thereof or the person in charge of such restaurant. There is nothing in the conviction to show this essential ingredient of the offence (not even reference is made to the Act itself), nor is the ingredient contained in the information upon which the conviction is founded. In my opinion, therefore, the information and complaint is defective. (*Rex* v. *Ing Yick Ing, supra*).

Dealing with the second point, the only evidence adduced to establish that the appellant was a keeper or person in charge of the restaurant in question was Exhibit 4 showing the incorporation of the company, and Exhibit 5, being the copy of the annual report of the company filed with the registrar of joint-stock companies, which shows that in December, 1940 (approximately a year and a half before the alleged offence herein was committed), Thomas Pulos was a director of the defendant company, and the evidence of Provincial constable James Cooper set out in paragraph 3 of the case stated, in which he says in part:

> He further deposed that Thomas Pulos was one of the owners of the cafe, and stated in cross-examination he said this because Pulos had stated to him that he was an owner but did not state the names of the other owners.

There is no other evidence to show that the appellant company was either the owner, keeper or person in charge of the restaurant.

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It was the contention of Crown counsel that the name of the restaurant being similar in name to that of the appellant company, and the fact that one Thomas Pulos was in December of 1940 (a year and a half before the alleged offence was committed) a director of the appellant company, and at the time of the alleged offence a man of similar name was apparently in charge of the restaurant and admitted he was part owner of the same but refused to give the name of the other owners, was sufficient to establish a *prima facie* case that the appellant was the owner and keeper of the restaurant, and that relying upon sections 96 and 97 of the Act the burden of proof was placed upon the appellant to prove that he was not the owner or keeper thereof.

Section 96 of the Act provides that in certain specified offences certain evidence being adduced, such evidence shall be *prima facie* evidence of the guilt of the accused, and that unless such person so accused proves that he did not commit the offence, he may be convicted. Section 97 provides that in certain specified cases the burden of proof shall be on the accused to prove that he is not guilty of the charges particularly specified in 97. The offence charged in this case is not one of the offences specified in either sections 96 or 97, and these sections are not applicable to the present case. In my opinion, therefore, there is no evidence that the appellant company was at the time of the alleged offence the keeper or person in charge.

Dealing with the third point: (a) namely, there must be *mens rea* or knowledge on the part of the appellant. Crown counsel contended that the knowledge of Thomas Pulos who was in charge of the premises at the time of the alleged offence was knowledge of the company, but in any case that sections 101 and 102 of the Act justify the conviction without proof of *mens rea* or knowledge on the part of the appellant. I cannot follow this contention, as in my opinion sections 101 and 102 have no bearing on this point; and as to the contention that knowledge of Pulos was knowledge of the appellant company, no evidence was given that the Thomas Pulos who was in charge of the premises at the time of the alleged offence was the same Pulos who was shown to be a director of the company a year and a half before the alleged

offence, or that the said Pulos was an officer or servant of, or in any way connected with the appellant company at the time the alleged offence was committed.

(b) The appellant contends that even with knowledge of a proper officer or manager there can be no *mens rea* on the part of the company, and without such *mens rea* there can be no conviction. The authorities have well settled this point, and if knowledge is brought home to an accused when an incorporated company, such company can be convicted of an offence such as this.

Having in mind my reasons as stated, I would answer the questions of the magistrate as follow:

(a) Does the information herein disclose any offence? No.

(b) Does the charge as drawn comply with the statute? No.

(c) Was I right in ruling that there was evidence of knowledge on the part of the defendant of the presence of liquor in the restaurant? No.

(d) Could the defendant, being a corporation, be convicted of the offence charged? Yes, if knowledge was brought home to the defendant. But in this case no evidence of knowledge was given and therefore the defendant could not be convicted.

And if my determination in law overruling said objections was incorrect, what should be done in the premises? The conviction should be quashed.

Conviction quashed.

B.C. ELECTRIC POWER & GAS COMPANY v. LOUIE JHONG.

Taxation—Special War Revenue Act—Sales tax on gas—Supplied through single meter for both business and living-quarters—"Dwelling"—Definition—R.S.C. 1927, Cap. 179, Sec. 85 (g).

By the Special War Revenue Act and regulations a sales tax is payable on gas when used for cooking or other domestic purposes in dwellings and the seller is authorized to collect such tax from the consumer. By section 85 (*g*) of the Act, "'dwelling' shall include business premises where the supply of gas or electricity for both the business and living quarters is metered through a single meter, or where a flat charge is

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made to cover both business and living quarters." On the ground floor of the premises is a cafe operated by the defendant where gas is consumed. Upstairs is a bedroom used by the defendant and an office and storeroom used in connection with the cafe business, also a room used by the employees for changing their clothes when going to and from the cafe. There is also a hallway upstairs in which is installed a gas-stove. This gas-stove was installed prior to the defendant becoming a tenant and he swears he has never used it, as he has all his meals in the cafe downstairs. There is but one meter downstairs through which gas is piped to the stoves both up and downstairs and the defendant could use the upstairs stove if he wished to do so. There is a minimum monthly charge of $50 payable by the defendant under his contract with the plaintiff but not a flat charge. From September 12th, 1939, to September 5th, 1941, the tax payable by the defendant in respect to the gas supplied by the plaintiff was $71.84. In an action to recover said sum, it was held that the premises did not come within the definition of "dwelling" and the action was dismissed.

Held, on appeal, reversing the decision of COADY, J., that there was a supply of gas provided for the stoves both up and downstairs through one meter, the premises are within the definition of "dwelling" as aforesaid and the tax is payable.

APPEAL by plaintiff from the decision of COADY, J. of the 28th of May, 1942, in an action to recover $71.84 for sales tax on gas manufactured from coal and supplied by the plaintiff to the defendant. By the Special War Revenue Act, R.S.C. 1927, Cap. 179, and amending Acts and regulations thereunder a sales tax is payable on gas when used for cooking or other domestic purposes in dwellings and the seller is authorized to collect such tax from the consumer. By section 85 (*g*) of said Act "dwelling" is defined as follows: (*g*) "dwelling" shall include business premises where the supply of gas or electricity for both the business and living quarters is metered through a single meter or where a flat charge is made to cover both the business and living quarters. . . . The question is whether or not the gas is supplied to a "dwelling" as above defined. On the ground floor of defendant's premises is a cafe operated by the defendant, and upstairs a bedroom used by the defendant, an office and storeroom, both used by the defendant in connection with the cafe business and an additional room used by the cafe employees for changing clothes when coming to and going from work. There is also a corridor or hallway in which is located a gas-stove. The defendant says this stove is not used by him and that it was

installed there prior to his becoming a tenant of the premises in 1933. There is one gas-meter downstairs through which all gas used on the premises is metered. This gas-stove is piped for gas and could be used by the defendant if he wished to do so. The defendant, while having his living-quarters upstairs, does no housekeeping or cooking there and takes his meals in the cafe below. There is a minimum monthly charge of $50 payable by the defendant pursuant to his contract with the plaintiff but not a flat charge. It was held that on the evidence, the premises do not come within the definition of "dwelling" and it follows that no tax is payable.

The appeal was argued at Vancouver on the 27th of November, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

J. W. deB. Farris, K.C., for appellant: The Act makes the company selling gas responsible for the tax and we must collect from the customer. There is an 8 per cent. tax on manufactured goods but electricity and gas are exempted unless it is a dwelling-house that is supplied. Gas and electricity when supplied to a dwelling-house are taxable. The question is whether the premises in question come within the definition of "dwelling." The proprietor has the room in which he lives upstairs and there is a gas-stove in the hall that is supplied gas from the same meter that supplies gas for the cafe below. The defendant says the stove upstairs, although supplied with gas, is not used but burnt matches were found around the stove. We say the premises come within the definition of "dwelling" as defined by the Act. The gas is supplied and can be used at any time.

J. A. Sutherland, for respondent: We submit that they have no right of action. The stove in question is in a corridor upstairs and is not part of the living-quarters. The learned judge finds as a fact that this stove was installed before the defendant was a tenant and he accepted the evidence of the defendant that it was never used. He further found that the premises do not come within the definition of "dwelling."

Farris, in reply.

Cur. adv. vult.

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12th January, 1943.

McDONALD, C.J.B.C.: This appeal raises questions respecting the sales tax payable on manufactured gas under the Special War Revenue Act and amendments, and the regulations made pursuant to order in council thereunder.

A sales tax is payable on manufactured gas "when used in dwellings." The appellant company is a "selling utility" as defined by section 1 (c) of the regulations, inasmuch as it sells gas, to be used for cooking or other domestic purposes in dwellings. As such selling utility it is entitled to collect the tax from the consumer or user.

The building in question here is occupied by the defendant, the lower floor being operated as a restaurant, while the defendant's living-quarters are upstairs. Hence the premises looked at as a whole, constitute a "dwelling," which by section 85 (*g*) of the Act is defined as follows:

> "Dwelling" shall include business premises where the supply of gas . . . for both the business and living quarters is metered through a single meter, or where a flat charge is made to cover both the business and living quarters.

It is common ground that the plaintiff's *status* to bring this action depends upon whether it is a selling utility. A dispute, however, has arisen over the question of whether the premises constitute a dwelling. I think the learned trial judge was quite justified on the evidence in finding that the building is a dwelling and that he was further justified in finding that it had not been proven that gas was in fact used in the living-quarters, though there was a gas-stove there.

The real dispute arises over the question of whether, in this case where there is only a single meter in use, the tax is payable on all gas supplied to that meter, or only on gas passing through that meter to the living-quarters, which latter in this case would be none.

While it is true that the taxing authority must show its right to collect the tax, and while the matter is not entirely free from doubt, I think that, having in mind the purpose of the Act and regulations, there can be little doubt that in a case such as this the tax is payable on all gas supplied at the single meter. Obviously the purpose was to catch the person who has his living-quarters in the same building as his business premises and under

circumstances where it is impossible to ascertain what portion of the gas supplied at the meter went to the business premises and what portion went to the living-quarters.

The fact that in the definition of "dwelling" above we have the words "or where a flat charge is made to cover both the business and living-quarters" I think adds strength to this argument, the point being that if the user chooses to instal but a single meter or to accept gas on a flat charge, then he takes the risk of paying for all gas supplied, whether used in the living-quarters or not.

I would allow the appeal.

McQUARRIE, J.A.: This is an appeal from COADY, J. who dismissed the action brought by the appellant at the request of the Dominion Government. The facts in the main are not in dispute and the findings of the learned trial judge may be accepted. They are as follows:

On the ground floor of the defendant's premises is a cafe operated by the defendant, and upstairs a bedroom used by the defendant, an office and storeroom, both used by the defendant in connection with the cafe business and an additional room used by the cafe employees for changing clothes when coming to and going from work. There is also what the defendant describes as a corridor or hallway in which is located a gas-stove. This gas-stove the defendant says is not used by him and was already installed there when he became a tenant of the premises in 1933. There is one gas-meter downstairs through which all gas used on the premises is metered.

On the evidence I find as a fact that this stove has not been used and is not now being used by the defendant although it is piped for gas and could apparently be used by the defendant if he so wished. The defendant, while having his living-quarters upstairs, does no housekeeping or cooking there and takes his meals in the cafe below.

So far as this appeal is concerned the question is whether or not the respondent's premises are such as to render him liable for the tax under the Special War Revenue Act and amendments and the regulations passed thereunder. The appellant submits that the question is if the premises are a dwelling under section 85 (*g*) of the Act. There is a cafe downstairs and living-quarters upstairs and only one meter by which all gas used on the premises is recorded. There is equipment for the use of gas upstairs. The appellant contends that the tax must be paid and the respondent's only remedy is to have another meter put in. Respondent supports the judgment except in so far as the trial judge finds that there are living-quarters upstairs. Counsel for

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the respondent submits that the equipment for the use of gas is in the corridor upstairs and not in the alleged living-quarters. As a matter of fact he submits that the upstairs is not living-quarters under the Act at all, notwithstanding the judge's finding that there are living-quarters upstairs.

I am of the opinion that the tax must be paid and with all deference would allow the appeal.

SLOAN, J.A.: I agree with my brothers that this appeal should be allowed.

O'HALLORAN, J.A.: "Dwelling" in section 85 (*g*) of the Special War Revenue Act, Cap. 179, R.S.C. 1927 as amended in 1939 includes

> business premises where the supply of gas or electricity for both the business and living quarters is metered through a single meter.

The respondent operates a cafe downstairs, and in his living-quarters upstairs there is a gas-stove piped for gas on the same meter which supplies the cafe. But he testified the stove was not used, and that no gas had been metered through for it. It appears the stove could be used at any time without notice to the appellant company.

Shortly stated, gas used in business premises is exempt from consumption or sales tax, while gas used for domestic purposes in living-quarters is not. One can appreciate the confusion in the single meter supply here, if actual or periodic use of gas in the living-quarters were accepted as the test of the statutory meaning of "dwelling" and consequent liability for the consumption tax which the appellant is obligated to collect under order in council P.C. 2845.

In my view with respect, the correct test is found in the existence of the single meter, making gas available for both the business premises and the living-quarters. That test is consistent with the definition of "dwelling" cited *supra*. I choose that construction as it is in harmony with the smooth working of the system of consumption tax the statute imposes and is regulating. In the conditions of its application I do not think on reflection that it offends against the rule stated by Strong, J. in *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420, at pp. 424-5. And I must reject the construction adopted in the Court below,

because of the uncertainty and confusion it would interject into the working of that system: *vide Shannon Realties, Lim.* v. *Town of St. Michel* (1923), 93 L.J.P.C. 81, at p. 84.

I would allow the appeal, and direct judgment to be entered in the Court below as sought in the statement of claim.

FISHER, J.A.: In my view no sufficient ground has been shown for refusing to accept and I therefore accept the findings of the learned trial judge that the defendant has his business and living-quarters on the premises in question herein and that no gas is used in the living-quarters. With all respect, however, I have to say that I think the trial judge was wrong in holding that:

> If in fact no gas is used in the living-quarters, which is the case here, then it appears to me the premises would not fall within the definition.

The definition referred to is that of "dwelling," as defined by section 85 subsection (*g*) of the Special War Revenue Act reading as follows: [already set out in the head-note and the judgment of MCDONALD, C.J.B.C.].

The defendant admits that pursuant to the agreement between plaintiff and defendant the plaintiff supplied manufactured or illuminating gas to the said premises and that "the gas-pipe upstairs is connected with the meter downstairs." As the defendant had both the business and living-quarters on the premises, the living-quarters being upstairs and a cafe downstairs, I do not see how it can reasonably be contended under the existing circumstances that there was not in fact a supply of gas for both if the words are construed in their ordinary sense. Assuming for the moment that the defendant, who had a lease of the whole building, had the right to sublet and desired to sublet and the question was raised as to whether there was a supply of gas for both the business and living-quarters I think the answer would necessarily be in the affirmative. I think also that construing the words in their ordinary sense one would say that the supply is metered through a single meter.

The words must be construed in their ordinary sense unless such construction is at variance with the intention of Parliament, to be collected from the Act and the regulations. In my view the construction suggested is not at variance but in accordance with the intention which seems to be to make the tax payable on

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Fisher, J.A.

the gas used on such premises as we have here where it would be impossible for the Crown to satisfy itself as to where the gas went. In my view, therefore, the premises are within the definition of "dwelling" as aforesaid and the tax is payable.

The only other issue that arises is whether or not the plaintiff has the right to sue and upon this phase of the matter I have only to say that after careful consideration of all the sections of the regulations I have come to the conclusion that it has.

I would, therefore, allow the appeal.

Appeal allowed.

Solicitor for appellant: *V. Laursen.*
Solicitor for respondent: *John A. Sutherland.*

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Nov. 20;
Dec. 17.

YOUNG v. WORKMAN.

Real property — Highway — Dedication — Principle upon which dedication arises—Animus dedi candi—R.S.B.C. 1936, Cap. 140, Sec. 37; R.S.B.C. 1897, Cap. 111, Secs. 65, 66 and 70.

The plaintiff brought action to recover possession of part of lot 1, plan 3012, New Westminster District. She had a certificate of title in her name to the part in dispute. The defendant had been in possession of the property since 1927 and claimed that the disputed area occupied by her is part of a public highway and she relies on subsections (*e*) and (*i*) of section 37 (1) of the Land Registry Act. On the 2nd of March, 1903, pursuant to section 65 of the then Land Registry Act, the owner of the land in question deposited plan 858 in the Land Registry office. There was no evidence who the owner was. This plan showed a road immediately to the south of the Fraser River and it was part of the road the defendant occupied in 1927. On July 31st, 1906, pursuant to section 70 of the Land Registry Act then in force the then registered owner obtained an order of the Supreme Court cancelling plan 858. The papers in connection with this application could not be found. On plan 858 there were two endorsements: (1) Amended and cancelled in part 23rd August, 1906, as No. 3356; (2) amending order filed 19th April, 1907, cancelled except as to lot 6, block 2, No. 3356. Filing No. 3356 could not be found. On May 8th, 1908, the land in question was conveyed to one Rorison who on the 12th of September, 1917, deposited plan 3012 in the Land Registry office. This plan does not show any road immediately south of the Fraser River. The defendant claimed the road shown on plan 858

was, by reason of depositing of plan and subsequent use by public generally, a public highway, and further that section 70 only gave power to alter and amend so that cancellation of plan 858 was invalid. In view of the disappearance of the records mentioned, it was difficult to ascertain what exactly was done. To establish dedication of a highway, two concurrent conditions must be satisfied: (1) There must be on the part of the owner the actual intention to dedicate and (2) it must appear that the intention was carried out by the way being thrown open to the public and was accepted by the public. The defendant further submitted that the intention to dedicate should be inferred from the evidence of user of the road by the public, but the only evidence of user was that of a witness who lived near the lot in question who said that from 1905 to 1906 or 1907 he saw persons crossing the bridge near by, drive or walk along the road in question. In 1907 a new road was opened up which was used instead of the old one. There was no evidence as to who was the owner between 1905 and July, 1906; there was no evidence as to where the owner lived during that period. There was no evidence as to the nature of the land in question or the surrounding lands or highways; there was no evidence as to whether the persons using the same were neighbours and might be using the road by tolerance or whether they were members of the public generally.

Held, that the Court was unable to infer any "*animus dedi candi*" from the slim evidence in this case. The road shown on plan 858 was not at any time a public highway. The plaintiff is entitled to judgment for possession of the lot and to costs.

ACTION for recovery of possession of part of lot 1, plan 3012, New Westminster District. The facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at New Westminster on the 20th of November, 1942.

G. L. Cassady, for plaintiff.
Lucas, for defendant.

Cur. adv. vult.

17th December, 1912.

ROBERTSON, J.: This is an action for recovery of possession of part of lot 1, plan 3012, which part has been in the possession of the defendant since 1927. It is common ground that the plaintiff has a certificate of indefeasible title in her name to the part in dispute. Section 37 (1) of the Land Registry Act enacts that such a certificate of title shall be conclusive evidence at law and in equity as against all persons that the person named in the certificate of title is seized of an estate in fee simple in the land described in it, subject, *inter alia*, to

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(*e.*) Any public highway . . . :

(*i.*) The right of any person to show that the whole or any portion of the land is by wrong description of boundaries or parcels improperly included in such certificate.

The defendant says that the disputed area occupied by her is part of a public highway and she relies on the above subsections. The *onus* is on the defendant. The facts are as follows: On the 2nd of March, 1903, pursuant to section 65 of the then Land Registry Act, the owner of the land, part of which is lot 1, deposited plan 858 in the Land Registry office. There is no evidence who was the owner. This plan shows a road immediately to the south of the Fraser River, and it is part of this road which the defendant has occupied since 1927, and, as has been stated, is included in the plaintiff's certificate of indefeasible title. On the 31st of July, 1906, pursuant to section 70 of the Land Registry Act then in force, on the application of David M. Webster, the then registered owner, an order was made by a judge of the Supreme Court cancelling plan 858. The papers filed in the Supreme Court Registry in connection with the application to cancel cannot be found. On plan 858 there are two endorsements, as follows: (1) Amended and cancelled in part, order filed 23rd August, 1906, as No. 3356; (2) amending order filed 19th April, 1907, cancelled except as to lot 6, block 2, No. 3356. Filing No. 3356 cannot be found. No record of the amending order mentioned above is to be found in the Supreme Court Registry. On the 8th of May, 1908, the land in question was conveyed to one Rorison who on the 12th of September, 1917, deposited plan 3012 in the Land Registry. This plan does not show any road immediately south of the Fraser River. Lot 1 on this plan covers not only lot 1 shown on plan 858, but also the part of the road shown on that plan to the north of lot 1, and which is the part of the road in the possession of the defendant. The defendant submits that the road shown on plan 858 was by reason of depositing of the plan, and the subsequent use by the public generally, a public highway. It is submitted further that section 70 only gave power to alter and amend, and that therefore the cancellation of plan 858 was invalid. In view of the disappearance of the records as above mentioned, it is difficult to ascertain what exactly was done. Undoubtedly the order of

the 3rd of July, 1906, provided for cancellation only; whereas the endorsements on the plan would indicate that the plan was not cancelled but amended. However, in the view I take of section 70, it is not necessary to consider this. To establish dedication of a highway two concurrent conditions must be satisfied: (1) There must be on the part of the owner the actual intention to dedicate, and (2) it must appear that the intention was carried out by the way being thrown open to the public, and that way has been accepted by the public. (*Bailey* v. *City of Victoria* (1920), 60 S.C.R. 38, at p. 53.) Section 65 above referred to made it obligatory in the case of a subdivision of lots to deposit a plan in the Land Registry office. At the time of the depositing of plan 858, section 66 read as follows:

> In no case shall any plan or survey, although deposited, be binding on the person so depositing the same, unless a sale has been made according to such plan or survey; and in all cases amendments or alterations of any such map or survey may be ordered to be made, at the instance of the person depositing the same, or of any person who is the owner in fee of any portion of the land comprised in said map, plan or survey, by the Supreme Court, or by any Judge thereof, if, on application for the purpose made by rule or summons, and upon hearing all parties concerned, it shall be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient, and the original or an office copy of every such order shall be filed in the Land Registry Office.

The evidence does not disclose that any sale was made pursuant to plan 858, but it may be inferred from the recital in Exhibit 12 and from the mention of consents in the order of 3rd July, 1906, that there was one sale at least. For the purposes of my judgment I shall assume that there was, prior to the 8th of July, 1906, a sale of a lot shown on plan 858. Obviously the depositing of plan 858 alone did not constitute a dedication of the road shown on it because the statute said the plan so deposited was not binding.

Sections 65 and 66 are, so far as the matters in dispute are concerned, practically the same as sections 68 and 70 of Cap. 23, B.C. Stats. 1906, the Land Registry Act in force when the order of 8th July, 1906, was made. These sections are practically the same in effect as sections 73 and 75 of Cap. 24 of the Statutes of the Province of Canada, 1865, the Land Registry Act in force in that Province at that time. The Canada sections referred to were considered in the case of *Re Morton and Corporation of*

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St. Thomas (1881), 6 A.R. 323. Burton, J.A. said at pp. 329-330:

> How then is the question affected by the Registry Act? It is manifest that a registry law would be of little avail in cases where the original lot had been surveyed or subdivided into other lots in such a manner that by the new description the parcel conveyed could not be easily identified, if it were not made obligatory upon proprietors to register a plan of such new survey, and upon the Registrar to keep an index of the new survey, and to register no conveyances affecting the land so subdivided, unless made in conformity with it; but it was not intended to alter the relative rights of vendors and purchasers, or to confer any additional right upon the public than they would have had under a sale made in accordance with an unregistered map or plan.

Patterson, J.A. points out at p. 332 that in 1865 the registration of plans was made compulsory by section 73 of Cap. 24, as above mentioned. He then says at p. 332:

> The only remark necessary to make respecting these statutes is, that they do not profess to deal with the subject of public highways; they deal with the registration of titles and with private rights connected with or affected by registration; and, when they assume to make registered plans binding, that effect extends only to the subdivisions as recognized in registration, and to the titles acquired by conveyances in conformity with registered plans.

In the case of *Re Waldie and Village of Burlington* (1886), 13 A.R. 104, the fact was that a plan had been registered in the Land Registry office in Ontario in 1869. The sections of the Land Registry Act applicable were sections 82 and 84, which are practically the same as the Canada sections 73 and 75, *supra*. It was contended that the plan having been registered and sales having been made in accordance with it, the spaces marked out as streets were public roads or highways. Osler, J.A. who delivered the judgment of the Court said at pp. 111-112:

> Neither the mere marking out upon a plan, of spaces for roads and streets, nor the registration of such a plan, nor the sale of lots according to it, nor all of these acts combined, will constitute an absolute dedication of the places so marked down as public roads or highways.
>
> They may become so by any acts from which an irrevocable intention to dedicate them may be inferred, and by acceptance by the municipality, and then section 527 has its operation.
>
> But until they do become so, section 84 expressly provides that a plan, although filed, is not binding, and though sales may have been made under it, is only binding *sub modo*, that is to say, to the extent that the court or a judge may think proper not to permit a proposed amendment.
>
> I do not understand that section 84 is intended to authorize the judge to amend a plan by closing any road or street laid down thereon which has become a public highway in fact, though that is a fact he may have to determine.

If the public have acquired a right, I think it is not intended to be interfered with; but as between the lot owners, and the person who registered the plan, or his assigns, such amendments may be made and on such conditions, as may be thought proper.

The defendant also submitted that the intention to dedicate should be inferred from the evidence of user of the road by the public. The land in question is near the south end of a bridge crossing the Fraser River. The only evidence as to user was given by a witness Kirkbride, who says that in 1905, he went to live at a place 200 or 300 yards from the south end of the bridge; that from then, until 1906 or 1907, persons crossing the bridge drove or walked along the road in question, that in 1906 or 1907 he assisted in making a survey of the land shown on plan 858, after which another road was opened up, which persons crossing the bridge used thereafter instead of the road shown on plan 858. The cancellation order was made in July, 1906, so that the important period is from 1905 to 1906 or 1907. There was no evidence as to who was the owner from 1905 until July, 1906; there was no evidence as to where the owner lived during this period. There was no evidence as to the nature of the land in question or the surrounding lands or highways; there was no evidence as to whether the persons using the same were neighbours and might be using the road by tolerance, or whether they were members of the public generally. (See *Taylor* v. *Rural Municipality of Clanwilliam* (1924), 34 Man. L.R. 319.) I am unable to infer any *animus dedi candi* from the slim evidence in this case. In my opinion, the road shown on plan 858 was not at any time a public highway. The plaintiff is entitled to judgment for possession of the lot and to costs.

Judgment for plaintiff.

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Nov. 24, 25, 26. 1943 Jan. 12.

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Negligence—Plaintiff's crane secured to its own flat car—Included in train for transportation—Crane improperly secured to flat car for travelling—Derailment of train—Damages resulting—Appeal—R.S.B.C. 1936, Cap. 241, Sec. 215 (2).

[1942] 4 W.W.R. 196

The plaintiff company, having its gasoline locomotive crane at Bridge River, entered into a contract with the defendant company for transporting the crane to Vancouver, B.C. The crane is built into its own flat car and may be included in a train and hauled along with other cars. The boom of the crane was detached and hauled on another flat car in front of the crane car. The contract of carriage was verbal and made between one Newton, sole representative of the railway company at Bridge River, and one Grant, the crane operator. Grant said he would secure the crane and the body of the crane was secured to the car by passing wire through eyelet holes and when made fast to its own part was tightened by twisting with a bar after the fashion of a Spanish windlass. This was done on both sides of the crane. A hardwood wedge was driven in at the rear between the main body and the deck of the car. Grant and the superintendent of the plaintiff company inspected the crane fastenings and were satisfied that it was secure. Newton and the conductor on the train were of the same opinion. There are many curves, both right and left, in the railway and when the train reached about seven and one-half miles south of Bridge River the crane car derailed. It was found that the swinging of the crane car around these curves gradually slackened the wires and the increased play eventually broke the wires and dislodged the wedge thus allowing the crane body to swing around at an angle to the car with the ballasted end outboard causing the derailment. It was held on the trial that the duty of securing the crane was on the railway company and the plaintiff recovered judgment.

Held, on appeal, affirming the decision of SIDNEY SMITH, J. (MCDONALD, C.J.B.C., dissenting), that the cause of the derailment was the insecure fastening of the crane. The railway company had the duty of seeing that the crane was in proper condition for the journey so as to make the train railworthy, it being a transportation problem.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 14th of February, 1942 (reported, 57 B.C. 247), awarding the plaintiff damages in the sum of $5,170 and costs and denying the defendant's counterclaim for damages. In July, 1937, the defendant for hire at the request of the plaintiff undertook to move from Bridge River to Vancouver by way freight, a flat car on wheels upon which was mounted a gasoline-powered crane owned by the plaintiff and to carry on a flat car supplied by the

defendant a boom detached from the crane car and owned by the plaintiff. No bill of lading or other shipping document was issued by the defendant. The request for the movement was a verbal one made on behalf of the plaintiff by one Grant, the plaintiff's representative at Bridge River, to one Newton, the defendant's checker at Bridge River. Grant told Newton his company wanted to ship the crane to Squamish. He requested a flat car to take the boom and said he would secure the crane and boom for transportation. These instructions were communicated to the defendant's operating department and a flat car was placed by the defendant on the spur at Bridge River immediately adjacent to and south of the crane car. The crane car included, (a) a flat car on wheels capable of travelling on the railway under its own power. It was powered by a gasoline motor and became self-propelled by the engaging of certain gears operated on the car; (b) the boom of considerable length and weight; (c) a crane and crane-house mounted on a turntable permitting rotary movement; (d) at the base and back of the crane-house a compartment loaded with a considerable weight of broken rock and other material as a counterbalance for the boom; (e) two bolsters with spiral springs. The crane car and boom were prepared by the plaintiff's servants for shipment by, (1) disengaging the gears on the crane car, which were used for self-propulsion; (2) by placing a wedge between the floor of the crane car and the rear end of the crane; (3) by partially detaching and placing on a flat car ahead of the crane car the boom itself in such a way as enabled it to be carried wholly by the flat car, but leaving it still loosely attached by cables and the like to the crane and crane car. The boom itself was placed and secured on the flat car ahead of the crane car by the plaintiff, but no question in the action arises as to the sufficiency of the securing of the boom on the flat car. On the boom being loaded on the flat car, the bottom end of the boom projected backward over and above the crane car as well as forward beyond the south end of the defendant's flat car to the satisfaction of the plaintiff's servants and also to Newton's satisfaction. Newton was the defendant's checker, he was not an inspector, there being no inspector or agent at that point. The two cars were picked up by

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the defendant's way freight at Bridge River and placed behind a flat car or idler attached to the engine, the car with the boom being immediately back of the idler, and the crane car back of that. Behind the crane car were other cars of the defendant. The idler car was required to go ahead of the car with the boom on it because the end of the boom extended forward beyond the end of the car on which it was loaded. The conductor at the time of picking up the two cars checked over their running gear, the journal boxes, car couplings and "noticed the wiring on the side of the crane" and "checked the boom." The train proceeded south at eighteen miles an hour and, having covered seven and one-half miles during which some 50 curves were encountered, both left and right curves, the crane car left the track, derailing with it the flat car ahead which carried the boom and five other cars with it.

The appeal was argued at Vancouver on the 24th, 25th and 26th of November, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Locke, K.C. (*Sheppard,* with him), for appellant: The contract in question herein was, except as to the boom, not a contract of carriage of goods but a special contract of "haulage" entered into between the parties. The appellant undertook to "haul" the respondent's crane car, it and the boom first being prepared and secured by the respondent for carriage in respect of the boom and for haulage in respect of the crane car. The relationship between the parties requires to be considered from two points of view: (1) Under the Railway Act; (2) under the common law. Section 202 of the Railway Act imposes certain obligations on the railway. By section 2 of the Act "traffic" means the traffic of passengers, goods and rolling-stock. It is submitted that the crane car in question is "rolling-stock" as distinguished from "goods" and being "rolling-stock" is within the term "traffic" and not within the term "goods." Section 202 of the Act obligates the defendant to provide reasonable facilities for "haulage" of the plaintiff's rolling-stock: see *Spillers & Bakers, Limited* v. *Great Western Railway,* [1911] 1 K.B. 386, at p. 397. It is submitted the prohibition in section 215 (1) does not relate to the contract here and it was lawful for the appellant to enter into

a verbal contract for haulage with the respondent. The respondent is in no better position than that of the shipper in the case of *Watson* v. *North British Railway Co.* (1876), 3 R. 637. In the case at Bar, the appellant was not a common carrier of the crane car. There is no pleading or proof that the appellant held itself out to be willing generally to haul rolling-stock of private persons or companies. The appellant was not a carrier at all in respect of the crane car: see Macnamara's Law of Carriers by Land, 2nd Ed., 119 *et seq.*; *London and North Western Railway Company* v. *Richard Hudson and Sons, Limited,* [1920] A.C. 324. The *onus* of proof that the appellant did not exercise due care in the haulage was upon the respondent and not only was there no attempt on the part of the respondent either to plead or prove want of due care in the appellant, but on the whole of the evidence, none was shown. It is established by the evidence and so held that the crane car was the first to leave the rails. The obligation of the appellant in respect of such a contract did not extend in any way to the preparation of the train car for "haulage" but was limited to the exercise of due care in the haulage itself. The learned judge erred in holding that the appellant "owed the duty of seeing that the crane was in proper condition for the journey it was about to undertake" and erred in holding "that the duty of securing the crane so as to make the crane 'railworthy' was upon the railway company": see *Canadian Westinghouse Co.* v. *Canadian Pacific Ry. Co.,* [1925] S.C.R. 579, at p. 584 and (1923), 54 O.L.R. 238, at pp. 240-42. The respondent secured the crane to the car and the learned trial judge found that the wire cables did not securely fasten the crane to prevent its swinging. If there was any *onus* upon the appellant and it is submitted there was none, the *onus* was limited to showing due care in haulage: see *London and N.W. Railway* v. *Hudson & Sons, Lim.* (1920), 89 L.J.K.B. 323, at p. 330. The cause of derailment was shown by the evidence to be inherent vice, including that expression improper packing and the appellant is not responsible either at common law or under statute in such circumstances. The learned judge erred in holding that transportation difficulties in relation to the movement in question were all peculiarly within the knowledge of the appellant and

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not within the knowledge of the respondent, and erred in holding that the appellant recognized its responsibility in respect thereof. There were no transportation difficulties involved in this contract of haulage. The learned judge erred in holding that by reason of the crane car being an unusual article, special care should have been taken by the appellant, and erred in holding that the appellant ought to have called in railway inspectors stationed at Lillooet or Squamish. The learned judge erred in disallowing the appellant's counterclaim and ought to have awarded the appellant judgment thereon. In the circumstances, the respondent, having contracted with the appellant to prepare the crane for shipment, was negligent and the negligence was the direct and proximate cause of the damage done the rolling-stock of the appellant.

J. W. deB. Farris, K.C. (*Riddell,* with him), for respondent: The appellant failed to prove that the accident was caused by the breaking of the wire fastenings of the crane. The burden of proof was on the defendant who, as a common carrier, had custody of the crane. Nobody saw the cars leave the track. The learned judge accepted the evidence of the witness Bates, chief engineer of the railway company, who said the front left wheels of the crane car left the track caused by the wire fastening on the train car breaking, that the wires gradually loosened as the train went from curve to curve on the tracks, there being from 50 to 60 curves in the 7 miles between Bridge River and the point of accident. The whole issue is, did the breaking of the wires derail the car or did the derailment of the car break the wires? The appellant's theory is based on incorrect facts and is pure conjecture. The defendant hauled the crane car "wrong end to" with the weight in the rear, so that in making the turn the front wheels went off the track and this would cause the wires to break. Assuming the wires were defective, the defendant is liable for the damage done: see section 215 (2) of the Railway Act. The crane and the detached boom were "goods" within the meaning of section 215 of the Act: see *Johnson* v. *The North-Eastern Railway Company* (1888), 5 T.L.R. 68. The burden is on the appellant to prove that it was not negligent: see *Canadian Northern Quebec R. Co.* v. *Pleet,* [1923] 4 D.L.R. 1112,

at p. 1116. If the goods were entrusted to the defendant carrier within the meaning of section 215 of the Act, the learned judge was right in holding that the duty of seeing that the crane was in proper condition for the journey rested on the railway company as a transportation problem. It is a transportation problem. The proper manner to load the crane for transportation was not to have disconnected the boom from the crane. The appellant is on the "horns of a dilemma" (1) if the fastenings were reasonably adequate, then their theory of how the accident happened falls down; (2) if the fastenings were so clearly inadequate as to establish the cause of the accident, then the conductor Conley was guilty of serious neglect. The appellant should have had a man stationed on the crane car to watch and guard against the wedge coming out, and the wires stretching. In these circumstances, the cases cited by the appellant have no application: see also *Stuart* v. *Crawley* (1818), 2 Stark. 323; *Acatos* v. *Burns* (1878), 3 Ex. D. 282; *London and North Western Railway Company* v. *Richard Hudson and Sons, Limited,* [1920] A.C. 324. They rely on the fact that Grant told Newton that he would prepare the crane for shipment. There was no significance in Grant's offer as neither Newton nor Conley relied on what Grant had done. The only official in authority was Conley, the conductor, and he made his own inspection and decided the load was safe for transportation.

Locke, in reply: This is a special contract of haulage. We are not common carriers.

Cur. adv. vult.

12th January, 1943.

MCDONALD, C.J.B.C.: This case turns on responsibility for damage to respondent's crane while in transit over the appellant's railway. There is also a cross-claim for transportation charges and for damage to the appellant's property caused by the crane's going off the track. The Court below found the railway company liable and dismissed its counterclaim.

A feature of the case is that the crane had not been loaded on to the railway company's car, but was at all times mounted on its own base, which resembled a flat car. The crane could indeed propel itself along a railway by gasoline power, but when brought

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to the appellant for transportation it was put out of gear for self-propulsion.

The crane was brought to appellant's railway from a private spur. This is in a sparsely-settled district. The nearest station was a mile away, and even this had no station-agent, but only a "checker," a man named Newton, whose powers were considerably narrower than an agent's, though, in the view I take, I need not analyze them. This checker died some years before the trial, so we have not the benefit of his evidence. However, there is no real conflict as to what took place, even though no written contract was made, and no bill of lading or similar document was issued.

Apparently one Heinrich, respondent's superintendent, notified Grant, the crane tender, to make the necessary arrangements to have the railway company transport the crane south. Grant notified the checker and requisitioned for two flat cars to take the "boom" or hoisting-arm of the crane, which was too long for one car. He then set about preparing the crane for its journey. He disconnected the boom at the hinge joining it to the crane, and lashed it in place on the two flat cars, so that it came to no mishap. The crane machinery, other than the boom and tackle, is housed, and the house revolves on a pivot or turntable. The back of the house is ballasted to counterbalance the boom; and unfortunately the ballast was not removed when the boom was disconnected. To prevent the crane-house from revolving in transit, wire lashings and wedges were used. Heinrich, Newton, and the conductor of the freight train all examined the work and apparently were satisfied. However, their judgment proved faulty. As found by the trial judge, soon after the journey began, the jerking caused by curves in the track first stretched and then broke the lashings, the wedges failed to hold, and the crane-house slewed around, so that the ballast, without its counterweight, overbalanced the crane car and toppled it from the rails. This derailed several freight cars and caused considerable damage to them. The crane itself was damaged, and the railway company had to spend money in getting it back on the rails and putting it in running order. Eventually its journey was completed, but the owner refused to pay the charges, claiming for damages to the crane.

The defence has taken two main lines, first, that the contract was for hauling rolling-stock, and not for carriage, and that a haulage contract involves no liability except for negligence; secondly, that even if this was a contract for carriage of goods, still appellant was excused because it had shown itself to have acted without negligence.

The chief difference in these defences is that the first requires the plaintiff to prove negligence, the scond puts the *onus* of disproving it on the defendant.

The appellant has practically satisfied me that this was a contract for haulage, except as to the boom, which need not be considered, since it was not damaged. There seems to be no authority on the effect of such a contract, apart from statute, except two Scotch decisions, *Watson* v. *North British Railway Co.* (1876), 3 R. 637 and *Barr & Sons* v. *Caledonian Railway Co.* (1890), 18 R. 139. These are cited in Halsbury's Laws of England, 2nd Ed., Vol. 27, p. 135 as applicable in England, though all other text-writers seem to evade discussion of them, and the distinctions made in these decisions between contracts of haulage and carriage indicate that the law of Scotland is that of England in such matters. These decisions support the appellant's claim that under a haulage contract the bailee is liable only for negligence, which the other party must prove.

The common law as to common carriers hardly seems to affect this case, since the Railway Act, R.S.B.C. 1936, Cap. 241 covers the ground and appears to exclude it, though the statutory provisions are not greatly different. Appellant argues that the Act does not apply to haulage contracts, and points to the definition of "traffic" in section 2 as showing a distinction between "goods" and "rolling-stock," a distinction which becomes of importance because the sections in the Act that deal with negligence apply in terms to "goods" (section 215 (2)) and "merchandise" (section 215 (4)). Respondent argues that this crane was merchandise, but that seems to me rather extravagant. It also argues that the crane car was not "rolling-stock"; but the case cited, *Johnson* v. *The North-Eastern Railway Company* (1888), 5 T.L.R. 68, seems to me to favour the appellant. Indeed, on all these points, appellant seems to have the better of it. However,

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I find it unnecessary to decide them, because, even if the *onus* of disproving negligence was on the appellant, the cause of the damage to the crane has been affirmatively shown, and in my view it was not the fault of the appellant.

I think the decisive fact in this case is that Grant, in making his arrangements with the checker, told him he " . . . would get it [the crane] ready for shipment."

It is unnecessary to consider what would have been the effect of this undertaking if Grant had been merely an irresponsible subordinate, acting on his own. In truth, he had been told by his superior Heinrich to do the very thing he had told the checker he would do; and then Heinrich had personally supervised the means taken to secure the crane, and had been satisfied with it. So no suggestion of Grant's irresponsibleness can prevail.

The circumstances in this case show that it was a very natural thing for the respondent to undertake putting the crane in shape for shipping. Its officials knew the limited facilities the appellant had in that district, and they must have known that if they tendered the crane admittedly unsecured, its shipment would be delayed, and perhaps even refused. They were consulting respondent's own interests in agreeing to make the preparations for shipment.

Respondent has tried to make something of the fact that after Grant had lashed the crane in place, the checker and the conductor of the freight train that hauled it away both inspected the lashings and were satisfied. The argument apparently is that the two men thereby made the respondent's bad lashings their own work. I can see no logic in that. The natural conclusion from the fact that three interested parties (Heinrich, the checker and the conductor) all saw the work and were satisfied, is that its defects were not obvious to an unskilled eye. Grant himself admitted that he knew about cranes and the checker did not, and I think appellent owed no duty to the respondent to exercise skill in inspecting the crane after respondent had undertaken to attend to the matter.

