THE 26

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 LIX.

VICTORIA, B. C.
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1944.

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.
THE HON. HAROLD BRUCE ROBERTSON.

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. 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 10th of December, 1943, the Honourable Alexander Ingram Fisher, a Justice of Appeal, died at the City of Toronto, Ontario.

On the 1st of January, 1944, David Grant, retired Judge of the County Court of the County of Vancouver, died at the City of Vancouver.

On the 18th of March, 1944, the Honourable Sidney Alexander Smith, 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 Alexander Ingram Fisher, deceased.

On the 18th of March, 1944, His Honour John Owen Wilson, a Judge of the County Court of the County of Cariboo, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Sidney Alexander Smith, promoted.

On the 10th of April, 1944, the Honourable David Alexander McDonald, Chief Justice of British Columbia, died at the City of Rochester, Minnesota, U.S.A.

On the 4th of April, 1944, James Arthur McGeer, Barrister-at-Law, was appointed a Judge of the County Court of the County of Cariboo and a Local Judge of the Supreme Court of British Columbia, in the room and stead of His Honour John Owen Wilson, promoted.

TABLE OF CASES REPORTED

IN THIS VOLUME.

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"COURT RULES OF PRACTICE ACT."

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

1. Order IX. of the said Rules be amended by adding the following as Rule 16:—

"16. Where any person on active service outside of Canada has been served by an officer of His Majesty's Canadian Forces with a writ of summons, notice of a writ, or any originating summons, petition, notice of motion, or other originating proceeding under any Statute, Rule of Court, or practice whereby proceedings can be commenced otherwise than by writ of summons, then proof of such service in the form of a certificate of service in Form 231, in Appendix B, certified by the officer, when filed in the Registry, may be accepted in lieu of the affidavit of service required under these Rules."

2. Order XIII. of the said Rules be amended by inserting after the words "in lieu of service," in the last line of Rule 2, and after the words "affidavit of service," in the fourth line of Rule 12, the words "or the certificate under Rule 16 of Order IX."

3. Appendix B of the said Rules be amended by inserting the following as Form No. 231:—

No. 231.

CERTIFICATE OF SERVICE BY COMMISSIONED OFFICER.

In the Supreme Court of British Columbia.

A. B. against *C. B.*

I, , do hereby certify:—

1. That I am Captain [*or as the case may be*] in His Majesty's Canadian Naval, Military, or Air Forces [*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 defendant [*or as the case may be*], a soldier [*or as the case may be*] on active service outside of Canada, with the writ, notice of writ, originating summons, petition, etc. [*as the case may be*], of this Honourable Court, which writ, etc. [*as the case may be*], is attached hereto and marked Exhibit A to this my certificate, by delivering to the said *C. B.* personally a true copy thereof.

3. That I identified the said *C. B.* at the time of service aforesaid as the said *C. B.* set out in the said writ, etc. [*as the case may be*], by obtaining

his address and official number from the proper records and by his admission that he is the same person mentioned in the said writ, etc. [*as the case may be*], as the said *C. B.*

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

.....

Rank and Unit.

R. L. MAITLAND,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., October 28th, 1943.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

McFALL AND McFALL v. VANCOUVER EXHIBITION ASSOCIATION: MARBLE *ET AL.* THIRD PARTIES (No. 4).

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Jan. 25, 26; *March* 2.

Indemnity—Negligence of defendant—Remedy over against third party—Contract between defendant and third party—Indemnity clause—Construction.

Article 19 of a contract between the defendant and third party for the construction of a building on the exhibition grounds in Vancouver reads: "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." The defendant, lessee of the exhibition grounds and adjoining golf course, employed the female plaintiff as a caterer on the golf course where she lived. On the day of the accident in question she was employed by the defendant in catering for a dinner in a building on the exhibition grounds. On finishing her

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work at about 11 o'clock at night, she started for home when the grounds were in darkness. On the way she fell over a pile of gravel left on the roadway by the third party when in the course of construction of a new building under contract with the defendant association. She was severely injured and in an action for damages the defendant was found guilty of negligence. On an issue between the defendant and the third party, it was held that the cause of the accident was solely attributable to the negligence of the third party in violation of said article 19 and the defendant was entitled to indemnification as against the third party.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C., that no "independent act of negligence" of the defendant had been the immediate and effective cause of the injuries sustained by the plaintiff, but the tortious act of the party covenanting to indemnify, of the very class against the consequences of which indemnity has been stipulated for, was the primary cause of injury.

APPEAL by the third parties from the decision of FARRIS, C.J.S.C. of the 7th of October, 1942 (reported, 58 B.C. 168) whereby it was adjudged that the defendant was entitled to be indemnified by the third parties in respect of a judgment recovered by the plaintiffs against the defendant on the 24th of September, 1942, in an action for damages. The defendant was lessee and occupier of the premises known as Hastings Park. The park comprised two main portions—a built-up portion and a golf course separated by a fence. The defendant, desiring to enlarge and in part to reconstruct the live-stock building on the premises, did on September 29th, 1939, contract with the third parties to do the work. The work under contract was completed and the cleaning up outside was proceeding on May 3rd, 1940, and there remained on the roadway on the southerly side of the building at the top of an incline and to some extent down over the incline, gravel variously described as from 3 to 6 inches in depth and the area of it was from 8 to 16 feet in diameter. Trucks carrying dirt away had moved some of the gravel down over the incline. The female plaintiff had a contract with the defendant granting her the concession of catering at the golf club house and her husband was an employee in connection with the golf course. By separate arrangement, the plaintiff contracted with the defendant to cater to a buffet supper for the defendant's executives and guests in the evening of the 3rd of May, 1940, at the administration building located in the built-up portion of

the park. Defendant supplied a car to bring the plaintiff, with various utensils, from the golf club to the administration building between 8 and 9 o'clock in the evening of May 3rd, the route taken by the car being north on Windermere from the golf club to the entrance to the park from Windermere, then westerly through the park on Miller Walk to the front of the administration building. Miller Walk was a main artery running through the park east and west, hard-surfaced and kerbed on both sides. After getting through her work at the administration building, the plaintiff proceeded for home shortly before 12 o'clock when the park lights were out. Instead of going by Miller Walk, she decided to take a short-cut. She passed over the dirt portion of the roadway at the westerly end of the live-stock building and down a decline without realizing that it was not a hard-surfaced road, nor did she remember the decline in question and further east on roadway that had remained hard-surfaced and at the top of another decline in the roadway immediately beyond the point where the decline began, she fell, suffering injury to her back. It was agreed in these third-party proceedings that the evidence taken on the trial between plaintiff and defendant should, along with other evidence adduced, be evidence in the issue between the defendant and the third parties.

The appeal was argued at Victoria on the 25th and 26th of January, 1943, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Guild (*J. R. Young,* with him), for appellants: It is not suggested in the findings of the Chief Justice or in the evidence that the presence of the gravel described in the evidence, if lighted, in itself constituted a menace. No action would have lain had the accident occurred in the daytime or while the lights were on. It is clear that the cause of the accident was the turning off of the lights. The presence of the gravel was the *sine qua non,* the *causa causans* was the turning off of the lights. It was the defendant's servant who turned off the lights and he did so without first having ascertained that the guests and employees had left the park. The defendant was guilty of an act of negligence and it was so found. In these circumstances article 19 of the contract between defendant and third parties does not assist

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the defendant: see *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200; *Sutton* v. *Town of Dundas* (1908), 17 O.L.R. 556 and *William Cory & Son* v. *William France, Fenwick & Co.* (1910), 80 L.J.K.B. 341. The case of *City of Kitchener* v. *Robe and Clothing Company,* [1925] S.C.R. 106, is distinguishable. In this case the facts are not similar to the *Kitchener* case. The case of *Butler* v. *Grand Trunk Pacific Ry. and Jasper Coal Ltd.,* [1940] 2 W.W.R. 532 is also distinguishable, and so is *Haley* v. *Canadian Northern Railway and Hawke,* [1920] 1 W.W.R. 460. On the difference between a cause, which is merely a *sine qua non* and a *causa causans* see *McLaughlin* v. *Long,* [1927] S.C.R. 303, at pp. 310-11. The learned Chief Justice erred in holding that the *onus* was upon the third party to prove that the presence of gravel at the time and place in question was known to the defendant. The obligation to indemnify arises only if the injuries are solely caused by the fault of the third parties. The defendant must prove all the essentials of the cause of action. If the *onus* of proof lay upon the third parties to establish that the defendant had actual knowledge of the presence of the gravel, as found by the learned Chief Justice, the evidence adduced was sufficient to meet that *onus* or at any rate sufficient to throw the burden over upon the defendant in the third-party proceedings. In the circumstances, the lights having been turned out, it was negligence on the defendant that Mrs. McFall was not warned not to proceed to her home by the route taken.