The effect of Grant's promise to secure the crane for shipment was, I think, simply this: it was not a contract; I think he could have withdrawn his promise on due notice at any time; but it

narrowed down the scope of the obligations assumed by the appellant. Appellant simply assumed no obligation as to securing the crane because the respondent, in representing that it would see to that, reduced the scope of what appellant was asked to undertake.

From the above it will appear that accepting the learned trial judge's findings of fact, I cannot accept his conclusions of law. He said this [57 B.C. 249]:

> The question before me is whether the *onus* of securing the crane was on the plaintiff or on the defendant. In other words, whether the owner of the crane or the railway company had the duty of seeing that the crane was in proper condition for the journey it was about to undertake. In my opinion this duty is for the railway company. It is a transportation problem.

This would be right enough (assuming the crane to be "goods") but for the course taken by Grant. On this the learned judge comments [57 B.C. 250]:

> I find that Grant, the crane operator, told Newton [checker] that he would prepare the crane for shipment. But that could not mean that the railway company was thereby relieved of all responsibility. Grant had had no experience with cranes other than at Bridge River with comparatively light loads. He had no special knowledge of the security required for transportation over a railway, and in particular over a railway like the P.G.E. which, according to the evidence, contains a number of curves. Nor had Heinrich.

This reasoning does not convince me. Grant had had six years' experience with cranes; but even if he had been a complete novice, that would not have mattered. If he, as respondent's representative, undertook to perform an act for it, and to excuse appellant from having to attend to that, then appellant was entitled to take him at his own valuation, and had no obligation to enquire into his capabilities. Those were the concern of his employers.

The learned judge also said this [57 B.C. 249]:

> It does not concern the question of whether goods are properly packed. It is a matter of the railway company taking into its train something that imperilled the train itself. Adopting a term from the sea, by analogy, the train was "unrailworthy." I think there can be no doubt that the duty of securing the crane so as to make the train "railworthy" was upon the railway company.

But I cannot feel that the analogy between the train and an unseaworthy ship is sound. The seaworthiness of a ship is something that the owner has full control of; here there was no complaint of the "railworthiness" of the appellant's part of the train;

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the only unrailworthy part was the respondent's. It had tendered that part as ready for shipping; so it did not lie in its mouth to complain that appellant took it at its word. I could see an analogy to an unseaworthy ship if the crane had been shipped on the appellant's car, and this had proved defective, causing it to leave the rails. But that is certainly not this case. The whole trouble was the unruliness of the respondent's own property. The learned judge held that the appellant was the one to curb that unruliness, because that was a "transportation problem." I could agree if the bargain had been to treat it as the appellant's problem. Presumably—assuming that the crane is "goods"—if respondent had simply brought the crane on its car to the appellant and said in effect: "we want this taken south; but no attempt has been made to secure it for shipping; that is left to you," and the appellant had then attempted to take the crane away, respondent would succeed. But that is the very opposite of what happened. Respondent, instead of leaving the problem to the appellant, undertook to solve it.

Even had we been dealing with a common carrier's liability at common law, I think the result would be the same. Such a carrier escaped liability if he showed that goods carried were damaged through their own inherent vice, which included bad packing. Here, with all respect for the learned judge's contrary view, I think the unskilful preparation of the crane for transport was analogous to bad packing by the owner.

It is true that if bad packing is obvious, there may be a liability on the carrier if he accepts it without demur; but the respondent can hardly claim the bad lashings of the crane were obvious, when its own superintendent was satisfied with them. As shown by Lord Atkinson's judgment in *London and North Western Railway Company* v. *Richard Hudson and Sons, Limited,* [1920] A.C. 324, at p. 341, the carrier has no duty to scrutinize goods closely for possible defects. This last case indeed seems to have turned on the fact that the goods were shipped, not by the owner, but by a mere vendor to the consignee. As pointed out by Lord Buckmaster at p. 343, if the goods had been the vendor's own, he could have had no claim for damage caused by their defective covering.

If it were necessary for the appellant to disprove negligence, I would hold that it has done so.

As negligence in the appellant is negatived, the Contributory Negligence Act can have no application.

I turn now to the counterclaim, by which appellant claimed for damages to its freight cars, derailed when the respondent's crane car left the rails, and for expense incurred in clearing up the wreckage.

It seems to me a fallacy to assume that because respondent relieved the appellant of the obligation to secure the crane, respondent thereby contracted to secure it. As I have said, I think respondent's statement of intentions was not part of a contract at all; it merely narrowed the scope of the appellant's contract. If appellant claims in tort, then I would say that the respondent's failure to secure the crane sufficiently, amounted to non-feasance, not misfeasance. It was not as though respondent did some act which made the crane more dangerous than it would have been had nothing been done. The lashings were there for the appellant to inspect, if it saw fit, and though it owed the respondent no active duty to inspect them, it decided to rely on the respondent's measures at its own risk. Actually the checker and the conductor of the train did inspect the lashings, and being inexperienced in such matters, did not realize the inadequacy of what they saw. That, however, was a risk which appellant assumed by not having more skilled employees.

That part of the counterclaim for transportation charges would, however, seem to be recoverable; I see no answer to it. There is not enough before us to enable us to decide whether the small item of $105.80, for cost of putting the crane into repair after the accident, so that its haul could be completed, is a proper charge. The parties seem to have agreed that the *quantum* allowable might be spoken to after liability was decided, and I am prepared to hear them further.

I would allow the appeal as to the plaintiff's claim, by dismissing the action, and would dismiss the counterclaim, so far as it claims for damage to the railway company's property, and for costs of clearing up the wreck.

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McQUARRIE, J.A.: I would accept the reasons stated by the learned trial judge and dismiss the appeal.

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

O'HALLORAN, J.A.: I agree with the conclusion reached by the learned trial judge. It involves a finding there was a duty upon the railway company to inspect the crane and boom as tendered for shipment, in order to determine whether the same complied with good railway practice.

The railway company could not reasonably be expected to undertake to haul and transport the same to Squamish, unless it was satisfied it was safe to do so. On it fell necessarily the responsibility of determining by adequate inspection whether the crane and boom as tendered for shipment could be so hauled and transported without damage to that equipment and to the train itself.

As I read the evidence, no special contract was established to exempt the railway company from that responsibility and consequent liability.

I would dismiss the appeal.

FISHER, J.A.: The plaintiff's claim is for "damage to certain goods of the plaintiff, namely, a locomotive crane, while entrusted to the defendant [railway company] for conveyance" from Bridge River to Vancouver, B.C., in consideration of the freight rate to be paid therefor. At the trial counsel for the defendant admitted that

> the defendant railway company took delivery of the crane at Bridge River on the date mentioned [July 7th, 1937] and that it sustained damage while *en route* from Bridge River to Squamish in the train of the defendant company.

Counsel for the plaintiff relies especially upon subsection (2) of section 215 of the Railway Act, R.S.B.C. 1936, Cap. 241, reading as follows:

> (2.) Every company shall be liable for the loss of or damage to goods entrusted to such company for conveyance, except that the company shall not be liable when such loss or damage happens:—
>
> (*a.*) Without actual fault or privity of the company, or without the fault or neglect of its agents, servants, or employees; or
>
> (*b.*) By reason of fire or the dangers of navigation; or
>
> (*c.*) From any defect in or from the nature of the goods themselves; or

(*d.*) From armed robbery or other irresistible force.

The appellant railway company is one to which the Provincial Railway Act applies and the first question that arises therefore is whether or not this is a case of goods entrusted to the said railway company for conveyance within the meaning of quoted subsection. Counsel on behalf of the appellant contends that the contract in question herein was, except as to the boom, not a contract of carriage of goods but a special contract of "haulage" whereby the appellant undertook to haul the respondent's crane car, it and the boom first being prepared and secured by the respondent for shipment. This contention seems to divide the contract into two distinct parts, one with regard to what may be called the crane car and the other with regard to the boom, and makes the railway company a hauler with regard to the crane car and a carrier with regard to the boom. It is therefore necessary to consider whether under the special circumstances here such a contention is justified.

The arrangement for the shipment was made between one Grant an employee of the respondent company and one Newton employed by the appellant company at Shalalth one mile from Bridge River where the railway company had no representative, Newton having no power to issue a bill of lading. Newton died before the trial but we have the examination for discovery of Grant (put in at the trial) who said in part as follows:

What did you tell him [Newton]? I asked him—I told him we were shipping this crane and wanted to know if he could spot, get hold of a 54 or 52-foot flat to put the boom on, because the boom was a 50-foot one, and that would save putting an idler car in between, and by putting on a 50-foot flat there would be that much sticking out of it.

. . . . .

. . . And what did he say? Well, he 'phoned up—I don't know whether it was Squamish or Lillooet, but whoever was in charge.

He 'phoned somewhere? Yes, 'phoned somewhere, and they said they would try and locate a 50-foot, but when the time came they couldn't. It was a 40-foot flat that was put in. Then after we started loading it on the—it was just one car they put in there; then they were going to arrange to let the front end stick over, and they were going to put a partial car, spot a partial car, some flat, so that the end would stick over and it would not interfere; use it for an idler; and the other end was sticking over the crane car where it had been detached from the crane, so after I got the crane fastened I went over and got Newton——

What do you mean by getting the crane fast? That is the crane itself. That is the swing part of it.

. . . . .

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Did you detach the boom from the crane? Yes. Right there, do you see these bolts? [indicating]

You are indicating the bolts that bolt the boom to the crane? Yes.

But you did not detach the wires? No.

So that the boom lay flat? Flat.

Partly on the crane car and partly on the idler ahead? Yes, partly over the end.

. . . . .

And you had told Newton you would do this, had you—you would fasten up the crane? No, I don't think so. I told him I would get it ready for shipment.

You told him you would get it ready for shipment? Yes.

. . . . .

You are telling me you put these four stakes on the flat car which carried the main part of the boom. The boom then extended farther along over the idler car? Right.

Now when you had done this, when you had made these preparations for fastening the crane car itself and the boom, then what happened, Mr. Grant? Did you notify Newton? Wait a minute. We are a little ahead of the story. After I finished the body of the crane itself and lowered the boom then I went over and got Newton. I wanted to know how much clearance he wanted on the back end of the crane where I took it over there.

. . . . .

How much clearance he wanted? Yes.

What would he know about it? You were the man who operated the crane. I know, but I wanted a 52-foot idler, and they wouldn't give it to me—I mean a 52-foot flat car.

You wanted to know what distance he wanted between the end of the boom and the end of the crane? Yes.

. . . . .

I see. Go ahead. Then Newton stayed with me until we fastened her. He stayed right over there until we fastened her.

Until you fastened what? Fastened the boom down.

On the flat car? On the flat car.

Yes. You had already fastened the crane, had you? Yes.

What happened then? Then—I think that was all there was to it. I asked him if everything was O.K. and satisfied, and he said yes, it was all right.

Under the circumstances set out in this evidence I think what Buckley, L.J. said in *Spillers & Bakers, Limited* v. *Great Western Railway*, [1911] 1 K.B. 386, at p. 404 is very applicable:

> Upon the first of these two questions the contention of the appellants is that, notwithstanding that the railway company have maintained and offer for use a proper truck, the trader is entitled to say "Haul my truck upon the terms that I am only to pay you a reduced rate." This argument has been based upon sections in the Acts which provide that traffic is to include trucks, from which the appellants evolve as matter of argument that if a truck and its contents are offered both the one and the other are within the word "traffic" and the company is bound to convey them. I think this argument rests upon a fallacy. If a manufacturer in Birmingham has there

manufactured for a purchaser at Cardiff railway trucks and is desirous of sending them to Cardiff I have no doubt that the railway company can be compelled to haul those trucks as traffic. That is a case in which the owner of the goods, namely, the truck, desires to have it conveyed from one place to another in order that the truck as a truck may as matter of transport or change of the position of the truck cease to be at Birmingham and be delivered at Cardiff. But this is not true where the truck is not sent for the purpose of conveyance (meaning thereby alteration of the position) of the truck as a truck, but is sent as a vehicle for the purpose of conveyance—that is to say, alteration of the position—of something else, namely, the contents of the truck. The truck where employed as a vehicle is sent not for conveyance of the truck, but for conveyanec of its contents. The haulage of the truck is only a means to an end. The trader does not want the truck conveyed. So far as the truck is concerned he would be content that it should stay where it is, and when he has sent it away he wants it returned. The real subject-matter of conveyance is not the truck, but its contents.

Buckley, L.J. thus clearly distinguishes between a case where the owner wants a truck conveyed from one place to another as a truck in which case he calls the truck "goods" and a case where what the owner really wants is that the contents of the truck should be conveyed from one place to another in his truck, in which case the contents may be called goods and the truck the owner's rolling-stock. This latter class of case was cited by the appellant's counsel and it may assist to compare the circumstances in the present case with those in the cases specially relied upon by him. *Watson* v. *North British Railway Co.* (1876), 3 R. 637, was a case of a shipper of coal supplying his own wagons to be hauled by the railway company and damage being done to the wagons. The Lord President delivering the judgment of four of the Court of five judges, who were of opinion that the damage sustained was caused by the fault of the defenders, said at p. 638 in part as follows:

The difference of opinion in the Court is entirely on the question of fact. We are all at one on the principle of law, which is well stated by the Lord Ordinary:—"The railway company undertook to carry coals for the pursuer in his own waggons at certain rates, and I do not think the pursuer has put his case at all higher than he was entitled to do, when he states that the defenders were bound to use all proper care and diligence for the protection of his waggons, by which I understand is meant all reasonable care and diligence. The question of fact is whether such reasonable care and diligence was used." I concur with Lord Deas in holding that the liability of the defenders rests on different grounds from the liability of common carriers in the carriage of goods, and that there is also an important distinction between the present case and that of injury to passengers. In the present case the train consisted of the plant, partly of the railway company and partly of

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the pursuer, and its safety depended on both being in good working condition. There was no presumption that if anything went wrong with the plant it was the fault of the railway company, whereas a break-down of the plant affords a presumption of liability in the carriage of passengers. Therefore I think that in the contract of haulage, where the injury is occasioned by a break-down of the plant, the burden of proving fault is distinctly on the person who alleges it, and so in this case on the pursuer.

Lord Deas (dissenting) said at p. 638 in part as follows:

It is important to railway companies to know the nature of their liability in cases of this kind. It was said that their liability was that of carriers, but that contention was quite untenable. Then it was suggested that their liability was similar to what they lay under in conveying passenger trains, but that proposition was little less extravagant. The contract, if there was a contract at all, was one of haulage.

In the *Spillers* case, *supra*, at p. 397 Fletcher Moulton, L.J. in one place speaks of the conveyance by a railway of a "vehicle proper to run on railway lines," and belonging to the shipper, as "haulage" and Cozens-Hardy, M.R. speaks of such a vehicle as the shipper's own "rolling-stock" but it must be noted that Fletcher Moulton, L.J. says elsewhere in his judgment in part as follows, at pp. 395-6:

Moreover, no question arises as to the willingness of the Great Western Railway Company to convey the merchandise. . . . In general it has furnished trucks which the Railway Commissioners have found to be suitable, and to have been supplied in numbers adequate to convey the whole of the merchandise of the appellants. But the appellants insist that the merchandise shall be forwarded in their own trucks and not in the trucks so supplied. Whether they are entitled so to do is the question for our decision.

The obligations upon the Great Western Railway Company in this behalf must come from one or both of two sources, namely, its obligations as a common carrier, or its obligation to grant reasonable facilities for traffic under the Act of 1854, and the subsequent Acts which impose that obligation. It is conceded that there is no obligation upon it in its character of common carrier to haul other people's trucks. As a common carrier it may decide for itself in what way it will convey goods. The only question, therefore, that remains is whether the carriage of the goods in the appellants' own wagons is a reasonable facility in respect of the conveyance of those goods.

And Cozens-Hardy, M.R. said at pp. 391-2:

This appeal raises, so far as I am aware for the first time, a very important question as to the nature and extent of the obligations of a railway company towards traders desirous of using their own rolling stock loaded with merchandise for the purpose of having such merchandise carried by a railway company upon the terms of payment of the proper rates for such merchandise.

In the *Spillers* case also therefore it is clear that the issue before

the Court was with regard to the right of a shipper to have merchandise forwarded by the railway company at a reduced rate in trucks belonging to the shipper.

In the present case my view is that the real subject-matter of the conveyance was the locomotive crane, consisting of what has been or may be called the "crane proper," or what Grant calls the "crane itself," and the boom or lifting-arm attached to the rotating part. The respondent desired to have it conveyed from one place to another in order that the crane, as a crane, might "as matter of transport or change of the position" cease to be at Bridge River and be delivered at Vancouver. The case is thus clearly distinguishable from the *Watson* case in which wagons belonging to the shipper were being used to convey coal which was shipped from one place to another and the wagons were treated as part of the train and the train was said to consist of the "plant" partly of the railway company and partly of the shipper. When the wagons were damaged and the nature of the liability was in question the contract was treated as one of haulage. In my view the locomotive crane which was not being used to convey something else but was itself being conveyed under the contract cannot be fairly considered like the trucks in the *Spillers* case which the owner wished to be used to transport something else or like the wagons in the *Watson* case, so that it cannot be said here as was said in the latter case, that the train consisted of the plant partly of the railway company and partly of the shipper. Transporting a locomotive crane under the circumstances here is also clearly distinguishable from running a locomotive under its own steam as in *Johnson* v. *The North-Eastern Railway Company* (1888), 5 T.L.R. 68. The train here was a regular freight train operated as a common carrier and as indicated by the evidence two flat cars belonging to the railway company were used directly in connection with the locomotive crane and, as the learned trial judge suggests, the railway company took it "into its train."

Having carefully considered the circumstances of the present case and having compared them with those of the other cases as aforesaid I have come to the conclusion that the contract should

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be considered as entirely one for the conveyance of goods and not for the haulage of rolling-stock.

The question may still arise, however, as to whether it was a contract for the conveyance of the locomotive crane or of such crane prepared for shipment by the respondent. In this connection reference might be made to *London and N.W. Railway* v. *Hudson & Sons, Lim.* (1920), 89 L.J.K.B. 323 where the nature of the contract was in issue. Counsel for the appellant relies especially upon what was said in such case by Viscount Haldane and Lord Phillimore dissenting. It must be noted, however, that the majority of the Court held that assuming a contract necessary the contract was not simply that the railway company should haul a loaded wagon or goods already loaded and covered but was the ordinary arrangement in accordance with which the shipper would pay the total freight to the common carrier. Lord Dunedin said as follows at p. 327:

> . . . The view of the Divisional Court is that there was a contract made by Kynochs as agent for the respondents, that in the terms of this contract made, the railway company were not answerable for the loading, and that as the damage came from improper loading, the respondents cannot recover. Now, what was the contract? Sankey, J., says that the contract was that the railway company should haul a loaded wagon from Birmingham to Manchester. I cannot agree with this view.

Lord Buckmaster at pp. 331-2 said in part as follows:

> . . . But the duty of providing proper protection against wet and proper means of carriage is part of their ordinary duty as carriers from which they cannot escape, except by express contract.
>
> . . . . .
>
> In the present case the company undertook to carry for, and on behalf of, the consignees who were responsible to them for the total freight, and, in the discharge of these duties proper care was not taken to secure the goods against damage, which it was the company's duty to prevent.

In the present case there is no suggestion that the plaintiff company was to pay anything less than the usual charges if it prepared the crane for shipment, as Grant told Newton he would. It was a gratuitous undertaking on the part of Grant and it is quite apparent from the evidence of conductor Conley that what was said by Grant to Newton as to preparing the crane for shipment did not constitute a contract by which the company was obliged to transport it as so prepared. The evidence of Conley shows that he had no information about what Grant had told Newton, that he made his own inspection and would not have

picked up the locomotive crane if in his opinion it was not safe. Part of his evidence is as follows:

Did you have any knowledge of who had fastened the crane in place? No.

. . . . .

. . . who did you know that the Bridge River Power Company had around there? I didn't know whether there was anybody there at that time or not.

You didn't know whether there was anybody there at that time or not, and you didn't make any enquiries? No.

You made no enquiries about whether they knew how the wiring was or not? No.

. . . . .

Well, looking at it now after the event, is it your opinion as an experienced railroad man that there was enough strain on that curve to break those wires before the car went off the track? I would say no. I was of the opinion that the crane would be locked, as well as those wires.

Under the circumstances it was the duty of Conley when receiving the locomotive crane to ask such questions about it as were necessary. See *Walker* v. *Jackson* (1842), 10 M. & W. 161, at p. 168, where Parke, B. says in part as follows:

. . . I take it now to be perfectly well understood, according to the majority of opinions upon the subject, that if any thing is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; . . .

In my view Conley when acting on behalf of the railway company and taking delivery of the locomotive crane for carriage after inspection did not carry out his duty and it cannot be said that there was any special contract established exempting the railway company from the responsibility and liability imposed upon it as a common carrier by the entrustment of the locomotive crane to it for conveyance. There was no arrangement made to carry the goods at the risk of the plaintiff nor was it pleaded that the contract between Newton and Grant was intended by them to have that effect. My view is it was the locomotive crane and not the locomotive crane prepared for shipment that was entrusted to the railway company for conveyance, that it is quite obvious there was no inherent defect in the crane itself and that therefore the apposite section of the said Railway Act applies and attaches liability to the railway company.

I have only to add that I have carefully considered whether the appellant company is within the exception provided for in section 215 (2) (*a*) of the Railway Act as aforesaid and in my

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view it is not. I agree with the finding of the learned trial judge that the cause of the derailment and the consequent damage was the insecure fastening of the crane body to the frame of its car. I also agree, however, with the submission of counsel for the respondent that on the evidence that must be accepted to support such finding the appellant is in this position that, the fastenings being so clearly inadequate as to establish the cause of the derailment, then either the conductor Conley was guilty of serious neglect or the railway company itself of actual fault in having an inadequate system. I am therefore in agreement with the judgment of the learned trial judge when he says as follows [57 B.C. 250]:

> I find that Grant, the crane operator, told Newton that he would prepare the crane for shipment. But that could not mean that the railway company was thereby relieved of all responsibility. Grant had had no experience with cranes other than at Bridge River with comparatively light loads. He had no special knowledge of the security required for transportation over a railway, and in particular over a railway like the P.G.E. which, according to the evidence, contains a great number of curves. Nor had Heinrich. The transportation difficulties were all peculiarly within the knowledge of the railway company and not within the knowledge of the plaintiff. And in my view the railway company recognized this responsibility. Both the conductor and Newton inspected the fastenings of the crane. So far as their knowledge and experience went they thought the crane was safe for travel. They were mistaken. It is true that the crane was perhaps an unusual article to transport. But for this very reason special care should have been taken, and the railway inspectors who were stationed at Lillooet and Squamish ought to have been called in. This was not done.

In the result I hold that the appellant is not within any of the exceptions provided for in said section 215 of the Railway Act and is liable for the loss to the respondent. I think the effect of said section of the Act is to make the railway company responsible for the damages to the shipper, notwithstanding some fault on its part, in such a case as this where it cannot be said that the damage happened

> Without actual fault . . . of the [railway] company, or without the fault or neglect of its agents, servants, or employees.

I would, therefore, dismiss the appeal.

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

Solicitor for appellant: *W. S. Lane.*

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

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In Chambers
1943
Jan. 15;
Feb. 3.

IN RE ORDER No. 108 OF THE WARTIME PRICES AND TRADE BOARD RESPECTING MAXIMUM RENTALS AND TERMINATION OF LEASES AND *IN RE* SECURITY STORAGE LIMITED AND DOMINION FURNITURE CHAIN STORES LTD.

Canadian War Orders and Regulations 1942—Order No. 108, Secs. 18 (3) and 21 (4)—Notice of renewal of tenancy—Notice by landlord to vacate —Application by landlord to county court for possession—Dismissed— Discontinuance of action in county court—Application in Supreme Court.

The tenant had been in occupation of the premises in question under lease from one Horie which was to expire in October, 1942, and on August 4th, 1942, the tenant gave Horie, the landlord, notice of renewal pursuant to section 18 (3) of order No. 108 of the Canadian War Orders and Regulations 1942. On August 19th, 1942, the Security Storage Limited became the registered owner of the property and on September 21st, 1942, gave the tenant notice to vacate. The tenant required the landlord to apply to the Court for an order for possession. The landlord then applied on the 18th of November, 1942, but his application was refused by BOYD, Co. J. and an application for leave to appeal to the Court of Appeal was refused on the 25th of November, 1942. On December 16th, 1942, in response to notice of the tenant, a motion was launched in the county court for an order for possession when counsel for the landlord requested BOYD, Co. J. to refer the application to HARPER, Co. J. The learned judge then stated he would refer the matter to HARPER, Co. J. but the members of the county court had had a consultation and had agreed that BOYD, Co. J.'s decision in the previous case was correct. In view of the learned judge's remarks, the landlord gave notice to the tenant of discontinuance of the action without prejudice to his right to further proceed and then launched this application under section 21 (4) of order No. 108 of the Canadian War Orders and Regulations 1942. Counsel for the tenant raised the objections: (a) That order No. 108 taken as a whole contemplates only proceedings in the county court, and the Supreme Court has no jurisdiction to hear the application; (b) that if the Supreme Court has jurisdiction, the landlord must elect as to the Court in which he will proceed and by his proceedings in the county court he had elected and he cannot now be heard in the Supreme Court.

Held, as to the first objection, that as it appears to be the intention of the regulations to confine the jurisdiction of the hearing of such applications to the county court, the Supreme Court should not assume jurisdiction in opposition to what at least is the spirit of the regulations. As to the second objection, the landlord, believing he would be unsuccessful in his application before the county court, discontinued his application with a view to canvassing another Court. This cannot be done. He elected to proceed before the county court and his election must stand. The application is dismissed.

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In Chambers
1943

IN RE ORDER No. 108 OF THE WARTIME PRICES AND TRADE BOARD RESPECTING MAXIMUM RENTALS AND TERMINATION OF LEASES AND IN RE SECURITY STORAGE LTD. ET AL.

APPLICATION made on behalf of the landlord under section 21 (4) of order No. 108 of the Canadian War Orders and Regulations 1942, Vol. 10. The facts are set out in the reasons for judgment. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 15th of January, 1943.

Bull, K.C., for the application.
J. W. deB. Farris, K.C., contra.

Cur. adv. vult.

3rd February, 1943.

FARRIS, C.J.S.C.: This application came on before me for hearing on the 22nd of January, 1942, Mr. *Alfred Bull, K.C.*, of counsel for the landlord and Mr. *J. W. deB. Farris, K.C.*, of counsel for the tenant. The application made on behalf of the landlord was under section 21 (4) of order No. 108 of the Canadian War Orders and Regulations 1942, Vol. 10.

The facts being as stated by counsel for the landlord and accepted by counsel for the tenant, and as shown by the affidavit on file, were that the tenant had been in occupation of the premises in question under a lease from one A. J. Horie, and the lease was to expire in October, 1942, and on August 4th, 1942, the tenant gave to the landlord Horie a notice of renewal pursuant to section 18 (3) of order No. 108. That on or about August 19th, 1942, the Security Storage Limited mentioned as the landlord throughout, became the registered owner of the property, and on September 21st, 1942, gave the tenant notice to vacate. In response to the notice to vacate the tenant required the landlord to make application to the Court for an order for possession, and accordingly the landlord made application to the county court, which was on the 18th of November, 1942, dismissed by BOYD, Co. J. On November 24th an application was launched before BOYD, Co. J. to appeal to the Court of Appeal, but this application was dismissed on Wednesday, the 25th of November, 1942. On November 24th, 1942, a new notice to vacate was given by the landlord to the tenant, but such notice reserved the rights of the tenant to proceed under the former notice in case of success on appeal. In response to the notice of November 24th the tenant gave notice requiring an application

to, under section 21 (4), order No. 108, be made to the Court for possession. On December 16th, 1942, in response to the notice of the tenant, a motion was launched in the county court for order for possession. The motion came on for hearing before BOYD, Co. J. on December 23rd, 1942, and was adjourned to January 5th, 1943, when it again came on for hearing, and counsel for the landlord then requested BOYD, Co. J. to refer the application to HARPER, Co. J. According to Mr. *Bull's* statement to the Court on the hearing of this application when he asked that the matter be referred to HARPER, Co. J., BOYD, Co. J. stated he would refer the matter to Judge HARPER but the members of the county court had had a consultation and had agreed that BOYD, Co. J.'s decision in the previous case was correct. According to the affidavit of Mr. *Nemetz,* the solicitor for the tenant, at the hearing on January 5th Mr. *Bull* undertook to inform him of the date which he could procure from HARPER, Co. J. for the hearing. In the meantime, according to Mr. *Bull's* statement to the Court on this application, he felt, in view of BOYD, Co. J.'s remarks it was useless to proceed before any member of the county court, and he accordingly gave notice to the tenant of the discontinuance of the action in the county court without prejudice to his right to further proceed. He then launched the present application. Counsel for the defendant took four objections:

1. That order No. 108 taken as a whole contemplates only proceedings in a county or district court, and this Court has no jurisdiction to hear the application.

2. That if this Court has jurisdiction to hear the application, the landlord had the right of election as to whether he would proceed before this Court or the county court, and that by his proceeding in the county court he had elected to proceed before the county court and could not now be heard in this Court.

3. That the landlord was not the landlord in accordance with the definitions 1 (*b*) (i) of order No. 108 in that Horie, the original landlord, was the only landlord within the definition mentioned, and that the remedy of the present landlord was not that of a landlord but that of a purchaser, and that any application made by the present landlord should have been made prior

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IN RE ORDER No. 108 OF THE WARTIME PRICES AND TRADE BOARD RESPECTING MAXIMUM RENTALS AND TERMINATION OF LEASES AND IN RE SECURITY STORAGE LTD. ET AL.

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to acquiring the property, and by joint application by the then landlord and the purchaser, as provided for under order No. 108.

4. That the notice of November 24th to vacate was not an unconditional notice and therefore not a good notice.

The application was argued ably and at some length by both counsel, and at the conclusion I intimated to counsel, that as to two of the main points, important questions of jurisdiction were involved, it would be an advantage to reserve judgment in order to have a consultation with my brother judges, with which counsel fully concurred.

I accordingly reserved judgment and have since the original argument had the benefit of written argument made by counsel upon point 1.

A conference of the members of this Court has been held at which all members of the Court were present, so that in delivering this judgment I have the benefit of their opinions as well as my own, and in giving this judgment it has the unanimous approval and concurrence of all of the members of the Court.

Dealing with the first contention, it is my opinion that the whole tenor of order No. 108 is to provide for summary procedure and that the county or district court, as the case may be, should have sole jurisdiction similarly as is given to the county court in this Province in a summary eviction proceeding under section 19, Cap. 143, R.S.B.C. 1936. It would appear, however, that there is grave doubt whether or not the regulations as worded have been sufficiently explicit to take away the jurisdiction of this Court to hear an application of this kind.

It is the view, however, of this Court that as it appears to be the intention of the regulations to confine the jurisdiction of the hearing of such applications to the county court, this Court should not assume jurisdiction in opposition to what at least is the spirit of the regulations.

Dealing with the second point, section 21 (4) of order No. 108 gives the power to make an application to the Court, and section 20 (1) of order No. 108 sets up the machinery for making such application. Such machinery, however, does not give any right to the applicant to withdraw the application after the same has been made.

It was contended by counsel for the landlord that under County Court Rules, 1932, Order IV., rr. 17 and 18, a party in a county court may discontinue an action without prejudice to his right to renew such action.

These rules, however, do not apply in the present case inasmuch as the machinery or procedure of the Court selected has not been invoked, but on the contrary the regulations have set up definite machinery for the procedure to be followed in an application made under the regulations in the Court selected. There is no procedure in the regulations which permit of the discontinuance of an application when made by the landlord on the demand of the tenant.

It would appear that if this Court has concurrent jurisdiction with the county court to hear an application of this kind that upon the tenant giving notice to the landlord requiring the application to be made, then the landlord must elect as to which Court he shall choose in making the application. Having once made this election and proceeded in the Court of his choice he has no right to change his election and select another Court.

It seems clear that in the present application what occurred was that the tenant demanded the application should be made to the Court in pursuance of his rights contained in section 21 (4) of the regulations, and the landlord in compliance with this demand selected the county court and proceeded under section 20 (1) to have the application come before such Court, and the application was duly launched in such Court and actually came before the Court and was dealt with by being adjourned. The landlord, believing he would be unsuccessful in his application before that Court, discontinued his application with a view to canvassing another Court. This, of course, cannot be done. He elected to proceed before the county court and his election must stand: *Shipway* v. *Logan* (1916), 22 B.C. 410, at p. 412; *Lissenden* v. *C. A. V. Bosch, Ld.*, [1940] A.C. 412, at p. 417; *United Australia, Ld.* v. *Barclays Bank, Ld.*, [1941] A.C. 1, at p. 32.

In view of the findings on the first two points it is unnecessary to deal with the last two points raised by counsel.

The application is accordingly dismissed with costs.

Application dismissed.

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J. H. MUNRO LIMITED v. THE T. EATON CO. WESTERN LIMITED AND THE T. EATON CO. LIMITED.

Trade-mark—"Gold Medal Furs"—Registration—Validity—Whether abandoned—Infringement by defendants—"Gold Medal Seal"—Unfair Competition Act, 1932—Trade Mark and Design Act—Damages—R.S.C. 1927, Cap. 201, Sec. 18; Can. Stats. 1932, Cap. 38, Secs. 6 and 18.

In 1913 one J. H. Munro started in the fur business dealing only in raw furs and in 1925 commenced the manufacture of seal and other furs, continuing until 1931 when he caused to be incorporated the plaintiff company to take over the business, he being the principal shareholder and he and his wife were the sole directing heads. In 1925 he exhibited at Wembly Exhibition where he received first honours; also at Dunedin, New Zealand, where he was awarded the gold medal and grand diploma of merit. In 1927 or 1928 he adopted as a trade-mark and label the words "Canada Gold Medal Furriers," which was used continuously until 1931 when the business was taken over by the plaintiff company, and the company continued to use the trade-mark until the commencement of this action. In 1932 the plaintiff company applied for and was given the copyright of a trade-mark "Gold Medal Furs." In 1939 The T. Eaton Co. Limited arranged with a fur manufacturing company in Winnipeg to be supplied with certain French dyed rabbit coats. These coats were labelled "Gold Medal Seal," The T. Eaton Co. Limited having exclusive right to purchase and sell all the coats manufactured from the French rabbit under the label "Gold Medal Seal." The defendant The T. Eaton Co. Western Limited is a subsidiary of the defendant The T. Eaton Co. Limited. The defendant companies were large distributors and in 1938 the sale of coats by the plaintiff company began to fall off very materially and continued to do so. In November, 1941, the plaintiff discovered that the defendants were using the offending trade-mark. Action was commenced in January, 1942, and on entering an appearance, the defendants ceased to use the offending trade-mark. The plaintiff sought an injunction for infringement and damages. The defendants contest the validity of the alleged "trade-mark," but admit that if same was a registered trade-mark upon which action could be brought, the trade-mark used by the defendants was an infringement, but they were innocent infringers and not liable in damages. The contention of the parties was dealt with under the following headings: (1) Was the trade-mark of the plaintiff validly registered? (2) If the trade-mark of the plaintiff was properly registered, did the plaintiff lose its rights to bring an action by abandonment or through non-user? (3) Infringement. (4) Does section 18 of the Unfair Competition Act, 1932, apply to a trade-mark registered under the Trade Mark and Design Act, R.S.C. 1927, Cap. 201. (5) Passing off. (6) Damages and costs.

Held, as to (1), that there is nothing in the evidence to indicate that prior to use by the plaintiff and Munro, the words "Gold Medal" were used

in connection with furs. The use of the words "Gold Medal," whether descriptive or not, is not bad in the trade-mark registered by the plaintiff and the trade-mark was properly registerable. It was not obtained by untrue declaration of the plaintiff and in any case the *onus* is on the defendant to establish that it was registered "without sufficient cause." As to (2), that the special trade-mark was used in such a manner as to comply with the requirements, as to use, of section 6 of the Unfair Competition Act, 1932, and there was no deviation such as would disentitle the plaintiff to the protection of his trade-mark. As to (3), owing to admissions of defendant, no order for an injunction should be made at present. As to (4), that it is the intent of the Unfair Competition Act, 1932 as a whole that section 18 should be applicable to a trade-mark originally registered under the Trade Mark and Design Act and as both the defendants were simply users and not the adoptors of the offending trade-mark they, therefore, are not deemed to have notice of the registered trade-mark by virtue of section 18 (2) of the Unfair Competition Act, 1932. As to (6), that the damages be assessed on the basis that the time of infringement with notice was the only period in which the infringement took place and the plaintiff's damages as against the defendant The T. Eaton Co. Limited be in the sum of $750 and as against the defendant The T. Eaton Co. Western Limited $1 and the plaintiff is entitled to costs against the defendants.

ACTION for an injunction to restrain the defendants from using the trade-mark "Gold Medal Seal" as being an infringement of the plaintiff's registered trade-mark "Gold Medal Furs" and for passing off. The facts are set out in the reasons for judgment. Tried by FARRIS, C.J.S.C. at Vancouver on the 16th of November, 1942.

Bull, K.C., and *Burnett*, for plaintiff.
Guild, and *J. R. Young*, for defendants.

Cur. adv. vult.

5th December, 1943.

FARRIS, C.J.S.C.: This was an action brought by the plaintiff against the defendants for an injunction to restrain the defendants from using the trade-mark "Gold Medal Seal" as being an infringement of the plaintiff's registered trade-mark, "Gold Medal Furs" and for passing off. The facts are briefly these: That the president of the plaintiff company, one J. H. Munro, started in about 1913 in the fur business dealing only in raw furs, and about the year 1925 in conjunction with his wife commenced the manufacture of seal and other fur goods which he

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continued to manufacture until 1931. In April, 1931, Munro caused to be incorporated the plaintiff company to take over the business theretofore carried on by Munro and his wife. It would appear that the said Munro was the principal shareholder of the plaintiff company, and in the operation thereof the said Munro and his wife were the sole directing heads. In 1925 Munro exhibited at the Wembley Exhibition in England a collection of furs and fur goods, and received first honours for his exhibits, and in the following year he exhibited at the South Sea International Exhibition at Dunedin, N.Z., and at such International Exhibition he was awarded the Gold Medal for manufactured furs as well as the Grand Diploma of Merit. Shortly following this, either in the year 1927 or 1928, he adopted as a trade-mark and label for his goods the words, "Canada Gold Medal Furriers," which label has been used continuously on the coats manufactured, being Exhibit 2. He continued to use this label until the business was taken over in 1931 by the plaintiff company, and the plaintiff continued to use such label or trade-mark on all goods manufactured by the plaintiff until the commencement of this action. In 1932 the plaintiff applied for and was given the copyright of a trade-mark, "Gold Medal Furs." But such trade-mark was not used as a label and attached to the furs, although it was referred to throughout by the plaintiff in its circular advertisement. The company, from the time of its incorporation, showed a gradual increase of the coats manufactured and sold by it until 1937 (these coats being Alaska Seal coats). It had manufactured and sold in that year some 63 coats. In the year 1938 the plaintiff's business dropped off very materially in the sale of these coats, and continued to drop off until at the commencement of this action the plaintiff was selling practically none of the coats. The coats disposed of by the plaintiff were sold at a price of approximately $280 per coat. In the year 1938 (about August) the defendant The T. Eaton Co. Limited, entered into an arrangement with Neaman & Company of Winnipeg, fur manufacturers, to be supplied with certain French dyed rabbit coats to be sold by the defendant The T. Eaton Co. Limited as a certain brand of seal coats. These coats were labelled "Gold Medal Seal," the defendant The T. Eaton Co. Limited having the exclusive right

to purchase and to sell all of the coats manufactured from the French rabbit under the label "Gold Medal Seal." The coats of this class and under this label were first sold to the public by the defendant companies, the beginning of such sales being approximately in August of 1938, and were sold to the public at the price of $98.50. The T. Eaton Co. Limited is a very large distributor of merchandise in Canada, having many places of business throughout Canada. The defendant The T. Eaton Co. Western Limited is apparently a subsidiary of the defendant The T. Eaton Co. Limited, and carried on business in Calgary and Edmonton, Alta., and there sold the coats obtained by the defendant The T. Eaton Co. Limited from Neaman Fur Co. Limited under the label "Gold Medal Seal." On or about the month of November, 1941, the plaintiff discovered that the defendants were using the offending trade-mark or label, and in December of the same year notified the defendants of the alleged infringement. The plaintiff brought action in January, 1942, and on 27th January, 1942, the defendants entered an appearance to the action and on 2nd February, 1942 (being after the commencement of the action by the plaintiff and the entering of an appearance to the action by the defendants), ceased to use the offending label or trade-mark.

The plaintiff seeks an injunction for infringement and for damages. The defendants contest the validity of the plaintiff's alleged trade-mark but admit that if the same was a registered trade-mark upon which the plaintiff could bring action, the trade-mark or label used by the defendants was an infringement of the plaintiff's trade-mark, but further contended that in such case they were innocent infringers and therefore not liable in damages.

This case lasted several days and many witnesses were called, and it was pleasing to me to be able to find that, in my opinion, all witnesses called were truthful witnesses, and that any discrepancies between one witness and another was due entirely to faulty memory and not indicative of any intention to deceive the Court.

I will deal with the contention of the parties under the following headings:

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I. Was the trade-mark of the plaintiff validly registered?

II. If the trade-mark of the plaintiff was properly registered, did the plaintiff lose its rights to bring an action by abandonment or through non-user?

III. Infringement.

IV. Does section 18 of the Unfair Competition Act, 1932, apply to a trade-mark registered under the Trade Mark and Design Act, R.S.C. 1927, Cap. 201?

V. Passing off.

VI. Damages and costs.

I. The defendants' first contention, and which is of primary importance to the success of any claim by the plaintiff, is that the trade-mark "Gold Medal Furs" was not validly registered as a trade-mark, on two grounds:

(1) The words "Gold Medal" are descriptive or misdescriptive, as the case may be, and therefore could not be registered in a trade-mark. (2) The defendants obtained the said registration by false representations.

Dealing with (1), the rule of law is,

> that words ordinarily descriptive or misdescriptive, as the case may be, through extensive usage in a particular trade may acquire secondary meaning so as to distinguish the goods of the user in that trade, and therefore the trade-mark is not bad because of use of such descriptive words.

Counsel for the defendants claim that the words "Gold Medal" in common usage were descriptive (denoting high-class quality), therefore a trade-mark containing these words could not be registered, and relied upon the cases—*Dominion Flour Mills Co.* v. *Morris* (1912), 25 O.L.R. 561, at p. 563; *In re Joseph Crosfield & Sons, Limited,* [1910] 1 Ch. 130, at pp. 141-2; *Partlo* v. *Todd* (1888), 17 S.C.R. 196, at p. 220; *Gold Medal Camp Furniture Mfg. Co.* v. *Gold Medal Furniture Mfg. Co. Ltd.,* [1928] S.C.R. 575.

It so happens that in the *Dominion Flour Mills Co.* v. *Morris* case, the very words "Gold Medal" were used, but that case is distinguishable from this, as there it was found that the words "Gold Medal" had been in common use in the flour trade prior to the registration of the trade-mark, and it was there held if the words were nondescriptive but distinguishing as indicating the user had secured a Gold Medal, then this was a false representa-

tion, as no Gold Medal had been received. In the present case the evidence shows:

1st. The words "Gold Medal" in connection with furs were not in common use in Canada at the time of the adoption of the trade-mark by the plaintiff.

2nd. That the plaintiff acquired the goodwill of the business carried on by Munro who is also the principal owner and president of the plaintiff company, and that Munro had received diplomas and at least one Gold Medal for his exhibition of furs, and as far as was disclosed by the evidence he was the only person in Canada to ever have received a Gold Medal in connection with furs, and as a result of receiving this Gold Medal in 1926 at Dunedin, New Zealand, Munro conceived the idea of distinguishing his goods by the use of the words "Gold Medal" and proceeded to use the label (Exhibit 2), which has on the left-hand corner a circle on which appear the words "New Zealand and South Seas Exhibition Dunedin 1925-6" (this being the Exhibition in which Munro had received the Gold Medal). Prominently displayed at the top of the Gold Medal are the words, "Canada's Gold Medal Furrier," while across the centre in larger type appear the words, "The Munro Fur Store," and in smaller type underneath, the words, "Vancouver, B.C."

3rd. The words "Gold Medal" have been so used in the fur business as to distinguish the goods of the plaintiff. The evidence discloses that among the fur traders of British Columbia (at least), the words "Gold Medal" associated with furs was practically synonymous with furs manufactured by the plaintiff. I quote from the evidence of one witness, Morrison:

> It was common knowledge among fur traders when they got together just like any other business, when they get together they talk shop, and it was well known among the fur trade, to the best of my knowledge, that "Gold Medal Furs" was Munro's.

Again in cross-examination:

> What is on the label, do you know? "Gold Medal" is what I remember distinctly about it.
>
> And is this not the fact that as far as the trade is concerned that they knew Mr. Munro showed himself as "Gold Medal Furrier" or the Fur Store showed itself as the "Gold Medal Furrier"; is that not all the trade knew? The "Gold Medal" and Munro furs were one.

And then to the Court:

> Mr. Morrison, if you were to go down the street and see a fur coat with

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the name "Gold Medal" on it, what would it indicate to you, if anything? It would indicate it was a Munro coat made by Munro.

Munro carried on business in his name, and using the same label from approximately 1927 until 1931, when the plaintiff company was incorporated to take over the business and goodwill of Munro, and continued using the label (Exhibit 2) and general advertising, and in May, 1932, applied for the registration of the trade-mark "Gold Medal Furs" (Exhibit 3).

In *Dominion Flour Mills Co.* v. *Morris*, and in the *Gold Medal Camp Furniture Mfg. Co.* v. *Gold Medal Furniture Mfg. Co., Ltd.*, the very words "Gold Medal" appear, but the Courts in both cases have found it unnecessary to determine whether such words are descriptive or not. Neither is it necessary to do so in this case. I find that there is nothing in the evidence to indicate that prior to use by the plaintiff and its predecessor in business Munro, the words "Gold Medal" were used in connection with furs and that in British Columbia at least, the extensive usage by the plaintiff and predecessor in business Munro, of the words "Gold Medal" was such that if the words are descriptive they acquired a secondary meaning so as to distinguish the goods of the plaintiff, and I find, therefore, that the use of the words "Gold Medal" whether descriptive or not, is not bad in the trade-mark registered by the plaintiff, and that the trade-mark was therefore properly registrable.

I come to (2), the second objection to the registration.

The defendants claim the plaintiff made an untrue declaration in applying for registration in that the company declared:

(a) That the company verily believed that the specific trade-mark, registration of which in the name of the company was requested, was the company's on account of having been the first to use the same; (b) that the specific trade-mark, registration of which in the name of the company was requested by it, was adopted by it.

Dealing with (a):

The plaintiff's declaration is set out in the application to the Commissioner of Patents and is attached to Exhibit 2. In the request for the patent these words appear:

> Which the company believes is the company's on account of having been the first to make use of the same.

In that part of the application which is the declaration as required by section 13 of the Trade Mark and Design Act, it says in whole:

> The said company declares that the said specific trade-mark was not in use to its knowledge by any person other than the company at the time of the adoption thereof. The said specific trade-mark consists of a name or words, "Gold Medal Furs."

The declaration as above quoted, follows the identical language of section 13 of the Act. I attach no importance to the words in the request "that the company was first to use the specific trade-mark," for three reasons:

1st. Such statement was not required by the Act and was superfluous in that all that was required by that Act was to show whether it was in use at the time of adoption by the applicant.

2nd. The misrepresentation, if any, was not material in that the company was not misleading or deceiving anyone, as it considered itself the perpetuator of Munro the individual, and if all of the facts had been stated it would not have affected the decision of the Commissioner to grant registration.

3rd. That the specific trade-mark "Gold Medal Furs" had not been used until adopted by the plaintiff.

Dealing with (b):

It is clear from the evidence that the plaintiff did adopt the words "Gold Medal" in its trade-mark when it took over the business of Munro.

I therefore find: (1) That the trade-mark of the plaintiff as registered by the plaintiff was registrable; (2) that the same was not obtained by the untrue declaration of the plaintiff. In any case (3) the *onus* is upon the defendant to establish that for the reasons relied upon, the trade-mark was registered "without sufficient cause." (*The Bayer Co.* v. *American Druggists' Syndicate,* [1924] S.C.R. 558, at p. 570). The defendants, in my opinion, have not acquitted themselves of the *onus.*

II. The defendants contend, secondly, that if the trade-mark "Gold Medal Furs" was properly registered, it was not a valid and subsisting registered trade-mark which would entitle the plaintiff to institute an action at the time of the alleged infringement by the defendants, in that (A) the trade-mark had been abandoned by the plaintiff. (B) If the trade-mark had not been abandoned, the plaintiff had lost his right to bring an action for

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an infringement by failure to use the same. (C) If the plaintiff had purported to use the trade-mark, it was by use of a label, Exhibit 2, which was such a deviation from the specific trade-mark as to constitute a non-user of the specific trade-mark.

While the exact words referred to in (A), (B) and (C) were not pleaded, yet I think paragraph 11 of the defendants' amended statement of defence is wide enough to permit these contentions being made in argument.

Dealing with (A): The *onus* is upon the defendant to prove the allegation of "abandonment." To my mind, from the evidence this has not only not been proved, but the contrary intention has been shown, and there has been no abandonment. (*Mouson & Co.* v. *Boehm* (1884), 26 Ch. D. 398).

Dealing with (B) and (C), which I think must be considered together, has given me some difficulty in arriving at a decision.

There can be a deviation from a specific trade-mark, as is clearly indicated by the authorities. The principle on which deviation is permitted is set out by Maclean, J. in *Honey Dew, Ltd.* v. *Rudd et al.*, [1929] Ex. C.R. 83, at p. 89. He says:

> The practice of departing from the precise form of a trade-mark as registered is objectionable, and is very dangerous to the registrant. The mark as used here is not however substantially different from the mark as registered. Nobody has been deceived, no injury could occur to anybody by the deviation from the form of the registered mark, and I do not think the plaintiff should lose his right to protection because of this . . . Deviation from the form of a mark as appearing on the register has been considered by the courts. It was held in *Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.* (1887), 4 R.P.C. 215, that the mere addition of something, as in that case a coat of armour to a trade-mark, is not sufficient to disentitle a person who otherwise uses the whole of his trade-mark to sue for an injunction.

The question of whether or not the use of a label deviating from the specific label is such a deviation as would constitute a non-user of a specific trade-mark appears to be one of fact as relating to each particular case, the principle on which such facts shall be applied being as laid down by Maclean, J. in the *Honey Dew* case, *viz.*, that the deviation shall not be such as to cause an injury or deception to anyone. In *In re Verity's Trade Mark case* (1901), 18 T.L.R. 214, cited by the plaintiff, it was held that the trade-mark must, in order to constitute user, be in some manner stamped or affixed to the goods themselves. This case,

however, is distinguishable from the present case in that section 6 of the Unfair Competition Act, 1932, specifically provides that in addition to being affixed or marked on goods it is sufficient to establish user if the trade-mark is used in association with goods in such a manner that in the ordinary course of trade the acquirer of the goods has notice of the association.

The plaintiff in its label (Exhibit 2) already referred to and described by me, did not use the specific words "Gold Medal Furs" but used instead, "Canada's Gold Medal Furriers." This label (Extibit 2) was the only label ever used by the plaintiff and was attached to all goods manufactured and sold by the plaintiff. Two questions now arise:

(1) Was the label with the words "Canada's Gold Medal Furriers" on it such a deviation from the specific trade-mark as would be sufficient to constitute a non-usr of the specific trade-mark?

(2) If it was such a deviation, was the use of such label together with the general advertising of the plaintiff sufficient to constitute a user of the specific trade-mark in association with goods such as to satisfy the requirements of section 6 of the Unfair Competition Act, 1932?

To determine these questions it is necessary to examine the evidence. The evidence discloses that in the fur trade in British Columbia at least, that the dominating words by which the goods of the plaintiff were known were "Gold Medal." Exhibit 21 at least night be termed the connecting link between the label used and the specific trade-mark. Exhibit 21 was a general circular issued and distributed by the plaintiff every year since the plaintiff was first incorporated, about 5,000 copies per year being circulated. This circular on its front page has the words, "J. H. Munro Limited, Canada's Gold Medal Furrier's, 505 Granville St., Vancouver, B.C." The first paragraph of the second page says:

> It occurs to us while the name of our firm (J. H. Munro Ltd.) and that of the principal product (Gold Medal Furs) is well known there may be many people including yourself who know little if anything about our background.

This circular then goes on to give the history of Munro and the company, but does not differentiate between the business as

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operated by Munro personally or as operated by him through the plaintiff company. It goes on to show how the use of the words "Gold Medal" in connection with furs first originated, and says—

> this was the origin of the name which is now known wherever furs are worn, *i.e.*, "Gold Medal" furs. The name was granted to Mr. Munro exclusively by letters obtained from the Department of Trade and Commerce at Ottawa and the words "Gold Medal" may not be used by any other furrier in Canada in connection with their business; to show that we and we alone are entitled to use this title.

Throughout the circular which is clearly printed, the words "Gold Medal" stand out, as, for instance, on the third page it says: "While we employ many people in making Gold Medal furs," etc. The circular on page 4, the last page, is signed by the plaintiff, and the last line which is below the signature and stands out distinctively consists of the words "'Gold Medal' furs are Better Furs."

It would seem to me from the evidence including the exhibits filed that throughout the business course of the plaintiff the words "Gold Medal" were the dominating words used in distinguishing the furs manufactured by the plaintiff, and no person would be deceived by the use of the words "Canada's Gold Medal Furrier's" (Exhibit 2). The attaching of the label (Exhibit 2) to the product manufactured by the plaintiff together with the general advertising done by the plaintiff would clearly indicate to the purchasers that this was the product manufactured by the plaintiff as "Gold Medal Furs" or, in other words, that the specific trade-mark was associated with the wares at the time of the transfer of the property therein or of the possession thereof in the ordinary course of trade and commerce, so as to give notice of the association to the persons to whom the property or possession was transferred.

I, therefore, find that the specific trade-mark was used in such a manner as to comply with the requirements, as to use, of section 6 of the Unfair Competition Act, 1932.

In any case, the use of the words "Canada's Gold Medal Furrier's" on the label attached to the product of the plaintiff instead of the words in the specific trade-mark, *viz.*, "Gold Medal Furs" would in all of the circumstances of this case not deceive or injure any person, and, therefore, under the principle laid down by

Maclean, J. in the *Honey Dew* case, *supra,* would not be such a deviation as would disentitle the plaintiff to the protection of his registered specific trade-mark.

III. Counsel for the defendants admitted that if the plaintiff was the holder of a properly registered trade-mark "Gold Medal Furs" and at the time of the alleged infringement, such registered trade-mark was a valid and subsisting registered trade-mark so as to entitle the plaintiff to bring an action for infringement, the defendants had used the trade-mark "Gold Medal Seal" in connection with the sale of manufactured furs, and this was an infringement of the plaintiff's registered trade-mark such as to entitle the plaintiff to an injunction. Having found that the plaintiff was the registered holder of the trade-mark "Gold Medal Furs" and that it was a valid and subsisting registered trade-mark at the time of the infringement by the defendants, on the admission of counsel for the defendant as above set out, it is unnecessary for me to deal further with this aspect of the case. At the request of counsel for the defendants and by consent of counsel for the plaintiff, I shall not make an order for an injunction at this time so as to give counsel an opportunity of agreeing, if possible, upon a suitable undertaking by the defendants not to use the offending trade-mark further, in lieu of an injunction.

IV. It is contended by counsel for the plaintiff, the effect of section 18 (2) of the Unfair Competition Act, 1932, Cap. 38, Can. Stats. 1932, is that when the trade-mark has been registered and so long as it remains registered this is notice of such trade-mark being in existence, and that in an action for infringement a defendant cannot plead ignorance or innocence. The defendants contend that inasmuch as the trade-mark of the plaintiff was registered under the Trade Mark and Design Act, Cap. 201, R.S.C. 1927, Sec. 18 does not apply, but 18 only applies to trade-marks registered after the coming into force of the Unfair Competition Act, 1932, and rely upon the *dicta* of the Honourable Chief Justice of Canada in the case of *Magazine Repeating Razor Co. of Canada Ltd. et al.* v. *Schick Shaver Ltd.,* [1940] S.C.R. 465, at p. 475. If it were not for these words in the *dicta* of the learned Chief Justice (p. 476):

> On the other hand, it must be admitted that the phrase "registered pursuant to the provisions of this Act" is very loosely used in more than one

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place in the statute, and in some cases (it could be argued with a good deal of force) with the plain intention of denoting registrations under the earlier Act, as well as those effected under the Unfair Competition Act.

I would have had much misgivings in finding the trade-mark in this action is registered pursuant to the Unfair Competition Act, 1932. The learned Chief Justice first says (p. 476):

> I do not think that the words of section 23 (1), which provides that the register now existing under the Trade Marks Act shall form part of the register maintained pursuant to the Unfair Competition Act and that all entries in that register "shall be governed by the provisions of the Unfair Competition Act," would alone be sufficient to bring registrations under the Trade Marks Act within the description "registrations made pursuant to the Unfair Competition Act."

With this opinion which appears to be the only definite opinion of the learned Chief Justice in his *dicta,* I am in complete accord. It is necessary, therefore, to consider the whole Act to determine the intention. Section 3 of the Act reads:

> No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which
>
> (*c*) is similar to any trade mark or distinguishing guise in use, or in use and known as aforesaid.

The effect of section 3 is to protect a person having a trade-mark even although not registered, but in such case the prohibition is against a person who knowingly adopts the trade-mark of another. Section 4 (1) gives an exclusive right to the holder of a registered trade-mark and says in part:

> Provided that such trade mark is recorded in the register existing under the Trade Mark and Design Act at the date of the coming into force of this Act, or provided that in compliance with the provisions of this Act he makes application for the registration of such trade mark within six months of the date on which this Act comes into force, . . .

It would seem to me, therefore, that the clear intention of section 4 (1) is to give the same effect in regard to exclusive use of a trade-mark whether registered under the Trade Mark and Design Act or under the Unfair Competition Act, 1932, as the words "or provided" would indicate that a trade-mark whether registered under the Trade Mark and Design Act or within six months after coming into effect of the Unfair Competition Act, 1932, would have equal standing, and therefore for the purpose of the Unfair Competition Act, 1932, a trade-mark registered under the Trade Mark and Design Act is a trade-mark registered pursuant to the provisions of the Unfair Competition Act, 1932. In other words, to take advantage of the Unfair Competition Act,

1932, the holder of a trade-mark could come under such Act in two ways: (a) If registered pursuant to the provisions of the Act; (b) if unregistered by being within six months of the Act coming into force registered under the Act itself.

A trade-mark registered under the Trade Mark and Design Act would not be a registration under the Unfair Competition Act but would be a registration made pursuant to the provisions of the Unfair Competition Act, 1932. A registration of an unregistered trade-mark made within six months after the coming into effect of the Unfair Competition Act, 1932, would be a registration under that Act itself. Section 22 (1) provides for the keeping of a register; 22 (2) provides what shall be specified in the register; section 23 (1) declares that the register existing under the Trade Mark and Design Act shall form part of the register provided for in section 22, or in other words, merges the register set up under the Trade Mark and Design Act with the register set up under the Unfair Competition Act, 1932.

The effect of section 18 (2) is to give the holder of a registered trade-mark a greater right than is given to the holder of an unregistered trade-mark provided in section 3 (*c*), in that under section 3 (*c*) the *onus* is put upon the holder of an unregistered trade-mark to show that the person who infringed upon the same did so knowingly, while by section 18 (2), if the trade-mark is registered, this *onus* of proof is removed and the infringer of a registered trade-mark cannot be heard to say that he adopted his particular trade-mark in ignorance of the registered trade-mark. It would seem to me without section 18 (2) there is no particular advantage in being registered under section 4 (1), and if section 4 (1) does not mean that a trade-mark registered under the Trade Mark and Design Act is by force of section 4 (1) and subsequent provisions a registration pursuant to the Unfair Competition Act, 1932, it is meaningless in so far as it applies to the holder of a trade-mark under the Trade Mark and Design Act, and the rights of a holder of such trade-mark is therefore distinguishable from that of the holder of an unregistered trade-mark who registered his trade-mark under the Unfair Competition Act, 1932, within six months of that Act coming into force, although the holders of both classes of trade-mark appear in the

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same common register and all entries in the register in respect to either shall be governed in the same manner, namely, under the provisions of the Unfair Competition Act, 1932. Section 23 (1) of the Unfair Competition Act, 1932, says in reference to a registration made under a prior Act:

> . . . but shall not, . . . be expunged or amended only because they might not properly have been made hereunder.

It is interesting to note that the words referring to a registration made after the coming into force of the Unfair Competition Act, 1932, are "made hereunder" and not the words "made pursuant to the provisions of this Act." While the reference made in section 18 (1) is to a registration "made pursuant to the provisions of this Act," it would seem to me that a registration "made hereunder" would refer to a new registration made after the coming into force of the Act and under the Act itself, while a registration made after the coming into force of the Act and under the Act itself, while a registration made under the Trade Mark and Design Act would by sections 4 (1), 22 (1), (2) and 23 (1) be a registration "made pursuant to the provisions of this Act" as referred to in section 18 (1) of the Unfair Competition Act, 1932. It is my opinion, therefore, that it is the intent of the Unfair Competition Act, 1932, as a whole, that section 18 should be applicable to a trade-mark originally registered under the Trade Mark and Design Act.

V. The plaintiff contended that the defendants had notice of the trade-mark of the plaintiff and that in the assessment of damages they could not be considered innocent parties in the infringement. The plaintiff contends that notice was given in two ways: (a) By actual notice; (b) registration of a trade-mark is notice by virtue of section 18 (2) of the Unfair Competition Act, 1932.

Dealing with contention (a), I find there was no evidence from which I could reasonably draw a presumption that the defendant had actual notice of the plaintiff's trade-mark prior to December, 1941.

Dealing with (b), it would appear that the coats upon which the offending trade-mark appeared were manufactured by Neaman & Company of Winnipeg, the largest manufacturer of this class of goods in Canada. The coats with these labels were made

of French dyed rabbit and sold exclusively to the defendant The T. Eaton Co. Limited. The T. Eaton Co. Limited advertised the coats as "Gold Medal Seal" dyed rabbit, and sold them with the offending label attached thereto. The coats were sold as the property of The T. Eaton Co. Limited, and the label did not disclose the manufacturer. It was contended by counsel for the defendants that section 18 (2) did not constitute notice in that the defendants while being the users of the offending label were not the adopters thereof, and that section 18 (2) did not refer to a user but only the adopter. Counsel for the plaintiff with much force contended that inasmuch as the defendant The T. Eaton Co. Limited had the exclusive sale of the coats with the offending label thereon, and were the first to advertise them to the public, and sold such goods as their own property, that they were in fact the adopters thereof, and relied upon the admission made by the defendant The T. Eaton Co. Limited in interrogatory No. 35.

35. Why were the words "Gold Medal" so used? The name was suggested to The T. Eaton Co. Limited by Mr. A. Neaman of Neaman Fur Co. Limited, which company manufactured and sold the coats in question to The T. Eaton Co. Limited, and attached to each of the said coats at the time of delivery to The T. Eaton Co. Limited was the label aforesaid.

From the answer to this interrogatory if taken alone and with the surrounding facts as mentioned, it would appear that Neaman & Company was only the suggester of the label, but the defendant The T. Eaton Co. Limited was the adopter thereof. However, Mr. Neaman, president of the Neaman Fur Co. Ltd., was called and testified:

And what was done in regard to names? Well, after that—at the beginning of '38—or I think it was towards the end of '37, we anticipated to buy very large quantities of French rabbits and everybody seemed to have started to name it all sorts of names away ahead of us, so we have adopted a few names.

What were the names that you adopted? Well, the majority of the names that are adopted signify a certain country of a certain source of origin; and since furs are from all quarters of the globe we felt it might be deceiving in naming it such, and so after *pros* and *cons* between ourselves, we have adopted a Crown seal—originally an Eskimo seal, and then a Crown seal which denotes gold, and a gold medal seal.

THE COURT: What is the first seal you adopted? They were all sold at the same time.

But what was the names of those seals? Eskimo, Crown, and Gold Medal seals.

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Guild: That is quite all right. Perhaps I can put it this way: I show you Exhibit 47 [Exhibit 47 being the offending label]. What is that label, Mr. Neaman? That is our label.

That is your label? Yes.

That happens to be the "Gold Medal"? Yes.

And in using these labels you sold coats, did you? Yes.

With the labels on? With the labels on.

Now as to the defendants in this action, what was sold to the defendants? The "Gold Medal" seal label.

Not the other two? No, we gave the others to our other customers.

In what year, do you know? I would say '38.

1938. And you say you purchased the labels yourself? Yes, sir.

Now, where did you sell your output of the coats labelled with the "Gold Medal" seal? Most of our business is done right in the city of Winnipeg.

Yes, it is mostly done there, but with whom? T. Eaton Company.

Do you mean exclusively? That is not all of our business, no.

No, no. I am talking of coats labelled "Gold Medal" seal. Exclusively to The T. Eaton Company. No one else got them.

Now at the time you adopted these three labels that you have spoken about, did you know of any user in Canada of any of those names? I definitely did not.

Again in cross-examination:

And had never heard of a gold medal being awarded to a furrier. That is right.

And that is your only explanation, is it? Of adopting it.

Why did you put the gold medals on it? Well, this was submitted to me as a proof, and I simply adopted it. It was not intended to deceive anyone.

Who submitted it to you? The Colonial Weaving Company generally come with a proof or suggestions, and I am not blaming anyone, but I am saying that it was in collaboration with his suggestion and mine that we adopted it.

Regardless of the fact that you had never won a gold medal? That is right.

And you put that gold medal label on the best quality of your dyed coats? Well, I figured that those coats deserved a medal.

And you sold those exclusively to Eatons? Yes.

And you never sold them to anyone else? No.

"Adopted" and "used" are quite clearly differentiated in the Act. Section 7 prohibits adopting for use; section 8 prohibits an adopter continuing to use. Section 18 (2) says in part: "That no person could thereafter adopt the same." These words would appear to be in singular sense only, and not to contemplate more than one adopter. It is clear from the evidence of Neaman that the Neaman Fur Company Limited did adopt, and was the first person to adopt the offending label. Counsel for the plaintiff, however, contended that there might be one or more adopters of

the same label, and even if Neaman was the first offender the defendant The T. Eaton Co. Limited was the second offender, as it had also adopted the same label. It would seem to me that section 18 (2) contemplated by the words, "that no person could thereafter adopt the same," "such person" referred to should, if the offending label was registrable, be the person entitled to have registered the same. It is quite clear in this case that if the trade-mark "Gold Medal Seal" could have been registered, that in a contest as between Neaman Fur Company and The T. Eaton Co. Limited as to who would be entitled to have the same registered, that Neaman & Company would have been that party. It would seem that there is an excellent reason why there should be a distinction between an adopter and the user. If a person is adopting a new name and is going to advertise it and put in on the market, it is a very simple thing for him to apply to the Registrar of Patents and find out whether such trade name is available or not. On the other hand chaos in business life would result if every seller of a goods labelled by a manufacturer was compelled before selling to ascertain whether the trade-mark of the manufacturer was an infringement of a registered trade-mark. The mere fact that The T. Eaton Co. Limited was a large purchaser, in fact so large that it could exclusively purchase all of the goods sold under the trade-mark of the manufacturer, does not change the principle, and it is my opinion that both the defendants were simply users and not the adopters of the offending trade-mark, and therefore they are not deemed to have notice of the registered trade-mark by virtue of section 18 (2) of the Unfair Competition Act, 1932.

VI. In view of the fact that I have found there was an infringement of the plaintiff's trade-mark and that the defendants had received no notice of the plaintiff's trade-mark until at least December, 1941, no good purpose can be served by my dealing with the passing-off part of the plaintiff's claim.

VII. According to the plaintiff's evidence, he wrote the defendants in December, 1941, advising of the offending label. The notice was not produced, but no objection was taken to the plaintiff's evidence of having given such notice, nor was it denied that such notice was received. In view of this I am of the opinion

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that I can properly presume the defendants did have notiec of the infringement in December, 1941, but as no time is fixed in December, I therefore must presume the date as of the end of December, 1941. From the admissions made by the defendant, they ceased to use the trade-mark on the 2nd of February, 1942. They entered an appearance to the action on the 27th of January, 1942. It would therefore appear that for one month at least after notice the defendants did use the offending label. In the case of *Slazenger & Sons* v. *Spalding & Brothers,* [1910] 1 Ch. 257, and in *Edlesten* v. *Edlesten* (1863), 1 De G. J. & S. 185; 47 E.R. 72, the principle was laid down that no damages should be allowed until after notice of the infringement had been received by the defendants. In the *Slazenger* case the bringing of the action was criticized, because as soon as the defendants were notified of the infringement they ceased to use the same, and undertook to not use further, and the judge refused to allow the plaintiff costs after the defendants had offered to give such undertaking. In the *Edlesten* v. *Edlesten* case, however, the defendants contested and denied the plaintiff's right for a decree at all, and the learned judge in that case (the plaintiff having shown its right for a decree for the infringement) held that the plaintiff was entitled to costs. In this case both defendants have strenuously contested on all grounds the plaintiff's right to any decree. It has also been shown that the defendants did for a month at least after notice use the offending label, and then only ceased using the same after the commencement of this action. As counsel for the plaintiff only sought substantial damages as against the defendant The T. Eaton Company, I therefore only have to consider substantial damages as against the defendant The T. Eaton Co. Limited, and then only for a period of approximately one month, that being the period after the defendants had received notice of the infringement and before the defendant ceased using the offending label.

The plaintiff sought to establish damages by showing decrease in the business of the plaintiff after the defendants commenced to use the offending label, and asked the Court to presume that such loss in business was caused through the use by the defendants of the offending label.

I cannot find any real assistance in this case in assessing damages by the evidence given in respect to the drop in sales of the plaintiff, and accept the reasoning of Sir Wilfred Green, M.R. in *Draper* v. *Trist,* [1939] 3 All E.R. 513, at pp. 523-4 as applicable to this case.

Neither would it seem to me that I should calculate the total number of months from the beginning of the infringement until the cessation thereof, and the total damages for that period, and divide this by one month (being approximately the time in which the infringement continued after notice) as against the number of months in which the whole damage was done.

It would seem to me that I must assess the damages on the basis that the time of the infringement with notice was the only period in which the infringement took place.

The evidence for the plaintiff was that as a result of the infringement it was useless to carry on the manufacture under the trade-mark, and accordingly for the year 1942 the manufacturing and advertising of these trade-mark goods were discontinued. Whether the plaintiff was justified in so doing I cannot say, but there is no question in my mind that the advertising and the sale of goods under the offending trade-mark by such a large concern as The T. Eaton Co. Limited would have a serious detrimental effect on the business of the plaintiff. I would therefore award the plaintiff damages as against the defendant the T. Eaton Co. Limited in the sum of $750 and as against the defendant The T. Eaton Western Limited, $1. The plaintiff is entitled to costs against the defendants.

Judgment for plaintiff.

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[1943] 3 W W R 27

FEWSTER v. MILHOLM, VALLIERES AND McANDLESS.

Automobile—Collision at intersection — Taxicab — Plaintiff a passenger—Overworked driver of taxi sleepy—Other driver not keeping proper look-out—Both to blame—Apportionment.

Shortly after the noon hour on November 17th, 1941, the defendant taxi-driver, with the plaintiff as a passenger in the back seat, was driving west on Matthews Avenue in Vancouver. The plaintiff noticed they were travelling slowly and on asking the driver as to this, the driver said he was working overtime and he was sleepy. At this time the defendant Mrs. McAndless was driving her car south on Cypress Street. The cars collided in the north-west quadrant of the intersection, Mrs. McAndless's car striking the rear left side of the taxicab. The plaintiff only was injured. When the taxicab neared the intersection, the plaintiff saw Mrs. McAndless's car approaching the intersection at his right and tried to draw the driver's attention to it by tapping him on the shoulder, but there was no response. It was found that the taxi was travelling at from 15 to 20 miles an hour and the automobile at from 25 to 30 miles an hour.

Held, that the sleepy condition of the taxi-driver caused a lack of alertness required by one in charge of a motor-car that amounted to negligence and Mrs. McAndless, although having the right of way, failed to keep a proper look-out which was a contributing factor. The liability was apportioned 65 per cent. on the part of the taxicab and 35 per cent. on the part of the automobile.

ACTION for damages resulting from a collision between a taxicab in which the plaintiff was a passenger and an automobile driven by the defendant Anna McAndless. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 7th and 8th of January, 1943.

G. E. Housser, for plaintiff.
McAlpine, K.C., for defendants Milholm and Vallieres.
J. G. A. Hutcheson, for defendant Mrs. McAndless.

Cur. adv. vult.

30th January, 1943.

SIDNEY SMITH, J.: The plaintiff brings this action to recover damages for injuries sustained by him in a collision between a taxicab in which he was riding as sole passenger, and of which

the defendant Milholm was owner and the defendant Vallieres was driver, and an automobile owned and driven by the defendant Mrs. McAndless. For convenience I shall personify the vehicles and refer to them as the taxicab and the automobile respectively. The collision happened shortly after noon on 17th November, 1941, at the intersection of Cypress Street and Matthews Avenue in the city of Vancouver, British Columbia. It is admitted that the defendant Vallieres was the servant of the defendant Milholm and was driving in the course of his employment. The defendants bring third-party proceedings amongst themselves.

The plaintiff is a medical doctor, and at the date of the collision was 73 years of age. He had hired the taxicab to take him home *via* St. Vincent's Hospital. While proceeding to this hospital he noticed that the taxicab was being driven rather slowly and commented upon this to the driver. The driver replied that he was working overtime and that he was sleepy.

In the course of the journey to the plaintiff's home the taxicab was proceeding in a westerly direction along Matthews Avenue and nearing the intersection of Cypress Street. About the same time the automobile in question was proceeding south along Cypress Street. I find that they collided in the north-west quadrant of the intersection. This is admittedly a bad corner. The vision is partially obstructed in the case of any car approaching from the north, east or west. It therefore calls for greater caution, but this should be apparent to careful drivers. The automobile struck the right-hand side of the taxicab at the rear end. Neither driver was injured.

Of the three persons thus caught in the web of these circumstances the plaintiff was the only one to keep his wits and his eyes about him. I therefore accept substantially what he says. His evidence is that after entering the intersection he saw the automobile about 50 to 100 feet away coming south on Cypress Street, and attempted to draw the driver's attention to it by tapping him on the shoulder. There was no response. I find that at that time the speed of the taxicab was from 15 to 20, and the speed of the automobile from 25 to 30 miles per hour. There was no appreciable change in the course or speed of either the

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taxicab or the automobile prior to the collision. The automobile had the right of way.

My attention was directed in argument to the damage sustained by the respective vehicles as confirming the evidence of the defendant Mrs. McAndless that her car was practically stopped at the time of the collision. No doubt there are collision cases where the nature and extent of the damage done to two moving bodies give a valuable indication of the speed and direction of one or both of them at the moment of impact. But such inferences should be made guardedly. In the present case I think that little help is to be derived from this source.

With respect to the taxicab, I find that the driver was sleepy, that such sleepiness caused a lack of that alertness required by law to be exercised by those in charge of motor-vehicles, and that this amounts to negligence (*Lajimodiere* v. *Pritchard and Duff*, [1938] 1 W.W.R. 305). This resulted in failure to keep a good look-out, which contributed to the collision. I find that the defendant Mrs. McAndless also failed to keep a good look-out and that this also was a contributing factor. She admitted that she did not see the taxicab until after the accident.

In view of these circumstances I find that both vehicles were to blame, but in unequal degree. It seems to me that the taxicab was the more blameworthy of the two, in that the automobile had the right of way. Had the driver of the taxicab been alert he would have realized upon reaching the intersection, or immediately thereafter, that the defendant Mrs. McAndless was approaching at about twice his own speed, that she was not keeping a proper look-out and that collision was imminent. He should then have conceded her the right of way to which she was entitled. His passenger appreciated the position. He should have done likewise. I therefore apportion liability to the extent of 65 per cent. on the part of the taxicab and 35 per cent. on the part of the automobile. (*Lloyd* v. *Hanafin* (1931), 43 B.C. 401; *Cornish* v. *Reid and Clunes* (1939), 54 B.C. 137).

With respect to damages. The plaintiff was sitting on the rear seat of the taxicab and the impact knocked him against the window on the right-hand side. There was some conflict of medical evidence as to his injuries. But looking at the evidence

broadly, and I hope in a commonsense way, I think there can be no doubt that the plaintiff (after allowing for his advancing age) is not the man he was before the accident, and that this is at least partially due to the accident. I think there is some, although perhaps not much, permanent disability to his right arm and shoulder attributable to the accident. Taking this into consideration together with the other injuries he suffered, which were fortunately not serious, and having in mind his background, his age, his earnings, his present opportunities on account of the scarcity of doctors, that he was wholly unable to carry on his practice for three months and is still to some extent incapacitated from carrying on a full practice, the pain he suffered and the other matters brought out in evidence, I think a proper allowance for general damages would be $5,000. He makes no claim for special damages.

The special damages of the defendants Milholm and Mrs. Anna McAndless will go as proved. They make no claim for general damages.

I think these are all the findings necessary to enter the appropriate judgment. Should anything have been overlooked, the matter may be spoken to again.

The plaintiff will have judgment for his damages and costs against the defendants. Amongst the defendants costs will run with the liability.

Judgment for plaintiff.

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MAH MING YU v. TERMINAL CARTAGE LIMITED.

Negligence—Damages—Death after being run down by employee of defendant —Motor-cycle—Action by administrator of estate of deceased—Costs.

Aplld
Pesonen v. Barre
62 WWR 299
(B.C. C.A)

Aplld
reton v Heizer
[1973] 3 WWR 77
(BCSC)

Refd to
hild v. Stevenson
[1973] 4 WWR 322
(BCCA)
also
37 DLR (3d) 429

On the 18th of October, 1941, at 8.30 in the morning Mah Lim Jung, a Chinaman, started northerly across Pender Street in Vancouver on the pedestrian lane on the west side of Columbia Street. At this time an employee of the defendant was driving a motor-cycle westerly on Pender Street. On nearing the intersection of the two streets he saw the Chinaman crossing Pender Street and when within the intersection (the Chinaman then being about half way across Pender Street), he swerved to his left with a view to passing behind the Chinaman. Just as he turned the Chinaman saw him, hesitated and then ran back towards the north side of Pender. As he did so, he got in the path of the motor-cycle and was knocked down. He was taken to the hospital and treated for hemorrhage on the right side of the brain. On the 15th of November following he was taken to his home where the died four days later. An autopsy disclosed that he had a fresh hemorrhage on the left side of the brain, also lung and heart trouble of long standing. In an action by the administrator for damages for both the injuries and the death under the Administration Act, it was held that the accident was caused solely by the negligence of the driver of the motor-cycle, but the plaintiff failed to discharge the burden of proof devolving on him of showing that the death was caused by or resulted from the injuries occasioned by the accident and judgment was given for the hospital and doctor's bills only with the costs of the action. On appeal by the defendant on the question of costs and cross-appeal by the plaintiff for general damages:—

Held, affirming the decision of COADY, J., that on the cross-appeal the plaintiff had no finding to support the claim for shortening of life and there was not even any satisfactory evidence as a basis for such a finding, and on the appeal for costs, there was only one cause of action, namely, the negligent running down of the deceased; all the other claims were merely separate items of special damage resulting therefrom.

Per SLOAN, J.A., FISHER, J.A. concurring: At common law no one can maintain an action for the recovery of damages for negligently causing the death of a human being and to remedy in part this situation the Families' Compensation Act and the 1934 amendment to the Administration Act were enacted. The relevant effect of the 1934 amendment to the Administration Act was to extend beyond his death any cause of action for damages a deceased person had vested in him when living. After his death this continuing cause of action was vested in his executors or administrators and any damages recovered formed part of the personal estate of the deceased. It must be clearly understood that the 1934 Act did not create any new right of action. Its purpose was to preserve from abatement whatever rights were vested in the deceased at the time of his death. The executor continues the action and in rela-

tion thereto stands in the shoes of the deceased with the exception that from the damages recoverable by him are excluded, for obvious reasons, compensation for physical disfigurement or pain or suffering caused to the deceased, and loss of expectancy of future earnings, because the element of damage described as loss of life expectancy vests in the deceased prior to his death and the right of action to recover damages for that loss vests by the 1934 Act at his death in the personal representative of the deaceased.

APPEAL by defendant from the decision of COADY, J. of the 16th of July, 1942, in an action by the plaintiff as administrator of the estate of Mah Lim Jung, deceased, for damages for injuries to and death of Mah Lim Jung caused by being struck by a motor-cycle driven by a servant of the defendant on the 18th of October, 1941. The accident occurred at the intersection of Pender and Columbia Streets in Vancouver. The deceased was crossing Pender Street in a northerly direction on the pedestrian lane on the west side of Columbia Street. The driver of the motor-cycle was proceeding westerly on Pender Street. On entering the east side of the intersection, he saw deceased crossing Pender and turned to his left in order to pass behind him. When doing this the deceased first saw him and evidently, feeling in imminent danger, darted back towards the south side of Pender Street and came right into the path of the motor-cycle. He was struck near the south-west corner of the intersection. Deceased was taken to the hospital and treated for hemorrhage of the brain on the right side. He was discharged from the hospital on the 15th of November, 1941. He was taken to his home where he died four days later. An autopsy showed he had a fresh hemorrhage on the left side of the brain, also lung and heart trouble of long standing. It was held that the driver of the motor-cycle was solely responsible for the accident and judgment was given for hospital and doctor's accounts amounting to $202.05, but the plaintiff had not discharged the burden of proof devolving upon him of showing that the death was caused by or resulted from the injuries occasioned by the accident, and no damages were allowed in this regard. The plaintiff was given the costs of the action. The defendant appealed on the question of costs and the plaintiff cross-appealed on the ground that, having found the driver of the motor-cycle guilty of negligence and

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had injured Mah Lim Jung, he should have found that said injuries shortened his life and should have awarded general damages in respect thereof.

The appeal was argued at Vancouver on the 13th of November, 1942, before MCDONALD, C.J.B.C., SLOAN and FISHER, JJ.A.

McAlpine, K.C., for appellant: Three questions arose: First, was the defendant guilty of negligence? Second, what did the plaintiff suffer and damages therefor? Third, was the death of deceased a result of the accident through driver's negligence? There were two issues: (a) Damages for injury; (b) damages for death. As to the latter, he failed. Under Order LXV., r. 2 we are entitled to the costs of the issue on which he failed: see *Reid, Hewitt and Company* v. *Joseph*, [1918] A.C. 717, at p. 728; *Howell* v. *Dering*, [1915] 1 K.B. 54; *Jones* v. *Curling* (1884), 13 Q.B.D. 262, at pp. 270-1; *Godfrey* v. *Good Rich Refining Co.*, [1939] 2 D.L.R. 779; *Slatford* v. *Erlebach*, [1912] 3 K.B. 155, at p. 161; *Forster* v. *Farquhar*, [1893] 1 Q.B. 564; *Wagstaffe* v. *Bentley*, [1902] 1 K.B. 124; *Nelson* v. *Pacific Great Eastern Ry. Co.* (1918), 26 B.C. 1; *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), *ib.* 560. The word "event" is distributive and applies to "issues."

L. H. Jackson, for respondent: The learned trial judge found negligence and awarded damages for expenses only. The learned judge said "The second point to be considered is: Did the injuries received cause the death of deceased?" This is a misconception of the point as set out in *Rose* v. *Ford*, [1937] A.C. 826. The right of action is the action which deceased would have had if alive, which right of action survives in the administrator. The cause of action is not the death, but the injuries and the resulting shortening of the injured man's life. The plaintiff by reason of the finding of negligence and injuries is *ipso facto* entitled to general damages: see Mayne on Damages, 10th Ed., 3; *Owens* v. *Liverpool Corporation* (1938), 55 T.L.R. 246. Decision in this case rests on inferences drawn from the evidence. There are only two possible conclusions, either death as a result of injuries or death from natural causes. A finding of fact based on inference may be freely reviewed by a Court of Appeal: see *Sayward* v. *Dunsmuir and Harrison* (1905), 11 B.C. 375, at

p. 392; *Hood* v. *Eden* (1905), 36 S.C.R. 476; *Makins Produce Co.* v. *Canadian Australasian Royal Mail Line* (1926), 36 B.C. 462. On the question of costs see *World P. & P. Co.* v. *Vancouver P. & P. Co.* (1907), 13 B.C. 220.

McAlpine, replied.

Cur. adv. vult.

12th January, 1943.

MCDONALD, C.J.B.C.: In this case we have an appeal by the defendant on costs only, and a cross-appeal by the plaintiff for increase of his damages.

Consideration of the cross-appeal first will obviate some repetition of facts.

Plaintiff sued as administrator of Mah Lim Jung, deceased, in respect of physical injuries inflicted on the deceased by a motor-cycle. The deceased died only a little more than a month after being injured; the plaintiff set up that the death was caused by those injuries, and claimed damages for both the injuries and the death under the Administration Act, Sec. 71. The death took place before the amendment of 1941-42 came into effect. No claim was made under the Families' Compensation Act.