Bull, K.C., for respondent: The claim of the respondent against the appellants for indemnity rests on the contract of September 29th, 1939, and particularly articles 19 and 32 thereof. The appellants relied on *Sutton* v. *Town of Dundas* (1908), 17 O.L.R. 556 and *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200 but these cases are distinguished as in neither case had the wrongful act of the contractor, who had undertaken the obligation to indemnify in the carrying out of the work contracted for, been the primary and sole effective cause of the damage suffered. In this case the plaintiff's injury was directly attributable to the negligence of the appellant within the meaning of the indemnity clause: see *Butler* v. *Grand Trunk Pacific Ry. and Jasper Coal*

Ltd., [1940] 2 W.W.R 532; *City of Kitchener* v. *Robe and Clothing Company*, [1925] S.C.R. 106. We were not obliged to keep the lights on until the plaintiff arrived home: see *Huggett* v. *Miers*, [1908] 2 K.B. 278; *Sheppard* v. *Glossop Corporation*, [1921] 3 K.B. 132.

Guild, in reply: We rely on the fact that the defendant turned off the lights. It is an independent act of negligence.

Cur. adv. vult.

2nd March, 1943.

McDONALD, C.J.B.C.: This case presents considerable complexity, though some points are concluded by the fact that two judgments affect the parties, only one of which has been appealed from. Fortunately, the case has been well argued on both sides.

The main plaintiff (whom I hereafter call "the plaintiff") an invitee on the respondent's premises, was awarded damages against the respondent for physical injuries caused by her falling over the remnants of a heap of gravel that appellants had left on those premises. Her husband also recovered damages based on her injuries. Respondent had brought in appellants under a third-party notice, claiming indemnity; appellants had leave to contest the main action and were accordingly bound by the judgment; later the judgment appealed from was given, finding appellants liable to indemnify respondent against the first judgment.

The plaintiff's husband was an employee of respondent, and they lived on one part of respondent's premises. On the night when the plaintiff was injured, she had been hired by the respondent for the evening to cater on another part of its premises, *viz.*, in the exhibition grounds at Hastings Park. She was kept at work until 11.30 p.m. and then set out for home in the dark, the respondent's lighting through the park having been turned off forty minutes earlier. On her way home she fell over the gravel, which was lying on a surfaced roadway, and was injured.

This gravel was the remains of a pile used for mixing concrete by the appellants, who were contractors employed by respondent to construct a new building.

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Apparently respondent had a lighting system which would have rendered the gravel visible to the injured woman if the lights had been on; but according to their usual practice they had turned these off soon after 11 o'clock.

Respondent claimed indemnity from appellants, not only under the common law, but also under an express contract of indemnity.

At the trial the Chief Justice found that [58 B.C. 164]

> . . . 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.

It is unnecessary for me to consider whether I would take this view if the first judgment were under review. It has not been appealed against; so the findings are conclusive. However, though appellants admit they put the gravel there, and cannot escape the finding that it was a menace under the circumstances, they dispute their responsibility for the circumstances, and their liability to indemnify the respondent.

Appellants present two main defences to the third-party claim: (1) a defence on the merits, in that they say the respondent was more to blame than they, and (2) the technical defence that at the worst both were joint tort-feasors, and respondents are barred from claiming indemnity. I shall deal with the second defence first.

It is clear enough that in general one joint tort-feasor cannot claim indemnity from another, even under an express contract of indemnity. There is, however, even apart from statutory exceptions (not invoked here), a well-defined exception to the general rule. This exception is that where both parties' negligence contributes to an accident, but one's negligence consists in commission, the other's merely in omission, there the situation is not the same as where they are partners in wrongdoing, but the inactive party may claim indemnity from the other: *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. In the former case at p. 113 Anglin, C.J.C. said:

> Where, as here, a tortious act of the party covenanting to indemnify, of the very class against the consequences of which such indemnity has been stipulated for, is the primary cause of injury, that party cannot escape the

liability to indemnify merely because that act itself, or neglect to provide against its consequences, has also entailed liability to the person injured of the party in whose favour the stipulation for indemnity was exacted. It is upon the very liability thus entailed that the claim for indemnification rests.

Appellants' counsel conceded this general exception but said it did not apply here, because the respondent had contributed to the accident by "turning off the lights," an act of commission. I think this argument contains a fallacy. It was not the "turning off" that contributed to the accident; for this is not a case where the plaintiff was put in sudden peril by a switching-off while she was in the midst of an act that she would never have begun without lights, such as walking a plank across a stream. The factor that did contribute was the omission to have lights at the critical time; but whether that was due to turning-off or to an original failure to turn on was immaterial. The result would have been the same if there had never been lights that night. So the respondent's failure toward the plaintiff was non-feasance, not misfeasance. And this was no bar, technically at least, to indemnity from appellants.

The above passage from Anglin, C.J.C.'s judgment refers to neglect of one party "to provide against the consequences" of the other's negligence as not barring indemnity. Respondent says that was the situation here; appellants' complaint against its turning off the lights was really a complaint that it did not protect them from the consequences of their own negligence, which as between the two it had no duty to do. It seems to me that this is a difficult argument to answer. Can the appellants argue that so long as gravel was there, respondent owed it a duty to have lights burning? (I say nothing of the duty to the plaintiff, which we are not now dealing with). Would the respondent have to keep these burning all night and every night, so long as there was any possibility of anyone passing that way?

Such broad contentions are so obviously untenable that appellants have tried to reduce them to claims of a duty created for the time and place by the particular facts and circumstances.

Considerable argument has been directed to the inquiry as to what was the *causa causans* or effective cause of the accident, and both sides have invoked the first judgment as concluding the facts in their favour. I think that judgment does not help or fetter

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either party. The former issue was whether the respondent had failed in its duty toward the plaintiff, and there being several factors, the Court was only interested in their cumulative effect. Whether respondent was liable for its own acts, or only vicariously for its contractor's was not really in issue, and if the respondent and appellants (as third parties) had tried earlier to argue the questions now raised as to responsibility *inter se*, the Court must have refused to hear the argument as then irrelevant. It seems clear therefore that the division of responsibility or any point not already directly in issue cannot be *res judicata*, even though the plaintiff's right to recover is.

The effective cause of the accident as between respondent and appellants is therefore an open question. Strictly speaking, in this appeal our direct concern is with the respondent's and appellants' duties towards each other, even though these to some extent turn on duties to the plaintiff.

Appellants say: The real cause of the accident was the respondent's bringing its invitee on the premises after dark, turning off the lights and sending her forth into danger without warning. They add: Respondent cannot ask us to indemnify it against what it has itself brought about. Against this it is not enough for respondent merely to say that the plaintiff was injured by gravel and appellants put it there. If the gravel had been put in a field off the roadway, and respondent had expressly invited the plaintiff to cut across the field after dark, and she had injured herself, then appellants would not have been liable to anyone, if they had rightfully put the gravel there. Then the decisive factor would be that appellants would not have been negligent, because they could not foresee such a contingency, and there was no inherent danger in what they did. Here, however, they put the gravel on a roadway, which is a place where travel is to be expected.

That element alone would not necessarily be decisive, if as between them and the respondent, respondent had done wrong. But since it was the appellants themselves who put the gravel on the road, every complaint that they make about the absence of lights to disclose it rebounds with double force on their own heads, unless they can show that the presence of an invitee there

after dark was so extraordinary and unprecedented that they could not reasonably have anticipated it. In that case, appellants would not have been negligent, and probably the incident would not have fallen within the indemnity contract.

But we cannot, I think, take that view of the facts. It seems altogether likely that one reason for the contract was the continual presence of outsiders. Though most of these would be there by day, it is very hard to believe that there would not usually be persons coming and going by night. At the very least, such invitees as the respondent's employees could be expected to be about by night; and the plaintiff was really a temporary employee. If there is a scarcity of evidence on this point, it is the appellants' misfortune; for I think the *onus* was on them.

If we hold there was reason to expect that the road might be used at night, so that appellants had a duty to put a lantern on the gravel, the only argument left to them is that the respondent had an even higher duty to disclose the gravel to the plaintiff, because it had specific knowledge that the plaintiff was there and not a mere general knowledge that there might be someone.

I shall assume that specific knowledge creates the higher duty, other things being equal. But the appellants' whole argument hinges on the respondent's having equal knowledge of the gravel. The admissions of Cuthbertson, its superintendent, and of McLennan, its general manager, are relied on to show this. But I am not satisfied that sufficient knowledge is brought home to either of these officials. Cuthbertson indeed admitted seeing gravel shortly before the accident. But I do not think it follows that he knew it was there on the night of the accident. Apparently what the plaintiff fell over were the mere remnants of a pile, a few inches deep, and these could easily have been used up during the day. Can we assume that he knew they would not be? McLennan's admissions were extremely vague; all he said was that when he saw the roadway after the accident, it was "the same as it always had been." We cannot assume from this that on the night of the accident he knew there was gravel there.

The Chief Justice below held that even if the officials knew the gravel was there, there was nothing to show that they knew appellants had not put a lantern on it, as they should have done.

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To this appellants answer that the *onus* was on the respondent to show lack of knowledge, because they had to show affirmatively that the accident was caused by the appellants. I think this answer can be met by the wording of the indemnity contract, which makes the appellants liable for all claims "arising out of or made in respect of anything done or omitted to be done in the execution of the work."

Prima facie, I think, this accident fell within such broad language, and it was for the appellants to take it out; so that the *onus* as to knowledge was on them, even if such knowledge by the respondent would help them.

I am not sure that the Chief Justice did not over-state respondent's duty to appellants not to issue invitations to outsiders with knowledge of a danger created by appellants. For one thing, I am not satisfied that any such duty would be as high where the invitor is a corporation like the respondent, and the knowledge of the official who issues the invitation is only imputed knowledge. It may well be that the appropriate official's knowledge of a danger imposes a duty on the corporation towards anyone invited by another official who does not share the knowledge. But appellants must argue that even toward them, who created the danger, respondent owed a duty to have all its officials cognizant of the danger as soon as any one of them knew of it. I find it hard to believe such a duty existed.

Even if we were dealing with an individual occupier, I doubt whether we could lay down any general principle as to the effect of knowledge on an indemnity contract. It may indeed be reasonable (though no case directly in point has been cited), that a party cannot invoke a contract of indemnity where he has conduced to an accident by recklessly issuing invitations that bring third parties into danger, relying on his ability to throw responsibility for whatever happens on the covenanting party. Here, however, there was nothing like recklessness on anyone's part, but merely an unfortunate accident, such as was within the scope of the indemnity agreement, once liability was found and the finding not appealed against.

I would dismiss the appeal.

McQUARRIE, J.A.: I would dismiss the appeal of the third parties (appellants) for the reasons stated by the learned trial judge.

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

O'HALLORAN, J.A.: The appellants seek to escape liability under their contract of indemnity, first on the ground that it was not their duty, but was the duty of the respondent to light or otherwise guard the pile of gravel upon which the respondent's employee Ellen McFall fell and injured herself.

The learned trial judge found against the appellants in that respect, and I am satisfied the finding is warranted by the evidence. Whether the danger was a pile of gravel, a hole in the ground, or anything else connected with their work, it was the duty of the appellant contractors to protect from that danger people properly on the premises. The appellants relied apparently upon the respondent's flood lights for that purpose at night. But it appears that the respondent utilized the flood lights only during the times its premises were in use at night. It turned them off when not required for its own purposes.

It was not explained on what ground the respondent should be fixed with responsibility to guard the contractor's works at night any more than during the day time. Article 19 of the contract of indemnity specifically provides:

> The contractor shall use due care that no person is injured in or about the said work. . . .

That applied at night as well as in day-time. No evidence was adduced to show that the respondent had in fact assumed a responsibility to relieve the appellants from their duty in that respect. Nor was any evidence adduced from which that inference could be legitimately drawn.

The other effective issue was the submission on behalf of the appellants that the contract of indemnity is confined to instances where the indemnifier alone does the negligent act, and does not extend to a case like the present, where the respondent while not itself joining in or contributing to the negligence nevertheless was exposed to liability. I think that objection is answered in *City of Kitchener* v. *Robe and Clothing Company*, [1925] S.C.R.

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106. After referring to *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200 and *Sutton* v. *Town of Dundas* (1908), 17 O.L.R. 556, Anglin, C.J. said at p. 113 in delivering the judgment of the majority of the Court: [already quoted by McDONALD, C.J.B.C.].

I would dismiss the appeal accordingly.

FISHER, J.A.: This is an appeal by the third parties from the judgment below holding that they should indemnify the defendant (respondent) against the judgment for damages and costs, given in favour of the plaintiffs against the defendant in the action. The claim of the respondent against the appellants for indemnity rests upon a contract and particularly articles 19 and 32 thereof, reading as follows (the third parties being referred to as the contractor and the defendant as the owner):

Article 19.

Contractor's Liability Insurance.

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.

Article 32.

Cleaning Up.

The contractor shall at all times keep the premises free from accumulation of waste material or rubbish caused by his employees or work and at the completion of the work he shall remove all his rubbish from and about the building and all his tools, scaffolding and surplus materials and shall leave his work "broom clean" or its equivalent, unless more exactly specified. In case of dispute the owner may remove the rubbish and charge the cost to the several contractors as the architect shall determine to be just.

In view of the manner in which the matter now comes before us I think it necessary first to express my view as to what was the real basis of the judgment below finding the defendant guilty of negligence making it liable to the plaintiffs. In my view it was based upon the duty of the defendant as occupier to an

invitee which is, as was declared by Lord Chancellor Hailsham in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), 98 L.J.P.C. 119, at p. 121, the duty of taking reasonable care that the premises are safe, such declaration being referred to by MARTIN, J.A. (afterwards C.J.B.C.) in *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at p. 223, as at last clearing up "the 'unfortunate ambiguity' in *Indermaur* v. *Dames* [(1866), L.R. 1 C.P. 274, 288] pointed out by Salmond [on Torts, 7th Ed.] p. 461." Such being the basis of the finding of negligence on the part of the defendant in the Court below it is quite obvious that the learned trial judge found in effect that the place where the accident happened was not reasonably safe at the time of the accident which was about midnight and that the negligence of the defendant consisted in not carrying out its duty to the female plaintiff of taking reasonable care that the premises were safe. I also think it necessary further to consider in what particular respect the learned trial judge found that the defendant had not carried out its duty as aforesaid. In this connexion reference might be made to his judgment in the action between the plaintiff and defendant reading in part as follows [58 B.C. 164-5]:

> . . . 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. . . . 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.

As the accident in question happened at night I think this finding of the trial judge means that in his view the defendant was negligent in permitting to remain at the place of accident at night a pile of gravel neither lighted nor otherwise guarded and in this respect had not carried out its duty as occupier to take reasonable care that the premises were safe and that an invitee should not be injured while making a reasonable use of its premises. As the trial judge says, he treated the acts of the third parties as the acts of the defendant when he was determining the issue as between the plaintiffs and the defendant in the action, the defendant being the occupier of the premises.