At the trial COADY, J. declined to find that the death was caused by the injuries in question and allowed no damages beyond hospital and medical expenses. The cross-appeal claims an allowance for the injuries themselves and for the deceased's loss of expectation of life, and the judge's view of the facts is also questioned.

After perusing the evidence, I feel that we cannot disturb COADY, J.'s finding that plaintiff did not prove that deceased died from the injuries in question.

On the measure of damages I shall deal first with loss of expectation of life. I think there are several answers to the claim for damages under this head. I pass over the sufficiency of the pleadings to support this claim, though that is certainly not free from doubt. The first difficulty is that the plaintiff has no finding to support the claim for shortening of life. There is not even any satisfactory evidence as a basis for such a finding. Dr. Brynildsen did, it is true, state that the cerebral hemorrhage

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caused by the motor-cycle would have shortened the deceased's life, apart from the other hemorrhage found on the *post mortem*. But he entirely failed to make the estimate required for the plaintiff's present argument, that is, an estimate of the *quantum* of time sheared from deceased's life expectation by that particular injury. Having no evidence on this vital point, I do not see how the plaintiff could ask us to make an award, even if there were not other obstacles.

I cannot feel moreover that Dr. Hunter's evidence is consistent with Dr. Brynildsen's on this point, even though the former was never asked to deal with it specifically; and fairly obviously the trial judge gave at least as much weight to Dr. Hunter's views, if not more.

If the deceased's death was not caused by the injuries complained of, then some other cause must have supervened. Dr. Hunter was strongly of that opinion, and we must so assume, since we are precluded from the other view. How then, could we give damages for shortening of life, even if satisfied that, apart from the supervening cause, deceased's life would have been shortened? Deceased was 69 years of age. According to the table of expectancy of life in our Succession Duty Act, a person 69 years of age can expect to live 9.13 years. I will assume that, before being hit, Mah Lim Jung could expect to live that time. Even if we had evidence before us that, after being hit, his expectancy of life was reduced to, say a year, would that help the plaintiff, when actually deceased was cut off, in little more than a month, by some *novus actus interveniens?* No doubt if damages had been assessed in the meantime, allowance would have had to be made for the prospective shortening of life. But when, by the time for assessment, there was proof that the acts which might have shortened his life, never operated to do so, then I think it was proved that no damage was suffered under that particular head.

Under what head then could we make an award? Deceased could have sued for pain and suffering. But the Act, which alone gives the administrator any right to sue, expressly precludes him from claiming for deceased's pain or suffering.

His counsel however argued that the bare fact that he was

struck gave the deceased a cause of action, which passed to the plaintiff; he used the analogy of an action for assault, which will lie even in the entire absence of material damage. There, however, the law is curbing insolent or high-handed acts, presumably with a view to preserving the peace. But I know of no authority for saying that a technical trespass to the person is actionable where merely accidental, and where there is neither wilful act nor damage.

I hold therefore the cross-appeal fails, and turn to the appeal.

At the trial much time was taken up with the cause of the death of Mah Lim Jung, but the defence also contested its negligence, and on this the Court found for the plaintiff. The plaintiff was given the general costs, COADY, J. holding that though the defence had successfully resisted responsibility for the death, this was not a separate "issue" within Order LXV., r. 2. Defendant appeals on the ground that this was wrong, and that it should have been given the costs of resisting liability for the death.

This proves to be rather a troublesome point; for, though there is no lack of decisions, it is by no means easy to apply such principles as can be extracted from them. It seems to me that there is considerable conflict between the cases; for example, I find it hard to reconcile *Slatford* v. *Erlebach,* [1912] 3 K.B. 155 and *Howell* v. *Dering,* [1915] 1 K.B. 54, though both are decisions of the Court of Appeal, and the latter refers to the former without disapproval. For my part I can see no logic in *Slatford* v. *Erlebach,* and am not sorry to see that doubts were thrown on its soundness by Lord Haldane in *Reid, Hewitt and Company* v. *Joseph,* [1918] A.C. 717. This last case is the most authoritative that we have, but I cannot find that it helps me here except by making clear that, in order to constitute an "issue," a dispute need not go to the whole cause of action. The converse was considered in *Williams* v. *Stanley Jones & Co.,* [1926] 2 K.B. 37, where it was held that if the subject of a dispute could constitute a separate cause of action, and is met by a separate plea, a separate issue results.

In the present case there is no question of separate causes of action. Obviously if the plaintiff had sued, after the death, first

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for hospital and doctor's expenses, and later for causing the death, the second action would be answered by a plea of *res judicata*. Here there was only the one cause of action, *viz.*, the negligent running-down of the deceased; all the claims were merely separate items of special damage resulting therefrom.

That being so, I think the decision in *Forster* v. *Farquhar*, [1893] 1 Q.B. 564 governs this case. There the plaintiff, suing for several items of damage resulting from the same breach of contract, succeeded as to some but failed on one important item. He recovered general costs, but the judge gave the defendant the costs relating to this item. On appeal, he was held to have had "good cause" for doing so. At first sight, this case seems to favour the defendant here, but consideration shows that this is not so. At p. 570 Bowen, L.J., giving the judgment of the Court, conceded that

> the various items of damage claimed do not create separate issues in the pleader's sense, nor for purposes of taxation.

He then went on to say that nevertheless they could be considered separate issues for "purposes of justice." However, the point is that the Court obviously held that in point of law the "issue" had gone in favour of the plaintiff, and that the defendant could only derive benefit from success in the *quasi*-issue by the judge's making this serve as "good cause" for a special order.

To apply the same reasoning here—strictly speaking there was only one issue, in which plaintiff succeeded; but defendant succeeded in a *quasi*-issue and thereby enabled COADY, J. to exercise his discretion in defendant's favour if he saw fit. He did not do this, for the obvious reason that he was never asked to exercise his discretion; defendant took the position (as it did before us too) that it was entitled to these costs as of right, in which it was wrong. If we were to overrule COADY, J., it could only be on the ground that he did not exercise his discretion. But I do not think defendant can be heard to complain of that, when it never asked him to exercise discretion, and in effect claimed that he had none. I would not interfere now. There might well be factors that COADY, J. would have taken into account, and that we cannot fully appreciate here. Nor would I remit the matter to him, under all the circumstances.

I would, therefore, dismiss both appeal and cross-appeal.

SLOAN, J.A.: The action herein arose out of personal injuries sustained by one Mah Lim Jung when he was struck by a motor-cycle driven by a servant of the defendant company. The accident occurred on the 18th of October, 1941, and the injured man died on the 21st of November, 1941.

The plaintiff is the administrator of his estate and commenced this action for damages for the benefit of the said estate pursuant to the relevant provisions of the Administration Act.

Because of the submissions advanced in this appeal it appears necessary to restate once more the principles of law governing this class of action.

In the first place it must be remembered that as Lord Sumner said in *Admiralty Commissioners* v. *S.S. Amerika,* [1917] A.C. 38, at p. 51:

> . . . , never during the many centuries that have passed since reports of the decisions of the English Courts first began has the recovery of damages for the death of a human being as a civil injury been recorded.

Ritchie, C.J., in *Monaghan* v. *Horn* (1882), 7 S.C.R. 409, at p. 422 said, in speaking of the common law in this regard:

> "No one, whether as executor, master, parent, husband, wife or child, or in any other right or capacity whatsoever, could maintain an action for damages on account of the death of a human being."

In order to remedy in part this situation in special relation to the position of dependants of a man killed by the negligence of another, in England "Lord Campbell's Act" was passed (1846, 9 & 10 Vict., c. 93) and in this Province the Families' Compensation Act, of like effect, was enacted. (Now R.S.B.C. 1936, Cap. 93).

These statutes left untouched, however, the common-law principle that personal actions for injuries abate with death and England led the way again with the Law Reform (Miscellaneous Provision) Act of 1934. This provision was adopted in this Province by an amendment to the Administration Act (B.C. Stats. 1934, Cap. 2, now R.S.B.C. 1936, Cap. 5, Sec. 71).

The relevant effect of these statutes was to extend beyond his death any cause of action for damages a deceased person had vested in him when living. After his death this continuing cause of action was vested in his executors or administrators and any damages recovered formed part of the personal estate of the

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deceased. It must be clearly understood that the 1934 Act did not create any new right of action. Its purpose was to preserve from abatement whatever rights were vested in the deceased at the time of his death. The executor continues the action and, in relation thereto, stands in the shoes of the deceased with the exception that from the damages recoverable by him are excluded, for obvious reasons, compensation for physical disfigurement, or pain or suffering caused to the deceased, and loss of expectancy of future earnings.

Now in England another development was under way. In *Flint* v. *Lovell,* [1935] 1 K.B. 354, the Court of Appeal recognized loss of life expectancy as a heading of damages recoverable by a living person due to the injuries received by reason of the defendant's negligence. (It is not without interest to note that this principle was discussed by Stuart, J. in Alberta 35 years ago—*McGarry* v. *Canada West Coal Company, Ltd.* (1909), 2 Alta. L.R. 299).

The next step in England was *Rose* v. *Ford,* [1937] A.C. 826. This case arose after the 1934 amendment and was one in which the injured person died as a consequence of the accident. It was held that as the right to recover damages had vested in the deceased person prior to her death that right, including the element of damage described as "loss of life expectancy," had by reason of the 1934 Act vested in her personal representative.

The third case was *Benham* v. *Gambling,* [1941] 1 All E.R. 7, which turned on the *quantum* of damage that ought to be awarded in cases of this character.

I turn now to a consideration of the present case. In the statement of claim, after a claim for special damage, the following paragraph appears:

> 8. The plaintiff further claims on behalf of the estate of Mah Lim Jung against the defendant general damages in respect of the death of the said Mah Lim Jung aforesaid.

In his opening statement to the Court counsel for the plaintiff said in part:

> This action is brought by the administrator of the estate of Mah Lim Jung deceased who was killed we allege as a result of a traffic accident on October 18th last year. . . . I may simplify this by saying that there is no claim under the Families' Compensation Act. We are claiming under the Administration Act.

Counsel for the plaintiff then proceeded to call his evidence and, as the trial developed, it became abundantly clear that the matter was narrowed down to the question as to whether the deceased died as a result of the injuries sustained in the accident or from causes not associated with his injuries.

As I pointed out above, the fact that the deceased died because of his injuries could only be relevant to one element of damage, *i.e.*, loss of life expectancy. Of course, if the administrator could prove to the satisfaction of the trial judge that the deceased had died as a result of injuries suffered by him then that would be conclusive evidence that his expectation of life had been shortened by the accident. But that is not the only way of proving loss of life expectancy. Medical evidence could have been called to prove that as a fact. Counsel for the plaintiff elected however to proceed on his chosen course and to rely upon the fact of death as the sole proof of the shortening of life and although the learned trial judge did on occasion endeavour to steer the medical evidence into other channels in that he was unsuccessful. The case at the end, because of the trend of the trial, fell to be decided on the one ground, *i.e.*, the cause of the death.

The learned trial judge held that death was not due to the accident and because of lack of any other kind of evidence to support him he could not award any damage for loss of life expectancy.

The defendant appeals to us on the narrow ground that as he succeeded on what he terms an issue namely the failure of the plaintiff to establish that the injuries received in the accident caused the death of the deceased he ought to have been awarded costs of that issue. In my opinion that submission cannot succeed. The cause of the death was not an issue within Order LXV., r. 2, for the reason that the death of the deceased was advanced as the sole method of proving an element of damage, *i.e.*, loss of life expectancy. In truth it could not be relevant to any other issue than damages under that head. Failure to prove one element of damage is not, generally speaking, failure of an issue within the meaning of the rule and I think that principle ought to be applied to this case. *Forster* v. *Farquhar*, [1893] 1 Q.B. 564, at p. 570. It follows that I would dismiss the appeal.

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That leaves for consideration the cross-appeal of the plaintiff who complains that the learned trial judge erred in not awarding him damages for loss of life expectancy. In my view the cross-appeal fails because I cannot say the learned trial judge was wrong in holding that the death of the deceased was not occasioned by the negligence of the defendant. That being so the death of the deceased is not a relevant consideration in determining the damages to be awarded any more than if he had been killed by a street-car while on the way home from the hospital.

The plaintiff selected the ground upon which he wished to make his stand. Driven from that he has no other place upon which to put the case on its feet. He is bound by the trend of the trial; it is of his own making. Certainly now he cannot ask us to award damages for loss of life expectancy because of a few vagrant passages in the medical evidence. I would, therefore, dismiss the cross-appeal.

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

Appeal and cross-appeal dismissed.

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for respondent: *L. H. Jackson.*

GEROW v. GREAT WEST TOWING AND SALVAGE LTD. DARKIN v. GREAT WEST TOWING AND SALVAGE LTD.

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Jan. 28, 29; *Feb.* 9, 11.

Shipping—Tug-boat—Towing logs—Loss of logs in transit—Fishermen's boats and nets—Drifting logs foul fishing-boats and nets—Damages—Negligence.

On the night of the 7th of November, 1942. the plaintiffs were fishing in their respective vessels off Sturgeon Bank in a line between the light at the end of the Fraser River North Arm jetty and the light at the end of the Steveston jetty. The plaintiff Darkin was about four miles south of the former light and the plaintiff Gerow was about three miles further south. Both had out about 1,200 feet of salmon gill-net. At about midnight drifting logs fouled the vessel and net of Darkin and carried both southward and two hours later the same logs fouled the net and vessel of Gerow. About 7 o'clock in the morning the vessels and nets were piled up on the Steveston jetty a quarter of a mile from its outer end. At about 6.30 in the evening of 7th November, the defendant's tug Tyee I. with twelve sections of logs passed the end of the North Arm jetty going outward but two hours later, the weather being bad, the master turned back and headed for the North Arm for shelter, the wind hindering progress. About midnight he noticed the tow getting lighter and suspected he was losing logs. On arriving at the North Arm jetty early in the morning he found that ten sections of the tow were missing and after tying up the remaining two sections, he went back to find the lost sections, and in the forenoon found them piled up on the Steveston jetty with the two fishing-vessels and their nets. In an action for damages for loss of their fishing-nets and consequential loss of fishing profits:—

Held, in answer to the claim that the master, when he found that his tow had lightened, should have searched for the lost portion in order either to pick it up or give warning of danger; that to ask the tug master to head into a lee-shore and shoal water on a dark night with wind and sea as indicated and encumbered with two sections of logs is to ask for an unreasonable exercise of a master's duty. He acted with prudence in getting into the North Arm and tying up. In answer to the claim that he should have turned back at the end of the North Arm jetty owing to the weather, the evidence of the weather at that place and time was not such as to justify any finding of negligence upon this ground.

CONSOLIDATED ACTIONS for damages for loss of fishing-nets and consequential loss of fishing profits. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at

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DARKIN v. THE SAME

Vancouver on the 28th and 29th of January and the 9th of February, 1943.

Lucas, for plaintiffs.

Walkem, K.C., for defendant.

Cur. adv. vult.

11th February, 1943.

SIDNEY SMITH, J.: In these consolidated actions the plaintiffs claim damages for loss of their fishing-nets and consequential loss of fishing profits in the following circumstances.

On the night of the 7th of November, 1942, the plaintiffs were fishing in their respective fishing-vessels off Sturgeon Bank, Strait of Georgia, and more or less on a line between the light at the end of the Fraser River North Arm jetty and the light at the end of the Steveston jetty. The plaintiff Darkin was in a position approximately four miles to the south of the former light, and the plaintiff Gerow about three miles further south. Both had out about 1,200 feet of salmon gill-net.

About midnight several unlighted drifting sections of logs fouled the vessel and net of the plaintiff Darkin and carried both to the southward; and about 2.15 a.m. on the 8th the same logs fouled in the same way the vessel and net of the plaintiff Gerow with the same result. About 7 a.m. logs, vessels and nets piled up on the Steveston jetty about a quarter of a mile from the seaward end thereof.

The logs had broken loose from a tow in charge of the defendant's tug "Tyee I." and consisting of twelve sections of boomsticks (which I shall continue to refer to as logs). Tug and tow had proceeded down the North Arm of the Fraser River and had passed the light at the end of the jetty at 6.30 p.m. on a passage across the Strait of Georgia to Porlier Pass. The usual white light was carried at the tail-end of the tow. Two hours later, the weather becoming bad from the N.W. the master turned and headed back to the North Arm for shelter. The rising wind and sea hindered his progress. About midnight he noticed his tow getting lighter and that its light had disappeared, and suspected that he was losing logs. When he arrived in the North Arm in the early morning he found that ten sections were missing. He tied up the remaining two sections and then proceeded out

again to look for the lost ten sections. He found them that forenoon on Steveston jetty; and with them the two fishing-vessels and their nets, as I have indicated. It is admitted that the nets were wholly ruined.

The loss of the ten sections was due to the parting of a boom-chain at the end of a swifter; and the splitting open of the hole at the other end of the same swifter, thereby allowing the drawing through of the boom-chain at that end. The construction and fitness of the boom for the journey were not attacked.

The defence is inevitable accident. The plaintiffs must therefore first prove a *prima facie* case of negligence. The burden is then upon the defendant to prove that the loss of the logs and the consequent damage could not have been prevented by the exercise of ordinary care, caution and maritime skill. (Marsden's Collisions at Sea, 9th Ed., 18.)

It was the height of the salmon-fishing season, and there were upwards of 2,000 fishing-vessels in the vicinity. Drifting logs amongst these fishing-vessels at night in bad weather would constitute a danger to the vessels and their nets of which the tug master would or should be aware. If the logs became adrift through his negligence and damage resulted, the tug owner would be liable upon the footing of the damage being the reasonable consequence of such negligence.

There was some conflict as to the weather prevailing during the night but on the whole of the evidence, and having particular regard to that of the plaintiffs, I find that at 6.30 p.m. when the tug passed the end of the North Arm jetty the wind was light and the sea smooth; that about 8.30 p.m. when the tug turned back it was freshening; and at midnight it was blowing 20 to 25 miles per hour from the N.W. with a rough sea and continued so throughout the night. According to the evidence this is much too severe for the towing of logs.

It was urged upon me by plaintiffs' counsel that the tug master when he found that his tow had lightened should have searched for the lost portion in order either to pick it up again or, by his spotlight or otherwise, give warning of its presence and the danger thereof. But I think that to ask a tug master to head into a lee shore and into shoal water on a dark night with wind

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and sea as indicated, and encumbered with two sections of logs (as it turned out) is to ask for an unreasonable exercise of a master's duty. It is extremely doubtful if he could have done anything effectively and it would have involved danger to the remaining part of the tow and possibly also to the tug. I think he acted with prudence in getting into the North Arm, tying up what was left of the tow and then proceeding with the search.

It was also urged upon me that the master should not have proceeded across the gulf but should have turned back at the North Arm jetty at 6.30 p.m. in view of the threatening weather. I allowed an amendment so that this feature of the case could be dealt with in argument. But on the evidence and after anxious consideration I cannot find that the weather at that place and time was such as to justify any finding of negligence upon this ground. (*Cf. Neno* v. *Canadian Fishing Co.* (1916), 22 B.C. 455).

It follows that these actions must be dismissed. I regret this conclusion. But I am fortified by the concluding words of the late Chief Justice MARTIN (then Local Judge in Admiralty) in *Ostrom* v. *The Miyako* (1924), 34 B.C. 4, at p. 6:

> This result may seem a hardship, but the longer I sit upon this Bench the more I am convinced that the only real justice is strict justice for all concerned.

Actions dismissed.

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Feb. 16, 22.

LAWSON v. LAWSON.

Divorce—A soldier on active service—Right to maintain a divorce action against—R.S.C. 1927, Cap. 132, Sec. 69.

A wife can proceed in a divorce action against her husband although he may be a member of His Majesty's Canadian forces on active service either in Canada or overseas.

L. v. *L.*, [1943] 1 W.W.R. 241, not followed.

PETITION for divorce by a married woman against her husband who is a member of His Majesty's Canadian forces on active service overseas. The facts are set out in the reasons for

judgment. Heard by FARRIS, C.J.S.C. at Vancouver on the 16th of February, 1943.

Carmichael, for petitioner.

Cur. adv. vult.

22nd February, 1943.

FARRIS, C.J.S.C.: This was a petition for divorce by a married woman against her husband who, according to the petition itself, is a member of His Majesty's Canadian forces on active service overseas. Upon the facts I had no difficulty in coming to the conclusion that I was justified in holding that the defendant had been guilty of misconduct as set out in the petition. On the hearing counsel very properly brought to my attention the case of *L.* v. *L.,* [1943] 1 W.W.R. 241, in which case Taylor, J. of the King's Bench Court of Saskatchewan held that no action for divorce would lie against a member of His Majesty's Canadian forces when on active service overseas, and counsel requested the case should be adjourned for one day until he had an opportunity of further considering this case and presenting argument on it. I accordingly granted the adjournment and heard argument of counsel and reserved judgment. I have in the interval had the opportunity of consulting with available members of this Court.

While I am not bound by the decision of the King's Bench of Saskatchewan, yet I believe that it is most desirable that members of the Courts of the various Provinces should in so far as reasonably possible follow Courts in other Provinces. Having this in mind and also the very great importance of the conclusion of Taylor, J. if followed, I have given the most careful consideration to his reasons in reaching his conclusion.

His Lordship in the somewhat lengthy judgment has dealt with three phases of the case before him: First, the facts; secondly, whether a Canadian soldier on active service overseas can be made a party to a divorce action; and third, whether or not in the particular case a soldier being in gaol at the time was on active service. In the present case it is only necessary to consider the second phase as discussed by his Lordship, in which he finds that a Canadian soldier on active service overseas cannot be made a respondent in a divorce action. The first case referred to by him

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in support of this conclusion is *Read* v. *Read,* [1942] P. 87; [1942] 1 All E.R. 226. In this cited case an application was made under the English Supreme Court Rules, Order IX., r. 14B, for leave to dispense with service of a respondent who was an alien enemy. The rule of which we have no corresponding rule reads in material part as follows:

> (1) Subject to the provisions of this Rule, the court or a judge may dispense with service of a writ of summons or a notice of a writ of summons on any defendant who is an enemy within the meaning of the Trading with the Enemy Act, 1939, as amended by or under any enactment.

The Court came to the conclusion that the Supreme Court Rules could not be invoked, as there is a provision in the English Divorce and Matrimonial Causes Act, section 42 of the English Act, similar to section 26 of our Act, to the effect that the Court may dispense with service altogether in the case that it shall be necessary or expedient to do so. In view of the fact that the field was covered by the Divorce and Matrimonial Causes Act, the Supreme Court Rules could not be invoked. The Court was further of the opinion that although the application had been wrongfully made under the Supreme Court Rules, an application might still be made to the judge under section 46 of the Divorce and Matrimonial Causes Act to dispense with service, and that it was for the judge to exercise his discretion. I cannot, therefore, see anything in the *Read* v. *Read* case that in any way supports the conclusion arrived at by Taylor, J. The next case dealt with by the learned judge was *In re Binstead. Ex parte Dale,* [1893] 1 Q.B. 199. That case merely decides this: That the judgment recovered by a petitioner in a divorce proceeding for costs against a co-respondent is not a judgment within the meaning of the English Bankruptcy Act on which an order for bankruptcy could be made. How this can be pertinent to the point in question I cannot see.

The learned judge then proceeds to quote from Halsbury the general law applicable to soldiers and the decision on which the general statement in Halsbury is based. Both the decision referred to and the quotation from Halsbury would seem rather than supporting the conclusions of the learned judge to be to the contrary and indicate that unless otherwise exempted that proceedings can be taken against soldiers notwithstanding the fact that they are on active service.

The learned judge then deals with the English Army Act, 1881, which is made applicable in Canada by virtue of section 69 of our Militia Act, Cap. 132, R.S.C. 1927. He then apparently contends that inasmuch as the English Army Act, 1881, is applicable to Canada, that by virtue of that Act a soldier on active service cannot be proceeded against in a divorce action. He supports his opinion by reference to the case in the Court of Appeal of British Columbia of *Gale* v. *Powley,* 22 B.C. 18; [1915] 8 W.W.R. 1312, and in the recent New Brunswick case of *The King* v. *Limerick et al., Ex parte Harding* (1942), 16 M.P.R. 377. It would seem to me with all respect that the learned judge has entirely misinterpreted the decision of our Court of Appeal in the *Gale* v. *Powley* case. In *Gale* v. *Powley* an action was brought against a soldier for foreclosure and cancellation of an agreement for sale and forfeiture of moneys paid, it not appearing in the reports that any other notice other than the usual notice contained in the writ was given. Counsel there argued on the appeal that the defendant was entitled to the protection of the Army Act, 1881, as adopted by section 69 of our Militia Act, and apparently argued that under section 144, subsection (4) of the Army Act, 1881, an affidavit must be filed. Subsection (4) can have no bearing on the present issue as it simply deals with the adjudication of the debts, damages or sum that shall be adjudicated against the defendant, and provides that before the Court shall adjudicate upon such debt, damages or sum, it shall be proved by affidavit and a memorandum of such affidavit shall be endorsed upon any process or order issued against a soldier. The Appeal Court in considering this point also considered 144 (1) of the Army Act, 1881, which says:

> A soldier of Her Majesty's regular forces shall not be liable to be taken out of Her Majesty's service by any process, execution, or order of any court of law or otherwise, or to be compelled to appear in person before any court of law, except in respect of [certain] matters,

and found that this section only relates to proceedings taken against the person of the soldier: *per* IRVING, J.A. at p. 21 and MARTIN, J.A. at pp. 22-3, 22 B.C. It would, therefore, seem clear from that case that our Court of Appeal decided that the affidavit referred to in 144 (4) is only necessary when execution is sought against the person of the soldier and is only important

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to the question in issue in that it decides 141 (1) only applies when the person of the soldier is to be interfered with. The learned judge in further reference to the *Gale* v. *Powley* case says (p. 248):

> The accepted view seems to be that under this section notice in writing is a condition precedent to the right to commence proceedings. No argument is suggested that service of the writ of summons and statement of claim or demand would constitute sufficient notice.

It would seem to me that no such interpretation can be given to the decision of the Court of Appeal in the *Gale* v. *Powley* case. The only reference made to this branch of the case was made by MARTIN, J.A. where he says in reference to the requirements for an affidavit (p. 23):

> I am of the opinion that such requirement relates only to proceedings taken against the person of the soldier, and that the case at bar is governed by the proviso to said section, which only requires "due notice in writing" to be given to the soldier in causes of action where execution against his person is not sought.

As I have already pointed out that in the *Gale* v. *Powley* case no mention is made of any notice having been given other than the usual notice contained in the statement of claim. It would seem clear to me that the notice referred to is not a notice precedent to the commencement of the action but the notice given in the writ, or in a divorce matter the notice required by our rules to be attached to the petition when served upon the respondent.

The proviso mentioned in section 144 of the Army Act, 1881, reads as follows:

> (1.) Any person having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this section, after due notice in writing given to the soldier, or left at his last quarters, proceed in such action or suit to judgment, and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessaries, or clothing of such soldier.

What is apparently contemplated by this section is that judgment cannot be given against a soldier unless he has been given due notice. Due notice would seem to be only that notice which is required by the Rules of Court to be given.

It also must be noted that this section does not prohibit an action being commenced against a soldier until after notice has been given, but the words of the section would indicate that it is a notice to be given in the action itself before judgment, as it says: "He shall only be allowed to proceed in the action or suit

when such notice has been given." How can he proceed in an action or suit when no action or suit is in existence? If it was meant that due notice was to be given as a condition precedent to the commencement of the action, then surely it would specifically set out not that "He shall only be allowed to proceed in the action or suit" but instead he shall only be allowed to proceed in an intended action or suit.

Under the Divorce Act and the practice, when the petition is issued a notice is required to be attached to the petition giving the time in which the respondent may appear, which time would be fixed by the judge allowing reasonable time under all the circumstances for the soldier to appear if he so desired. It is therefore my opinion that the due notice required by the section is the notice specifically provided for in the rules. If I am wrong as to this, however, the proviso is not a prohibiting section but an enabling section, and as there is nothing in section 144 which prohibits a divorce action being instituted the proviso does not apply, and notice as therein mentioned is not required.

Mr. Justice Taylor also deals with section 145 of the Army Act, 1881, and makes this quotation from such section:

> (3.) And no process whatever under any Act or at common law in any proceeding in this section mentioned shall be valid against a soldier of the regular forces if served after such soldier is under orders for service beyond the seas.

An examination of section 145 shows that this section deals exclusively with the liability of the soldier to maintain his wife and family while he is in the service. The quotation, therefore, clearly has no application to divorce proceedings that may be taken by the wife.

Again the case of *The King* v. *Limerick et al., supra,* quoted by Taylor, J., can surely have no application. In that case the soldier was arrested for failing to comply with an order made against him under The Illegitimate Children's Act of the Province of New Brunswick. This was an interference with the person of the soldier, and inasmuch as the offence was not a crime within the meaning of the Army Act, 1881, it was held that there could not be any such interference, and a writ of *habeas corpus* was accordingly granted.

The learned judge in the *L.* v. *L.* case then proceeds to deal

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with policy. In my opinion it is not for the Courts to determine policy. This is for the Legislature, and the Courts are bound by the statutes and Rules of Court, and the Legislature has not seen fit to exempt a soldier on active service overseas from being made a party to a divorce action.

With the greatest respect I cannot accept the conclusion of Taylor, J. in the *L.* v. *L.* case, nor can I agree with his reasoning upon which such conclusion was based.

I find that a wife can proceed in a divorce action against her husband although he may be a member of His Majesty's Canadian forces on active service either in Canada or overseas.

The decree for divorce is granted in accordance with the terms of the prayer of the petition.

Petition granted.

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March 2.

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Practice—Pleadings—Action for libel and slander—Defective endorsement on writ—Statement of claim did not set out defamatory words—Application to strike out endorsement and statement of claim—Application to amend statement of claim—Whether cause of action shown—Rules 18a and 305.

In an action to recover damages for libel and slander, the endorsement on the writ failed to identify the libellous publications alleged and although the statement of claim identified the publications, it did not set out the defamatory words complained of. After filing his defence, the defendant moved to strike out the endorsement on the writ and the main allegations in the statement of claim on the above grounds and that neither the endorsement on the writ nor the statement of claim disclosed any "reasonable cause of action." On motion of the plaintiff on the return day to amend his pleadings, an adjournment was granted. The plaintiff took out a summons and both applications were heard together. The Chamber judge allowed the amendments and although the order was silent as to the plaintiff's application, it was impliedly dismissed as the amendments were granted.

Held, on appeal, affirming the order of FARRIS, C.J.S.C., that the allowing of such amendments as may be necessary for the purpose of determining the real question in controversy between the parties is a matter within the discretion of the judge applied to, and whether the statement of claim as amended sets up a cause of action is one which could be deter-

mined better by the trial judge, as the Court is not justified in dismissing the claim as demurrable unless it, if defective, could not be cured by any other further amendment.

APPEAL by defendant from the order of FARRIS, C.J.S.C. of the 9th of December, 1942, whereby

it [was] ordered that the plaintiff be allowed to amend his endorsement on his writ of summons by adding "The libellous letters were dated August 30th, 1941, September 18th, 1941, and October 8th, 1941, and were sent by the defendant to M. L. Fitzgerald of Loretteville, Quebec." The plaintiff to be allowed to amend paragraph 3 of the statement of claim herein by adding the following words: "The words contained in the letter dated August 30th, A.D. 1941, which are false, malicious and libellous, are as follows: 'However, further trouble has developed with Willett, who is doing his best to disrupt matters here, and I have written him as you advised, suspending him from further activities with the Corps and calling for his resignation—copy of letter attached herewith.' "The false, malicious and libellous words contained in the letter of September 18th, 1941, are as follows: 'Further to our previous correspondence relative to ex-Lieut. R. H. Willett of "A" Squadron, Vancouver. Notwithstanding his appeal for reconsideration of his supension, he refuses to recognize any authority other than his own, and his last act has been to refuse to hand over funds to the Records Officer of the Province as ordered. Instead of this he has turned over what funds remain to the credit of the Squadron to two N.C.O.'s. You can well see that it is impossible to do anything with him, and he is trying every possible means to disrupt matters internally but unfortunately there is a great tendency in other quarters to bring fresh blood along and I am sanguine of much new life when the bad influence which has existed for some time past has been fully eradicated. Willett will be struck off strength as from the 10th inst. I might mention that he has repeatedly threatened to take legal proceedings against me owing to his dismissal from the Corps, but what he bases his alleged grievance on is pretty hard to fathom.' "The false, malicious and libellous words contained in the letter dated October 8th, 1941, are as follows: 'It is with regret that I have again to bring up the matter of former Lieut. R. H. Willett of "A" Squadron, Vancouver, who has been struck off strength, as you are aware. He persistently carries on a campaign of annoyance and on Monday last, the 6th inst., he forced his way into a Squadron business meeting which had been arranged with Capt. P. Burton, and without the whole affair developing into a brawl it was impossible to conduct any business. I should therefore be glad if you would kindly write him direct informing him that he is no longer a member of the Corps and that his name has been struck off the strength. As I was present at the meeting referred to, I advised him that as he was no longer a member he must perforce leave the room, this in support of Captain Burton's request. However, he insisted that he was still a member and had a right to be there and created a general uproar. Apparently his presence had been prearranged by a clique he has created around him and which has been causing all the discord. It will mean the expulsion of a number of members, as

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their conduct was most unseemly and unbecoming, and this state of affairs cannot be tolerated if we are to make headway and uphold the dignity of the Corps. I am glad to say we are gaining ground notwithstanding Willett's efforts of disruption and Point Grey Unit is already numerically superior in active members to the original squadron.'" By adding after paragraph 5 "The said slanderous words were false, untrue and defamatory and that the defendant knew that the said words were false and untrue."

The appeal was argued at Victoria on the 12th of January, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Campbell, K.C., for appellant: The communications, both written and oral, are absolutely privileged: see *Dawkins* v. *Lord Paulet* (1869), L.R. 5 Q.B. 94; *Dawkins* v. *Lord Rokeby* (1866), 4 F. & F. 806; 176 E.R. 800; *Law* v. *Llewellyn*, [1906] 1 K.B. 487; *Burr* v. *Smith*, [1909] 2 K.B. 306; *Lilley* v. *Roney*, [1892] 61 L.J.Q.B. 727; *Barratt* v. *Kearns*, [1905] 1 K.B. 504; Halsbury's Laws of England, 2nd Ed., Vol. 20, pp. 460 and 474; *Bottomley* v. *Brougham*, [1908] 1 K.B. 584; *Pullman* v. *Hill & Co.*, [1891] 1 Q.B. 524; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431; *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405, at p. 510; *Adam* v. *Ward*, [1917] A.C. 309, at p. 328. Secondly, the civil Courts will not interfere when a military tribunal is set up: see *Cookson* v. *Harewood* (1931), 101 L.J.K.B. 394 n.; [1932] 2 K.B. 478; *Chapman* v. *Lord Ellesmere*, [1932] 2 K.B. 431, at pp. 478 and 485. Third, if amendments are allowed, the full particulars must be given: see *Harris* v. *Warre* (1879), 4 C.P.D. 125, at pp. 128-9; Bullen & Leake's Precedents of Pleadings, 7th Ed., 344; *Berry* v. *Retail Merchants Association*, [1924] 1 W.W.R. 1279; *Shannon* v. *King* (1931), 44 B.C. 383; *Evans* v. *Martyn* (1926), 37 B.C. 231; *Hodson* v. *Pare*, [1899] 1 Q.B. 455, at p. 459; *Munster* v. *Lamb* (1883), 11 Q.B.D. 588; Halsbury's Laws of England, 2nd Ed., Vol. 25, p. 254.

Castillou, for respondent: With relation to the word "commandant," there is no such rank in the army. They must establish that it is a military corps, properly constituted in Canada. They must be properly organized here. If they are not, then they have no privilege here. The court of inquiry is

improper. On the question of privilege, the burden is on him to show he has privilege and prove it is a military organization duly authorized by Parliament. Here a number of men have come together and called themselves frontiersmen. There is no privilege at all. He can demand particulars, but he cannot strike out because we do not give an exact date: see 3 C.E.D. 605; Halsbury's Laws of England, 1st Ed., Vol. 18, p. 645; Gattey on Libel and Slander, 3rd Ed., 48; *Russell* v. *Stubbs, Limited (1908)*, [1913] 2 K.B. 200 n.

Campbell, replied.

Cur. adv. vult.

2nd March, 1943.

McDONALD, C.J.B.C.: This appeal is from an interlocutory order of FARRIS, C.J.S.C. allowing the plaintiff respondent to amend the endorsement on his writ and also his statement of claim.

The action is one to recover damages for libel and slander. The endorsement failed to identify the libellous publications alleged, as required by rule 18a, Supreme Court Rules, 1925. The statement of claim identified the publications, but did not set out the defamatory words complained of, thus failing to meet requirements well-established by the decisions. So far there was little in the plaintiff's proceedings that was right, and the defendant after filing his defence, took out a Chamber summons to strike out the endorsement on the writ and alternatively, the main allegations of libel and slander in the statement of claim, both because of the irregularities mentioned and because it was said neither the endorsement on the writ nor the statement of claim disclosed any "reasonable cause of action." On the return day the Chief Justice seems to have adjourned the application to enable the plaintiff to make a cross-application to amend, which he did by summons taken out six days later. Both summonses were heard together, and the Chief Justice then made the order appealed from.

This order authorized amendment of the endorsement so as to give particulars of the publications of libel, and amendment of the statement of claim so as to set out the exact words, both written and oral, claimed to be defamatory. These words are

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set out verbatim in the order. The order does not dispose of the defendant's summons; obviously no action was taken on it, since the order made left no room for giving effect to it.

The appellant complains of this order, first, because he says that the plaintiff's procedure having been quite wrong, the offending pleadings should have been struck out, and the plaintiff should not have been allowed to put them in better order. I do not see how in these times we can give effect to such an objection. If we were to do so, the plaintiff would simply issue another writ, taking in the second action the identical steps which the order authorizes him to do in this; a few more costs would be piled up, but no more decisive results would follow. So, though I certainly have no desire to encourage slip-shod work, I think this ground of appeal fails.

But appellant sets up the further more serious ground that the statement of claim discloses no reasonable cause of action, which is a matter of substance. So I examine the claims set up. Paragraph 3 of the statement of claim, which is the one to be amended under the order, taken with the order, alleges that appellant (elsewhere stated to be respondent's commanding officer in the Province, of the Corps of Imperial Frontiersmen) wrote to the senior commandant of the Corps in Quebec a letter charging the respondent with "doing his best to disrupt matters here" and later with "refusing to recognize any authority other than his own," with refusing "to hand over funds to the Records Officer," and with turning over the funds to "two N.C.O.'s." The letter is also alleged to have said it was "impossible to do anything with him," and to have referred to "a bad influence" in a context that certainly appears to denote the respondent, though there is no innuendo to identify him. Another letter between the said parties is alleged to have charged the respondent with persistently carrying on a "campaign of annoyance" and with having forced his way into a meeting so as to prevent the conduct of business, with creating "a general uproar" and with prearranging his presence through "a clique he has created around him."

Appellant's counsel urges that these statements are not shown to be defamatory without innuendoes; hence the pleading is bad, and the amendment should be disallowed. In view of such

decisions as *Hoare* v. *Silverlock* (1848), 12 Q.B. 624 it is difficult to say with certainty when innuendoes are essential, and I certainly am not prepared to say that some of the above statements are not capable of being actionable as alleged.

Paragraph 5 of the statement of claim alleges several slanderous statements about the respondent, some of which would appear even to charge him with criminal offences.

Appellant's counsel, however, strongly urges that the statements complained of are on their face not actionable, because absolutely privileged. In support of this argument a number of cases have been cited. Some illustrate the well-known principle that evidence given before judicial tribunals, which term includes courts martial, is absolutely privileged. I do not see how these cases apply. We have no material before us to show that any tribunal was holding a hearing. But the appellant also relies on such cases as *Dawkins* v. *Lord Paulet* (1869), L.R. 5 Q.B. 94, which holds that defamatory reports made by naval or military officers in the course of their duties to their superior officers are absolutely privileged, even when malicious and false. These cases, however turn on the principle that such reports are "matters of State." We, however, have nothing before us to show that the Imperial Frontiersmen are a recognized military body, or that the State has any concern at all with its doings. We cannot hazard conjectures on these points.

When we turn to the slander alleged, we have even less to indicate any absolute privilege. Paragraph 5 of the statement of claim merely refers to publication to a group of individuals, and there is nothing to suggest that they are even connected with the Frontiersmen.

I am certainly not prepared to hold that all the plaintiff's pleadings are good, even as amended. But they are not all demurrable, and even the defective parts can be best dealt with by a trial judge. We are not justified in dismissing a claim as demurrable unless it is one that could not be cured by any further amendment; and that is a matter best considered at the trial. I do not think the defendant is really embarrassed by the bad pleading. We might easily infer that parts of the plaintiff's claim have very little substance; but that would be indulging

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in guess-work; and the appellant asks too much in inviting us to throw it out summarily.

The Chief Justice has quite properly ordered the respondent to pay the costs occasioned by his intitial mistakes; and I think his order deals with this case in the most practical way. So I would dismiss the appeal.

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

SLOAN, J.A.: In my opinion the application of the defendant to strike out paragraphs 3 and 5 of the statement of claim herein was properly refused below. I base my judgment upon the narrow ground that, in my view, the said application was premature. Under the special circumstances of this case the trial judge will be better able to deal with the matters in question after all the evidence is before him. I refrain from expressing any opinion on the merits of the action as it appears on the face of the pleadings.

I also refuse to interfere with the order made giving the plaintiff the right to amend his pleadings. I cannot say, in this regard, that the learned judge below improperly exercised his undoubted discretion to make the order he did.

I would therefore dismiss both appeals.

O'HALLORAN, J.A.: The appellant is the defendant in a libel and slander action. He took out a Chamber summons to strike out the endorsement on the writ and two vital paragraphs in the statement of claim, on the main ground no cause of action was disclosed. The plaintiff-respondent then moved to amend the statement of claim.

The two applications were heard together. The learned Chamber judge allowed the amendments, and thereby—although the order is silent thereon—impliedly dismissed the appellant's application. The appeal lies from that order. Many interesting points of libel and slander law were raised before us. But at this stage of the action, as I view it at least, there are only two effective issues to be decided, *viz.*, Was the learned judge right in making the order, and secondly, if he was, does the statement of claim thus amended, disclose a cause of action?