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When the learned trial judge was dealing with the question of the liability of the defendant to the plaintiffs there is no doubt he was obliged to base his conclusion upon what was the duty of the defendant as occupier to the female plaintiff as invitee. When he came to deal with the question of the liability of the third parties (appellants) to indemnify the defendant (respondent) he had to base his conclusion upon what was the duty and obligation of the appellants to the respondent under the contract in question herein. On the latter question which is the one before us counsel for the appellants contends that the *onus* was upon the respondent to prove as alleged in its third-party notice, which took the place of a statement of claim, that the sole responsibility for the accident was that of the appellants and that the respondent did not satisfy this *onus*. Counsel for the appellants relies upon the fact that the respondent turned out its own flood lights which would have lighted up the gravel on the roadway where the accident happened and submits that this was an independent act of negligence on the part of the respondent and the effective cause of the accident. It is contended that the learned trial judge erred in holding that the *onus* was on the appellants and that they had failed to prove that the respondent at the time had actual knowledge of the presence of the gravel and alternatively that the evidence adduced was sufficient to satisfy such *onus* if it was on the appellants. On this phase of the matter I have to say in the first place that I do not find it necessary to express an opinion upon whether or not the learned trial judge erred, as contended by the appellants, because, even on the assumption that it was proved that the respondent had actual knowledge of the presence of the gravel, my view is that the respondent had established that, as between it and the appellants, the sole responsibility for the accident was that of the appellants. The respondent had proved and the trial judge was justified in finding as he did that the pile of gravel was left on the road by the appellants, who were engaged in the construction of a building for the respondent under said contract, and that what evidence was given on the point would indicate that the roadway was used at night as well as by day. The respondent had also proved the contract as aforesaid, which provided that

the contractor shall use due care that no person is injured in or about the said work.

This duty on the part of the appellants existed at night as well as in the day-time and no evidence was adduced to show that the respondent had relieved the appellants from their duty or that the respondent had any knowledge that the appellants were not carrying out such duty. Upon the evidence as it stood therefore my view is that the respondent had proved as against the appellants that there was no independent act of negligence on its part as it was entitled to expect that the appellants would carry out their duty under the contract and light or otherwise guard the gravel. As between the parties to this appeal therefore the accident was solely attributable to the negligence of the third parties in violation of article 19 of the contract as aforesaid and the trial judge was right in so finding in the third-party proceedings.

In my view the learned trial judge was also right in holding that under said article 19 the respondent was entitled to be indemnified by the appellants. As contended by counsel for the respondent the present case falls within the decision in the *City of Kitchener* v. *Robe and Clothing Company,* [1925] S.C.R. 106. Counsel for the appellants relied especially on *Sutton* v. *Town of Dundas* (1908), 17 O.L.R. 556 and *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200, but this case is distinguishable from such cases in the same way as the *Kitchener* case, *supra,* was distinguished from such cases by Anglin, C.J.C. at p. 113 as follows:

> The material placed in the lane was "surplus material not required by the city." In direct violation of the clause just quoted the contractor so placed it that it became the cause of injury to private parties. Why should they not indemnify the city for the present claim for such injury? It is argued that the clause was not meant to apply to a case in which negligence of the city itself is found to have involved it in liability and such authorities as *City of Toronto* v. *Lambert* and *Sutton* v. *Town of Dundas* are invoked by the third parties. In each of those cases an independent act of negligence of the party asserting the right to indemnity under a contractual provision, which may for the moment be taken to have been somewhat similar to clause 7 of the specifications above quoted, had been the immediate and effective cause of the injuries sustained; in neither of them had a wrongful act of the contractor who had undertaken the obligation to indemnify, in the carrying out of the work contracted for, been the primary and sole effective cause of the damage suffered. In the case at bar, on the contrary, the city's liability arises either because responsibility for the tortious act of its con-

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tractors is by law attached to it, or because it had failed to remove a known source of danger, which a tortious act of its contractors had created. Where, as here, a tortious act of the party covenanting to indemnify, of the very class against the consequences of which such indemnity has been stipulated for, is the primary cause of injury, that party cannot escape the liability to indemnify merely because that act itself, or neglect to provide against its consequences, has also entailed liability to the person injured of the party in whose favour the stipulation for indemnity was exacted. It is upon the very liability thus entailed that the claim for indemnification rests.

In the present case my view, as already indicated, is that no "independent act of negligence" of the respondent had been the immediate and effective cause of the injuries sustained, but a tortious act of the party (here the appellants) covenanting to indemnify, of the very class against the consequences of which indemnity has been stipulated for, was the primary cause of injury. I would accordingly dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *W. S. Lane.*
Solicitor for respondent: *W. W. Walsh.*

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Jan. 27, 28;
March 2.

REX v. GREEN.

Criminal law—Reckless driving—Death of passenger—Accused gives evidence on his own behalf—Proof of his competency as a driver—Cross-examination as to previous convictions for reckless driving—Canada Evidence Act, R.S.C. 1927, Cap. 59, Sec. 12.

The accused was driving his car with three passengers on the Island Highway intending to go from Victoria to Duncan. When they reached a point on the Malahat called "The Corner" about 25 miles from Victoria where there is a heavy guard-rail to protect cars from a deep declivity on the east side of the road, the accused lost control, drove through the guard-rail and rolled down the hill about 200 feet. One of the passengers was killed. On a charge of killing one P. A. Campbell, the accused was found guilty of reckless driving. On the trial the accused gave evidence in an endeavour to prove that he was a competent driver of motor-cars and motor-buses. Counsel for the Crown on cross-examination showed that accused was a racing driver and had driven racing-cars from time to time, also that on at least two occasions he had been convicted of speeding when driving a motor-car.

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Held, on appeal, affirming the conviction and sentence by SIDNEY SMITH, J. (MCDONALD, C.J.B.C. dissenting), that accused adduced evidence in an endeavour to prove that he was and had been a careful driver. For that reason counsel for the Crown could properly confront the accused, after his undertaking to give evidence, with his record of previous convictions for speeding and reckless driving and that he had been a professional automobile racing driver both here and in the United States.

Per FISHER, J.A. (MCQUARRIE and O'HALLORAN, JJ.A. concurring): Section 12 of the Canada Evidence Act permits such cross-examination on previous convictions.

APPEAL by accused from his conviction and sentence of one year's imprisonment and three years' suspension of driving licence before SIDNEY SMITH, J. and the verdict of a jury at the Fall Assize at Vancouver on the 29th of November, 1942, on a charge that on the 24th of July, 1942, he unlawfully did kill and slay one Peter Alexander Campbell. At shortly after 8 o'clock on the evening of the accident accused started from Victoria in his motor-car with Campbell and two other men named Jones and Reid as passengers intending to go to Duncan over the Island Highway. Previous to starting, the men had been drinking. Two of the men were intoxicated but the accused had had only two or three glasses of beer. There was no suggestion that he was intoxicated. At first he was going at about 35 miles an hour, but shortly before the accident he reduced his speed to about 25 miles an hour and was going at about that speed when the accident occurred. The accident took place on the Malahat about 21 miles from Victoria at a spot where there is a sharp bend known as "The Corner," a short distance north of Buller's look-out. There is a heavy guard-rail on the east side of the road as a protection from the sharp fall on that side. As accused drove round the corner, he was met by a motor-car going south which was coming near the middle of the road. Accused turned towards the guard-rail when the front wheel got into some loose gravel. He lost control, the motor-car broke through the guard-rail and rolled down for 200 feet. The passenger Campbell was killed and the other three were injured.

The appeal was argued at Victoria on the 27th and 28th of January, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

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Davey, for appellant: Accused was convicted of reckless driving and sentenced to one year. First, when the accused was in the box, he was improperly examined as to previous convictions and there was misdirection and non-direction amounting to misdirection in failing to put to the jury the defences, *i.e.,* construction of the road at this place. There was misdirection in withdrawing from the jury's consideration facts of other accidents at this point. There was non-direction amounting to misdirection in failing to put to the jury the evidence of corporal Henry, an officer of the British Columbia police. There was misdirection as to the evidence given by the two men in the motor-car (Jones and Reid) and summarizing other evidence as to the speed, also the evidence of Louisa Done and Hanson as to the identification and speed of a motor-car coming the opposite way. On the question of previous convictions see section 12 of the Canada Evidence Act. These questions do not go to the credibility: see *Maxwell* v. *The Director of Public Prosecutions,* [1935] A.C. 309; *Koufis* v. *Regem,* [1941] S.C.R. 481, at pp. 487 and 490. A man's racing experience does not go to credibility. We say the warning as to previous charges was not sufficient to eradicate the harm done by what was previously said: see *Rex* v. *Boak* (1925), 36 B.C. 190. Non-direction of failure of putting to jury difficulty of controlling car see *Rex* v. *Brooks,* [1927] S.C.R. 633, at p. 634. That the various defences must be put to the jury see *Rex* v. *Manheim* (1926), 30 O.W.N. 317.

Clearihue, K.C., for the Crown: At the end of the charge counsel for the defence was asked whether he was satisfied with the charge and he said he was: see *Rex* v. *Munroe* (1939), 54 B.C. 481, at p. 488; *Rex* v. *Sanders* (1919), 14 Cr. App. R. 9. Twenty-five miles per hour is too fast round that corner: see *Rex* v. *Krawchuk* (1941), 75 Can. C.C. 219, at p. 223.

Davey, in reply, referred to *Rex* v. *Jackson,* [1936] O.R. 594, at p. 603.

Cur. adv. vult.

2nd March, 1943.

MCDONALD, C.J.B.C.: The appellant was convicted of reckless driving, by a jury. Several objections were raised, among which I base my judgment upon two grounds. The appellant

led evidence to the effect that he was a competent driver of motor-cars and motor-buses. In cross-examination of the appellant counsel for the Crown made a point of the fact that the appellant was a racing driver and had driven racing-cars from time to time. It was also brought out in cross-examination that the appellant on at least two occasions had been convicted of speeding when driving a motor-car. Admitting that he was subject to cross-examination on his previous convictions, the cumulative effect of this evidence, together with the fact that he was a racing driver, was, I have no doubt, greatly prejudicial to the defence. In my opinion the fact that he drove racing-cars was irrelevant to any issue raised by either side and did not go to the question of his credibility.

Further, it was proven—and as a part of the narrative there could be no objection to this—that at the time of the accident in question the accused had two passengers in the front seat of the Plymouth coupe which he was driving. He was not asked in the witness box whether this hampered him in handling his car, nor was any evidence given one way or the other upon this question, nor upon the width of the seat, nor upon the question of whether the three people in the front seat were in any way crowded. Nevertheless, it appears Crown counsel made something of this point in his address to the jury, and in any event the learned judge left it to the jury to consider this question as an element in the case they were trying. I think this must necessarily have been prejudicial to the accused. For all the jury knew, he may not have been hampered at all and hence this was an element which ought not to have been left, in the vague way in which it was left, for their consideration.

For these reasons, and without offering any opinion upon the other objections raised, I would allow the appeal and direct a new trial.

McQUARRIE, J.A.: I agree that the appeal should be dismissed for the reasons stated by my brother FISHER.

SLOAN, J.A.: From a consideration of the charge as a whole and in the light of the evidence and the issues raised at the trial, I am satisfied that there is therein no substantial misdirection

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nor non-direction amounting to misdirection. While it is true the learned trial judge might have laid more emphasis in his charge on certain aspects of the evidence favourable to the accused I cannot say that on the whole he did not fairly put the defence to the jury.

So far as the impugned cross-examination is concerned I cannot say that under the circumstances of the case it was improperly allowed. The accused adduced evidence in an endeavour to prove that he was and had been a careful driver. For that reason, among others, I think counsel for the Crown could properly confront the accused, when he undertook to give evidence, with his record of previous convictions for speeding and reckless driving and with the fact that he had been a professional automobile racing driver both here and in the United States.

In the result I would dismiss the appeal from conviction.

With reference to the sentence appeal I see no valid grounds for interfering with the sentence imposed below.

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

FISHER, J.A.: The appellant appeals from his conviction of reckless driving by a jury at the Victoria Assize. I will deal in turn with what would appear to be the main grounds of appeal.

It is first submitted by counsel on behalf of the appellant that the prosecuting counsel in cross-examining the appellant improperly questioned him as to previous convictions and as to his having been a racing driver at Colwood and having an accident there. Counsel relies especially upon *Maxwell* v. *The Director of Public Prosecutions,* [1935] A.C. 309 and *Koufis* v. *Regem,* [1941] S.C.R. 481.

With regard to the cross-examination on previous convictions my view is that section 12 of the Canada Evidence Act permits such cross-examination. In *Rex* v. *Mulvihill* (1914), 19 B.C. 197, IRVING, J.A., with whose judgment MACDONALD, C.J.A. and GALLIHER, J.A. concurred, said as follows at p. 207:

In *Rex* v. *D'Aoust* (1902), 3 O.L.R. 653; 5 Can. Cr. Cas. 407, on a case reserved, where the prisoner, accused of robbery, had been cross-examined as to a number of previous convictions, Armour, C.J.O. pointed out the difference between our Act and the English, and at p. 655 said:

"Nor is there any other provision limiting in any way the cross-examination of a person charged with an offence who becomes a witness on his own behalf."

Osler, J.A. at pp. 656-7 said:

"When he [the prisoner] does so, he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination."

The other three judges, Maclennan, Moss and Garrow, JJ.A., concurred.

Section 12 permits a witness to be questioned as to whether he has been convicted of any felony; and to prove it, if denied, even though the conviction is altogether irrelevant to the matter in issue: *Ward* v. *Sinfield* (1880), 49 L.J.C.P. 696, at p. 697.

In *Rex* v. *Sidney Miller* (1940), 55 B.C. 204 my brother SLOAN, with whom MACDONALD, C.J.B.C. agreed, said as follows at pp. 206-7:

In England, because of the Criminal Evidence Act, 1898 (61 & 62 Vict., Cap. 36), Sec. 1 (*f*) I am inclined to think that the form of the Crown's questioning might be considered improper but in Canada there is not the same limitation upon the right of cross-examination as in England (*Rex* v. *D'Aoust* (1902), 5 Can. C.C. 407). . . .

The *Maxwell* case, *supra,* is a decision clearly based upon the Imperial statute and distinguishable on that basis. In the *Koufis* case Kerwin, J., delivering the judgment of himself and the Chief Justice said as follows at pp. 486-7:

By section 4 of the Canada Evidence Act, every person charged with an offence is a competent witness for the defence, and by section 12, a witness may be questioned as to whether he has been convicted of any offence and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction. We are not concerned on this appeal with the question as to when the prosecution is entitled to give evidence of the bad character of an accused because it is not suggested that Koufis had been convicted of any crime in connection with the fire at the London Grill, . . .

The judgment of Rinfret, Crocket and Taschereau, JJ. was delivered by Taschereau, J. who said in part as follows at pp. 489-90:

. . . The Canada Evidence Act, section 12, says:

"A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction."

If the accused admits having committed the offence, the answer, being a collateral one, is obviously final. If he denies having committed the offence, then the conviction may be proved by legal means provided for in subsection 2, paragraphs (*a*) and (*b*), of section 12. The authority given to the Crown is to cross-examine the accused on previous convictions, but this

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section 12 cannot be interpreted as meaning that the accused may be cross-examined on offences which he is suspected of having committed but for which he has not been convicted.

. . . .

. . . The accused cannot be cross-examined on other criminal acts supposed to have been committed by him, unless he has been convicted, or unless these acts are connected with the offence charged and tend to prove it (*Paradis v. The King* [1934] S.C.R. 165, at 169), or unless they show a system or a particular intention as decided in *Brunet* v. *The King* [1918] 57 S.C.R. 83. . . .

It has or may be argued that some expressions used in the judgments in the *Koufis* case in the Supreme Court of Canada suggest that the right to cross-examine the accused on previous convictions is subject to the limitations suggested in the *Maxwell* case but with all deference I have to say that after careful consideration of the whole of the judgments I do not think so.

Referring to the submission with regard to cross-examination on the racing matter I think that in any event it may be said here, as was said by Lord Sankey of the prisoner in the *Maxwell* case, *supra* (p. 318), that the prisoner in the present case "threw away his shield" against questions relating to such extraneous matter (if it was such) by the examination-in-chief of the witness Johnson called on his behalf, along the following lines:

Do you know the accused Green? Yes.

. . . .

Does he drive cars or buses on occasion? Oh, yes.

Have you ever driven with him? Oh, yes.

What would you say as to his qualifications as a driver? First class.

It is clear that this evidence was interpreted by the accused himself as being evidence that the accused was a good driver, as is apparent from his answer on cross-examination to a question as follows:

You had other evidence here you were a good driver, Mr. Johnson gave evidence you were a good driver? Yes.

Such evidence was followed up by cross-examination of the accused as follows:

You used to be a racing driver at Colwood? That's right.

You did a good deal of racing there? Yes, I did.

You had a few accidents there? No, very few. I have raced in Seattle, Spokane, Los Angeles, Portland——

You had one accident? Yes, I had one here when the car turned over one night.

At Colwood? Yes, there are lots of them out there.