On the first point, it is hardly susceptible of argument in these days of more elastic procedure, that a curative amendment should not have been granted simply because essential allegations were not pleaded in the vital paragraphs. The jurisdiction to grant the amendments is not in doubt, and *vide* rule 305. It was a discretionary matter. I cannot view it otherwise than as a discretion exercised "for the purpose of determining the real questions in controversy between the parties" within the meaning of rule 305. The tendency has been to permit considerable latitude in allowing amendments. Multiplicity of legal proceedings is thereby avoided and, *vide* section 2 (7) of the Laws Declaratory Act, Cap. 148, R.S.B.C. 1936.

In *Bushby* v. *Tanner* (1924), 34 B.C. 270, an amendment was allowed even when it set up a new cause of action. In *Levi* v. *MacDougall, Trites and Pacific Coast Distillers Ltd.* (1941), 56 B.C. 81, the amendment was sought in this Court, although it was not asked for when the opportunity arose in the Court below. The majority of this Court refused it, because they could not see how any amendment could give the appellant a cause of action in the special circumstances then under review. The Supreme Court of Canada took a different view, and held shortly that the amendment ought to have been granted *vide* [1941] 4 D.L.R. 340.

Consideration of the second point requires the statement of claim to be read as amended by the order appealed from. Does it then disclose a cause of action? In the special circumstances I think that is best a matter for the trial judge after all the evidence has been adduced. It is of little use attempting to apply principles or decisions until the evidence has been sifted and the facts have been stabilized. Particularly so if nicely balanced points of law are involved, the effect of which slight differences in fact may shade one way or the other. *Howarth* v. *Dench*, [1942] 2 D.L.R. 177 is a recent case where this Court refused to do so even when the applicant supported his pleading by affidavit.

Looking at the statement of claim as amended in the order appealed from, I should hesitate to say now that there is not substantial compliance with what Bullen & Leake's Precedents

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of Pleadings set out as essential allegations in this type of action. If the appellant finds that any allegation therein lacks essential particularity, he has his remedy of demanding particulars, and if they are refused, of applying to the Court below for an order directing them.

Counsel for the appellant also raised questions relating to privilege and sole jurisdiction of a special tribunal. But those are matters which the trial judge may best decide after the necessary foundations of fact thave been established in the evidence. The nature of the organization to which the parties belonged, its constitution and rules, and their respective offices, duties and responsibilities may be but indifferently appreciated unless the Court has the benefit of the evidence which the parties may bring forward at the trial.

I would dismiss the appeal.

FISHER, J.A.: I would dismiss the appeal for the reasons given in the judgment of the Chief Justice.

Appeal dismissed.

Solicitor for appellant: *Elmore Meredith.*
Solicitor for respondent: *H. Castillou.*

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Jan. 18, 19;
March 2.

BROWN v. WALTON *ET AL.*

Negligence—Damages—Truck with broken wheel left on highway—Car going same way collides—Followed at short intervals by two other cars that collide behind one another—Bad condition of road—Visibility—Liability.

On January 14th, 1942, at about 5.40 a.m. the defendant Walton was driving his truck westerly on Marine Drive with a three-ton load of sawdust when the flange of his left front wheel cracked. He immediately stopped on his proper side of the road (fearing that if he attempted to take the truck off the road, the wheel might come off and dump the load on the highway, causing a worse obstruction) got off the truck and, having no spare wheel, he walked home (nearly 5 miles) to procure another wheel. He was away nearly 2 hours. When he started away, it was dark and foggy and the roadway was slippery. Shortly after 6 o'clock the plaintiff James Brown, driving a motor-car in the same

direction at 15 miles an hour, collided with the rear of Walton's truck and damaged his car to the extent of $60. At the point of collision he could see ahead about fifteen feet. He immediately went back to warn other drivers. In about ten minutes the defendant Berkenshaw came along in a light Morris car. The plaintiff warned him when 75 feet away from the truck and he tried to stop but his car skidded and he ran into the back of the plaintiff's car, but lightly. Five minutes later the defendant Thomas Brown came along in his car at about 25 miles an hour. He was warned by the plaintiff when about 100 feet away from the truck, but in attempting to stop, his car skidded and he ran into the back of Berkenshaw's car with considerable force causing material further damage to the plaintiff's car. It was held on the trial that the injury to the plaintiff's car was caused by the negligence of both defendants Walton and Thomas Brown. That it was negligent for Walton to leave the truck on the highway without taking precautions to prevent such an accident and Thomas Brown was negligent in driving too fast under the circumstances and not having his car under sufficient control. The negligence of the defendants Walton and Brown cannot be separated or distinguished to such an extent that it can be said that the negligence of one is more to blame than the other. They contributed jointly to the damage done and both are liable.

Held, on appeal, varying the decision of SHANDLEY, Co. J. (*per* MCQUARRIE, O'HALLORAN and FISHER, JJ.A.), that with relation to the first collision, the plaintiff James Brown and the defendant Walton were both guilty of negligence and the liability for the damages resulting therefrom should be divided equally between them, but the finding of the learned trial judge that the defendant Thomas Brown was solely responsible for his collision with Berkenshaw's car and the resulting damages to the plaintiff's car, should be upheld.

Per MCDONALD, C.J.B.C.: That the defendant Walton was in the circumstances not guilty of negligence. The plaintiff, however, was either going at a speed at which he could not stop within the limits of his vision or he was not keeping a proper look-out and the effective cause of the collision was his own negligence, but the judgment against the defendant Thomas Brown should be upheld.

Per SLOAN, J.A.: There was sufficient evidence to support the findings of the learned trial judge that the defendants Walton and Thomas Brown were negligent and that the plaintiff James Brown was not but the negligence of said defendants ought to be treated separately. The damage caused to the plaintiff's car by his collision with Walton's truck cannot be chargeable in any degree to Thomas Brown, Walton being solely responsible, and Thomas Brown was solely responsible for the final collision, Walton's negligence in no way being a responsible factor in it.

APPEAL by defendant Walton from the decision of SHANDLEY, Co. J. of the 13th of July, 1942, in an action for damages under the following circumstances: The defendant Walton was driving

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his truck westerly along Marine Drive with a load of three tons of sawdust at about 20 minutes to 6 on the morning of the 14th of January, 1942, when the flange of the left front wheel cracked in two places and, not having a spare wheel and not desiring to risk taking the truck off the highway, which was only 17 feet wide, he left it unattended and went into Vancouver to get another wheel and was away two hours. At 10 minutes past 6 the plaintiff, driving westerly, collided with the back of the truck and the damage resulting prevented his using it. A few minutes later the defendant Berkenshaw, driving westerly, ran into the back of the plaintiff's car, and a few minutes later the defendant Brown, driving westerly, ran into the Berkenshaw car with considerable force shoving it into the plaintiff's car which suffered more damage. It was found on the trial that the truck was left unattended for two hours on a 17-foot highway when the weather conditions were cold and foggy and the pavement slippery from frost. There were no lights burning on the truck until shortly after 6 o'clock when a witness, McCormack, nearly ran into it when it was very foggy and he turned on the light switch. On the switch being turned, there came on at the rear of the truck in the centre a white tail-light bent down towards the pavement and under the rear body of the truck were two red clearance lights, a view of them being obstructed by a channel iron. The plaintiff collided with the truck, being unable to see it until 15 feet from it, and the pavement being icy he skidded. The defendant Berkenshaw was driving in a careful manner having regard to the weather conditions. He was signalled about 50 feet from the truck, but the icy condition of the road caused him to skid and he struck the back of the plaintiff's car. The defendant Thomas Brown was travelling at from 25 to 30 miles per hour. He was signalled when 75 to 100 feet from the truck, but he also skidded and struck the Berkenshaw car with considerable force adding considerably to the damage done to the plaintiff's car. It was held that Walton and Thomas Brown contributed jointly to the damage done to the plaintiff's car and both were held liable.

The appeal was argued at Victoria on the 18th and 19th of January, 1943, by MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Bull, K.C., for appellant: As Walton drove west with a heavy load the left front wheel went wrong. He got off and looked at it. It looked dangerous and he was afraid to move it, so he started for Vancouver and was back in about two hours. A few minutes after Walton left, the plaintiff came along and ran into the back of the truck and he was followed by Berkenshaw and Thomas Brown. The last car did some further damage to the plaintiff's car. We say first, that Walton was not guilty of any negligence: see *Wandeleer* v. *Dawson*, [1936] 3 W.W.R. 282. Negligence is a breach of duty to take care. There is no such common-law duty to keep the highway clear of an obstacle: see *Johnston* v. *McMorran* (1927), 39 B.C. 24; *Hall* v. *West Coast Charcoal and Wood Products Co. Ltd.* (1935), 50 B.C. 18. He thought that by moving the car there was great danger of a worse obstruction. He did nothing that could be said to be negligence. As to the regulations pursuant to the Highway Act, there was no breach of the regulations and regulation 9 (a) is a complete answer: see *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832. Second, the plaintiff was guilty of negligence and he was the sole author of his misfortune. He must be able to stop in his own visibility: see *Tart* v. *G. W. Chitty & Co.*, [1933] 2 K.B. 453; *Baker* v. *E. Longhurst & Sons, Ld.*, *ib.* 461, at p. 465; *Swadling* v. *Cooper*, [1931] A.C. 1; *Tidy* v. *Battman*, [1934] 1 K.B. 319; *Ristow* v. *Wetstein*, [1934] S.C.R. 128. If we fail on the first submission, then we are only liable to the extent of $50 or $60. There was a red tail-light on Berkenshaw's car and Thomas Brown ran into him with such force as to do most of the damage to the plaintiff's car.

G. R. McQuarrie, for respondent J. McG. Brown: The learned trial judge was right in deciding that the negligence could not be distinguished. Walton left the truck unattended and unguarded and without a light as the light was turned on shortly after he left by another driver. He should have attempted to move the truck as it blocked a narrow pathway. The three collisions took place very closely after one another: see *Stewart* v. *Hancock*, [1941] 1 W.W.R. 161; *Tidy* v. *Battman* (1933), 103 L.J.K.B. 158; *McCannell* v. *McLean*, [1937] S.C.R. 341; *Stefura* v. *Ridge*, [1930] 3 W.W.R. 465; *Wandeleer* v. *Dawson*, [1936] 3 W.W.R. 282, 478.

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Lewis, for respondent Thomas Brown: If Thomas Brown was negligent, then the plaintiff James Brown was negligent and we further say Walton was negligent. [Here on the application of counsel, Thomas Brown was granted leave to file notice of appeal]. We say there was continuing negligence on the part of Walton: see *Brockie* v. *McKay,* [1934], 1 W.W.R. 725; *McMillan* v. *Murray,* [1935] S.C.R. 572, at p. 574. The standard to apply is not a standard of perfection: see *Pacific Stages Ltd.* v. *Jones,* [1928] S.C.R. 92.

Bull, in reply, referred to *Stewart* v. *Hancock,* [1940] 2 All E.R. 427.

Cur. adv. vult.

2nd March, 1943.

MCDONALD, C.J.B.C.: On 14th January, 1942, at about 6 o'clock on a dark foggy morning defendant Walton was proceeding westerly on Marine Drive in Vancouver with his truck loaded with sawdust. He had been engaged throughout the night in hauling sawdust for distribution from his premises on 12th Avenue the next day. Suddenly, without warning, he noticed that his left front wheel was out of repair and he considered it, on grounds which I think reasonable, unsafe to proceed further. He accordingly left it on his own side of the roadway, standing somewhat at an angle, with its fore-end pointing somewhat toward the northwest. He says he left his truck lighted, but whether this is so matters not, for plaintiff's witness McCormack states that he came along shortly afterwards, that the lights were out and that he put them on. Being alone and having no spare wheel Walton found it necessary to walk some four or five miles to his home to procure another wheel. Shortly after 6 o'clock plaintiff driving a motor-car in the same direction, perceiving that he was coming into a very thick "pocket" of fog, lowered his speed somewhat from 25 miles an hour, and says that he was proceeding at about 15 miles an hour when he collided with the rear of Walton's truck, doing damage to his car to the extent of some $60. At and about the point of the collision he could see ahead for about 15 feet. Knowing the conditions and further that the road was slippery, he went back to warn other drivers coming from the same direction when suddenly defendant Berkenshaw came along

in a light Morris car, going at about 25 miles an hour. Berkenshaw received plaintiff's warning about 100 feet east of the truck, clamped on his brakes and skidded into the plaintiff's car. Plaintiff then watching for other cars, saw his brother, defendant Thomas Brown coming along at from 25 to 30 miles an hour. He on being warned also put on his brakes and skidded into Berkenshaw's car, forcing it against plaintiff's car and causing further injury thereto.

Under these circumstances the learned county court judge dismissed the action against Berkenshaw and gave judgment for the plaintiff against Walton and defendant Thomas Brown in the sum of $301.25, being the whole cost of repairing plaintiff's car. The learned judge held that Walton was negligent in leaving his truck where he did, under all the circumstances, and that Thomas Brown was guilty of negligence in proceeding at so high a rate of speed under the circumstances.

With respect, I think the learned judge reached the wrong conclusion. He does not specify just wherein defendant Walton was negligent. While it is true that his truck was there for some two hours before he arrived back with his good wheel, this had nothing to do with the accident. Whether he left his lights on or not is immaterial, because a light (though not red) was on when the accident happened. He had no one to leave in charge of the truck; he had met with an emergency which he could not have been expected to foresee, and I am unable to put my finger on any negligence of his which caused the plaintiff's damages.

However, even if I am wrong about this and if Walton was negligent, in the legal sense, I still think the plaintiff cannot succeed because he is in this dilemma: either he was going at a speed at which he could not stop within the limits of his vision, or he was not keeping a proper look-out, and the effective cause of the accident was his own negligence. See *Tart* v. *G. W. Chitty & Co.*, [1933] 2 K.B. 453 and *Baker* v. *E. Longhurst & Sons, Ld.* in the same volume, at p. 461. While it is true that there are certain *dicta* in the opinions expressed by the Court of Appeal as in that case constituted, in *Tidy* v. *Battman*, [1934] 1 K.B. 319 I do not understand that it was intended to overrule the above decisions, and in any event such decisions were expressly

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adopted by the Supreme Court of Canada in *Ristow* v. *Wetstein*, [1934] S.C.R. 128.

The same rule was laid down by the late Chief Justice HUNTER in *MacGill* v. *Holmes* (1927), 39 B.C. 65, at p. 68, and with due respect, speaking literally, and in the vernacular, it is a rule of "plain horse-sense," for a horse will never willingly go where he cannot see.

The learned judge below relied on the decision of the majority in *Wandeleer* v. *Dawson*, [1936] 3 W.W.R. 282, 478. As to this decision I would only say, and with due respect, that I prefer the reasoning of McGillivray, J.A. who dissented. Again in both *Hall* v. *West Coast Charcoal and Wood Products Co. Ltd.* (1935), 50 B.C. 18, and *Stewart* v. *Hancock*, [1940] 2 All E.R. 427 the whole situation was altered by the fact that the driver's sight was affected by the lights of a car facing him. In my view, neither of these cases weakens the rule.

For these reasons I would allow the appeal.

There remains for consideration the question of what judgment should be given regarding the defendant Thomas Brown. The damages caused by him may be taken to have amounted to $241.25. I agree with the learned judge in holding that the defendant Thomas Brown was guilty of negligence causing the accident in which he was concerned; but I hold that this accident was due entirely to his own negligence. James Brown, having a red light at the rear of his car, had a right under all the circumstances to stop on the road if he saw fit to do so, and he can be in no worse position regarding his car in that he was stopped without his volition. I think there is no room for applying the Contributory Negligence Act respecting this collision, and I would uphold the judgment against the defendant Thomas Brown to the extent of $241.25.

MCQUARRIE, J.A.: This is an appeal from SHANDLEY, Co. J. Four motor-vehicles were involved in a rather complicated situation. There was another defendant (Berkenshaw) in the proceedings but the action against him was dismissed and no appeal was taken against that judgment. The sequence of the various collisions is set out in the reasons for judgment of the learned trial judge, together with his findings of fact on the evidence.

The trial judge was clearly in error in finding the appellant by cross-appeal Brown responsible for the damages caused by the collision of the respondent Brown's car with the appellant Walton's truck amounting to approximately $60, which collision occurred before the appellant by cross-appeal Brown came into the picture at all. The latter's appeal therefore should be allowed to the extent of the said amount.

Counsel for the appellant Walton contends that he was not guilty of any negligence and propounds the question as to what precautions the said appellant could have taken to avoid the damages which resulted. The truck had been carefully inspected and repaired by a qualified mechanic (Leonard Johnson) before the accident and no defect was apparent according to his statement; when the truck broke down unexpectedly there was plenty of room to take the truck off the road but according to Walton it would have been a dangerous thing to have attempted as there was the probability that the truck would have turned over and become a greater nuisance to other traffic; to try to stop other cars would have been a doubtful proceeding and that is borne out by the police evidence; he was justified in leaving the truck as it was and going to get another front wheel to make the truck safe, particularly in view of the weather and road conditions which prevailed when he left it unattended; the reasonable view is that the appellant Walton could not have foreseen the breaking down of the truck; leaving it unattended at most was only an error of judgment for which he could not be held liable. Counsel for Walton quoted extensively from the evidence including Johnson, Henry Smith, police officer John Thomas, police officer McCormack, Errutt, Thomas Brown, Alexander, Berkenshaw, Goodrich and the appellant Walton. Counsel for Walton also contended that even if he were guilty of negligence the respondent (plaintiff) was only entitled to the damages caused by the first collision. After that the Berkenshaw car's tail-lights supplied the deficiency in the tail-lights of the truck. He also contended the trial judge should have found on the evidence that even if the appellant Walton was guilty of any negligence contributing to the said collision and the resulting loss or damage, the ultimate negligence which was the true and effective cause of such col-

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lision and the resulting loss and damages, was the negligence of the respondent (plaintiff). He argued that Thomas Brown has no excuse as he was running too fast.

Counsel for the respondent (plaintiff) supported the judgment and quoted extensively from the evidence to show that there was ample evidence to support it. He argued that the appellant Walton was negligent in leaving his truck unattended on the highway under the circumstances; the roadway was slippery and foggy conditions prevailed; the truck blocked the entire right side of the road; the truck was not properly lighted; it had no spare wheel; the equipment of the truck was deficient; the truck was a nuisance on the highway; he also submitted that the defendant Brown was negligent inasmuch as he was driving too fast under prevailing conditions; the finding of the trial judge that the respondent (plaintiff) was driving in a careful and prudent manner having regard to the weather conditions is fully supported by the evidence.

The defendant (appellant by cross-appeal) Brown by his counsel submitted that he was no more negligent than the plaintiff (respondent) but at the same time claimed that neither was negligent; he was not driving too fast; he was just as careful as the plaintiff and Berkenshaw; the trial judge should have found that he was not negligent or in the alternative should have apportioned the damages; the appellant Walton in leaving the truck unattended on the highway and in not having the proper equipment was responsible for the loss and damages which resulted from the collisions.

I shall not attempt to review the authorities cited by the respective counsel as the same are adequately dealt with by my brother O'HALLORAN in his judgment.

It is a rather difficult case in many ways but I am inclined to think that as to the first collision the damages should be equally apportioned between the appellant Walton and the respondent (plaintiff) as they were both at fault, and as to the last collision I agree that on the evidence the defendant Thomas Brown should be held entirely responsible for the resulting damages.

I agree that the costs should be disposed of as set out in the judgment of my brother O'HALLORAN.

SLOAN, J.A.: In my view there is sufficient evidence to support the findings of the learned trial judge that the defendants Walton and Brown were negligent and that the plaintiff Brown was not. Certainly I am unable to say he was so clearly wrong in those conclusions that we ought to set them aside and substitute our view of the evidence for his.

The matter however does not end there. After reaching his conclusions of fact to which I have made reference he continued:

> I am of the opinion that the negligence of the defendants Walton and Brown cannot be separated or distinguished to such an extent that it can be said that the negligence of one is more to blame than the other. They contributed jointly to the damage done to the plaintiff's car, and both are liable.

In my view with deference, in this case, the negligence of the defendants Walton and Brown can and ought to be treated severally.

The damage caused to the car of the plaintiff by his collision with Walton's car cannot be chargeable in any degree to the defendant Brown. I would say therefore that Walton is solely responsible for all the damage caused by the first impact. This amounts to $60.

That leaves for consideration the additional damage done to the plaintiff's car due to the negligence of the defendant Brown.

In my opinion the sole and effective cause of that damage, amounting to $241.25, was the negligence of the defendant Brown. While in a sense Walton's car was the primary link in the chain of events which resulted in the collision between the various cars involved nevertheless, in my view, and in so far as the responsibility to the plaintiff is concerned for the added damage caused by the defendant Brown's car, Walton's negligence, in this aspect of the matter, and at that stage of the affair was not a responsible factor in the final collision. This conclusion is founded upon the facts of this case and it must be remembered, in this connection, among other relevant elements, that the defendant Brown collided with the rear of the Berkenshaw car upon which was displayed the proper red-warning light.

In the result therefore I would allow both appeals to the extent indicated and direct judgment be entered by the plaintiff against

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Walton for the sum of $60 and against the defendant Brown for the sum of $241.25.

Costs to be spoken to.

O'HALLORAN, J.A.: This appeal involves questions of general importance. It entails analysis of complicated facts to know their true emphasis, as well as some study of the principles which should be applied. We are concerned with two separate collisions. The attendant circumstances distinguish the problems presented in each. To avoid confusion, the drivers of the several motor-vehicles are described as X, A, B, and C.

The appellant Walton (X), about 5.40 a.m., left his loaded truck standing on Marine Drive (between Victoria Drive and Fraser Avenue) in the city of Vancouver. The left front wheel was in a dangerous condition and he went home to get another to replace it. While he was away three collisions occurred. The respondent James McGowan Brown (A) crashed into the rear of the truck about 6.20 a.m., Berkenshaw (B) in a light Morris car, crashed into A's car a few minutes later. And shortly after, the appellant Thomas Brown (C), crashed into B's car with considerable force, causing further damage to A's car.

A sued X, B, and C. The learned trial judge freed B from blame, but found X and C jointly liable for A's damage. He did not apportion their respective liability under the Contributory Negligence Act. Nor did he distinguish the damage A sustained when he crashed into X, from the damage he later received from the impact when C crashed into B. We are not concerned with the consequences resulting from B crashing into A before C came on the scene, since the evidence does not disclose A suffered any appreciable damage thereby, and the learned trial judge has absolved B from all responsibility. No one has appealed from that finding and B is not before us. X appealed from the judgment against him, and during the hearing of the appeal C applied for and was given leave to appeal also.

The paved portion of the highway to the right of the centre yellow line was nine feet wide at the place of accident. The truck was seven feet wide, but occupied substantially the whole nine feet. The mishaps occurred on 14th January, 1942. The area was then subject in the early morning to intermittent fogs

and slippery road conditions. While X testified there was only a slight haze when he left his truck, it is beyond dispute a heavy fog had rolled in shortly before the crashes to which I have referred. During that period at least, the fog continued heavy and the road was in a slippery and icy condition. X said the lights were on his truck when he left. But a motorist who had narrowly escaped colliding with its rear end testified the lights were not on, and that he had stopped and turned them on.

In any event, at the time A crashed into the truck, it did not have a red tail-light as the regulations require. It had a dim white light pointing downward and shining on the road. The truck had two red clearance lights, but they were obscured by an overhanging part of the truck. The facts surrounding the two accidents are not quite the same and the decision of the appeals conveniently divides itself into two enquiries, *viz.*, (1) the responsibility for the damage A suffered when he crashed into X, amounting to some $60; and (2) the damage A suffered from the subsequent crash of C amounting to $241.25. First, concerning the responsibility for the crash of A into X. It is clear in my view that X was guilty of negligence. His truck was on the highway without the red tail-light prescribed by the Motor-vehicle Act regulations as a warning of its presence to motorists approaching from the rear; and *vide* the decision of the Manitoba Court of Appeal in *Stefura* v. *Ridge,* [1930] 3 W.W.R. 465.

A's collision with X was causally associated with the latter's breach of the regulation, *vide Caswell* v. *Powell Duffryn Associated Collieries, Ld.,* [1940] A.C. 152, Lord Macmillan at pp. 168-9. X failed in that respect to adopt precautions commensurate with the danger to oncoming motorists which he knew or ought reasonably to have appreciated. He had driven that road at night and in the early morning for some years. He was therefore fixed with knowledge that fog and slippery road conditions were likely to occur suddenly in the area at that time of year. But X's negligence does not in itself excuse A from responsibility: *vide Butterfield* v. *Forrester* (1809), 11 East 60; 103 E.R. 926; *Davies* v. *Mann* (1842), 10 M. & W. 546; 152 E.R. 588 and *Radley* v. *London & North Western Rail. Co.* (1876), 46 L.J. Ex. 573 (H.L.).

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Whether A was also guilty of negligence, must depend entirely on whether he used common and ordinary caution in the given circumstances. While that is a questin of fact, its decision is governed by legal principles. In the leading case of *Butterfield* v. *Forrester, supra,* Lord Ellenborough, C.J. said at p. 927:

> A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.

In *MacGill* v. *Holmes* (1927), 39 B.C. 65, HUNTER, C.J.B.C. at p. 68, described the fundamental requirements of all careful driving, no matter what the conditions:

> And that is that a man driving a motor ought to be prepared to stop in the space which he sees clear ahead. If he is driving in a fog, unless he goes at a mere crawl, he is liable to collide with something; if he is rounding a curve he ought to reduce his speed according to the degree of curvature; on the other hand, in open country, he may go 30 miles an hour with safety, so I think the true principle is that a driver is more or less negligent as the case may be unless he is prepared to stop in the space he sees clear ahead.

That principle requires flexibility in interpretation, and what is "common and ordinary caution" (to repeat Lord Chief Justice Ellenborough's expression in *Butterfield* v. *Forrester*), must be a question of fact in the particular case, but ascertained according to legal principles. A motorist encountering a pocket of fog in a dip in the road in a low-lying area, may in some cases be negligent if he does not stop his car completely, until his eyes become more accustomed to the sudden fog and to driving under the new conditions. What constitutes lack of common and ordinary caution which is a contributing cause to the damage, while a question of fact, is not a matter of uniform standard. As Lord Wright observed in *Caswell* v. *Powell Duffryn Associated Collieries, Ld., supra,* at p. 176, it may vary according to the circumstances, from man to man, from place to place, from time to time, and may vary even in the same man.

The principle governing the legal responsibility of a motorist driving at night has been settled by the Supreme Court of Canada in *Ristow* v. *Wetstein,* [1934] S.C.R. 128. The Court after considering *Tart* v. *G. W. Chitty & Co.* (1931), 102 L.J.K.B. 568 and *Baker* v. *E. Longhurst & Sons, Ltd., ib.* 573, said at p. 132:

> A person driving at night must drive at such speed that he can pull up within his limits of vision; accordingly, on his colliding with anything, he

is faced with the dilemma that either he was driving at an undue speed or he was not keeping an adequate look-out, unless there is some other factor causative of the collision.

We were referred to *Tidy* v. *Battman* (1933), 103 L.J.K.B. 158, decided in the Court of Appeal in England, *Hall* v. *West Coast Charcoal and Wood Products Co. Ltd.* (1935), 50 B.C. 18, in our own Court and *Stewart* v. *Hancock*, [1941] 1 W.W.R. 161 an appeal to the Judicial Committee from New Zealand.

When these three decisions are examined, they are found to furnish examples of "some other factor causative of the collision," within the meaning of *Ristow* v. *Wetstein, supra.* In *Tidy* v. *Battman* the "causative factor" appears in the judgment of Macnaghten, J. in the Divisional Court, approved on appeal. A motor-car stopped at night ten yards behind a standing lorry which showed no lights and blocked two-thirds of the road. A motor-cyclist passed the motor-car, crashed into the truck and was killed. Macnaghten, J. held there was evidence to enable the jury to find the motor-cyclist could easily have misinterpreted the motorist's signal as a passing instead of a stopping signal, and to find that explanation of his mishap.

The causative factor in *Hall* v. *West Coast Charcoal and Wood Products Co. Ltd.* was the blinding lights of an approaching motor-car. In *Stewart* v. *Hancock* their Lordships of the Judicial Committee concluded there was ample evidence before the jury to find the existence of a causative factor to which the questions of speed and look-out were properly subordinated. It was the dazzling effect upon the motor-cyclist of the lights of a standing motor-car, combined with what was described as a tendency of those lights as well as the motor-cyclist's own lights, to blend with the surface of the road to a degree which impaired ordinary vision.

It seems clear therefore that the principle in *Ristow* v. *Wetstein* must determine if A was guilty of negligence contributing to cause his damage. In my view with respect, the evidence fails to relieve him from that contributory responsibility, since it does not disclose any causative factor which is not causally associated with undue speed or inadequate look-out on his part. On coming into the fog, it is true he reduced his speed to between 15 and 20 miles per hour. He testified, however, he did not see the truck

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until it loomed up 10 to 15 feet in front of him, but it was then too late to stop. He did say:

> I do know this, I was travelling carefully and slowly enough that I could have stopped if I had a fair warning.

But he was not asked what he meant by "fair warning."

It was submitted by counsel before us, it meant that if the truck had a red tail-light he could have seen it in time to stop. That is to say he failed to stop because X was negligent in failing to have a proper warning red tail-light on his truck. But such negligence of X cannot be invoked as "some other" causative factor within the meaning of *Ristow* v. *Wetstein* to excuse A from negligence contributing to cause the accident. For that would deny the *Butterfield* v. *Forrester* principle which is fundamental to *Ristow* v. *Wetstein, viz.*, that one cannot avail himself of the negligence of another, if he do not himself use "common and ordinary caution."

Nor can A invoke the fog as "some other causative factor" within the meaning of *Ristow* v. *Wetstein*. Fog is a reason for slow speed and a sharp look-out. It is but common sense that a man driving in a fog should limit his speed to the range of his vision, and *vide MacGill* v. *Holmes, supra*. It may be that many people do not do so, but that is not a reason why the Courts should apply legal principles in a manner which would encourage dangerous driving. The fact there was not as good a light on the truck as there should have been, important as it is in considering X's negligence, cannot excuse A if he was not driving with common and ordinary caution. There may have been a pedestrian (there was no sidewalk) or a bicyclist on the road. We are not concerned here with a four-lane non-stop highway.

Nor can the slippery condition of the road be invoked as a causative factor distinct from speed and look-out. Again that is a reason for slow speed and sharp look-out. A was driving to work over his accustomed route, and must be taken to be more or less familiar with the weather and road conditions to be expected along that road in the early morning at that time of year. He gave evidence that

> The road was quite slippery and icy. It had been foggy more or less all night, and this fog setting on the pavement and it turned colder about 5 o'clock in the morning [my note: he left home at about 5.50 a.m. and the accident occurred at 6.20 a.m.] caused a slight sheet of ice on the road.

A was fully aware the road was slippery, but he made a distinction between "icy" and "slippery." He testified he knew the road was slippery because of the wetness and cold at that time of morning, but that he did not know it was icy until he put on his brakes at the accident. In any event, A conceded on cross-examination that even if the road had not been icy, he could not have avoided the truck at the speed he was going. His speed of 15 to 20 miles per hour was not very great, but it was too fast under the road and weather conditions then prevailing, for he could not stop within the range of his vision at that rate of speed, even if the road had not been icy. There was not present any causative factor within the meaning of *Ristow* v. *Wetstein* distinct from his undue speed in the circumstances, which would excuse him from colliding with an object or person on the road within or beyond the range of his vision.

In *Irvine* v. *Metropolitan Transport Co.*, [1933] 4 D.L.R. 682, a decision of the Ontario Court of Appeal, the plaintiff driving at about 15 miles per hour at night in a snowstorm, collided with a truck which had a red tail-light burning, but was standing on the road contrary to the Ontario statute. The road was level and not slippery, and the snow did not adhere to the windshield. But the plaintiff did not see the truck until within four or five feet of it. The trial judge found the plaintiff motorist 25 per cent. at fault and the owner of the truck 75 per cent. That was upheld by a majority of the Court of Appeal (Sir William Mulock, C.J.O. and Masten, J.A.), relying on *Admiralty Commissioners* v. *Owners of S.S. Volute* (1921), 91 L.J.P. 38, at p. 43. Riddell, J.A. who dissented, would have dismissed the motorist's action on the *Davies* v. *Mann* principle.

In my view, the facts in this aspect of the case require a finding that the damage to A was caused by a combination of negligent acts on the part of A and X. Both A and X were negligent, but I am not prepared to hold that the evidence shows either A or X to be solely responsible. They were each guilty of negligence so connected with the damage to A as to be a cause materially contributing to it, *vide Canadian Pacific Railway* v. *Frechette*, [1915] A.C. 871, at p. 879. The Contributory Negligence Act applies when the negligence is a cause "or any part of

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the cause" of the damage, *vide McLaughlin* v. *Long,* [1927] S.C.R. 303, Newcombe, J. at pp. 313-4.

X's truck, seven feet wide, occupied substantially the whole nine feet of the right-hand portion of the paved highway. The left rear end projected inward to the centre of the highway at an angle of about 30 degrees. Obviously as A testified, that made it far more difficult for a motorist, faced with that situation on a foggy night and slippery road to avoid it by swerving to the left, than if the left rear end had been projected at the same angle outward from the centre of the highway. The significance of the foregoing observation lies in A's testimony describing the dangerous angle of the truck as a part of the cause of collision. He added that when he crashed, the right-hand side of his radiator was up against the left rear corner of the truck body, and:

> A few more feet and probably I would have been stopped. I was nearly stopped but not quite.

If X's truck had been parked at a less dangerous angle I am not satisfied that A, negligent as he was under *Ristow* v. *Wetstein* would necessarily have collided with it. It seems to me that A's negligence was so mixed up with the state of things arising through X's negligence and so wrapt up therein, that viewed realistically, the negligence of each must be regarded as co-ordinating parts of the cause of collision. In other words, the damage resulted from combined but not clearly severable acts of negligence of A and X under very difficult night conditions; and *vide* a recent decision of this Court in *Ivey and Owl Cabs* v. *Guernsey Breeders' Dairy Ltd.* (1941), 56 B.C. 342.

I need hardly say that the above conclusion, on the prevailing facts, is in no wise inconsistent with the *Butterfield* v. *Forrester* and *Davies* v. *Mann* principle. There is no principle of the common law which denies that the cause of damage may be the combined but not clearly severable negligent acts or omissions of a plaintiff and a defendant. But the common law does deny the plaintiff the right to recover when combined negligence appears, and *vide Caswell* v. *Powell Duffryn Associated Collieries, Ld.,* [1940] A.C. 152, Lord Atkin at pp. 164-5, and Lord Wright at p. 179. In jurisdictions where no Contributory Negligence Act exists, any act of negligence in the plaintiff contributing to cause

the injury, defeated his action, hence an enquiry into combined negligence would be pointless.

But in our jurisdiction where the statute exists, combined negligence has assumed importance, since the statute recognizes divided responsibility with consequential liability, in cases where the combined but not clearly severable negligent acts or omissions of two or more persons are found to constitute the cause of damage. Section 2 (*a*) of our statute reads:

> If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;

But the acts or omissions which form the combined negligence must nevertheless be such as, prior to the statute, constituted "the cause or part of the cause" of the damage in the words of Newcombe, J. in *McLaughlin* v. *Long, supra,* or as stated in another way by Lord Atkinson in *Canadian Pacific Railway* v. *Frechette, supra,* "were so connected with the injury as to be a cause materially contributing to it."

In a true case of combined negligence such as exists here, the time factor may be but one of many influences, forces, and circumstances, precedent as well as contemporaneous, which united to form the cause of damage. In some cases it may be the predominant influence, in others it may be a secondary influence or not a factor at all. In *Leyland Shipping Co.* v. *Norwich, &c. Insurance Society* (1918), 87 L.J.K.B. 395, Lord Shaw observed at p. 405:

> To treat *proxima causa* as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely. . . .

It is of interest to note that the above passage was quoted with approval by Mr. Chief Justice Hughes in delivering the opinion of the Supreme Court of the United States in *Lanasa Fruit Co.* v. *Insurance Co.* (1938), 302 U.S. 556, at pp. 562-3. In *The Eurymedon,* [1938] 1 All E.R. 122 Scott, L.J., after referring to Lord Wright's observation in *McLean* v. *Bell* (1932), 147 L.T. 262, at p. 264, on the importance of responsibility as a test of liability, said at p. 132:

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When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but also the determining factor in the result, since, *ex hypothesi*, but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link.

The *Eurymedon* passage was adopted by the Ontario Court of Appeal in the judgment of the Court delivered recently by Gillanders, J. in *Fingland* v. *Brown and Garon*, [1943] 1 D.L.R. 176, at p. 180. I respectfully subscribe to the view in the cited extract, since I interpret it not to question the principle of causality, but rather to emphasize the importance of preserving the reasoned relation between cause and condition.

It is true the learned trial judge found that A was driving in a careful and prudent manner having regard to the weather conditions, and absolved him of any responsibility. But with respect, he could not have done so in the light of what has been said, unless he had misdirected himself upon the principles of law properly applicable. In *McCann* v. *Behnke*, [1940] 4 D.L.R. 272, Davis, J. (with whom Sir Lyman Duff, C.J. concurred) said at p. 273:

> It is well established, of course, that in respect of a finding of a trial judge as distinct from a verdict of a jury, an appellate Court has to consider whether it on the evidence would have come to the same conclusion even though there be findings based on credibility of witnesses.

I do not think that the Alberta decision of *Wandeleer* v. *Dawson*, [1936] 3 W.W.R. 282, and on appeal at p. 478, relied on by the learned trial judge, decides anything contrary to the view expressed here. The X and A counterparts in that case were both held jointly liable; the one whose tail-light had gone out, for failing to take proper care to warn the public of the danger of his unlighted standing truck, and the other for having defective head-lights and failing to have his truck under sufficient control. But under section 2 (*a*) (cited *supra*) of our Contributory Negligence Act if it is not possible to establish different degrees of fault, the liability shall be apportioned equally. In my view A and X were equally at fault under our Contributory Negligence Act. A's damage when he crashed into X was caused by their combined but not clearly severable acts of negligence.

Next for consideration is the responsibility for the damage to

A when C crashed into B with considerable force, thereby pushing the latter further against A with consequential damage to A. Although B's car came between A and C, he is excluded in the search for responsibility for reasons stated at the outset, which I need not now repeat. This second enquiry lies really between C on the one hand, and A and X on the other. It is true that C has not claimed over against his co-defendant X under rule 177. But under our Contributory Negligence Act, if in the action of A against X and C, any two of them should be found at fault for damage to the third, then such two are jointly and severally liable therefor, and as between themselves in the absence of contract, "they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault."

In this corner of the case, it should first be determined if X negligently contributed to cause the damage A suffered from C's crash. For, if he did not, he is excluded from responsibility for C's damage to A. In my opinion X cannot be fastened with responsibility in that respect unless it can be properly said: (1) The improper lighting of X's truck was causally associated with C's crash into B, or that (2) X was otherwise causally associated as the responsible agent for the ensuing damage. That is to say that C's crash into B's car legally equipped with a red tail-light, was within the risk of harm to be reasonably anticipated by X on account of the frost, wet, fog, darkness, locality, traffic and width of road conditions existing there in the early morning during the month of January.

On the first point, C did not crash into X's improperly-lighted truck as A did. He crashed into B's car which was properly equipped with a red tail-light. On C's own evidence he could see it 25 feet away before he collided with it. X's failure to have a proper tail-light could not therefore affect C's vision. That fault on X's part was ousted or cured by the intervening act of B. Obviously X's faulty lighting could not therefore be causally associated with C's crash into B. That is to say, B's intervening act deprived X's original fault of its own consequences, by intercepting and breaking the sequence of cause and effect between X and C; and *vide* application of the principle in *Canadian*

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Pacific Railway Co. v. *Kelvin Shipping Co. Lim.* (1927), 138 L.T. 369, at p. 370 cited by Sir Lyman Duff, C.J. in *The King* v. *Hochelaga Shipping & Towing Co. Ltd.*, [1940] S.C.R. 153, at pp. 155-6.

The second point raises a wider issue and rests upon an important principle. I have referred previously to the test of liability by responsibility as laid down by the House of Lords in *McLean* v. *Bell,* and applied in the *Eurymedon* case and in *Smith* v. *Harris,* [1939] 3 All E.R. 960 by the Court of Appeal in England, and also by the Ontario Court of Appeal in *Fingland* v. *Brown and Garon.* As I understand it, the emphasis is there laid upon responsibility, because the risk of harm, and not proximity in point of space or time or the number of intervening events, is regarded as the true spring-board of causation; and *vide* the decision of the majority of this Court in *Edwards* v. *Smith* (1941), 56 B.C. 53, particularly at p. 65. Reference is directed also to the reasoning of Cardozo, J. in *MacPherson* v. *Buick Motor Co.* (1916), 111 N.E. 1050, and in *Wagner* v. *International Ry. Co.* (1921), 133 N.E. 437 in the New York Court of Appeals.

The reasoning of Cardozo, J. in *MacPherson* v. *Buick Motor Co.* was adopted by the House of Lords in *M'Alister (Pauper)* v. *Stevenson* (1932), 101 L.J.P.C. 119 (*Donoghue's* case). At p. 136 Lord Atkin said Cardozo, J. "states the principles of the law as I should desire to state them," and *vide* Lord Macmillan at p. 146. *Donoghue's* case was followed and applied by the Judicial Committee in *Grant* v. *Australian Knitting Mills, Ltd.* (1935), 105 L.J.P.C. 6. *Donoghue's* case and *Grant's* case, on their own facts, concerned the responsibility of a manufacturer. But as both decisions developed what Lord Esher said in *Heaven* v. *Pender* (which was not a manufacturer's case) (1883), 52 L.J.Q.B. 702, it is fair to conclude, that what the House of Lords and the Judicial Committee accepted as the general principle of responsibility enunciated by Lord Esher in *Heaven* v. *Pender* was extended incidentally to include the case of a manufacturer.

If that is a correct view of *Donoghue's* case and *Grant's* case as I think it is, the test of liability by anticipation of harm or risk of harm, has the sanction of high and recent authority. In

addition to the decisions already mentioned, reference may be made usefully to *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; 113 E.R. 1041, at p. 1044, *Engelhart* v. *Farrant & Co.* (1896), 66 L.J.Q.B. 122, *McDowall* v. *Great Western Railway* (1903), 72 L.J.Q.B. 652 and *Cooke* v. *Midland Great Western Railway of Ireland,* [1909] A.C. 229 and Lord Atkinson's reference to criticisms thereof in *Glasgow Corporation* v. *Taylor,* [1922] 1 A.C. 44, at pp. 53-4. The principle of liability to which the foregoing decisions point, also underlies the recent judgment of the House of Lords in *Hay or Bourhill* v. *Young* (1942), 167 L.T. 261. It was said in *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23, at p. 28 that an enquiry into responsibility for damage involves an enquiry

> . . . in search not merely of a causal agency, but of the responsible agent.

That does not deny the principle of causality, but rather emphasizes the logical relation between cause and condition. To illustrate: pressing the button of an electric bell is a "condition" for its ringing, but it is the electric current which "causes" the bell to ring. The person who presses the button is the "responsible agent" for ringing the bell. The learned trial judge found X and C jointly liable as responsible agents for A's damage from C's crash. For reasons already given, X cannot be held at fault in this second enquiry solely because his truck was improperly lighted when A crashed into it.

Of course, leaving a properly-lighted car standing on a highway at night is not *eo ipso* actionable negligence, even if prohibited by statute, unless it is causally connected with the damage claimed. But a person may do an act lawful in itself in a way which he must know does create risk of damage to others, if he gives any thought at all to the safety of others, and is not so absorbed in his own problems that he becomes oblivious to surrounding conditions. X's conduct in leaving the truck at a dangerous angle in a position where it blocked the right hand portion of a narrow highway in the circumstances of darkness, fog, slippery road and early morning conditions to be expected in January on a road which he had driven often at night, embraces a variety of factors which cannot be ignored in determining the question of fact, whether leaving the truck there even

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if subsequently protected by B's red tail-light, contributed to all or part of C's damage.

I am not prepared to hold the learned trial judge misjudged the weight of the evidence in finding that X was negligent in failing to anticipate the risk of damage to succeeding motorists, which was created by the truck even if properly equipped (or protected by B) with a red tail-light. That oncoming motorists might easily skid on the wet road in the fog, frost and darkness and crash into the truck, was a not unlikely eventuality which ought not to have escaped the mind of a prudent man. But even if X were negligent in that respect, that does not make him responsible under *Butterfield* v. *Forrester,* if C could have avoided B and the other piled up cars, by the use of common and ordinary care.

The learned trial judge found C negligent in driving too fast. C entered the thick curtain of fog at 25 miles per hour and, on his own evidence, continued driving in it at that speed until he was signalled to stop 75 to 100 feet behind B's car which had crashed shortly before. C admitted he could not see B's car until he was 25 feet away from it. The facts which elicited the principle enunciated in *Butterfield* v. *Forrester* deserve mention in the light of the evidence here. Forrester had put a pole across the road in front of his place. Butterfield rode his horse against the obstruction in the early evening, "when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance." Bayley, J. directed the jury,

> that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did.

Without more elaboration it may be said that is generally descriptive of what happened here. But counsel for C submitted that the icy condition of the road was the "factor causative of the collision" within the meaning of *Ristow* v. *Wetstein.* It is noted that *Pacific Stages Ltd.* v. *Jones,* [1928] S.C.R. 92, was a case where the icy condition of the road was so regarded. In my view that submission fails on analysis. As I interpret the law, C's negligent speed here prevents him invoking ice as a causative

factor. And as I view the evidence, the case is clearly distinguishable from *Pacific Stages Ltd.* v. *Jones.* C was driving much too fast to pull up within his range of vision. Furthermore it appears in the evidence of C's passenger Alexander, that C stalled his engine when he put on his brakes 75 to 100 feet behind B's car when signalled to stop.

Obviously that should not have happened to a prudent driver. By locking his wheels and stalling his engine C lost control of his car. C was clearly negligent within *Ristow* v. *Wetstein.* In my view the principle of *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J.P.C. 23 applies. I quote in part from p. 27:

"If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful but for some self-created incapacity, [my note—undue speed and stalling his engine here] which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes . . . it is in very truth . . . , the decisive cause of the incapacity, and, therefore, of the mischief."

The learned trial judge has found C did not know of the icy condition of the road. If that means C ought not to have known of it, I think there is evidence both ways in the record, if one adopts the distinction between "icy" and "slippery" which A made in his evidence. It will be remembered A testified he knew the road was slippery, but did not know it was icy until he put on his brakes just before the accident. C testified he did not know the road was icy. He was not asked, and did not say, that he did not know the road was slippery. The learned trial judge does not seem to have addressed his mind to the distinction between "icy" and "slippery" which was noticeable in the testimony of A. I do not read C's evidence that he did not know the road was "icy," to mean he did not know it was "slippery."

It may be of course C was so oblivious to his surroundings that he failed to realize what should have been immediately apparent to anyone using common powers of observation. The frosty tinge in the air, the wetness of the road, combined with the night and fog conditions and the handling of his car should reasonably have conveyed to his mind the danger if not the reality of a slippery road (as distinct from "icy") if he had been paying any attention at all to those surrounding conditions. Two motor patrol police officers gave evidence of conditions on the road

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between 5 o'clock and 7 o'clock that morning. One (Smith) said:

> It was noticeably slippery. Handling the car you could see your car wasn't reacting properly from about 5 a.m. on.

The other officer (Thomas) confirmed that evidence, and agreed that anyone driving at 6.30 a.m.

> should have been able to tell if the pavement was icy and slippery if they were watching their driving.

In answer to a question from the Court he said 15 miles per hour was the maximum speed a driver should have been going in order to control his car in the existent conditions.

Pacific Stages Ltd. v. *Jones,* [1928] S.C.R. 92, turned upon whether or not the icy condition of the pavement ought to have been known to the driver. The governing conditions were quite different. The visibility of the fog there was 40 to 50 feet. Here it was 25 feet on C's evidence. There the bus was going down a 5½ per cent. grade. Here C was on a slight up-grade. The driver there was going 12 to 15 miles per hour. Here he was going 25 miles per hour. There half a dozen witnesses testified the icy condition was abnormal and not to be expected. Here there is the evidence of the two police patrol officers and A that the slippery condition was noticeable. In *Pacific Stages Ltd.* v. *Jones* there was obviously ample ground for holding that the icy condition of the road was the causative factor of the collision distinct from speed and look-out. But here, the slippery condition of the road as disclosed in the evidence cannot be regarded as distinct from C's own undue speed or inadequate look-out under *Ristow* v. *Wetstein.* In the circumstances it must be found C's own negligence prevented him stopping within the range of visibility.

There is no negligence attributable to A in this aspect as it affects C. As between A and C, the former should be in no worse position than if he had himself stopped his car on the highway with a red tail-light burning, and had proceeded to warn other traffic as he did here. Furthermore, even if A and X were where they were through their combined negligence, C cannot avail himself of A's negligence in that respect, for the same reasons it has been explained C could not avail himself of X's negligence. Carrying the question further, although A and X

may have been negligent in respect to each other, it by no means follows they must therefore be held negligent in respect to C. For under the *Butterfield* v. *Forrester* principle their combined negligence cannot avail C any more than their individual acts of negligence. Accordingly C is solely responsible for the damage to A resulting from the former's crash into B.

In the result, A and X are held jointly responsible for the first crash, and C is held solely responsible for the second crash. Both A and C were not able, as they should have been while driving at night in a fog, to stop within their respective ranges of vision, and upon the facts here are both responsible under the *Ristow* v. *Wetstein* principle. C's fault renders him solely responsible for the second crash. A's degree of fault in the first crash did not extend to sole responsibility.

X's failure to anticipate the risk of damage to C through leaving his truck on the road, has been considered in the circumstances existing, and has been rejected as a causal agency in the second crash. It is true that X has been found jointly responsible for A's damage in the first crash. But that responsibility is not due on the facts present merely to failure to appreciate the risk to A and others by leaving the truck on the road.

X's responsibility exists in respect to the first crash, because his improper lighting of the truck and the dangerous angle at which he parked it on the road have been shown to be causally connected with A's damage. But A's negligence in not being able to stop within the range of visibility, is so wrapped up in X's recited negligence in respect to the first crash, that their respective acts form co-ordinating and not clearly severable parts of the cause of the first crash, resulting in their joint responsibility for the damage A sustained in the first crash.

Summarizing the foregoing conclusions: (1) The combined but not clearly severable acts of negligence of A and X caused the damage A sustained when he crashed into X; (2) X's negligence in not being equipped with a red tail-light was deprived of its consequences in so far as C was concerned, when B crashed into A and left a proper red tail-light showing which should have been observed by C. (3) Even if X, or A and X combined, were negligent in contributing to cause a block in the traffic, C

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cannot avail himself of that negligence, because (a) his own negligent high speed and stalling of his engine incapacitated him from avoiding the consequences thereof; and (b) the slippery condition of the road, was not on the evidence a causative factor within *Ristow* v. *Wetstein* distinct from C's own undue speed or inadequate look-out.

In the result: (1) As to A's damage of $60 sustained when crashing into X; C is not liable at all but A and X are held jointly liable and the damage is apportioned equally under the Contributory Negligence Act. A is therefore entitled to judgment against X for $30. (2) As to A's damage of $241.25 (*viz.* $301.25 less $60), sustained when C crashed into B; X and A are absolved from liability, and C is held solely responsible. A is therefore entitled to judgment against C for $241.25. Accordingly, the appeal of the appellant Walton (X) is allowed to the extent indicated and the appeal of the appellant Thomas Brown (C) is allowed to the extent indicated.

I think the appropriate order as to costs under the circumstances is as follows: A will have his costs in the Court below against X on the scale applicable to a judgment for $30 and against C on the scale applicable to a judgment for $241.25. X will recover against A nine-tenths of his costs in this Court, and C will recover against A one-fifth of his costs in this Court and there will be the usual set-offs. As between X and C there will be no costs to either party here or below.

FISHER, J.A.: The facts are reviewed in the judgment of my learned brother O'HALLORAN. I am in general agreement with the conclusions he has reached and would allow the appeal of Thomas Walton to the extent indicated and the appeal of Thomas Brown to the extent indicated. As to costs I agree that the appropriate order under the circumstances is as set out in the judgment.

Appeal allowed in part.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

Solicitor for respondent: *G. R. McQuarrie.*

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Dec. 1, 2, 3.

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Jan. 12.

Criminal law—Conspiracy—Evidence—Wholly circumstantial—Verdict of guilty by jury—Rule as to evidence consistent with innocence or guilt of accused—Whether the appellate Court should interfere with verdict.

The accused was found guilty by a jury on a charge of conspiring with others to commit the crime of robbery with violence. The evidence was purely circumstantial and it is admitted that the jury was properly instructed.

Held, on appeal, reversing the decision of MANSON, J. (MCQUARRIE and O'HALLORAN, JJ.A. dissenting), that in this case it is open to this Court, notwithstanding the verdict of the jury, to decide on the evidence whether the facts were such as to be equally consistent with the innocence as with the guilt of the accused and accordingly quash the verdict. It is concluded that on the evidence, the facts were such as to be equally consistent with the innocence as with the guilt of the accused. The appeal is therefore allowed, the conviction quashed with a direction that a verdict of acquittal be entered.

Fraser v. *Regem*, [1936] S.C.R. 296, applied.

Apld R. v. MacDonald 92 C.C.C. 47. [1944] 4 D.L.R. 37

Apld R.v. Halvorsen 53 W.W.R. 541 also [1966] 2 CCC 235

Consd R.v. Knox 62 WWR 8 (B.C.C.A.)

Apld R.v. Vallieres 15 CCC (2d) 241 (Que C.A.)

APPEAL from the conviction by MANSON, J. and the verdict of a jury at the Fall Assize at Vancouver on the 25th of September, 1942, on a charge that he with Edward Strain and Kelvin Thompson

at the city of Vancouver, . . . , between the 30th day of August and the 8th day of September, 1941, . . . unlawfully did conspire, combine, confederate and agree together to commit [a certain] indictable offence, to wit: the crime of robbery with violence, by then and there conspiring, combining, confederating and agreeing together to rob one Chong Dot

of approximately $620 in cash, one yellow gold Waltham watch and a number of personal effects. A Chinaman named Chong Dot, who was known to be in the habit of carrying considerable money on his person, lived on 16th Avenue in Vancouver. On the 7th of September, 1941, he drove his car home and went up a lane to his garage at the back of his house. He arrived there at about 11 o'clock in the evening. As he stopped his car he was attacked by two men, tied up, put in the back of the car and one of the men drove the car to Burnaby, going north on Sussex Street and then west on Winnifred Street (a blind street about 400 feet long) where they stopped about 150 feet from Sussex Avenue. The two men took the Chinaman's money ($620), his watch and other articles and left him in the car. The China-

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man after a short time managed to get free and he then went to a house near by and telephoned the police. A witness, one Robertson, visiting a friend in Burnaby, left there at nearly 12 o'clock on the night of the 7th of September in his car and turned from Marine Drive into Sussex Avenue. He saw the tail-lights of a car 150 feet in as he passed the entrance to Winnifred Street and continuing on on Sussex Avenue he was passed by a Plymouth car, 1941 model. He saw the number of the car (B-508) as he passed. A man was standing on the running-board. On the next morning seeing an account in the paper of the robbery, he telephoned the police as to what he had seen on Sussex Avenue. Having the number of the car, the police found it was a U-Drive car rented from 26 Pender Street East and that on the day in question the accused Dawley had rented the car and did not bring it back until the morning after the robbery. Dawley lived at the Piccadilly Hotel on Pender Street and evidence disclosed that the defendants Strain and Thompson were visiting Dawley's room a number of times just prior to the robbery. This evidence was disclosed by four women with whom the accused were in close touch at the time, also from a chambermaid working in the hotel where Dawley was staying.

The appeal was argued at Vancouver on the 1st, 2nd and 3rd of December, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Donaghy, K.C. (*Marsden*, with him), for appellant: Dawley was sentenced to seven years on a charge of conspiracy to rob Chong Dot. He was taken by two men from his house on 16th Avenue to Burnaby where he was robbed. The Chinaman did not identify anyone and there is no evidence whatever to connect Strain or Thompson with the crime: see *Rex* v. *Goodfellow* (1906), 11 O.L.R. 359; *Rex* v. *Hayes and Pallante*, [1942] O.R. 52; *Rex* v. *Anderson* (1942), [*ante*, p. 88]; 77 Can. C.C. 295. Thompson was a truck-driver in Nanaimo. Strain lived in Vancouver. The evidence does not show that these men had anything to do with Dawley, who is a riveter on a ship in North Vancouver. Jean Reid was a friend of Thompson. Anything said by them in the absence of Dawley is not evidence against

him: see Phipson on Evidence, 9th Ed., 89 *et seq.* There is no evidence whatever connecting Dawley with the robbery: see Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 43; *Rex* v. *Hop Lee*, [1941] 1 W.W.R. 330; *Rex* v. *Pavalini*, [1942] 1 W.W.R. 74; *Rex* v. *Keiwitz* (1941), 57 B.C. 85. The learned judge did not put the defence as fully as he should have. It is all circumstantial evidence in this case: see *Rex* v. *Lillian Elliott*, [*ante*, p. 96]; [1942] 3 W.W.R. 364; *Saskatchewan Farm and Land Co.* v. *Smith*, [1923] 1 W.W.R. 1179; *Rex* v. *O'Gorman* (1909), 15 Can. C.C. 173, at p. 183; *Reg.* v. *Boulton* (1871), 12 Cox, C.C. 87. They should, when an offence, is completed, be charged of the offence.

Bull, K.C., for the Crown: This case is under section 573 of the Criminal Code. Chong Dot was a man of means and always carried a lot of money in his clothes. In this case over $600. Eddie Hong and James Lee had their respective businesses adjoining and they relieved one another at intervals. Chong Dot parked his car at Eddie Hong's place and Dawley, who continually hired a U-Drive car there, knew that Chong Dot carried a lot of money on him. On a charge of conspiracy see *Paradis* v. *Regem*, [1934] S.C.R. 165, at p. 168. The accused did not get in the box: see *Rex* v. *Clark* (1901), 3 O.L.R. 176, at p. 181; *Rex* v. *Nerlich* (1915), 34 O.L.R 298, at p. 312; *Rex* v. *Baugh* (1917), 38 O.L.R. 559, at p. 565; Taylor on Evidence, 12th Ed., paragraphs 593 and 594. The evidence shows the three men were associates for a week before the hold-up and a declaration by one of them is admissible against the others: see *Paradis* v. *Regem*, [1934] S.C.R. 165, at p. 169. This Court cannot say there was no evidence upon which the jury could draw an inference of guilt: see *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1, at p. 10; *Fraser* v. *Regem*, [1936] S.C.R. 296. There is evidence upon which the jury may find guilt. The Court cannot put itself in the position of the jury. There was a complete charge on the question of circumstantial evidence: see *Fraser* v. *Regem* (1936), 66 Can. C.C. 240, at p. 244; *Jarry* v. *Pelletier*, [1938] S.C.R. 296, at p. 301; *Rex* v. *Comba*, [1938] O.R. 200; *Rex* v. *Lillian Elliott*, [*ante*, p. 96]; [1942] 3 W.W.R. 364. You must look at the whole picture and the Courts have so

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decided. As to the severity of the sentence. This man has a bad record: see *Rex* v. *Zimmerman* (1925), 37 B.C. 277, at p. 279.

Donaghy, in reply.

Cur. adv. vult.

12th January, 1943.

MCDONALD, C.J.B.C. agreed with FISHER, J.A.

MCQUARRIE, J.A.: This is an appeal from a conviction by MANSON, J. and a jury at the last Vancouver Assize. Appellant was charged with Edward Strain and Kelvin Thompson for that they did

> at the city of Vancouver, . . . , between the 30th day of August and the 8th day of September, 1941, . . . unlawfully conspire, combine, confederate and agree together to commit an indictable offence, to wit, the crime of robbery with violence, by then and there conspiring, combining, confederating and agreeing together to rob one Chong Dot of the said city of Vancouver.

There was a second count in the indictment charging robbery but that was not proceeded with. The three accused were convicted and the appellant alone appeals. Strain and Thompson were allowed to join the army and they have gone overseas. The appellant was sentenced to seven years' imprisonment.

Counsel for the appellant submitted that the evidence here did not warrant a conviction for conspiracy and that the conviction should be quashed; that the second count in the indictment charging robbery with violence should have been proceeded with. He cited *Rex* v. *Goodfellow* (1906), 11 O.L.R. 359; *Rex* v. *Hayes and Pallante* (1942), 77 Can. C.C. 195 and *Rex* v. *O'Gorman* (1909), 15 Can. C.C. 173.

He also urged that Strain and Thompson were improperly convicted as there was no evidence to prove that they had any connection with the robbery although they were convicted with conspiracy and that their convictions were bad.

Counsel for the appellant admitted that there was some evidence that the appellant was in the vicinity of the place where the robbery is alleged to have been committed and that the appellant had been renting U-Drive cars for some time. He claimed that there was no evidence that the appellant was in the dead-end street where the robbed Chinaman's car was seen. It was com-

mon ground, I think, that the appellant and Strain and Thompson had been in close association and had been in various questionable ventures together with certain young girls and had had opportunity to conspire. It is also, I think, common ground that the evidence was largely circumstantial and counsel for the appellant admitted that he had no objection to the judge's charge on circumstantial evidence. He canvassed the evidence extensively and in detail and threw out the challenge that there was no evidence to sustain a conviction for conspiracy. He claimed that no proper definition of conspiracy was given in the judge's charge which is essential to support a conviction. He referred to the following as being the only definition as to conspiracy given:

> The charge here is one of conspiracy. It is important that you have a clear understanding with regard to conspiracy, and as to the law with regard to the acts of those who are jointly charged as conspirators. The word "conspiracy" needs little if any definition at my hands. If you are interested—if I remember my Latin, and I do not remember it very well, it comes from the Latin conjunction, is it, or preposition "con," and "spire"—to breathe together. I do not need to go any further. It speaks for itself. You all know pretty well what a conspiracy is, a breathing together, if you will, to give it its derivation.

If such had been the case there might have been something to this contention but the learned judge proceeded as follows:

> Now, acts and statements by one of several conspirators or joint offenders or other persons engaged in any common transactions involving mutual legal responsibility, are parts of such common transactions, and are evidence against the other party or parties thereto as if they were done or made by him or them, so far as they were in the execution or furtherance of their common purpose, but not otherwise. That is not my language, and I hesitate to tamper with it, because it is exact language, and yet perhaps it does need a little elaboration at my hands. Acts and statements made by one of several conspirators. Now, there are three charged here. Acts or statements by one of those three. If you, in the course of your deliberations arrive at the conclusion that two of them, or three of them are conspirators as charged, then the acts and statements of any one of them, or of other persons engaged—it may be there was another conspirator who is not named; I do not know that the Crown suggests that, but I state it to you broadly—or other person engaged in any common transaction. Now, the common transaction we have here charged is the commission of an indictable offence, to wit, robbery with violence. Involving mutual legal responsibility —well, if that crime was committed, robbery with violence, or they conspired to commit the crime of robbery with violence, there would be no question of the responsibility of all of them; that is to say, if they all conspired. Those acts and statements while they are so engaged, are part of such common

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transaction, and are evidence against—no matter by which of the three the act was committed, once you have arrived at the conclusion that they are conspiring together, then those acts are evidence against the other party or parties thereto, as if they were done or made by him; that is, by the co-conspirator—the co-conspirators, so far as they were in the execution or furtherance of their common purpose, that is, the common illegal purpose, but not otherwise.

All that must I think be included in the judge's definition of conspiracy and to my mind makes it complete. Counsel for the appellant relied on *Rex* v. *Comba,* [1938] O.R. 200; [1938] S.C.R. 396; and *Fraser* v. *Regem,* [1936] S.C.R. 1 and 296.

Counsel for the Crown submitted that in face of the cumulative effect of the evidence it was difficult for the Court to disturb the verdict, and that there was ample evidence to support it.

He relied on *Paradis* v. *Regem,* [1934] S.C.R. 165, and I would refer particularly to the passage at p. 168 reading:

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

In accepting the challenge of counsel for the appellant he also referred to the evidence including that of the appellant, detective Hoare, Jean Reid, Grace Hewton, Nancy Oxley, Iddie Hong, and James Lee, and in my opinion the jury had the right on the evidence to draw an inference of guilt. I am satisfied with the judge's charge to the jury and his marshalling of the evidence.

Both counsel cited and discussed a number of other interesting authorities but I think the cases I have mentioned might be considered the governing ones on the arguments submitted to us.

With all due deference I would dismiss the appeal.

SLOAN, J.A.: The appellant was convicted at the Vancouver Assize on his third trial (the jury disagreeing in two previous trials) of conspiring with two named men to rob a Chinaman. At the conclusion of the appeal I was satisfied that the conviction could not be upheld. A further and more leisurely examination

of the evidence has confirmed that view. It is my opinion that no jury properly instructed and acting reasonably could find upon the evidence adduced that the Crown had proved the appellant guilty of the crime charged in the indictment.

In my view the appeal should be allowed and the verdict of the jury set aside on the ground that it is unreasonable and cannot be supported having regard to the evidence.

O'HALLORAN, J.A.: Among other objections to the charge of the learned judge, it was urged that the crime of conspiracy was not defined to the jury. It was said the jury were not instructed regarding the ingredients of that offence, and that their minds were not directed to those ingredients as essentials for the prosecution to prove.

The learned judge said: [already set out in the judgment of MCQUARRIE, J.A.].

I cannot find that was added to elsewhere in the charge, although the learned judge did tell the jury previously, that it was important they should have a "clear understanding with regard to conspiracy." He gave the derivation of the word "conspiracy," but omitted unfortunately, to explain the elements of the crime of conspiracy. Throughout the learned judge's charge the words "conspiracy," "conspiring," and "conspire" are found in frequent use, but nowhere are the jury informed of the elements the prosecution must prove in order to establish the crime of conspiracy.

It follows there should be a new trial, as I am not prepared to hold the record discloses no evidence upon which a properly-instructed jury could convict. That is not to say a jury should convict upon that evidence. But it is to say, that the jury, as judges of the facts—and constituted such in active reality and not in abstract theory—had evidence before them, upon which they could either convict or acquit, according to the weight and credibility which they might attach thereto in the conscientious exercise of their duty.

It is in point to add that in a criminal case, matters of credibility may be all-important and determinative. What and whom the jury believed is not revealed to an appellate Court. I would not minimize the danger an appellate Court incurs, if it is

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inclined to hold a jury could not properly draw certain inferences or reach a given conclusion. As the Court is not aware of what and whom the jury believed, it is necessarily without knowledge of the combinations of fact which formed the premises from which the jury drew its inferences and reached its conclusion of guilt.

Also, evidence which may pass as trivial in the mechanical and emotionally unrevealing typewritten transcript before the appellate Court, may, because of the demeanour of witnesses and the atmosphere surrounding living persons giving testimony in a trial Court, convey to that cross-section of the informed public represented on the jury, an intangible but nevertheless accurate appreciaiton of the evidence as a whole, which is necessarily denied to a Court of Appeal.

I would direct a new trial, and allow the appeal accordingly.

FISHER, J.A.: In this matter it is or must be common ground that on a charge of conspiracy the agreement itself is the gist of the offence but the actual agreement need not be proven by direct evidence—see *Paradis* v. *Regem,* [1934] S.C.R. 165 where Rinfret, J. says at p. 168: [already quoted by MCQUARRIE, J.A.].

It is or must be common ground also that the well-known rule, laid down in *Hodge's Case* (1838), 2 Lewin, C.C. 227, applies in a conspiracy case where (as here) the verdict admittedly rests solely upon a basis of circumstantial evidence. See *Fraser* v. *Regem,* [1936] S.C.R. 1 and 296. In such case Rinfret, J. says at p. 2:

> The result of that rule and of the decisions where it was applied is that "in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt. (Wills, on Circumstantial Evidence, at p. 262)."

Keeping in mind the way in which conspiracy may be established and that the aforesaid rule must be applied, I have examined the evidence in the present case minutely and, if it is open to this Court on such an appeal as this to decide on the evidence on its own findings, notwithstanding the verdict of guilty by the jury, that the facts were such as to be equally consistent with the innocence as with the guilt of the accused and accordingly

to quash the verdict, then speaking for myself I have to say that I would decide that the facts here were such as to be equally consistent with the innocence as with the guilt of the accused and accordingly quash the verdict. On this phase of the matter I note that counsel for the appellant admits that the jury was properly instructed within the terms of the rule and the submission of counsel for the Crown is that in such case this Court cannot quash the conviction upon the grounds suggested by counsel for the appellant. During the argument many cases were cited and it seems to me that the issue must be settled only after careful consideration of the two cases of *Fraser* v. *Regem, supra,* and *Rex* v. *Comba,* [1938] O.R. 200; [1938] S.C.R. 396.

In the *Fraser* case two of the accused had been found guilty on all counts of an indictment charging them with the offence of conspiracy as well as other offences. Upon appeal the judgment of the Court of King's Bench (appeal side) upheld the verdict and upon the application of the appellants leave was granted under section 1025 of the Criminal Code to appeal to the Supreme Court of Canada on the ground that the judgment conflicted with the judgments of other Courts of Appeal in Canada in like cases. See *Fraser* v. *Regem, supra,* at p. 1. When the case came on for argument Rinfret, J. delivering the judgment of the Court, said in part as follows at pp. 299-301:

> We will, therefore, proceed to express our view upon the merits of the point submitted by counsel for the appellants which is, in effect, that there was no legal evidence upon which a jury might find a verdict of guilty in the circumstances. The argument of the learned counsel was that, in a case where all the evidence is circumstantial, should the court of appeal not be satisfied, upon its own findings, that the circumstances proven were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person, it ought to quash the verdict on the ground that there was not sufficient legal evidence to support it.
>
> Although, as a general rule, the question whether the proper inference has been drawn by the jury from facts established in evidence is really not a question of law, but purely a question of fact, for their consideration (*Gauthier* v. *The King,* [1931] S.C.R. 417), there is authority for the view that the rule with regard to circumstantial evidence is not exclusively a rule in respect of the direction which it is the duty of the trial judge to give to the jury or a rule solely for the guidance of a trial judge unassisted by a jury.
>
> We were referred to, at least, two cases where the Court of Criminal Appeal in England set aside verdicts and quashed convictions when, after having considered the evidence as a whole, it seemed to the Court to be clear

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that the evidence was as consistent with the innocence of the accused as with his guilt.

. . . . .

It would appear, therefore, that, when the evidence in a criminal case is purely circumstantial and at the same time equally consistent with the innocence as with the guilt of the accused, the Court of Criminal Appeal in England regards that evidence as insufficient to justify the jury in convicting, holds the verdict unsatisfactory and quashes the conviction, on the ground that it cannot be supported, having regard to the evidence.

To a certain extent, this would assimilate verdicts based on circumstantial evidence "as consistent with the innocence as with the guilt of the accused" to verdicts where it is claimed that there is no evidence at all to support them, the view being that the court of appeal is empowered to set aside those verdicts on the ground that they are unsatisfactory, whether on account of a total lack of evidence or for want of sufficient legal evidence to support them.

Let it be granted, however, that such a question should be deemed a question of law, or of mixed law and fact, when once it is established that the evidence is of such a character that the inference of guilt of the accused might, and could, legally and properly be drawn therefrom, the further question whether guilt ought to be inferred in the premises is one of fact within the province of the jury (*Reinblatt* v. *The King*, [1933] S.C.R. 694, at 697).

I have quoted at length from the *Fraser* case as with all deference I think that until the later decision in the *Comba* case, *supra*, much might have been said in favour of the contention that the effect of the decision in the *Fraser* case was that, even if the evidence is purely circumstantial and at the same time equally consistent with the innocence as with the guilt of the accused in the view of the Court of Appeal making its own findings, nevertheless, if the jury has been properly instructed and finds a verdict of guilty, the Court of Appeal cannot quash the verdict as the question whether guilt ought to be inferred in the premises is one of fact within the province of the jury. In my opinion, however, this contention must now be rejected in the light of the decision in the *Comba* case. In such case the accused Comba appealed to the Ontario Court of Appeal from his conviction by Chevrier, J. and a jury on a charge of murder. The Court of Appeal held, Latchford, C.J.A. dissenting, that the conviction should be quashed and the accused should be acquitted since the evidence adduced by the Crown at the trial was purely circumstantial and was equally consistent with the innocence as with the guilt of the accused. In his reasons for judgment Middleton, J.A. with whom the majority of the Court agreed

(though some of them added further observations) stated (p. 211) that he was

> seeking guidance from the Supreme Court, [of Canada] when the case of *Fraser* v. *The King* already referred to came on for argument before the Supreme Court,

and it is obvious that such case was treated and followed by the majority of the Court as an authority for this principle of law, *viz.*, that, when the verdict of guilty in a case rests solely upon a basis of circumstantial evidence and it seems clear to the Court of Appeal after having considered the evidence as a whole that the evidence is as consistent with the innocence of the accused as with his guilt, the Court of Appeal quashes the conviction on the ground that it cannot be supported, having regard to the evidence. The appeal by the Crown in the *Comba* case to the Supreme Court [1938] S.C.R. 396 was dismissed, Sir Lyman Duff, C.J., delivering the judgment of the Court stating at p. 397 in part as follows:

> We agree with the majority of the Court of Appeal, whose reasons for their judgment we find convincing and conclusive, . . .

The Ontario Court of Appeal having indicated in its reasons for judgment in the *Comba* case its view of the effect of the decision of the Supreme Court of Canada in the *Fraser* case and the Supreme Court of Canada in the *Comba* case having found such reasons "convincing and conclusive," I am confirmed in my opinion that the effect of the decision of the Supreme Court of Canada in the *Fraser* case is properly stated in the head-note [1936] S.C.R. 296-7 reading as follows:

> Where the evidence in a criminal case is purely circumstantial and the jury has been properly instructed within the rule as to the value of circumstantial evidence, the verdict of the jury finding the accused guilty is equivalent to a finding that, in the minds of the jury, the inferences to be drawn from the evidence were consistent with the guilt of the accused and inconsistent with any other reasonable conclusion, *i.e.*, with the absence of guilt. Likewise, an appellate court could also decide, on the evidence, whether the facts were such as to be equally consistent with the innocence as with the guilt of the accused, and accordingly quash the verdict. But, before this Court, when the accused does not urge any ground of complaint against the direction of the trial judge and the evidence is such that the jury might, and could, legally and properly draw an inference of guilt, as held by the appellate court, it is not for the Court to decide whether the jury ought or not to have inferred that the accused was guilty.

My conclusion, therefore, is that in this case it is open to this Court, notwithstanding the verdict of the jury, to decide on the

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evidence whether the facts were such as to be equally consistent with the innocence as with the guilt of the accused and accordingly quash the verdict. As I have already intimated my own decision on the evidence is that the facts were such as to be equally consistent with the innocence as with the guilt of the accused. I would, therefore, allow the appeal, quash the conviction and direct a verdict of acquittal to be entered.

Appeal allowed, McQuarrie and O'Halloran, JJ.A. dissenting.

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Jan. 20, 21; March 2.

IN RE CHAMPION & WHITE LIMITED AND *IN RE* AJAX HOLDINGS LIMITED.

Companies Act—Sale of shares—Articles of association—Provision that shares be first offered to members—Notice of sale to be delivered to secretary of company—"Such notice shall state the price and terms at which the shares are to be sold"—Construction—R.S.B.C. 1936, Cap. 42, Secs. 78 and 89.

Section 5 of the memorandum of association of the C. Company provides: "No share of the company shall be transferred to a person who is not a member of the company as long as any existing member is willing to purchase the same at a fair value as may be decided upon by the auditor for the time being of the company." By section 9 (b) of the articles of association: "The directors may also decline to register any transfer of shares unless such shares have been offered through the secretary to the existing members of the company by a notice given at least thirty days before a sale is to be completed, such notice shall state the price and terms at which the shares are to be sold." The section further provided that if the company should within 28 days after service of such notice find a member or members willing to buy the share or shares and should give notice thereof to the proposing transferor, he would be bound upon payment of the fair value to transfer the share or shares to such member. On October 28th, 1940, the N. company notified the C. company that it desired to sell 3,006 shares of the C. company of which it is the registered holder, and offered through the C. company to sell the existing members thereof said shares for $60,000. No reply was received to the letter and on the 12th of December, 1940, the N. company sold the shares to A. company and executed a transfer. The N. company then notified the C. company of the sale and requested transfer thereof on the books of the company. C. company declined to transfer

the shares on the books of the company and on petition by the A. company for an order that the register of C. company be rectified by entering therein the name of the petitioner as owner of 3,006 shares of said company, it was held that there had been compliance with the memorandum and articles of association and an order for rectification of the register was granted.

Held, on appeal, reversing the decision of COADY, J. (MCDONALD, C.J.B.C. dissenting), that the words "such notice shall state the price and terms at which the shares are to be sold" in section 9 (b) of the articles of association must be construed to mean "the price and terms at which the shares are to be sold to a person other than a member of the company," that is to say, before the selling member is called upon to give notice to the secretary offering to sell his shares to other members, he must have made a conditional bargain to sell his shares to a non-member at the expiration of 30 days from the date of the notice upon the price and terms specified in the notice. The notice is not to be a mere offer to sell to the existing members upon the price and terms stated, but is an offer of the shares to existing members, which offer, unless accepted within 28 days, will be followed by the completion of the contemplated sale to a non-member at the price and terms upon which the notice discloses they are to be sold. The notice of October 28th, 1940, not being in compliance with section 9 (b) of the articles of association the appeal was allowed.

APPEAL by Champion & White Limited from the decision of COADY, J. of the 19th of November, 1942 (reported, *ante*, p. 365) granting the petition by Ajax Holdings Limited under section 78 of the Companies Act for an order that the register of members of Champion & White Limited be rectified by entering therein the name of the peitioner as the owner of 3,006 shares in the capital stock of the company. It is a private company incorporated under the laws of British Columbia in 1920. It has certain restrictions on the transfer of its shares. Section 5 of the memorandum reads, in part, as appears in the head-note. The pertinent part of the articles of association of the company, dealing with the matter of transfer is section 9 (b), set out in the judgment of SLOAN, J.A. On October 28th, 1940, The London & Western Trusts Company Limited, acting under a power of attorney from National Paper Box Limited at that time the registered owner of 3,006 shares in Champion & White Limited, wrote to the company as follows:

We deliver to you herewith power of attorney executed by National Paper Box Limited in your favour authorizing us to dispose of the shares in your company of which National Paper Box Limited is the registered holder.

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Pursuant to the articles of association and memorandum of association of your company, we accordingly offer, through you, to sell to the existing members of Champion & White Limited the 3006 ordinary shares of that company of which National Paper Box Limited is the registered holder, at the price of $60,000.00 all cash. We find on referring to your last audited balance sheet that these shares have a book value of about $104.00 each. You will thus observe that our present offer represents a substantial reduction. The offer hereby made relates to a sale of the whole number offered and not to a part thereof. Please advise us in due course as to the acceptance or refusal of this offer by the present members of the company, and in the meantime will you kindly acknowledge receipt of this letter and the enclosure.

No reply was received to this letter. On December 12th, 1940, National Paper Box Limited, through its authorized attorney, agreed to sell the said 3,006 shares to the petitioner herein and on the same day executed a transfer of the said shares to that company. By letter dated December 23rd, 1940, National Paper Box Limited, by its authorized attorney, gave notice to the company that the said shares had been sold to the petitioner herein and requested transfer thereof on the books of the company and that a new certificate be issued in the name of the petitioner. The share certificates and a form of transfer duly completed were enclosed. On February 13th, 1941, the directors of the company, by resolution, declined to transfer the said shares on the ground that a notice of compliance with the provisions of the articles of association had not been given. Counsel for the company based objections to transfer upon four grounds: First, that the memorandum of association must govern and that no transfer can be made so long as a present shareholder is willing to purchase any portion of the said shares; second, the provisions of the articles of association have not been complied with; third, another party claims to be the owner of these shares; fourth, the sale to the petitioner was at a price less than the price offered to the present shareholders.

The appeal was argued at Victoria on the 20th and 21st of January, 1943, by MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Donaghy, K.C., for appellant: The appellant is a private company and the restrictions on the transfer of shares may be inserted in the memorandum. The restrictive covenant in the

memorandum is clear and applies to each share. On the facts in this appeal it prohibits the proposed transfer. Being part of the constitution of the company, it is binding on the company. An act done in contravention of a restriction contained in the articles is void unless the consent of every shareholder was obtained: see *Hunter* v. *Hunter,* [1936] A.C. 222. Restrictions and conditions contained in the memorandum cannot be altered by provisions contained in the articles. The articles of a company are subordinate to and controlled by the memorandum of association which is a dominant instrument: see *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653. The restrictions contained in the memorandum become fundamental conditions upon which the company is allowed to be incorporated, the articles are only the internal regulations of the company. The learned judge erred in holding that there was no inconsistency between the memorandum and the articles. The notice containing the offer of sale does not comply with the requirements of paragraph 9 (b) of the articles. The notice sent to the secretary named the price of $60,000 for the 3,006 shares when the price for which the shares were sold was $10,000.

Locke, K.C. (*Lundell,* with him), for respondent: The offer made was in compliance with the requirements of the memorandum and articles of the company. A member desiring to sell must offer his shares to the members through the secretary stating the price and terms. The sale must be complied with in 30 days. If a member desiring to purchase complains the price is too high there is method provided for determining the value. In this case the company did not notify the vendor of the desire of any member to purchase the shares. There was compliance in every respect with the articles and it was so found. Article 20, as amended by paragraph 9 of the articles of association, does not authorize the directors to refuse to register a transfer where the directors are of opinion that it is desirable to admit the proposed transferee to membership: see Palmer's Company Precedents, 15th Ed., Part I., p. 880. There is no provision that the price and terms referred to refer to the price and terms to which a sale is to be made to some third party. The sale referred to is the sale to the existing members. If the language

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of paragraph 9 of the articles is capable of meaning either a sale to existing members or third parties, if there be ambiguity, it should be resolved against the appellant: see Mitchell on Commercial Corporations, 45; Leake on Contracts, 8th Ed., 158; McGillivray on Insurance, 2nd Ed., 1028; *Metropolitan Life Ins. Co.* v. *Montreal Coal and Towing Co.* (1904), 35 S.C.R. 266; *Confederation Life Association* v. *Miller* (1887), 14 S.C.R. 330. The offer was for the sale of 3,006 shares and not a lesser number. An offer to purchase one share only was made a year and one-half after the original offer of the whole 3,006 shares was made. This offer was properly refused: see *Ocean Coal Co.* v. *Powell Duffryn Steam Coal Co.* (1931), 101 L.J. Ch. 253. As to the share certificates in question being endorsed with a transfer of the shares to one Taylor which had been cancelled by striking out Taylor's name, the *onus* is on them to prove the interest of a third party and an incomplete transfer conveys no title: see *Hunter* v. *Hunter,* [1936] A.C. 222. As to the contention that the matter should not have been disposed of by petition, section 78 of the Companies Act gives the Court all the powers necessary to effectively determine every question arising under the petition.

Donaghy, replied.

Cur. adv. vult.

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MCDONALD, C.J.B.C.: I am so fully in accord with the reasoning and conclusions of COADY, J. (reported, [*ante,* p. 365]; [1943] 1 W.W.R. 152), that I gravely doubt that I can add anything of value.

Obviously the learned judge approached his problem with due regard to the rule recently laid down by Lord Greene, M.R. in *Re Smith & Fawcett, Ltd.,* [1942] 1 All E.R. 542, that:

> . . . one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than this: that the shareholder has such a *prima facie* right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity.

I agree with the learned judge that there is no difficulty in

this case in reading the memorandum and articles together, but if there were any such difficulty the above rule must be applied.

Much was made in the argument before us of the decision in *Ashbury* v. *Watson* (1885), 30 Ch. D. 376. In my opinion this case does not stand in respondent's way at all, as was clearly explained in *In re South Durham Brewery Company* (1885), 31 Ch. D. 261, and *In re Welsbach Incandescent Gas Light Company, Limited,* [1904] 1 Ch. 87.

With due respect for the ingenious argument of counsel, I think this case would never have presented any difficulty if the appellant had kept in mind the principle long established and clearly stated by Bacon, V.C. in *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107, at p. 135:

> Upon this record and in the present case the memorandum of association and the articles which accompanied it, and which are by the agreement of the parties substituted for Table A of the statute, are to be read together, not for the purpose of extending the terms of the memorandum of association or adding to the objects of the association; but they may and must be considered as expressing the meaning of the words used in the memorandum, for the two instruments taken and read together constitute the contract of partnership between the shareholders who are the parties here litigant.

I would dismiss the appeal.

McQUARRIE, J.A.: I agree that the appeal should be allowed for the reasons stated by my brother SLOAN.

SLOAN, J.A.: This appeal involves the construction proper to be placed upon the articles of association of a private company—Champion & White Limited—relating to the right of its members to transfer their shares to non-members.

Section 5 of the memorandum of association of the said company reads as follows:

> 5. No share of the company shall be transferred to a person who is not a member of the company as long as any existing member is willing to purchase the same at a fair value as may be decided upon by the auditor for the time being of the company, . . .

That a member has the right to sell his shares to a non-member is thus recognized by the quoted section of the memorandum provided the other conditions required to effectuate a valid transfer are fulfilled.