This cross-examination was objected to by counsel on behalf of

the appellant before us but I have to say that, whatever might have been the position (as to which I express no opinion), if the evidence as aforesaid had not been given by Johnson on behalf of the accused, I think as I have already intimated that this is a case where the matter had been opened by evidence on behalf of the accused and therefore the questions were admissible.

Another ground of appeal is that

the learned trial judge misdirected the jury by leaving to them the question of whether the appellant should have driven with three in the front seat under the circumstances when there was no evidence or such an issue before them.

This ground is based upon that part of the direction of the learned trial judge reading as follows:

. . . You must consider yourselves as to whether this was a wise thing to do—for a man, even a strictly sober man, to drive this small car with three in the front seat, and with the other two in the condition in which you may find they were. That is something you must take into your consideration when you dwell upon the facts in this case.

In my view there was evidence before the jury justifying the judge in referring to the matter in the way he did in this part of his charge which must, of course, be taken along with the rest of his charge.

It is further submitted that there was non-direction amounting to misdirection in that what is now said to be the main defence of the accused was not put to the jury, namely: that the accident happened through no negligence on the part of the accused but through the road being in an improper or dangerous condition. I do not think there is any basis for this submission. The trial judge clearly explained in his charge what was meant by criminal negligence and told the jury that the Crown must prove such negligence on the part of the accused beyond reasonable doubt before he could be convicted. He several times directed the consideration of the jury to the evidence that the corner in question was a dangerous corner and he did not leave the matter at that but said elsewhere:

. . . Remember in particular the evidence as to that corner. Remember the evidence with respect to the road, the heaps of gravel on the side and some which had gone down into the road and to the turn of the road there. . . .

Taking the charge as a whole I do not think it is open to another objection raised that the judge withdrew from the jury

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consideration of the evidence as to there having been another accident at this corner. I am satisfied that the particular part of the charge objected to on this ground would be understood by the jury as only a warning to them not to be prejudiced against the accused by the frequency of fatal motor-car accidents.

I now come to deal with the contention of counsel for the appellant that there was misdirection or non-direction amounting to misdirection by the learned trial judge in his reference to the evidence of the witnesses Mrs. Done and Mr. Hanson by which the Crown sought to identify the car driven by the appellant with the one they say they met at the corner. It is true that the trial judge did not refer to all the evidence bearing on the question but he had already charged them as follows:

> . . . Then of course you will consider the whole of the evidence. It is not right obviously to take a bit and ignore other portions which ought to be woven into the whole picture. That won't do. Look at all the evidence. Weave it into one whole. . . .

and while referring to the evidence of the said witnesses he said:

> . . . even if you accept them as being perfectly accurate witnesses you will consider whether the car they spoke about was the car Green was driving. . . . You will have to sruggle with that and decide for yourselves whether you think that the car they saw at that corner and caused them to more or less jump to one side was the car of the accused or not. . . .

As has been often said the charge must be read as a whole and in the light of the evidence and in my view when so read the charge in the present case was sufficient. In conclusion I have to say with all deference to contrary opinion that in my view no sufficient ground has been shown to justify this Court in setting aside the verdict of the jury or interfering with the sentence imposed. I would, therefore, dismiss the appeal.

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

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Feb. 1, 2;
March 2.

Criminal law—Assault with intent to rob—Alternative defence—Insructing jury upon—Rule as to—Insanity sole defence at trial—Lack of mental capacity to form intent—Defence raised on appeal—Whether open to accused—Sentence—R.S.C. 1927, Cap. 36, Sec. 19.

The accused was charged that while armed with an offensive weapon, to wit, a revolver, he unlawfully assaulted one M. with intent to rob M. Said M. was the manager of a branch of The Canadian Bank of Commerce and it was in the branch office that the accused held the revolver in front of M. and told him to "stick 'em up." At the trial the sole defence was insanity. Accused was convicted and sentenced to four years' imprisonment.

Held, on appeal, that both the conviction and sentence be affirmed.

On the contention by counsel for accused, raised for the first time on the appeal, that the trial judge should have directed the jury that if they rejected the defence of insanity, they must nevertheless take into consideration the accused's mental condition in determining whether he was capable of forming and did form an intent to rob:—

Held, that even if this point was now open to the accused and was good in law, yet there was no evidence to support the theory of lack of mental capacity to form the intent to rob. There is no obligation upon the trial judge to charge upon alternative defences, unless there is "material before the jury which would justify a direction that they should consider it."

Per SLOAN, J.A.: On the ground that there was no evidence to support the conviction the accused contended that the indictment charged him with assaulting Mutch with intend to rob Mutch whereas in fact he intended to rob the bank and not Mutch. There are, I think, two sufficient answers to that submission. In the first place if Mutch had handed over his own money to Flett I feel quite satisfied Flett would have received it from him and it was open to the jury upon the judge's charge to have reached the same conclusion. However, and apart from that aspect of it, the evidence discloses that Mutch had, as bank manager, the possession of and a special property in the money of the bank and therefore if the jury believed that Flett had intended to rob the bank and not Mutch personally even then the indictment was properly laid and the evidence supports the conviction.

APPEAL by accused from his conviction before SIDNEY SMITH, J. and the verdict of a jury at the Fall Assize at Victoria on the 14th of October, 1942, on a charge that at the municipality of Oak Bay, . . . ; on the 29th day of April, 1942, he the said Arnold Christmas Flett, being armed with an offensive weapon, to wit, a revolver, did unlawfully assault Thomas W. L. Mutch with intent to rob the said Thomas W. L. Mutch.

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On the morning of the 29th of April, 1942, Thomas W. L. Mutch, manager of the branch office of The Canadian Bank of Commerce at 2002 Oak Bay Avenue, Oak Bay, received a telephone call from a man who gave his name as Robertson, who said he just came from Kelowna and wanted a loan of $75, so he suggested that he (Robertson) should come and see him. Shortly after 3 o'clock in the afternoon a man came into the bank giving the name of Robertson. The manager was busy a short time with another customer and after letting him out, he turned to accused and brought him into his private office. As soon as he got into the private office, the accused immediately produced a large revolver, held it in front of the manager and said "stick 'em up." The manager then struck aside accused's right hand which held the revolver and immediately tackled him. He then called for the teller (named Henry) to help him, which he immediately did and took accused by the throat. The manager also called for the ledger-keeper (Miss Bailey) to telephone the police and go next door for assistance. In two or three minutes the two men disarmed and subdued the accused. The manager, after getting possession of the revolver, broke it open and took six shells out and put them on his desk. It was a 45-calibre revolver. Accused had on a pair of coloured glasses which effectively hid his features. The manager ordered him to take them off. The police then came in and took the accused in charge. Accused was convicted and sentenced to four years' imprisonment.

The appeal was argued at Victoria on the 1st and 2nd of February, 1943, before SLOAN, O'HALLORAN and FISHER, JJ.A.

Henderson, for appellant: The charge is under section 446 (*c*) of the Criminal Code: (1) The evidence does not support the indictment; (2) there was no proof of intent to rob Mutch. There is absence of *mens rea*. There is no defence of insanity, but the man was unwell; he was in financial difficulties and he took drugs. He was in a mental condition by virtue of which he was incapable of forming an intent to commit robbery. There is no evidence whatever to support the indictment. The whole of the evidence is evidence to rob the bank. In an assault the only one who can lay a charge is the person assaulted. The intent was to rob the bank and not Mutch. The question of intent should have

been explained to the jury by the judge: see *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 at p. 148; *Rex* v. *Cambridge University* (1723), 1 Str. 557; *Bonaker* v. *Evans* (1850), 16 Q.B. 163, at p. 171; *Martin* v. *Pridgeon* (1859), 28 L.J.M.C. 179; *The Queen* v. *Brickhall* (1864), 33 L.J.M.C. 156. The illness of the body affected the mind and intent. It is outside of drunkenness and insanity: see *Wilkinson* v. *Dutton* (1863), 3 B. & S. 821; *Rex* v. *Swityk* (1925), 43 Can. C.C. 245; *Rex* v. *Davidson* (1927), 20 Cr. App. R. 66, at p. 67; Harris and Wilshere's Criminal Law, 16th Ed., 201 and 218. In the evidence it was the intent to rob the bank and that was not the charge which was to rob Mutch: see *Rex* v. *Morrissey* (1932), 23 Cr. App. R. 188; *Rex* v. *Shevill* (1923), 17 Cr. App. R. 97; *Rex* v. *Armstrong* (1922), 16 Cr. App. R. 147. Where the charge is improper there should be a new trial: see *Rex* v. *Cooper* (1927), 49 Can. C.C. 87. On the question of *mens rea* see *Rex* v. *Regina Cold Storage & Forwarding Co.* (1923), 41 Can. C.C. 21; *Chapdelaine* v. *Regem* (1934), 63 Can. C.C. 5; *Paradis* v. *National Breweries Co.*, [1924] 1 D.L.R. 1082; *The Queen* v. *Martin* (1838), 8 A. & E. 481; *Rex* v. *Lee* (1908), 24 T.L.R. 627. On the importance of proving intent see *The Queen* v. *Pembliton* (1874), L.R. 2 C.C. 119; *Rex* v. *Berdino* (1924), 34 B.C. 142; *In re Abraham Mallory Dillet* (1887), 12 App. Cas. 459. Where the jury is misled see *Rex* v. *Wann* (1912), 28 T.L.R. 240. As to sentence on the evidence, this could not be considered any more than an assault. There was no firing and no money was taken.