The procedural machinery and conditions for carrying out

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such a sale are provided by section 9 (b) of the articles of association which reads as follows:

The directors may also decline to register any transfer of shares unless such shares have been offered through the Secretary to the existing members of the company by a notice given at least thirty days before a sale is to be completed, such notice shall state the price and terms at which the shares are to be sold. If the Company shall within a space of twenty-eight (28) days after being served with such notice, find a member willing to purchase the share or shares, and shall give notice thereof to the proposing transferor, he shall be bound, upon payment of the fair value, to transfer the share or shares to the purchasing member, and in case a difference arises between the proposing transferor and the purchasing member as to the fair value of a share the company's auditor on the application of either party shall certify in writing the sum which in his opinion is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the auditor shall be considered to be acting as an expert and not as an arbitrator, and the said purchasing member shall accept the value thereof as so given, and the share shall be transferred accordingly.

The neat point for decision is whether or not the selling member has complied with the provisions of said section 9 (b).

The facts, shortly stated, are that the National Paper Box Limited was the registered holder of 3,006 ordinary shares of Champion & White Limited and on the 25th of October, 1940, executed a power of attorney in favour of London & Western Trusts Company Limited authorizing the Trust Company (*inter alia*):

To sell and dispose of 3006 ordinary shares in Champion & White Limited aforesaid of which we are the registered holders on the books of the said company, and to comply with such of the provisions of the memorandum and articles of association of the said company as our said attorney in its absolute discretion may see fit in order to dispose of the said shares.

In the event of Champion & White Limited failing to find a purchaser for the said shares, to dispose of the same upon the open market in such manner and for such price as our attorney in its absolute discretion may see fit.

Pursuant to the authority conferred upon it the Trust Company on the 28th of October, 1940, wrote a letter to the secretary of Champion & White Limited from which communication I extract the following relevant paragraphs:

We deliver to you herewith power of attorney executed by National Paper Box Limited in our favour authorizing us to dispose of the shares in your company of which National Paper Box Limited is the registered holder.

Pursuant to the articles of association and memorandum of association of your company, we accordingly offer, through you, to sell to the existing members of Champion & White Limited, the 3006 ordinary shares of that

company of which National Paper Box Limited is the registered holder, at the price of $60,000.00 all cash.

The offer hereby made relates to a sale of the whole number offered and not to a part thereof.

Please advise us in due course as to the acceptance or refusal of this offer by the present members of the company, and in the meantime will you kindly acknowledge receipt of this letter and the enclosure.

Champion & White Limited did not reply to this letter.

On the 27th of November, 1940, a company known as Ajax Holdings Limited was incorporated and on the 12th of December, 1940, it purchased from the National Paper Box Limited the 3,006 shares of Champion & White Limited.

On the 23rd of December, 1940, the Trust Company wrote to Champion & White Limited as follows:

As attorney for National Paper Box Limited we have sold to Ajax Holdings Limited the 3006 shares of the capital stock of your company registered in the name of National Paper Box Limited.

We accordingly enclose herewith certificate No. 25 for 3005 shares with serial numbers 5 to 3002 and 6003 to 6009; and certificates from 1 share with serial number 6010. Attached to these certificates are proper forms of transfer executed under seal by the transferor and the transferee.

Kindly issue one new certificate in the name of Ajax Holdings Limited, 510 West Hastings Street, Vancouver, B.C., for 3006 shares.

Upon hearing from you we will promptly remit any transfer charges herein and stock transfer tax if any.

On or about the 13th of February, 1941, the application to register Ajax Holdings Limited as the holders of the said 3,006 shares was considered by a meeting of the directors of Champion & White Limited and a resolution was passed, which after recitals, was in the following terms:

RESOLVED by the directors that having considered the transfer to Ajax Holdings Limited of said 3006 shares and the application by The London & Western Trusts Company Limited as attorney for National Paper Box Limited for the issue of one new certificate in the name of Ajax Holdings Limited for said 3006 shares, the directors under the authority of the provisions of the articles of association reading as follows,—

"The directors may also decline to register any transfer of shares unless such shares have been offered through the secretary to the existing members of the company by notice given at least 30 days before the sale is to be completed, such notice shall state the price and terms at which the shares are to be sold."

decline to register the said transfer of National Paper Box Limited to Ajax Holdings Limited of said 3006 shares because a notice in compliance with the said provisions of the articles of association has not been given.

In April of 1942 Ajax Holdings Limited launched a petition

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under section 78 of the Companies Act for an order that the register of members of Champion & White Limited be rectified by entering therein the name of the petitioner as owner of the said 3,006 shares of Champion & White Limited.

The matter came on for hearing before COADY, J. who made an order in the terms of the prayer of the petition. From that order Champion & White Limited appeals to us.

Several grounds were advanced in support of the appeal but I propose to confine myself to a consideration of one which, with deference, in my opinion determines the matter in favour of the appellant. That point is whether the notice of October 28th, 1940, from the Trust Company to Champion & White Limited was or was not a proper compliance with section 9 (b) of the articles of association. The learned judge below thought it was. With great respect I think it was not.

The validity or invalidity of the notice depends upon, as I said before, the construction proper to be placed upon said section 9 (b). If section 9 (b) bears the interpretation put upon it by counsel for the respondent the notice is good and sufficient. If section 9 (b) is construed to mean what appellant's counsel contends it does the notice is bad and insufficient. Respondent's counsel concedes that that is the position.

The appellant's argument on this branch of the case may be summarized as follows: The phrase in section 9 (b) "such notice shall state the price and terms at which the shares are to be sold," must be construed to mean "the price and terms at which the shares are to be sold to a person other than a member of the company." That is to say before the selling member is called upon to give notice to the secretary offering to sell his shares to other members he must have made a conditional bargain to sell his shares to a non-member at the expiration of 30 days from the date of the notice upon the price and terms specified in the notice. The notice is not to be a mere offer to sell to the existing members upon the price and terms stated but is an offer of the shares to existing members to be accepted within 28 days, otherwise the contemplated sale to a non-member will be completed, at the price and terms which the notice discloses they are to be sold.

In my opinion that is what section 9 (b) means. Several

reasons impel me to reach that conclusion. In the first place the whole object of the section is to provide the means by which the limited right of transfer of shares may be effectively made by a member to a non-member and to render ineffective any attempted transfer by any other form of procedure. Thus the section speaks of the directors declining to "register any transfer" unless certain conditions precedent to the transfer of "such shares" are complied with. That must mean a transfer to a non-member and "such shares" must mean the shares offered for registration in the name of a non-member. When the notice is required to state the price and terms upon which "the shares" are to be sold I can only take that to mean the shares registration of which is sought by a non-member.

Then too the notice is required to state the price at which the shares "are to be sold." That must mean, in my opinion "sold to a non-member" otherwise if the notice was to contain an offer to the shareholders and nothing more one would expect the notice to read "are offered for sale" instead of "to be sold."

Again I think support is found for that interpretation by the requirement that the notice shall be given at least 30 days "before a sale is to be completed." That seems to me to indicate a bargain already made. If the notice was to be merely an offer to sell to existing shareholders and none was interested in buying how could the notice have any reference to a sale "to be completed" when no sale has ever had a beginning much less a date for completion?

Then again it is significant to note the different time periods of 28 and 30 days.

In my view of the matter the proposing seller must give to the secretary at least 30 days' notice of his intention to sell his shares to a stranger specifying in his notice the price and terms agreed upon. The secretary then must bring this notice to the attention of the other shareholders. If a member wishes to purchase the shares at a fair value to keep them within the family, so to speak, notice of his willingness to do so must, within 28 days, be communicated by the secretary to the "proposing transferor" who shall thereupon be bound to sell to the purchasing member subject to price adjustment by the auditor in case a difference arises. If, on the other hand, the notice is to

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contain an offer to sell to the shareholders and nothing more except that upon acceptance the sale is to be completed within 30 days and there is no acceptance is the proposing seller then at liberty at any time in the future to sell his shares to a non-member? That could never have been intended. And then too why, if this notice is a simple offer, are there the two periods? It seems to me that they can only be explained if the interpretation I put upon section 9 (b) is correct.

It seems clear that the reason why the notice to the existing members must contain details of the proposed sale to a non-member is to compel the selling shareholder to "put his cards on the table"—if I may be permitted the expression. The necessity for the disclosure is well known to those with company experience: one reason is to prevent a shareholder who wishes to sell from bludgeoning his fellow shareholders into buying his shares from him under threat of selling to an outside buyer whose only existence is in the mind of the seller. Hence the requirement of the notice giving details of the proposed sale and the "fair value" provision.

If I am right in the construction I place upon section 9 (b) of the articles then the notice of the 28th of October, 1940, is not a compliance therewith in that it does not specify "the price and terms" of a proposed sale to a non-member. It is clear from the power of attorney the National Paper Box Limited did not have any particular buyer in view because the Trust Company was authorized, if Champion & White Limited did not take up the shares, to sell them on the open market. The purchaser—the Ajax Holdings Limited—did not have in October of 1940 any corporate existence.

It follows therefore that, with deference, I would allow the appeal.

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

FISHER, J.A.: I would allow the appeal for the reasons stated by my brother SLOAN.

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

Solicitor for appellant: *Dugald Donaghy.*
Solicitors for respondent: *Lawson, Clark & Lundell.*

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Automobile—Collision at intersection—Automobile turning to left after stopping at stop sign—Motor-vehicle Act—Police officers signal by siren—Right to assume siren is heard—Apportionment of blame—R.S.B.C. 1936, Cap. 52; Cap. 195, Secs. 53 to 59 inclusive.

On the 26th of May, 1941, at 7.50 a.m., the defendant, driving his car easterly on Broadway in the city of Vancouver, stopped his car on reaching Burrard Street, there being a four-way compulsory stop at this intersection. On the opposite side of the intersection a western bound street-car was standing on the north track. The defendant was going north on Burrard. He started up, turned to his left across the tracks in front of the street-car and proceeded on when he was struck on his right side near the north-east corner of the intersection by the plaintiff, a police officer operating a motor-cycle with siren, as a member of the city's motor-cycle traffic squad going west in discharge of his duties answering a radio call to a motor accident. When the plaintiff stopped on the west side of Burrard, another traffic police officer going in the same direction as the plaintiff about a block ahead of him and on the same mission was driving a police panel car at 30 miles an hour and sounding his siren. As the plaintiff approached Burrard he was going at about 55 miles an hour and while approaching the intersection and while driving on it, was sounding his siren in a high pitch. The defendant testified that he neither heard nor saw plaintiff's motor-cycle until immediately before the collision. It was held on the trial that the collision was due to "synchronous negligence" of both parties and the degree of fault was apportioned two-thirds to the defendant and one-third to the plaintiff.

Held, on appeal, affirming the decision of SIDNEY SMITH, J. (MCDONALD, C.J.B.C. dissenting), that the learned trial judge found the collision was due to the synchronous negligence of both parties. There was no cross-appeal by the respondent and it was not necessary to express an opinion as to whether the respondent was partly to blame. It was sufficient to say that in any event the appellant was partly to blame and assuming, without finding, that there was fault on the part of the respondent contributing to the accident, there would be no finding that his degree of fault was greater than that found by the learned trial judge. Analysis of the evidence supported the conclusions that the appellant ought to have seen or heard the approach of the respondent and he was properly held responsible at least to the degree found below.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 18th of June, 1942, in an action arising out of a motor-vehicle collision which took place on the 26th of May, 1941, at about 10 minutes to 8 in the morning at the intersection of Broadway West and Burrard Street south in the city of Van-

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couver. Both are main thoroughfares and there is a four-way compulsory stop at the intersection. The appellant was driving a motor-vehicle easterly on Broadway and stopped at the westerly boundary of the intersection intending to turn northerly on Burrard Street. At the same time the respondent was driving and operating a police motor-cycle in a westerly direction on Broadway and approaching the said intersection and was sounding his siren up to the time he was entering the intersection. A street-car facing west was stopped on the north track on Broadway east of the intersection. A police panel car, going west on Broadway at a high rate of speed with its siren going, went through the intersection about a block's distance ahead of the respondent's motor-cycle. Upon the police panel car passing, the appellant proceeded to turn to his left on Burrard in front of the standing street-car on the east side of the intersection at about four miles an hour and when the nose of his car came past the street-car, he first heard the respondent's motor-cycle and immediately applied his brakes but when past the northerly car track he was struck by the respondent and both drivers were injured.

The appeal was argued at Victoria on the 22nd and 25th of January, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

G. E. Housser, for appellant: The respondent was proceeding at 55 miles an hour and must have been 770 feet east of the intersection when the appellant started from his stop sign. Before starting, the appellant took a good look and saw nothing even beyond Pine Street (the next street east of Burrard Street). The legal speed is 30 miles an hour. They say he should have looked again after turning. As to his duty in this regard see *Green* v. *Gordon* (1925), 35 B.C. 92. There was error in finding negligence by the appellant. The respondent was going at 55 miles an hour and he passed the standing street-car and the stop sign without reduction of speed. He relied on the city by-law and section 59 of the Motor-vehicle Act. The respondent failed to have any regard for section 53 (1) of said Act. He did not exercise due care for the safety of others. It is submitted that the effect of the finding by the trial judge read with the evidence

is that the ultimate negligence, which was the true and effective cause of the collision was that of the respondent. He saw the appellant start and saw him make the left turn. The appellant had his car under control and came to an immediate stop. The respondent knew what the appellant was doing and he should have guarded against the danger: see *Sim* v. *City of Port Arthur* (1911), 2 O.W.N. 864, at p. 865; *Perdue* v. *Epstein* (1933), 48 B.C. 115; *Lloyd* v. *Hanafin* (1931), 43 B.C. 401; *Noble* v. *Stewart* (1923), 51 N.B.R. 94; *Parsons* v. *Toronto R.W. Co.* (1919), 45 O.L.R. 627; *Jeremy* v. *Fontaine,* [1931] 4 D.L.R. 556; *B. & R. Co.* v. *McLeod* (1914), 18 D.L.R. 245; *Trueman* v. *Hydro-Electric Power Commission of Ontario* (1923), 53 O.L.R. 434; *Rogers et al.* v. *Lewis et al.,* [1934] O.W.N. 441; *Lind* v. *C.P.R.,* [1942] 4 D.L.R. 659; *Jacobson* v. *V.V. & E. R. & N. Co.* (1941), 56 B.C. 207; *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512. As to whether the Contributory Negligence Act has interfered with the common-law doctrine of ultimate negligence see *Irvine* v. *Metropolitan Transport Co. Ltd.,* [1933] O.R. 823; *Latimer et al.* v. *Ellis,* [1935] O.W.N. 288. Assuming the appellant was negligent, his negligence had exhausted itself and the respondent's failure to take any precaution was the *causa causans* of the accident. There was no excuse for his approaching the intersection at that speed: see *B.C. Electric R. Co.* v. *Loach* (1915), 23 D.L.R. 4; *Ontario Hughes-Owens Limited* v. *Ottawa Electric R.W. Co.* (1917), 40 O.L.R. 614. There was no such urgency as to justify not taking ordinary care: see *Hendrie* v. *Grand Trunk R.W. Co.* (1921), 51 O.L.R. 191, at p. 198. If the respondent had taken proper precautions there would have been no collision. His failure to do so was not synchronous with any negligence on the part of the plaintiff. If this were so, there is no excuse for placing the major portion of the blame on the appellant.

Donaghy, K.C., for respondent: Section 59 of the Motor-vehicle Act provides that the restrictions in section 53A shall not apply to a police officer in discharge of his duty. But they must give signal by warning with siren. In this case when the signals were given, all six cars at the intersection stopped and the appellant's car was the only one to start before the police vehicles

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passed. The policeman, assuming he knew what the appellant was doing and where he was going, had a right to assume that he would stop before crossing the north side of Broadway. The appellant's contention that the policeman ought to have assumed that the plaintiff did not hear his siren is not reasonable. Drivers must assume that other drivers will do the right thing: see *Parsons* v. *B.C. Elec. Ry. McLeod* v. *B.C. Elec. Ry.*, [1940] 3 W.W.R. 612, at p. 620. When the appellant's car appeared from in front of the street-car, the respondent was taken by surprise and he could not then avoid a collision.

Housser, in reply: A street-car has an overhang of about one and one-half feet: see *Swadling* v. *Cooper* (1930), 100 L.J.K.B. 97, at pp. 99 and 101.

Cur. adv. vult.

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MCDONALD, C.J.B.C.: In this appeal it is not necessary that I should recapitulate the facts, as they have been stated elsewhere. In his reasons the learned trial judge made these findings:

> I think that had the defendant taken reasonable care in the circumstances he would both have seen and heard the plaintiff's motor-cycle and would thereupon have remained stationary until it had passed clear. He must therefore be held at least partly to blame for the collision.
>
> But it seems to me that the plaintiff is also to blame. When he saw the defendant start his car and turn to the north across Broadway he should have realized that the defendant failed to appreciate the position and that collision was a probable consequence. He could then have taken appropriate action. I think his failure in this regard amounted to negligence.

He then proceeds to find that the collision was due to "synchronous negligence" of both parties and that the degree of fault should be apportioned two-thirds to the defendant and one-third to the plaintiff.

With respect, I cannot agree with the learned judge's conclusions. For the purposes of this judgment I shall concede that the defendant was guilty of negligence as stated, though I very gravely doubt that this is so. I doubt that under all the circumstances he was bound to hear the plaintiff's siren or to see the plaintiff from a distance of over 250 yards, even though others at the scene did hear and see. However, admitting that the defendant was negligent in starting when he did on a course

which would bring him across the plaintiff's path, I think the learned judge's findings in themselves lead to the inevitable conclusion that the plaintiff was guilty of ultimate negligence. The plaintiff saw the defendant start and yet he proceeded through that busy intersection at a speed of 55 miles an hour. Had he taken the reasonable precaution of reducing his speed to some 25 or 30 miles per hour his motor-cycle would have been under control, and on that wide street he could have swerved and avoided the accident. He had the last chance and he did nothing. Strongly as we may approve of the conduct of a man diligent in his business, such diligence must be tempered with reason, and I think the plaintiff must be held to have been the author of his own misfortune.

I would, therefore, allow the appeal and dismiss the action.

McQUARRIE, J.A.: This is an appeal from SIDNEY SMITH, J. without a jury. It concerns a collision between a police motor-cycle and an automobile driven by the defendant, which occurred at the intersection of 9th Avenue (Broadway) and Burrard Street, in the city of Vancouver. The appeal is only on the question of liability. The *quantum* of damages is not in dispute. The respondent has not cross-appealed. It involves a pure question of fact and I am of opinion that the learned trial judge properly found that it was a case for the application of the Contributory Negligence Act, and I also agree with him as to the apportionment of damages. The defendant was clearly negligent in committing a breach of section 56 of the Motor-vehicle Act and amendments in not keeping his automobile at a standstill until otherwise directed by a police officer or constable or until the approaching motor-cycle had passed. It is common ground that the plaintiff is a police officer or constable and was acting in the discharge of his duty at the time of the collision; that he was driving at a high rate of speed following a police panel car which was also proceeding in the same direction about a city block ahead of him and at approximately the same speed; that the plaintiff while so driving the said motor-cycle gave repeated and audible signals of warning by siren horn of his approach. The defendant contends that he did not hear the warnings given by the plaintiff which is rather remarkable con-

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sidering the fact that he admits that his hearing is perfectly good and considering the fact that the drivers of the other automobiles and the motorman of the street-car all apparently heard said warnings as indicated by their remaining at a stand-still. The defendant also contends that he did not see the plaintiff's motor-cycle until he got quite close to where the collision took place, notwithstanding the fact that there was an unobstructed view along Broadway as far east as Granville Street, a matter of some three city blocks. The trial judge finds that defendant in contravention of the said section, without being directed in any manner by a police officer or constable and without waiting until the approaching motor-cycle had passed, started his said automobile and drove same into the intersection in front of and across the line of travel of the said motor-cycle.

There was also a finding of negligence on the part of the plaintiff. I do not think such findings should be interfered with.

The opportionment of damages seems to me to be quite reasonable.

I would, therefore, dismiss the appeal.

SLOAN, J.A.: I agree with my brother FISHER that the evidence supports the conclusions reached by the learned trial judge. I would in consequence dismiss the appeal.

O'HALLORAN, J.A.: I concur in the reasons of my brother FISHER and would dismiss the appeal accordingly.

FISHER, J.: This is an appeal by the defendant from the judgment of SIDNEY SMITH, J., finding that the damages suffered by the appellant and the respondent in a collision were due to the fault of both the respondent and the appellant in the degree of 66 2/3rds per cent. on the part of the appellant and 33 1/3rd per cent. on the part of the respondent. The collision took place on the 26th of May, 1941, at about 10 minutes to 8 in the forenoon at the intersection of Burrard Street and Broadway, Vancouver, B. C. These are both main thoroughfares and there is a four-way compulsory stop at this intersection. Broadway at this point is 62 feet from kerb to kerb and has double street-car tracks running approximately along its centre. Burrard Street is 48 feet from kerb to kerb.

The respondent, aged 34 years, was at the time of the accident a police officer operating a motor-cycle, with siren, as a member of the motor-cycle traffic squad of the said city of Vancouver and in the discharge of his duties was answering a radio call to a motor accident. He was driving in a westerly direction on Broadway at about 55 miles an hour, and while approaching the said intersection and while driving on it was, according to the evidence of himself and six other witnesses, *viz.*, Messrs. Wyenberg, Barker, Holloway, Morrow, Crawford and Miss Ryan, sounding his siren in a high pitch. At the same time, answering the same call, another traffic police officer going in the same direction, that is, west on Broadway, and driving a police panel car or automobile at a speed of 50 miles per hour, preceded the respondent at a distance ahead of about one city block, likewise sounding a siren but with a lower pitch, according to the evidence of the witnesses Wyenberg, Morrow, Crawford and Ryan.

The appellant, aged 49 years, and alone, was driving a motor-vehicle, being a Ford automobile, in an easterly direction on Broadway on his way to work. At about 10 minutes to 8 he arrived at the said intersection, where he brought his car to a stop. His intention was to turn to the left and proceed north along Burrard Street. There were several other motor-cars which came to a stop at the intersection at the same time. Another automobile was stopped behind the appellant's. Three automobiles facing north were stopped on the east side of Burrard, south of the intersection. Another automobile facing south was stopped on the west side of Burrard, north of the intersection. The drivers of all six cars at the intersection with the exception of the appellant remained stationary waiting for both vehicles to pass. A street-car facing west also stopped and remained stationary on the north side of Broadway east of the intersection.

The circumstances being as hereinbefore recited it is important first to note certain provisions of the Motor-vehicle Act, Cap. 195, R.S.B.C. 1936 and amendments thereto, reading in part as follows:

53. (1.) Every person driving or operating a motor-vehicle on any highway shall drive and operate the same in a careful and prudent manner, having regard to all the circumstances, including the rate of speed and the weight and size of the motor-vehicle, the nature, condition, and use of the highway, and the traffic which actually is at the time or might reasonably be

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expected to be on the highway; and no person shall drive or operate a motor-vehicle on any highway so as to endanger the life or limb of any person or the safety of any property. . . .

53A. (1.) . . . No motor-vehicle shall be driven or operated upon any highway within any city, town, or village at a greater rate of speed than thirty miles per hour.

. . . . .

56. Every person driving or operating a motor-vehicle on any highway, upon the approach of a motor-vehicle driven or operated by the fire department of a municipality in responding to an alarm of fire, or by a police officer or constable in the discharge of his duty giving repeated and audible signals or warnings by bell or siren horn, shall immediately drive his motor-vehicle to a position as near as possible and parallel to the right-hand curb or edge of the highway, clear of any intersection of highways, and shall stop his motor-vehicle and keep the same at a standstill until otherwise directed by a police officer or constable or until the approaching motor-vehicle has passed.

. . . . .

59. The provisions of section 54 to the extent to which those provisions relate to the stopping of motor-vehicles and the provisions of sections 53A, 55, 56, 57, and 58 shall not apply in respect of any motor-vehicle while it is being driven or operated by the fire department of any municipality in responding to an alarm of fire, or by any police officer or constable in the discharge of his duty; but every person driving or operating a motor-vehicle to which this section applies shall drive and operate it with due regard to the duties and obligations imposed on him by all other provisions of this Act, including the provisions of section 53.

With regard to the meaning of the expression "giving repeated and audible signals or warnings" as used in section 56 as aforesaid reference might be made to *Grand Trunk Railway* v. *McAlpine,* [1913] A.C. 838 where Lord Atkinson in speaking of a section of a statute requiring a warning to be given by a railway company to persons crossing or about to cross the tracks, says at p. 844:

> . . . , it is not necessary for the protection of the company that the victim should hear the warning. It is only necessary that the warning should be such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably sound, active, and alert condition, . . .

I propose first to deal with the submission of counsel on behalf of the appellant that there was no negligence on the part of the appellant and that the conclusion of the learned trial judge in this respect was not justified on the evidence. The evidence of the appellant was that he neither heard nor saw the motor-cycle on which the respondent was until immediately before the collision which occurred at or near the north-east corner of the intersection just after the appellant going north had passed in

front of the street-car still standing and the respondent going west had got past the street-car.

The appellant at the trial gave evidence in part as follows:

You came to the stop? Yes.

And having come to the regular stop what did you then do? Well, I still remained there, because as I came to the stop sign there I heard a siren.

From what direction was that siren? I could not locate it immediately, but eventually I saw a flasher on the top of what turned out to be a police panel car, crossing the intersection of Granville Street [3 blocks east] and Broadway.

And proceeding west? Going in a westerly direction.

Did you follow the progress of that panel car with your eye? I just stayed there until that panel car came from Granville Street to the intersection and passed the intersection.

Through the intersection? You mean the intersection of Burrard? Yes.

. . . . .

And you started up? Yes, I did.

Did you hear any other siren or signal than that on the panel car that you have mentioned? No, sir, I did not, otherwise I would not have started.

. . . . .

How far did your view east along Broadway extend before you started up? Well, I could see through to Granville Street, but I really was not concerned with that part of the street. I looked about as far as Pine Street, which is one block away, but I could not see anything, so I considered it was all right to start.

Now the evidence is there was a street-car standing on the car tracks on the east side of Burrard Street. Yes, on the north-east corner.

A westbound street-car? Yes.

And your left-hand turn would take you across the bows of that street car? Yes, it would.

From your position at the point at which you had stopped were you in a position to see whether or not any passengers were getting on or getting off that street-car? No, I could not possibly see because the doors were on the opposite side of the street-car, but I did have to consider as to whether that car was going to start up or not.

. . . . .

Up to the time of passing across in front of the street-car had you had any intimation of the proximity of the motor-cycle or of any other vehicle? I did not hear the motor-cycle or see the motor-cycle. First of all, naturally, I looked east on Broadway. I did not see the motor-cycle, and as I crossed the street-car, as I got—just started to cross the tracks and got across to the north side of the tracks—I heard a motor-cycle coming past the street-car. I immediately applied my emergency brake, and the next instant there was a crash.

. . . . .

Would the statement in your answer be true? I will read the question and answer:

"When did you first learn there was one coming? As I was crossing the tracks I heard a motor-cycle—I didn't know at that time it was a motor-

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cycle, but I heard something coming at a very high rate of speed, and I put my emergency brake on right then." That is absolutely true.

. . . . .

It is true you have excellent hearing, is it not? Yes, sir.

On his examination for discovery the appellant said in answer to a question as follows:

Apparently you were surrounded by automobiles standing still while you were driving in this intersection and crossing the street-car tracks, is that true? Yes.

On his examination at the trial the respondent said in part as follows:

As you approached Burrard Street did you observe any of the motor-vehicles that had been standing there begin to move? Just one car.

Where was it standing before it began to move? Standing on Broadway facing east on the south-west corner.

Was that the car you came into collision with? It was.

Did any other vehicle or automobile move prior to the collision? None whatever.

About where were you when you saw that car start up—start to move? I would say approximately half a block away from the intersection.

Was your siren still sounding? It was.

Did you observe which way its course went after it started up? It was proceeding east along Broadway, had just started up. I lost sight of it as I went behind the street-car.

. . . . .

Did you observe anything else in connection with it before you lost sight of it by having a street-car between you and it? It was going very, very slowly, probably 4 or 5 miles an hour.

. . . . .

Going back to the time you saw Beechey move or start to move his car from its parked location, when you saw him start to move was there anything so far as you are aware to prevent him seeing you at the same time? No, there was nothing. There was no street-car between Granville and Burrard Street and there was no moving traffic between myself and the truck, that is, in between us.

And was the street-car parked or stopped at that time? Yes, it was standing at all times, as far as I know. I believe it was stopped when the panel truck went by and it was certainly stopped when I went by.

Upon the whole of the evidence including that of the parties as aforesaid I have no hesitation in agreeing with the conclusion of the learned trial judge that

had the defendant taken reasonable care in the circumstances he would both have seen and heard the plaintiff's motor-cycle.

Under the circumstances it was the duty of the appellant to take reasonable care and to comply with section 56 of the Motor-vehicle Act as aforesaid. Obviously he did not carry out such duty and was therefore guilty of negligence.

Counsel on behalf of the appellant, however, further submits that, if there was negligence on the part of the appellant, his negligence had exhausted itself before the collision and there was ultimate negligence on the part of the respondent. Counsel relies especially upon *British Columbia Electric Railway Company, Limited* v. *Loach,* [1916] 1 A.C. 719 and it may be noted that in *Morris* v. *Hamilton Radial Electric Railway Co.* (1923), 54 O.L.R. 208 Hodgins, J.A. says at p. 210:

> The *Loach* case, as has often been pointed out, proceeds upon the view that before the time of the accident the plaintiff's negligence was over and spent, and that there was thereafter no further act of negligence. It therefore allowed the raising of the issue of ultimate negligence, . . .

In the present case, however, it cannot be said that before the time of the accident the appellant's negligence was over and spent in view of the provisions of said section 56 from which it is quite apparent that the appellant was acting in violation of said section not only when he started his automobile from where he had stopped as aforesaid, but so long as he continued to move, for the section required him to keep his motor-vehicle at a standstill until otherwise directed by a police officer or constable or until the approaching motor-vehicle had passed. Moreover it cannot be said that there was no further act of negligence on the part of the appellant as he admits that he was moving in low gear so slowly that he could have stopped in about two feet and yet the evidence is conclusive that he went at least fifteen feet before stopping even after he had heard the noise of the approaching motor-cycle, *i.e.,* as he says, the gears and the tread of the tires on the road.

In *Morris* v. *Hamilton Radial Electric Railway Co., supra,* Hodgins, J.A., after referring to *British Columbia Electric Railway Company, Limited* v. *Loach, supra,* and *Hendrie* v. *Grand Trunk R.W. Co.* (1921), 51 O.L.R. 191, at p. 198, said in part as follows at p. 212:

> . . . The doctrine of ultimate negligence cannot properly be applied where conditions make it impossible to conclude that a fair chance was afforded to one party to deal with the emergency created by the negligence of the other party. And the Court should not endeavour to apply it unless it is certain that the circumstances of the case enable justice to be done to both parties by its operation.

It is strenuously contended, however, on behalf of appellant that in any event the respondent was solely responsible for the

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accident. This contention is based upon the admission made by the respondent on his examination for discovery that he saw the appellant not only starting up in an easterly direction from where he had stopped but also slowly turning north in front of the street-car. It is argued that the respondent was then at such a distance away from the intersection that he could have avoided the accident by either stopping or reducing his speed but he did neither. There was evidence, however, that according to police experience drivers of automobiles in a great many instances stop for a while and then start up (though they should not) and creep along but stop again and wait for the police vehicle to pass. Referring to this the respondent himself said in part as follows:

Did you expect to see a car move from the intersection when you were approaching, as you say, with your siren going? Well, I realized he probably shouldn't have done it. It is done all the time. It wasn't any surprise.

. . . . .

But notwithstanding the fact you were on a call to the scene of an accident and sounding your siren, you had to use due care for the safety of others on the highway. You were aware of that, weren't you? I was.

But you say when you saw this Beechey motor-car starting up it didn't surprise or startle you at all? No, it didn't.

Did you keep your eye on it to see what it was doing? I did as long as I was able.

. . . . .

. . . You saw him turning to go in front of the street-car, and you did nothing to avoid a collision, did you? Yes, I did.

What did you do? I swerved to the right.

But it was too late then, wasn't it? It certainly was.

But at the time you saw him turning to go in front of the street-car, from then on to the moment of impact, you did nothing, did you? Give me that again.

From the time you saw him turning to pass the front of the street-car until just before the moment of impact, you did nothing? No; and there is a reason too, and I would like to state that reason.

THE COURT: Witness, just take your time, and tell us all about it. I don't think I have been on a call, and I don't know how many calls I have answered in which I have used a siren and been travelling at different rates of speed, say a high rate of speed, that there hasn't been one, two or three of the cars that don't obey the law. They either are standing and start up again, or they just fail to pull in to the kerb and stop. And this particular car started up, he was going very slow—I don't think there is any argument about the speed, about going under 10 miles an hour—he started his car up, and I certainly expected he would stop long before he came out in front of the street-car, and I think I had every right to realize he would hear a siren wailing, especially as he was the only one in the intersection moving. After all, my only protection—on all these calls you go on an accident call, you

risk your life and you are supposed to be doing your duty. You use a siren which you have to, according to law, and your only protection is the siren. You have got your licence and possibly $1,500 worth of city equipment to look after, and the least to expect is that the public will do, shall we say, their duty, and obey the law.

There is no doubt that over and above the requirement of the last part of said sections 53 and 59 there is the common-law obligation to exercise due care in doing something of necessity dangerous even when it is fully authorized by law. Authority can be cited for the proposition that the driver of a vehicle is entitled to proceed upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. See *Tinsley* v. *Toronto Railway Co.* (1908), 17 O.L.R. 74, at p. 82 *per* Riddell, J. citing *Toronto Railway* v. *King,* [1908] A.C. 260 and *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155, at p. 1166. The argument in the present case, however, is that the respondent saw the appellant breaking the statutory rule and therefore had no right to assume that he would cease doing so and stop in time to let the motor-cycle pass. The argument, however, has to be tested in the light of the evidence referred to and having in mind such evidence I am of the opinion that under all the circumstances, when all other traffic obviously remained stationary, the respondent was justified in concluding that the appellant having stopped had heard his siren and, though he had started up again, would not come out in front of himself and the standing street-car. In the present case I am satisfied that the indications were not such that the respondent should have realized the exact situation in time to avoid the accident. In this respect, with all deference, I disagree with the learned trial judge when he says in his reasons for judgment:

When he [the plaintiff] saw the defendant start his car and turn to the north across Broadway he should have realized that the defendant failed to appreciate the position and that collision was a probable consequence. He could then have taken appropriate action.

I pause here to make a reference to the contention of counsel for the appellant that the trial judge in effect found in the quoted passage that the respondent was guilty of ultimate negligence. In testing whether one finding should be regarded as a finding of ultimate negligence it must be taken with the other findings

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and when so taken I am not convinced that the finding as aforesaid must be regarded as a finding of ultimate negligence. See *Whitehead* v. *North Vancouver* (1937), 53 B.C. 512, at pp. 522-526 *per* MACDONALD, J.A. (later C.J.B.C.) and *Greisman* v. *Gillingham*, [1934] S.C.R. 375 affirming [1933] O.R. 543 there cited.

Undoubtedly, as the judgment itself shows, the learned trial judge found that both parties were to blame and that the collision was "due to the synchronous negligence of both parties." As there is no cross-appeal by the respondent I do not think it is necessary for me to express an opinion as to whether the respondent was partly to blame for the collision. I think it sufficient to say that in any event the appellant was and assuming, without finding, that there was fault on the part of the respondent contributing to the accident, I would not find that his degree of fault was greater than that found by the learned trial judge. In the *Loach* case at p. 727 Lord Sumner, after referring to the object of the inquiry in such case, said the Court "is in search not merely of a causal agency but of the responsible agent." In this Province under our Contributory Negligence Act it may be said that the search may result in finding more than one responsible agent and it may be, as suggested by the writer of an article in (1938), 16 Can. Bar Rev. 137, at p. 141, that the Privy Council in part of its judgment in such case was merely saying that the railway company was more blameworthy in sending out trains with defective brakes than a person who negligently gets on their line.

In the present case I have to say that analysis of the evidence supports the conclusions that the appellant ought to have seen or heard the approach of the respondent unless he had become oblivious to the conditions surrounding him and the appellant is properly held responsible at least to the degree found below.

The appeal should be dismissed.

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

Solicitors for appellant: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

Solicitors for respondent: *Wilson, White & Woodburn.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

PONYICKY v. SAWAYAMA (p. 299).—Affirmed by Supreme Court of Canada, 2nd April, 1943. See [1943] S.C.R. 197; [1943] 2 D.L.R. 545.

REX v. ORFORD (p. 51).—Affirmed by Supreme Court of Canada, 2nd February, 1943. See 79 Can. C.C. 151; 13 F.L.J. 19; [1943] S.C.R. 103; [1943] 2 D.L.R. 337.

REX v. REID (p. 20).—Affirmed by Supreme Court of Canada, 6th May, 1943. See 79 Can. C.C. 311; [1943] 2 D.L.R. 786.

Cases reported in 57 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

REX v. HUGHES, PETRYK, BILLAMY AND BERRIGAN (p. 521).—Affirmed by Supreme Court of Canada, 12th November, 1942. See 78 Can. C.C. 257; 12 F.L.J. 211; [1942] S.C.R. 517; [1943] 1 D.L.R. 1.

Case reported in 54 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

WINSBY v. TAIT AND TAIT & MARCHANT (p. 335).—Affirmed by the Judicial Committee of the Privy Council, 13th October, 1942. See 12 F.L.J. 147; [1943] 1 D.L.R. 81.

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lane.] The accident in question took place on the evening of February 10th, 1942, at about 9.15, on the intersection of Kingsway and Victoria Drive. The accused was driving his car westerly on Kingsway, there being a slow sign at the corner of the next street east on Kingsway. The deceased, who was a cripple and walked with crutches, was crossing Kingsway within the intersection from the north side and close to the pedestrian lane on the east side of the intersection. Accused stated he was going 27 or 28 miles an hour when he passed the slow sign. He then slowed down and was going at about 17 miles an hour when he reached the intersection in question, that he did not see deceased until about twelve feet away from him, when he put on his brakes and swerved to the right, but too late, and his left head-light struck deceased. There were four street lights, one at each corner of the intersection, but the visibility was poor owing to the large area covered by the intersection, and the lights threw unusual shadows across the pavement. The impact took place just north of the north Kingsway street-railway rail and just west of the easterly pedestrian lane. Three witnesses who saw the impact did not see deceased until the impact took place. The jury found accused not guilty of manslaughter but guilty of driving to the common danger. *Held,* on appeal, affirming the decision of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), as to the objection that the verdict discloses no crime known to the law, there is no other possible conclusion than that the jury intended to convict and did convict of driving in a manner dangerous to the public. On the objection that the learned judge failed to bring out the appellant's defence, the jury had to decide whether the appellant had committed a crime either by driving at too great a speed or failing to keep a proper look-out. That was the issue pure and simple and was put by the learned judge clearly and fairly to the jury. On the objection that deceased was not walking in the pedestrian lane, there is no greater right to run a man down if he is crossing at some point in the intersection outside the lane than if he kept within the lane, particularly where there is no by-law nor any other law requiring him to keep to the lane. REX v. ROBERTSON. - - - - - - - - - - **37**

2.——*Breaking and entering—Notice of calling two Crown witnesses not heard at preliminary hearing given day previous to trial—Witnesses in other trial—Transcript*

obtained ten minutes before trial—Application for adjournment—Adjournment until the afternoon only — Trial — Evidence of accomplice—Evidence of wife of accomplice in corroboration—No warning to jury.] On the Saturday prior to the trial on the following Monday, Crown counsel notified counsel for accused that he intended to call two witnesses who were not called at the preliminary hearing. Just before the case was called on the Monday, Crown counsel gave accused's counsel extracts from examinations where these witnesses gave evidence on previous trials. Counsel for accused then asked for an adjournment as he was not in a position to go on, not having the cross-examinations of these witnesses. The case was adjourned until the afternoon. On the case being called in the afternoon, counsel for accused renewed his application for adjournment, as it was only ten minutes previously that he had received the said cross-examinations. The application for adjournment was refused. *Held,* on appeal, affirming the decision of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), that the learned judge having, in the exercise of his judicial discretion, refused the adjournment, there can be no review of his decision by this Court. The question of adjournment does not constitute a question of law within section 1014 of the Criminal Code. *Mulvihill* v. *Regem* (1914), 49 S.C.R 587, followed. The accused was charged with breaking and entering. A safe was blown on the premises in question and a large sum of money was taken therefrom. One Reid, who was admitted to be an accomplice, gave evidence that he had received a certain sum of money from the accused, which was identified as part of the money that was taken from the safe. His wife then gave evidence in corroboration. The learned judge gave the usual warning as to the evidence of an accomplice when Reid was called, but when the wife was called he did not give the same or any warning as to the evidence of the wife of an accomplice. The accused was convicted. *Held,* on appeal, reversing the decision of SIDNEY SMITH, J. (MCDONALD, C.J.B.C. dissenting), that the rule laid down in *Attorney-General* v. *Durnan,* [1934] I.R. 308, is "Where at a criminal trial the wife of an accomplice gives evidence to corroborate the evidence of her husband, it is necessary to warn the jury as to the nature of her evidence as in the case of an accomplice." In the present case the learned trial judge did give the usual warning as to the evidence of an accomplice but did not give the same or any warning as to the evidence

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of the wife of an accomplice. The rule referred to in the *Durnan* case should have been applied and as the warning required by such rule was not given, the appeal must be allowed and a new trial ordered. It cannot be said under all the circumstances of this case that the jury, if properly directed, must inevitably have found the appellant guilty. REX v. MUNEVICH. - - **4**

3.——*Conspiracy — Evidence — Wholly circumstantial—Verdict of guilty by jury—Rule as to evidence consistent with innocence or guilt of accused—Whether the appellate Court should interfere with verdict.*] The accused was found guilty by a jury on a charge of conspiring with others to commit the crime of robbery with violence. The evidence was purely circumstantial and it is admitted that the jury was properly instructed. *Held*, on appeal, reversing the decision of MANSON, J. (MCQUARRIE and O'HALLORAN, JJ.A. dissenting), that in this case it is open to this Court, notwithstanding the verdict of the jury, to decide on the evidence whether the facts were such as to be equally consistent with the innocence as with the guilt of the accused and accordingly quash the verdict. It is concluded that on the evidence, the facts were such as to be equally consistent with the innocence as with the guilt of the accused. The appeal is therefore allowed, the conviction quashed with a direction that a verdict of acquittal be entered. *Fraser* v. *Regem*, [1936] S.C.R. 296, applied. REX v. DAWLEY. - - - - - - - - - **525**

4.——*Evidence—Deposition on preliminary inquiry of witness who died before trial—Admissibility on trial—Accused tried on different charge from that originally laid—Whether full opportunity to cross-examine—Criminal Code, Secs. 999 and 1000.*] The accused was charged with unlawfully attempting to dissuade by corrupt means one Mond from giving evidence in a criminal matter, to wit, a charge against Sarwan Singh of contributing to juvenile delinquency. Upon hearing the evidence of Mond, the magistrate committed the accused for trial that he "unlawfully did attempt to pervert or defeat the course of justice, contrary to the provisions of subsection (*d*) of section 180 of the Criminal Code." The charge as laid was based on subsection (*a*) of section 180. Mond died before the trial. On the trial the charge was based on subsection (*d*) of section 180 as set out by the magistrate and when the deposition of Mond taken before the magistrate was sought to be introduced in evidence, the

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objection was raised that it was inadmissible because accused had not had full opportunity to cross-examine Mond as required by section 999 of the Criminal Code, that although the accused was present and his counsel had cross-examined Mond on the preliminary inquiry, the cross-examination was had in respect to the charge as originally laid and not as set out in the warrant of committal. The objection was sustained and the charge dismissed. *Held*, on appeal, reversing the decision of LENNOX, Co. J., that the case comes within section 1000 of the Criminal Code, the appeal should be allowed and a new trial ordered. REX v. BANTA SINGH. - - - **213**

5.——*Intoxicating liquors — Having liquor in restaurant—Case stated — Defective conviction—R.S.B.C. 1936, Caps. 271, Sec. 89 (3) and 160, Secs. 90, 96, 97, 101 and 102.*] The police found liquor being consumed on the premises of the National Cafe Limited and the National Cafe Limited was convicted on a charge "that the National Cafe Limited on the 21st of August, 1942, at Vernon in the county of Yale did unlawfully permit a person, to wit, Captain Louis Jacques Cote, to have liquor in a restaurant, to wit, the National Cafe Limited, in the city and county aforesaid." On appeal by way of case stated:—*Held*, that a person can only be convicted for permitting liquor to be consumed in a restaurant if he is either the keeper thereof or the person in charge of such restaurant. There is nothing in the conviction to show this essential ingredient of the offence (not even reference is made to the Act itself) nor is the ingredient contained in the information upon which the conviction is founded. The information and complaint is defective. *Held*, further, that the offence charged is not one of the offences specified in either sections 96 or 97 of the Government Liquor Act and these sections are not applicable to the present case. Therefore, there is no evidence that the appellant company was at the time of the alleged offence the keeper or person in charge. REX *ex rel.* WARD v. NATIONAL CAFE LIMITED. - - - - - **401**

6.——*Intoxicating liquors—Keeping for sale — Conviction — Quashed on appeal to county court—Accused's husband owner of premises—Confession of accused—Grounds for excluding—Proof of marriage—Appeal—R.S.B.C. 1936, Cap. 160, Sec. 56.*] Four policemen with a search warrant entered the premises occupied by the accused and her husband, and found several persons in the dining-room drinking beer, also a quan-

tity of beer and empty beer bottles in other rooms. The policeman in charge, without giving any warning, interrogated the accused as to who was in charge of the premises, to which she replied that the premises were registered in the name of the accused's husband. Accused was convicted for keeping liquor for sale, and on appeal to the county court the conviction was quashed, when it was held that it was the accused's husband, the owner of the house, who should have been charged with "keeping for sale." On appeal by the Crown, the Court of Appeal's jurisdiction being restricted to the consideration of points of law only, it was contended: (1) That there was no evidence to support the finding that the accused was the wife of the owner; (2) that even if there was such evidence, by that fact alone, the accused could not escape the *onus* sections of the Government Liquor Act; (3) that the judge should not have excluded a certain statement made by the accused to the police. *Held*, on appeal, affirming the decision of LENNOX, Co. J., that the appeal should be dismissed. *Per* SLOAN and FISHER, JJ.A.: There is some evidence upon which the finding could be sustained, enough to be weighed by the tribunal invested with jurisdiction to find marriage or no marriage. The learned judge below considered it sufficient and the question of sufficiency is one of fact and not open to us on this appeal. The accused attempted to rebut the presumptions of guilt arising from proof of possession and sale, by relying on the contrary presumption arising from the relationship of husband and wife, namely, that the husband was keeper and owner of the premises. Conflicting presumptions neutralize each other and leave the matter at large to be determined on the evidence. The determination of guilt or innocence becomes not a question of law alone but one in which the facts and circumstances of the case must be weighed, which is beyond the jurisdiction of this Court. When a suspected person is interrogated by the police and afterwards charged with an offence because of admissions elicited by that questioning, the exclusion of those inculpatory statements at his trial is a matter which must be left to the discretion of the trial judge to be decided upon the diverse and particular circumstances of each case. To say because the statement of the accused is proved to have been made without fear of prejudice or hope of advantage it is therefore admissible against him in complete disregard of all other factors which a wise "rule of policy" might, under certain circumstances, consider as having exercised an improper influence or inducement upon the free mind of the confessor, is in our opinion to fetter unduly the discretion of the trial judge to exclude the statement. See *Rex* v. *Knight and Thayre* (1905), 20 Cox, C.C. 711; *Rex* v. *Booth and Jones* (1910), 5 Cr. App. R. 177; *Ibrahim* v. *Regem*, [1914] A.C. 599; *Rex* v. *Myles* (1922), 40 Can. C.C. 84; *Rex* v. *Price* (1931), 55 Can. C.C. 206; *Rex* v. *Minogue* (1935), 50 B.C. 259; and *Rex* v. *Thompson*, [1940] 3 W.W.R. 341. The grounds upon which he may decide the incriminatory statement admissible are, however, of a more rigid character and that distinction must be kept in mind. *Per* O'HALLORAN, J.A.: In the circumstances it cannot be said that the judge erred in law in refusing to admit the statement upon the facts which he has found and which this Court has no choice but to accept as correctly found by him. REX v. ANDERSON. - - - - - - - - - - **88**

7.——*Morphine—Possession—Visitors in a room where morphine was found—Knowledge and consent—Criminal Code, Sec. 5, Subsec. 2.*] The two accused with one Harman Singh were charged with being in possession of morphine. Harman Singh pleaded guilty. The police entered Harman Singh's room at 11 o'clock in the morning where they found the two accused with Harman Singh. They had been there since 5 o'clock in the morning. The police found a pot boiling on a gas-heater which was about three-quarters full of a green liquid, later found to contain morphine. In a drawer they found a quart of poppy heads and on the floor a bent spoon burnt on the bottom and a parcel containing an eye-dropper and a hypodermic needle. The charge was dismissed. *Held*, on appeal, affirming the decision of police magistrate Wood (MCDONALD, C.J.B.C. and SLOAN, J.A. dissenting), that the facts do not disclose such consent on the respondents' part that would bring them within the meaning of section 5, subsection 2 of the Criminal Code. REX v. COLVIN AND GLADUE. - - - **204**

8.——*Murder — Conviction — New trial ordered on appeal — Appeal to Supreme Court of Canada — Motion for reprieve granted—Appeal—Criminal Code, Secs. 1013 and 1063, Subsec. 2.*] The appellants were convicted of murder and sentenced to be hanged on the 15th of July, 1942. A new trial was ordered by the Court of Appeal on the 30th of June, 1942. The Crown appealed to the Supreme Court of Canada. The Crown then applied to the assize judge for a

LUNACY—*Continued.*

On the 8th of February following, an order was made appointing The Toronto General Trusts Corporation *quasi*-committee of her estate. Two weeks after entering the Essondale Hospital, she was removed to the Hollywood Sanitarium at New Westminster and about one year later she was taken to a sanitarium at Guelph, Ontario, where she remained until the 23rd of December, 1937, when she was released. Shortly after she went to Toronto where she occupies an apartment of her own and has since lived there without restraint. Her estate is valued at about $200,000, and in May, 1939, an order was made that the *quasi*-committee pay her $500 per month. On the 12th of July, 1941, she applied for an order that The Toronto General Trusts Corporation be discharged of and from its duty as *quasi*-committee of her estate and for an order revesting the estate in her. The application was dismissed. *Held*, on appeal, affirming the order of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), that when the appellant's detention has ceased, she is not entitled to have the order discharged as of right. An order is needed to discharge it, which the Court will not make unless satisfied that the person in question is no longer subject to the delusions that led to the detention. Although the evidence discloses that the appellant has greatly improved in all respects, the Court is not satisfied that she has the steady capacity to manage her property and rule 33 of the Lunacy Rules is in accord with this conclusion. *In re* JANE QUINN MANN. - - - **241**

MARRIAGE—Proof of. - - **88**
See CRIMINAL LAW. 6.

MEDICAL ACT—*College of Physicians and Surgeons of B.C.—Charge of unprofessional conduct against member — Executive committee conducting inquiry—County judge included in committee — Whether properly included—R.S.B.C. 1936, Cap. 171, Sec. 50 —B.C. Stats. 1940, Cap. 26, Secs. 13 to 19.*] The executive committee of The College of Physicians and Surgeons of British Columbia associated with themselves a judge of the County Court of Vancouver as a member of the committee in conducting an inquiry into a charge against one Dr. Rogers, and found him guilty of unprofessional conduct and the Medical Council of the College ordered his name to be erased from the register. On appeal by Dr. Rogers:—*Held*, that section 50 of the Act, as re-enacted by B.C. Stats. 1940, Cap. 26, Sec. 13, provides that the executive committee may

MEDICAL ACT—*Continued*

ascertain the facts relating to the matter by a "committee of inquiry" which shall consist of three members of the executive committee appointed by the executive committee from amongst its members. This is a tribunal separate and distinct from the executive committee. Section 53 prior to the 1940 amendment provided that the executive committee may on the hearing of a complaint associate with themselves as a member of the committee one of the judges of the county court, but section 53 as re-enacted by section 15 of the 1940 amendment provides that a "committee of inquiry" may on the hearing of a complaint associate with themselves as a member of the committee one of the judges of the county court, but does not provide for the executive committee doing this. There are, therefore, two tribunals provided for under the Act to conduct an inquiry, one, the "executive committee," the other, a "committee of inquiry." The committee of inquiry only is authorized to associate with themselves a judge of the county court. The executive committee associated with themselves, as a member, a judge of the county court. There is no authority under the Act for such a tribunal and it is without jurisdiction. The findings of the committee are set aside and the name of the appellant is restored to the register. ROGERS v. THE COUNCIL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA *et al.* - - **287**

MENTAL HOME—Release from. - **241**
See LUNACY.

MERCHANT SEAMEN ORDER, 1941—Seaman — Deserter — Board of inquiry — Order for detention — *Habeas corpus*—Whether judicial or administrative tribunal. **321**
See WAR MEASURES ACT.

MINING—*Placer — Lay agreement—Breach of conditions—Right of re-entry by owner —Whether lay agreement a lease—Effect of breach of conditions—Equitable power to relieve against forfeitures.*] The defendant's predecessor in title entered into a "lay" agreement with the plaintiff giving him the right to work certain placer claims and the plaintiff agreed to pay the owner twenty per cent. of the gold recovered. There are no words of demise in the agreement, no term is fixed, no rent payable under that name, nor provision for penalty or forfeiture. After the agreement had been in force for three years, the defendant re-entered into possession for breach of the

MINING—*Continued.*

agreement. The plaintiff brought action for a declaration that he was in lawful possession of the ground under the lay agreement and for an injunction restraining the defendant from interfering with his mining operations. It was held on the trial that the plaintiff had failed to work the property in a miner-like manner as required under the agreement, that the defendant was not bound to bring an action for possession but was entitled to cancel the agreement and enter into possession. The action was dismissed and the defendant was granted an injunction restraining the plaintiff from trying to retake possession. *Held*, on appeal, affirming the decision of ELLIS, J., that the findings of the trial judge were justified on the evidence and the appeal should be dismissed. *Per* MCDONALD, C.J.B.C.: The "lay" agreement is not a lease, as it does not give the appellant an exclusive right to possession which is essential for a lease. Even if this document were a lease, the appellant would fail. A lessor cannot re-enter for mere breach of covenant but he can always re-enter for breach of condition. In general a term that the parties mean to make the foundation of an agreement creates a condition. In an agreement where there is no time limit or definite rental, it is of the utmost importance to the owner that the claims should be continuously worked and that the rate of working be maintained. This is an inherent duty of a layman and the observance of it is a condition in any "lay" agreement which entitles the owner to re-enter on the breach of it. The respondent was not enforcing any contractual remedy; it was merely following those remedies given by the general law for breaches going to the root of the contract. It follows that the equitable jurisdiction has no application. FALLESON v. SPRUCE CREEK MINING COMPANY LIMITED. - - - - - - - - - - **233**

MORPHINE—Possession. - - **204**
See CRIMINAL LAW. 7.

MOTOR-CYCLE. - - - **470**
See NEGLIGENCE. 8.

MUNICIPAL CORPORATION — *Drainage system — Ditches and culvert—"Temporary purpose"—Spilling water on plaintiffs' land—Right of action—Negligence—Damages—Injunction — Prescription — Compensation under Municipal Act—B.C. Stats. 1914, Cap. 52, Sec. 54 (176)—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163 (39).*] In 1938 the plaintiffs purchased a lot on the south side of 54th Avenue in Vancouver, opposite

MUNICIPAL CORPORATION—*Continued.*

Osler Street, upon which they built a residence. In 1915 the municipality of Point Grey (now part of Vancouver) constructed a culvert across 54th Avenue just west of the plaintiffs' lot, which drained a ditch running east and west on the north side of 54th Avenue. North of 52nd Avenue is a large area of swampy land and from 52nd Avenue to some distance south of the plaintiffs' lot there is a gradual slope in the whole area to the south. On the complaint of the owner of a house near the corner of 52nd Avenue and Hudson Street in 1918, the municipality constructed a ditch along 52nd Avenue, then south through various lots to connect with the ditch on 54th Avenue, and subsequently all the ditches were improved from time to time, mainly in the way of clearing them of debris. After the water left the said culvert it flowed south in a ditch close to the west boundary of the plaintiffs' lot and a stone wall was constructed along the west boundary of the plaintiffs' lot to keep the water from overflowing on the lot, but in the wet season the water seeped through, flooded the plaintiffs' cellar and formed a pond at the south end of their lot. The plaintiffs recovered judgment in an action for damages, and an injunction. *Held*, on appeal, affirming the decision of SHANDLEY, Co. J., that in the absence of evidence proving when all the said ditch construction was completed, and when the large quantity of water brought from the watershed began to flow through the culvert and spill over, the defendant has failed to establish its plea that it has acquired a prescriptive right to do what it is now doing, because it has failed to prove the actual user and exercise for more than twenty years of the right which it now claims: further the plea fails as the culvert and ditches were constructed for a temporary purpose only. *Held*, further, on the defence that the only remedy the plaintiffs had was to seek compensation under the provisions of the Municipal Act. The defendant did something it was permitted to do by statutory authority, but the damage done is not inevitable, as the water could be carried away so as not to damage the plaintiffs' land. The damage did not arise from a specifically authorized work, but from the method of carrying it out, which was in the discretion of those doing it, and it not having been established that the plaintiffs' damage was the inevitable result of what was specifically authorized, the plaintiffs were entitled to their remedy by action. FRASER AND FRASER v. CITY OF VANCOUVER. - - - - **81**

the appellant and respondent with respect to the fire-escape balcony is different from the relationship between them with respect to the roof. Under all the circumstances my view is that no reasonable jury could fairly hold on the evidence that the appellant should have reasonably supposed the employees of the Sign Company would be likely to go upon the fire-escape and use the balconies for the purpose of raising materials to the roof without asking anyone's permission and without any communication from the Sign Company to the appellant, its agents or servants as to the manner in which access to the roof should be effected. I think, therefore, that the plaintiff, while on and using the said balcony as aforesaid, was a trespasser. The plaintiff has failed to establish that the appellant owed him any duty that was unperformed. CREWE v. STAR PUBLISHING COMPANY LIMITED. - - - - - - - - **103**

6.——*Criminal.* - - - - - **37**
See CRIMINAL LAW. 1.

7.——*Damages.* - - - - - **81**
See MUNICIPAL CORPORATION.

8.——*Damages—Death after being run down by employee of defendant — Motor-cycle—Action by administrator of estate of deceased—Costs.*] On the 18th of October, 1941, at 8.30 in the morning Mah Lim Jung, a Chinaman, started northerly across Pender Street in Vancouver on the pedestrian lane on the west side of Columbia Street. At this time an employee of the defendant was driving a motor-cycle westerly on Pender Street. On nearing the intersection of the two streets he saw the Chinaman crossing Pender Street and when within the intersection (the Chinaman then being about half way across Pender Street), he swerved to his left with a view to passing behind the Chinaman. Just as he turned the Chinaman saw him, hesitated and then ran back towards the north side of Pender. As he did so, he got in the path of the motor-cycle and was knocked down. He was taken to the hospital and treated for hemorrhage on the right side of the brain. On the 15th of November following he was taken to his home where he died four days later. An autopsy disclosed that he had a fresh hemorrhage on the left side of the brain, also lung and heart trouble of long standing. In an action by the administrator for damages for both the injuries and the death under the Administration Act, it was held that the accident was caused solely by the negligence of the driver of the motor-cycle,

but the plaintiff failed to discharge the burden of proof devolving on him of showing that the death was caused by or resulted from the injuries occasioned by the accident and judgment was given for the hospital and doctor's bills only with the costs of the action. On appeal by the defendant on the question of costs and cross-appeal by the plaintiff for general damages:—*Held*, affirming the decision of COADY, J., that on the cross-appeal the plaintiff had no finding to support the claim for shortening of life and there was not even any satisfactory evidence as a basis for such a finding, and on the appeal for costs, there was only one cause of action, namely, the negligent running down of the deceased; all the other claims were merely separate items of special damage resulting therefrom. *Per* SLOAN, J.A., FISHER, J.A. concurring: At common law no one can maintain an action for the recovery of damages for negligently causing the death of a human being and to remedy in part this situation the Families' Compensation Act and the 1934 amendment to the Administration Act were enacted. The relevant effect of the 1934 amendment to the Administration Act was to extend beyond his death any cause of action for damages a deceased person had vested in him when living. After his death this continuing cause of action was vested in his executors or administrators and any damages recovered formed part of the personal estate of the deceased. It must be clearly understood that the 1934 Act did not create any new right of action. Its purpose was to preserve from abatement whatever rights were vested in the deceased at the time of his death. The executor continues the action and in relation thereto stands in the shoes of the deceased with the exception that from the damages recoverable by him are excluded, for obvious reasons, compensation for physical disfigurement or pain or suffering caused to the deaceased, and loss of expectancy of future earnings, because the element of damage described as loss of life expectancy vests in the deceased prior to his death and the right of action to recover damages for that loss vests by the 1934 Act at his death in the personal representative of the deceased. MAH MING YU v. TERMINAL CARTAGE LIMITED. - - **470**

9.——*Damages—Truck with broken wheel left on highway—Car going same way collides—Followed at short intervals by two other cars that collide behind one another—Bad condition of road—Visibility—Liability.*] On January 14th, 1942, at about

NEGLIGENCE—*Continued.*

5.40 a.m. the defendant Walton was driving his truck westerly on Marine Drive with a three-ton load of sawdust when the flange of his left front wheel cracked. He immediately stopped on his proper side of the road (fearing that if he attempted to take the truck off the road, the wheel might come off and dump the load on the highway, causing a worse obstruction) got off the truck and, having no spare wheel, he walked home (nearly 5 miles) to procure another wheel. He was away nearly 2 hours. When he started away, it was dark and foggy and the roadway was slippery. Shortly after 6 o'clock the plaintiff James Brown, driving a motor-car in the same direction at 15 miles an hour, collided with the rear of Walton's truck and damaged his car to the extent of $60. At the point of collision he could see ahead about fifteen feet. He immediately went back to warn other drivers. In about ten minutes the defendant Berkenshaw came along in a light Morris car. The plaintiff warned him when 75 feet away from the truck and he tried to stop but his car skidded and he ran into the back of the plaintiff's car, but lightly. Five minutes later the defendant Thomas Brown came along in his car at about 25 miles an hour. He was warned by the plaintiff when about 100 feet away from the truck, but in attempting to stop, his car skidded and he ran into the back of Berkenshaw's car with considerable force causing material further damage to the plaintiff's car. It was held on the trial that the injury to the plaintiff's car was caused by the negligence of both defendants Walton and Thomas Brown. That it was negligent for Walton to leave the truck on the highway without taking precautions to prevent such an accident and Thomas Brown was negligent in driving too fast under the circumstances and not having his car under sufficient control. The negligence of the defendants Walton and Brown cannot be separated or distinguished to such an extent that it can be said that the negligence of one is more to blame than the other. They contributed jointly to the damage done and both are liable. *Held*, on appeal, varying the decision of SHANDLEY, Co. J. (*per* MCQUARRIE, O'HALLORAN and FISHER, JJ.A.), that with relation to the first collision, the plaintiff James Brown and the defendant Walton were both guilty of negligence and the liability for the damages resulting therefrom should be divided equally between them, but the finding of the learned trial judge that the defendant Thomas Brown was solely responsible for his collision with Berkenshaw's car and the resulting damages to the plaintiff's car, should be upheld. *Per* MCDONALD, C.J.B.C.: That the defendant Walton was in the circumstances not guilty of negligence. The plaintiff, however, was either going at a speed at which he could not stop within the limits of his vision or he was not keeping a proper look-out and the effective cause of the collision was his own negligence, but the judgment against the defendant Thomas Brown should be upheld. *Per* SLOAN, J.A.: There was sufficient evidence to support the findings of the learned trial judge that the defendants Walton and Thomas Brown were negligent and that the plaintiff James Brown was not but the negligence of said defendants ought to be treated separately. The damage caused to the plaintiff's car by his collision with Walton's truck cannot be chargeable in any degree to Thomas Brown, Walton being solely responsible, and Thomas Brown was solely responsible for the final collision, Walton's negligence in no way being a responsible factor in it. BROWN v. WALTON *et al.* - - **498**

NEGLIGENCE—*Continued.*

10.——*Man run down when standing on track—Whether "thickly peopled" locality—Speed of train—Trespasser—Contributory negligence—Ultimate negligence.* - **253**
See RAILWAYS.

11.——*Pile of gravel left on roadway—Plaintiff falls over it at night—Invitee—Duty of occupier—Personal injuries—Quantum of damages.*] The Exhibition Association was the lessee of the exhibition grounds in Vancouver and of the adjoining golf course. The association employed the female plaintiff as a caterer at the golf course and she and her husband used the golf club house as living-quarters. On the day of the accident in question she was especially employed by the defendant in catering for a dinner given by the defendant in a building on the exhibition grounds. She finished her services shortly after 11 o'clock at night and started for her home when the grounds were in darkness. While walking on a roadway close to one of the other exhibition buildings and towards the golf grounds she fell over a pile of gravel which had been left there in the course of construction of a new building and she was severely injured. In an action for damages:—*Held*, that the plaintiff was an invitee when catering at the exhibition building and on her return home. The path taken by her was a proper one which the defendant knew or ought to have known she would take on her way home. The defendant was negligent in

PRACTICE—*Application for leave to bring action refused—Order settled without notice to applicant — Subsequent application to vacate order on ground that applicant was not notified of appointment to settle—Bankruptcy Rule 20—Refused.*] By rule 20 of the Bankruptcy Rules "All orders made by a Judge in Chambers shall be settled and signed by him or by the Registrar or proper officer. All orders made by the Registrar shall be settled and signed by the Registrar. The person who has the carriage of any order which in the opinion of the Judge or Registrar requires to be settled shall obtain from the Judge or Registrar, as the case may be, an appointment to settle the order and give reasonable notice of the appointment to all persons who may be affected by the order, or to their solicitors." An application by Mrs. May for leave to bring an action against the trustee in bankruptcy of the Daybreak Mining Company Limited was dismissed by MANSON, J. Subsequently she made an application to set aside the order on the ground that she had not been served with notice of the appointment to settle the order, that rule 20 of the Bankruptcy Rules had not been complied with and the order should be vacated. *Held*, that the order made by MANSON, J. was a simple order dismissing the application and rule 20 does not require all orders to be settled by an appointment, an appointment only being necessary when the judge or registrar is of the opinion that there is some point involved which requires the parties to be heard and it is only in such cases that it is necessary that an appointment to settle the order shall be served on the parties interested. In this case the judge was not of the opinion that an appointment to settle should be taken out and he settled it by signing the same. In so entering the order there was no violation of rule 20 and the application should be dismissed. *Irving* v. *Bucke* (1915), 21 B.C. 17 followed. *In re* THE BANKRUPTCY OF DAYBREAK MINING COMPANY LIMITED, N.P.L. AND *In re* APPLICATION OF MINNIE M. MAY AND J. J. UNVERZAGT ACTING FOR AND AS THE LIQUIDATORS OF THE GIBSON MINING COMPANY LIMITED, N.P.L. - - - - - - - **154**

PRACTICE—*Continued.*

2.——*Costs—Solicitor and client—Taxation—Order LXV,. r. 8 (b)—Ultra vires—Appendix M, Schedule No. 5—R.S.B.C. 1936, Cap. 249, Sec. 4 (6)—B.C. Stats. 1941-42, Cap. 37, Sec. 2 (2).*] The solicitors' bill of costs rendered for services in non-contentious matters was taxed by the registrar under rule 8 (*b*) of Order LXV. as amended by order in council on the 11th of October, 1938, and on review of the taxation it was held by SIDNEY SMITH, J. on December 10th, 1941, that the words "with such further allowances as the taxing officer . . . shall consider proper" in said rule 8 (*b*) were *ultra vires* because they had not been approved by the Judges of the Supreme Court as required by section 4 (6) of the Court Rules of Practice Act, and that the bill should be taxed under Appendix M. The Court of Appeal affirmed this decision on March 3rd, 1942. On the 12th of February, 1942, the Court Rules of Practice Act was amended by striking out section 4 (6) and substituting therefor a subsection that did not require the approval of the Judges of the Supreme Court to any tariff enactment. When the bill came before the registrar again he held the 1942 amendment of the Court Rules of Practice Act was retroactive and therefore rule 8 (*b*) in its entirety was validated by it, and he taxed the bill on this basis. On an application to review said taxation:—*Held*, that the *ultra vires* words were no part of the rules as they were never "in force from time to time." The registrar having wrongfully taxed under rule 8 (*b*) the bill must go back to him for taxation in accordance with the

PRACTICE—*Continued.*

views expressed in this judgment. Item 42 in Schedule No. 5 of Appendix M is followed by the words "In all the above enumerated cases the Registrar shall have power to allow higher fees than those mentioned, but either party may appeal from the Registrar's decision to the Judge, who may either increase or reduce such fee." *Held*, that the words "in all the above mentioned cases" were intended to refer to all the items in Schedule No. 5. [Affirmed by Court of Appeal]. *In re* TAXATION OF COSTS AND *In re* LOCKE, LANE, NICHOLSON & SHEPPARD, SOLICITORS. (No. 2). - - - - - - - - - **46, 149**

3.——*Costs of original hearing of petition—Taxation—Review—Costs of review—Taxed—Review of said taxation—"Amount involved"—Column 1 of tariff of costs.*] After the hearing of the petition herein which involved shares in the company of the estimated value of over $75,000, the petition was withdrawn and the respondent was awarded the costs of the original hearing. After taxation petitioner applied for an order to review the taxation. On the hearing the respondents were awarded the costs of the review. On the taxation of said costs the registrar held that the "amount involved" was under $3,000, and the bill was taxed under column 1 of the tariff of costs. On respondent's application for an order to review the taxation on the ground that the "amount involved" was over $75,000, and that the bill should be taxed under column 4:—*Held*, that when the petition was withdrawn all "amounts involved" in it had been disposed of. The only "amount involved" upon the last taxation would be the total amount of the bill. The amount claimed in the petition had nothing to do with it and the bill was properly taxed under column 1. *Re* COMPANIES ACT AND BRITISH AMERICAN TIMBER COMPANY. - - - - - - - - **49**

4.——*Discovery — Examination of past officer of company—Application made during the trial—An officer of the company had previously been examined—Rule 370c (1) and (2).*] A party has no right to examine a past officer or servant of a corporation as of right whether any officer or servant has been examined or not. He may examine such officer only by order of the court or a judge, and there is no limitation placed on the court or judge's jurisdiction to grant such order whether an officer of a company has already been examined or not. Rule 370c (2) does not add to or take away from the power contained in rule 370c (1) to

PRACTICE—*Continued.*

examine a past officer of the company. An examination for discovery cannot be ordered during the course of a trial. MCFALL v. VANCOUVER EXHIBITION ASSOCIATION: MARBLE, THIRD PARTY. (No. 3). - **290**

5.——*Interlocutory injunction—Application for—No consent to treat motion as trial of action—Order if granted would give substantially all relief claimed in action—Not the usual practice—B.C. Stats. 1922, Cap. 87, Sec. 2 (b).*] The plaintiff brought action for trespass and for an injunction to restrain the defendant from violation of the Shaughnessy Heights Building Restriction Act, 1922, in using a certain house premises for any purpose other than a dwelling-house. On an application for an interlocutory injunction, the parties not agreeing that the motion should be treated as the trial of the action:—*Held*, that an injunction will not be granted on an interlocutory application which has the practical effect of granting the whole relief claimed. On the balance of convenience the action should go to trial and as the action is based on a statute which is restrictive of the common-law rights it must be construed strictly and the fullest inquiry should be made which can only be had, by the trial of the issues between the parties. The plaintiff's right to an injunction ought not to be determined on this application, the action should proceed to trial and the motion will stand over until the hearing. SHAUGHNESSY HEIGHTS PROPERTY OWNERS' ASSOCIATION v. MCANDLESS, - - - - - **180**

6.——*Judgment debtor—Examination of —Right of debtor to have counsel—Liberty of the subject—Rule 610—Arrest and Imprisonment for Debt Act, R.S.B.C. 1936, Cap. 15, Sec. 19.*] On the examination of a judgment debtor, held pursuant to an order made under rule 610 of the Supreme Court Rules, 1925, and under section 19 of the Arrest and Imprisonment for Debt Act, as the liberty of the person is involved and there is no provision in the Act or Rules that a judgment debtor shall not be entitled to the assistance of counsel, there is an inherent right in the judgment debtor to have counsel represent him if he so chooses. POPE v. POPE. - - - - - **283**

7.——*Pleadings — Action for libel and slander—Defective endorsement on writ—Statement of claim did not set out defamatory words—Application to strike out endorsement and statement of claim—Application to amend statement of claim—Whether cause of action shown—Rules 18a and 305.*]

RAILWAYS—*Continued.*

neighbourhood to cross the railway tracks at the point in question, that the company was aware of this practice and the plaintiff's husband was in the habit of crossing the tracks with leave and licence of the company, nevertheless he knew of the passing of the east-bound train at the same hour each morning, namely, at approximately the hour at which he reached the track on his way to work and he was grossly negligent in standing on the east-bound track looking to the north-east instead of in the direction from which he knew the east-bound train was likely to come. On the facts of this case, the decision of this Court in *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207, settles the issue in favour of the respondent. LIND v. CANADIAN PACIFIC RAILWAY COMPANY. - - - **253**

REAL PROPERTY—*Highway — Dedication —Principle upon which dedication arises— Animus dedi candi — R.S.B.C. 1936, Cap. 140, Sec. 37; R.S.B.C. 1897, Cap. 111, Secs. 65, 66 and 70.*] The plaintiff brought action to recover possession of part of lot 1, plan 3012, New Westminster District. She had a certificate of title in her name to the part in dispute. The defendant had been in possession of the property since 1927 and claimed that the disputed area occupied by her is part of a public highway and she relies on subsections (*e*) and (*i*) of section 37 (1) of the Land Registry Act. On the 2nd of March, 1903, pursuant to section 65 of the then Land Registry Act, the owner of the land in question deposited plan 858 in the Land Registry office. There was no evidence who the owner was. This plan showed a road immediately to the south of the Fraser River and it was part of the road the defendant occupied in 1927. On July 31st, 1906, pursuant to section 70 of the Land Registry Act then in force the then registered owner obtained an order of the Supreme Court cancelling plan 858. The papers in connection with this application could not be found. On plan 858 there were two endorsements: (1) Amended and cancelled in part 23rd August, 1906, as No. 3356; (2) amending order filed 19th April, 1907, cancelled except as to lot 6, block 2, No. 3356. Filing No. 3356 could not be found. On May 8th, 1908, the land in question was conveyed to one Rorison who on the 12th of September, 1917, deposited plan 3012 in the Land Registry office. This plan does not show any road immediately south of the Fraser River. The defendant claimed the road shown on plan 858 was, by reason of depositing of plan and subsequent use by

REAL PROPERTY—*Continued.*

public generally, a public highway, and further that section 70 only gave power to alter and amend so that cancellation of plan 858 was invalid. In view of the disappearance of the records mentioned, it was difficult to ascertain what exactly was done. To establish dedication of a highway, two concurrent conditions must be satisfied: (1) There must be on the part of the owner the actual intention to dedicate and (2) it must appear that the intention was carried out by the way being thrown open to the public and was accepted by the public. The defendant further submitted that the intention to dedicate should be inferred from the evidence of user of the road by the public, but the only evidence of user was that of a witness who lived near the lot in question who said that from 1905 to 1906 or 1907 he saw persons crossing the bridge near by, drive or walk along the road in question. In 1907 a new road was opened up which was used instead of the old one. There was no evidence as to who was the owner between 1905 and July, 1906; there was no evidence as to where the owner lived during that period. There was no evidence as to the nature of the land in question or the surrounding lands or highways; there was no evidence as to whether the persons using the same were neighbours and might be using the road by tolerance or whether they were members of the public generally. *Held*, that the Court was unable to infer any "*animus dedi candi*" from the slim evidence in this case. The road shown on plan 858 was not at any time a public highway. The plaintiff is entitled to judgment for possession of the lot and to costs. YOUNG v. WORKMAN. - - - - - - - - - **414**

2.——*Land Registry Act, Sec. 34—Sale of timber with right to cut—Assignment thereof—Neither document registered—Interest in land — Assignee refused entry— Breach of contract—R.S.B.C. 1936, Cap. 140, Sec. 34.*] By written agreement, Mrs. L. sold M. the standing timber on her land with the right to enter and cut the same. M. assigned his rights under the agreement to the plaintiff company, written notice of which was given to the vendor. Neither the agreement nor the assignment was registered in the Land Registry office. Upon the plaintiff company attempting to cut the timber, Mrs. L. and her husband refused to allow entry on the land on the ground that the two documents had not been registered, as under section 34 of the Land Registry Act, no instrument becomes operative to pass any estate or interest either in law or

SHIPPING—*Continued.*

of salmon gill-net. At about midnight drifting logs fouled the vessel and net of Darkin and carried both southward and two hours later the same logs fouled the net and vessel of Gerow. About 7 o'clock in the morning the vessels and nets were piled up on the Steveston jetty a quarter of a mile from its outer end. At about 6.30 in the evening of 7th November, the defendant's tug Tyee I. with twelve sections of logs passed the end of the North Arm jetty going outward but two hours later, the weather being bad, the master turned back and headed for the North Arm for shelter, the wind hindering progress. About midnight he noticed the tow getting lighter and suspected he was losing logs. On arriving at the North Arm jetty early in the morning he found that ten sections of the tow were missing and after tying up the remaining two sections, he went back to find the lost sections, and in the forenoon found them piled up on the Steveston jetty with the two fishing-vessels and their nets. In an action for damages for loss of their fishing-nets and consequential loss of fishing profits:—*Held*, in answer to the claim that the master, when he found that his tow had lightened, should have searched for the lost portion in order either to pick it up or give warning of danger; that to ask the tug master to head into a lee-shore and shoal water on a dark night with wind and sea as indicated and encumbered with two sections of logs is to ask for an unreasonable exercise of a master's duty. He acted with prudence in getting into the North Arm and tying up. In answer to the claim that he should have turned back at the end of the North Arm jetty owing to the weather, the evidence of the weather at that place and time was not such as to justify any finding of negligence upon this ground. GEROW v. GREAT WEST TOWING AND SALVAGE LTD. DARKIN v. GREAT WEST TOWING AND SALVAGE LTD. - - **481**

SIREN—Police officer's signal by—Right to assume siren is heard. - **547**
See AUTOMOBILE. 1.

SOLDIER—On active service—Right to maintain a divorce action against. - - - - - - - - **484**
See DIVORCE. 1.

SPEEDY TRIAL. - - - - **182**
See CRIMINAL LAW. 12.

STATEMENT OF CLAIM—Application to amend—Whether cause of action shown. - - - - - **490**
See PRACTICE. 7.

STATUTES—B.C. Stats. 1914, Cap. 52, Sec. 54 (176). - - **81**
See MUNICIPAL CORPORATION.

B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 46. - - - **371**
See TAXATION. 4.

B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163 (39). - - **81**
See MUNICIPAL CORPORATION.

B.C. Stats. 1922, Cap. 87, Sec. 2 (*b*). **180**
See PRACTICE. 5.

B.C. Stats. 1937, Cap. 31. - - **351**
See EMPLOYER AND EMPLOYEES.

B.C. Stats. 1940, Cap. 26, Secs. 13 to 19. - - - - - - - - **287**
See MEDICAL ACT.

B.C. Stats. 1941-42, Cap. 37, Sec. 2 (2). - - - - - - - **46, 149**
See PRACTICE. 2.

Can. Stats. 1929, Cap. 49, Secs. 4 (*d*) and 17. - - - - - - - **96**
See CRIMINAL LAW. 10.

Can. Stats. 1932, Cap. 38, Secs. 6 and 18. - - - - - - - - **446**
See TRADE-MARK.

Criminal Code, Sec. 5, Subsec. 2. - **204**
See CRIMINAL LAW. 7.

Criminal Code, Secs. 170, 171, 172, 175, 176, 951 and 1016, Subsec. 2. - **51**
See CRIMINAL LAW. 9.

Criminal Code, Secs. 235 (*f*) and 1013, Subsec. 4. - - - **182**
See CRIMINAL LAW. 12.

Criminal Code, Sec. 399. - - **20**
See CRIMINAL LAW. 11.

Criminal Code, Secs. 999 and 1000. - **213**
See CRIMINAL LAW. 4.

Criminal Code, Secs. 1013 and 1063, Subsec. 2. - - - - - **189**
See CRIMINAL LAW. 8.

R.S.B.C. 1897, Cap. 111, Secs. 65, 66 and 70. - - - - - - - **414**
See REAL PROPERTY. 1.

R.S.B.C. 1936, Caps. 5 and 93. - **299**
See NEGLIGENCE. 4.

R.S.B.C. 1936, Cap. 6, Sec. 11. - **176**
See ADOPTION.

R.S.B.C. 1936, Cap. 15, Sec. 19. - **283**
See PRACTICE. 6.

TAXATION—*Continued.*

relief claimed, except that the railway company was only entitled to repayment of one year's taxes, that is, those that had been paid under protest, whereas the earlier taxes had not. The decision was based partly on the Crown's ownership of the two buildings, also on the ground that the buildings were "held by" His Majesty within the meaning of section 46 of the Vancouver Incorporation Act, 1921, which exempted all property vested in or held by His Majesty. *Held*, on appeal, affirming the decision of COADY, J. (SLOAN, J.A. dissenting), that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C.: The lease of the Boeing Aircraft Building is from the railway company to the Dominion alone. This provides that at the end of the lease the lessee shall forthwith remove his buildings from the demised premises, failing which, the lessor may remove them at the lessee's expense or keep them without compensation. The necessary inference is that the buildings put up by the lessee belong to him. The lessee has an equitable title at least and the Crown's equitable estate is as exempt from taxes as its legal estate. As far as the Boeing Aircraft Building is concerned the Crown's title is established. With respect to the provision in the lease on which the Vancouver Fumigation Station Building was erected, namely, as to its removal by the lessee as the lessor may direct, it is insufficient to support the trial judge's finding. But the lands "held by" the Crown within the meaning of section 46 of the Vancouver Incorporation Act, 1921, include its leaseholds. The city contends it did not tax the buildings but only the land in respect to the buildings. Even if this were a sound argument, in view of the Crown's holding of leaseholds, it is not borne out by the facts. The statement that the buildings are not themselves taxed is inconsistent with the Act and the building is exempt from taxation. The Crown Costs Act, R.S.B.C. 1936, Cap. 67 does not apply to the Crown (Dominion). *Per* FISHER, J.A.: Under the Vancouver Incorporation Act, 1921, taxes are imposed on buildings as improvements, not as land, and before the total amount of taxes imposed is set down in the tax roll with respect to any particular property (this being the amount to be paid) the Act requires consideration of the exemptions and deductions. In view of all the provisions of the Act, it cannot be said that if and when the name of the assessed owner of any parcel of land goes on the collector's roll, the improvements necessarily go on, and are taxed as part of, or as included in

TAXATION—*Continued.*

the land. Therefore, since the buildings in question or interests therein belong to the Crown and the buildings are occupied by the Crown, the city is faced with the obstacle that it is precluded from taxing such Crown property without express legislative authority therefor. *Attorney-General for Canada* v. *Montreal* (1885), 13 S.C.R. 352 applied. *Per* MCDONALD, C.J.B.C. and FISHER, J.A.: Taxes paid under protest can be recovered by action if they were not legally due. THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA, AND CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CITY OF VANCOUVER. - - - - - - **371**

5.——*Special War Revenue Act—Sales tax on gas—Supplied through single meter for both business and living-quarters—"Dwelling"—Definition—R.S.C. 1927, Cap. 179, Sec. 85 (g).*] By the Special War Revenue Act and regulations a sales tax is payable on gas when used for cooking or other domestic purposes in dwellings and the seller is authorized to collect such tax from the consumer. By section 85 (*g*) of the Act, "'dwelling' shall include business premises where the supply of gas or electricity for both the business and living quarters is metered through a single meter, or where a flat charge is made to cover both business and living quarters." On the ground floor of the premises is a cafe operated by the defendant where gas is consumed. Upstairs is a bedroom used by the defendant and an office and storeroom used in connection with the cafe business, also a room used by the employees for changing their clothes when going to and from the cafe. There is also a hallway upstairs in which is installed a gas-stove. This gas-stove was installed prior to the defendant becoming a tenant and he swears he has never used it, as he has all his meals in the cafe downstairs. There is but one meter downstairs through which gas is piped to the stoves both up and downstairs and the defendant could use the upstairs stove if he wished to do so. There is a minimum monthly charge of $50 payable by the defendant under his contract with the plaintiff but not a flat charge. From September 12th, 1939, to September 5th, 1941, the tax payable by the defendant in respect to the gas supplied by the plaintiff was $71.84. In an action to recover said sum, it was held that the premises did not come within the definition of "dwelling" and the action was dismissed. *Held*, on appeal, reversing the decision of COADY, J., that there was a supply of gas provided for