Clearihue, K.C., for the Crown: Assuming illness, was his mind so affected that he was incapable of having the intent to rob? Assuming evidence not sufficient to prove insanity, a sane person, unless affected by drink or drugs, is capable of forming intent. The only defence at the trial was insanity. He is either sane or insane. There is no other field: see *Sodeman* v. *Regem*, [1936] W.N. 190; *Rex* v. *Flavell* (1926), 19 Cr. App. R. 141; *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479. On irresistible impulse see *Rex* v. *Jessamine* (1912), 19 Can. C.C. 214. You cannot assault the bank, you must assault a servant of the bank, intending to rob the bank: see *Rex* v. *O'Brien*

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(1926), 50 Can. C.C. 369; *Wu* v. *Regem,* [1934] S.C.R. 609; *Rex* v. *Krawchuk (No. 2)* (1941), 56 B.C. 382, at p. 386; *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136. The manager of a bank has an interest in the assets of the bank and can be robbed: see *Rex* v. *Harding* (1929), 46 T.L.R. 105; *Reg.* v. *Tessier* (1900), 5 Can. C.C. 73. He was going to rob Mutch; there is evidence of this: see *Reg.* v. *Gibbons* (1898), 1 Can. C.C. 340. Robbing the bank is robbing Mutch. Even if technicalities wrong, no injustice is done: see section 1014 of the Criminal Code; *Rex* v. *McLachlan* (1924), 41 Can. C.C. 249. There was no appeal from sentence.

Henderson, in reply, referred to *Brooks* v. *Regem,* [1927] S.C.R. 633; *Rex* v. *Carswell* (1916), 26 Can. C.C. 288, at p. 300.

Cur. adv. vult.

2nd March, 1943.

SLOAN, J.A.: This is an appeal by the appellant Flett from his conviction by a jury at the Victoria Assize. The indictment upon which he was given in charge to the jury is in the following terms:

> That at the municipality of Oak Bay, in the county and Province aforesaid, on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and forty-two, he the said Arnold Christmas Flett, being armed with an offensive weapon, to wit, a revolver, did unlawfully assault Thomas W. L. Mutch with intent to rob the said Thomas W. L. Mutch, against the form of the statute in such case made and provided, and against the peace of our Lord the King his Crown and Dignity.

I shall have occasion to refer to the form in which this charge was laid in a later part of this judgment. The facts, however, must come first:

Flett, prior to this entanglement with the law, was a farmer living at Duncan. His holdings consisted of 180 unencumbered acres of land together with cattle and other live-stock appropriate to his establishment. His character was beyond reproach. He entered into the social activities of his own community and church and social work, together with his duties upon the local hospital board, accounted for most of the time he could spare from his husbandry.

In 1937 and again in 1941 he aspired to extend the scope of his good works by seeking to be elected to the Legislature of the

Province. In this endeavour he failed. These excursions into the political arena adversely affected his financial position so that, with one thing and another, he became indebted to various creditors in the total sum of between $1,500 and $2,000. This was the first time Flett had ever owed any considerable sum of money and he was liquidating this indebtedness by monthly payments.

In February of 1942 he fell ill with bronchitis and entered the Duncan Hospital on the 18th of that month with a temperature of 101. His doctor thinking that bronchial pneumonia was an imminent danger prescribed a treatment in which a normal dosage of a sulphanilimide derivative was administered. This resulted in a slightly toxic reaction with some nausea and vomiting. He was discharged from the hospital on the 23rd of February as "quite normal" and returned to the farm.

Upon his resumption of the daily farm chores Flett felt (according to his testimony) "very weak, depressed and rather nervous." He did not feel equal to the task of "breaking in" a three-year-old gelding and while prior to his admission to the hospital his practice had been to milk his cows "around 6.30 to 7" in the morning, after his return home he did not carry out this task until "around 8 o'clock." He had occasional lapses of memory and felt worried about his debts.

Matters thus continued on for a while until the morning of the 29th of April. On that morning Flett, whilst in the act of milking a cow, was turning over in his mind the idea of robbing a bank. This thought he put away because he considered it (as he said) "a wrong thing to do" and "a very fantastic" notion. Later that morning Flett left his farm in his automobile and journeyed to Victoria with the altruistic purpose of seeing a member of the British Columbia Cabinet concerning the welfare of some old-age pensioners. During the drive down the highway Flett's mind again began working on the bank robbery proposition; as he said "I always thought you could get money from a bank."

It so happened that in a satchel in the car there was a large calibre revolver, which Flett had been using for revolver practice.

Arriving in Victoria "sometime about 11 o'clock" Flett went

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into a drug store to consult a telephone book to see where he could find a bank. The Oak Bay branch of The Canadian Bank of Commerce—a small suburban branch bank—was the one he selected as the object of his attention. He thereupon telephoned the manager—Mr. Thomas Mutch—and said his name was Robertson; that he had just come down from Kelowna, had a war job, and wanted a loan of $75 to fix up a house. Mr. Mutch suggested a personal interview to which Flett agreed but stated he would not be able to get to the bank before its closing time of 3 o'clock, but would be there shortly thereafter. Mr. Mutch assented to this and said he would be admitted on his arrival.

From the time of that conversation until approximately 2 o'clock Flett's movements are not of apparent interest—at least the record is silent thereupon—but at about 2 o'clock he arrived at the offices of the Minister of Labour in the Parliament Buildings and sought an appointment. The Minister was busy and Flett waited until about 25 minutes after 2 but could wait no longer and left without discussing the affairs of the old-age pensioners. He had another and more pressing engagement.

Flett drove his car to a street near the bank and changed his clothing to the extent of ridding himself of an overcoat, removing his tie, and donning a cap instead of a felt hat. This done he put on a pair of coloured glasses, swung the satchel (or a sack) with the revolver in it—now fully loaded—over his shoulder, draped a rag over the licence plate of his car, and walked the short distance to the bank. It was then a few minutes after 3 o'clock. Flett—now Robertson—was admitted by a clerk. Mr. Mutch was busy with another customer and Flett sat upon a bench in the public office of the bank and waited. Thus he sat for fifteen minutes. Mr. Mutch having finished his business escorted his visitor to the door of the bank. His version of the immediate events is as follows:

Then what happened? I then returned to this man.

That is the accused? Yes.

You identify him now? Yes. He was sitting on a bench in the public banking office, and I turned to him and said, "You wish to see me?" and he said "Yes, my name is Robertson, I 'phoned you this morning," and I said "Come into my private office and sit down."

. . . . .

What happened after that? . . . . I sat down in my chair. He imme-

diately produced a large revolver held it in front of me and said "Stick 'em up."

. . . . .

Then what happened? I immediately struck aside his right hand which was holding the revolver and immediately tackled him. I then called to my teller Robert Henry to come to my aid which he immediately did and grabbed the accused around the throat and I also called to my ledger-keeper Miss Bailey to 'phone the Oak Bay police and to also go to the store next door, the carpenter shop and bring further aid which she did. During the struggle one of the glass panels in my office was smashed. However Henry and I in about two or three minutes subdued and disarmed the accused. I took the revolver, broke it open and threw the shells down on my desk.

Flett's version of the climacteric encounter is as follows:

You got to the bank about 3 o'clock. What happened then? I was admitted at the door by the stenographer and asked to wait and I remember the manager coming out of his office and asking me in and I can't remember clearly what happened after I got in the office until I realized I had a loaded revolver up against the bank manager.

When you remembered that what did you do? I decided to give up.

At the trial his sole defence was insanity and he called several well-known specialists in psychiatry to support his contention that he was at the time of the alleged crime suffering from a disease of the mind to the extent he was incapable of appreciating the nature and quality of his act or of knowing that such act was wrong. In the opinion of the medical witnesses for the defence Flett had been and was at the time in question suffering from an "infective exhaustive psychosis." One of the doctors explained this term as follows:

When that condition is marked there is usually marked confusion, often with hallucinations, or things with no external stimulus. I don't think he ever reached that stage. There is no evidence that he did so. It usually shows up by apathy, loss of interest, disinclination to work physically and depression, periodic depression.

Would loss of memory, failure to recall events after certain apparently recent periods have any bearing on that diagnosis? Yes, it would influence it, it is more of a patchiness of memory. They may remember things well for a period and then have a spot blotted out.

How does that condition of infective exhaustive phychosis affect the mental processes? As I pointed out a moment ago, you may get anything from a very definite confusion to hallucinations or a mild depression, a moodiness which he appears to have had.

Another defence medical witness thought that Flett's action in sitting in the bank for fifteen minutes within sight of the teller's cage and not making any effort to carry out the robbery of the bank until he was admitted to the manager's private office

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was corroborative of his opinion that Flett was at that time suffering from the "infective exhaustive psychosis."

The jury rejected the insanity theory.

The Crown called a medical doctor of high professional standing who said in relation to the symptoms complained of by Flett:

> You heard the evidence about him feeling weak and nervous and depressed, and milking his cows late? I think it is a common reaction. There is nothing peculiar about that. If you have a bronchial pneumonia you are tired for weeks after and don't like to work. There is nothing peculiar about it.

It is my view that although his counsel at the trial did all he could with the material with which he had to work the defence evidence falls far short of establishing insanity to the degree required by section 19 of the Code. Flett's present counsel was frank to concede before us that he shared that opinion. He advanced, however, several submissions in support of his appeal and I now propose to deal with these in turn.

He first contended that while Flett at the time of the alleged offence was neither insane nor drunk yet he was suffering from a mental condition—"infective exhaustive psychosis"—which would affect his capacity to form an intent. As "intent to rob" is an essential element of the charge he submitted that the learned trial judge erred in not directing the jury that if they rejected the defence of insanity nevertheless they still must take into consideration the mental state of the accused in deliberating whether or not he was capable of forming and did form an intent to rob.

Counsel for the Crown in answer to this attack took the position that the facts could not possibly support such a proposition but alternatively if the facts could be held capable of that interpretation then as a matter of law such a theory had no place in our criminal jurisprudence and that the principles laid down in *Rex* v. *Beard* (1920), 14 Cr. App. R. 159 with relation to the effect of drunkenness upon capacity to form an intent could not be extended to cover a case wherein a disease or condition of the mind, not amounting to insanity under section 19 of the Code was relied upon to negative the capacity to form a specific intention. He further pointed out that the sole defence below was insanity and submitted that counsel for the appellant could not now complain of non-direction on a point not raised below.

Assuming for the present purpose that the alternative defence now being raised in this Court is not negatived by the defence relied upon at the trial—*Wu* v. *Regem,* [1934] S.C.R. 609, at p. 617, *Rex* v. *Krawchuk (No. 2)* (1941), 56 B.C. 382—and that the point is open to the appellant, I do not consider it necessary to reach any conclusion as to whether or not the theory advanced by him is good in law as a defence. And for the simple reason that there is no obligation upon the trial judge to charge upon alternative defences unless there is "material before the jury which would justify a direction that they should consider it." *Mancini* v. *Director of Public Prosecutions* (1941), 28 Cr. App. R. 65, at p. 72, or as it was put in *Wu* v. *Regem, supra,* at p. 616, "for which a foundation appears in the record." And see *Rex* v. *Hughes, Petryk, Billamy and Berrigan* (1942), 57 B.C. 521, at pp. 543, 553. A careful consideration of all the material in the record leads me to the conclusion that there is no evidence to support the suggested theory of lack of capacity to form an intent to rob due to the mental condition induced by an "infective exhaustive psychosis"—in fact the evidence is in my opinion conclusively to the contrary.

In my view Flett's actions from the morning until his arrest in the bank in the afternoon, coupled with his admissions at the trial, manifest such a calculated course of conduct that under the circumstances the suggestion of lack of capacity to form a specific intent to rob is without any foundation of fact. His was not an act of sudden disordered impulse but one deliberately planned—even although its execution was amateurish and lacked the precision and dispatch of those whose technique displays a surer grasp of this kind of banking transaction. Granted the mental capacity the question whether he did form an intent is one for the jury to be determined upon a consideration of all relevant objective facts. I am satisfied that here the unlawful intent was obvious and would be implied—*Wu* v. *Regem, supra,* p. 619. On this point therefore the appellant fails for the reasons stated.

His next alternative ground was that there was no evidence to support the conviction. He contended that the indictment charged him with assaulting Mutch with intent to rob Mutch whereas in fact his intent was to rob the bank and not Mutch.

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There are, I think, two sufficient answers to that submission. In the first place if Mutch had handed over his own money to Flett I feel quite satisfied Flett would have received it from him and it was open to the jury upon the judge's charge to have reached that same conclusion. However, and apart from that aspect of it, the evidence discloses that Mutch had, as bank manager, the possession of and a special property in the money of the bank and therefore if the jury believed that Flett intended to rob the bank and not Mutch personally even then the indictment was properly laid and the evidence supports the conviction. *Rex* v. *Harding* (1929), 46 T.L.R. 105. The appellant therefore fails on this point.

An additional ground advanced was that Flett's evidence disclosed he had abandoned the intent when he realized he had a loaded revolver up against the bank manager and this defence ought to have been put to the jury by the learned trial judge. To my mind the point is without substance. The crime had been committed prior to the time of his alleged repentance—see *Rex* v. *Whitehouse* (1940), 55 B.C. 420.

He further contended that the learned trial judge had, in his charge, made several references to "robbing the bank" and that he had been prejudiced thereby. The sole defence below was, as I have stated, insanity and no doubt counsel for the Crown, counsel for the accused and the learned trial judge did, from time to time, loosely use the expression "rob the bank," when the indictment charged the intended robbery of Mutch. I think that objection is met by *Harding's* case, *supra*. If not then, because of the trend of the trial and the sole issue below, anything irregular in the use of the expression about Flett's intention to rob, especially under the circumstances of this case, would not, in my view, have prejudiced the accused before the jury.

To state the matter compendiously it is my opinion that if in this case there has been any irregularity in the matters complained of by the appellant then section 1014, subsection 2 of the Code applies. I do not think that any jury properly instructed could do other than find the accused guilty as charged.

That leaves for final consideration the question of sentence. No doubt the learned trial judge found it a difficult task to

assess properly the various relevant elements in reaching his decision to sentence Flett to four years' imprisonment. I must confess to a similar difficulty but in the end cannot say I can find any ground which would justify our interference.

In the result I would dismiss both the appeal from conviction and from sentence.

O'HALLORAN, J.A.: At the close of the argument, I had the impression there was some evidence to support the submission of his counsel, that although the appellant was not legally insane, yet he had lost temporarily the mental capacity to form a legal intent to commit the crime charged. But subsequent consideration has convinced me, as my brother SLOAN'S analysis of the evidence establishes conclusively, that there is in fact no evidence whatever to support that submission.

The distinction which I understand our law imposes between "no evidence whatever" and "some evidence," is a very real, and not an abstract distinction. The former is a question of law for the judge. But once he finds there is "some evidence," the credibility and weight of that evidence is for the jury. It is not for the judge in such circumstances, to say there is no reasonable evidence to enable a jury to convict. The reasonableness of that evidence, unsatisfactory and slight as it may perhaps appear to the judge, is a question of fact for decision by the jury as judges of fact. The jury are judges of all the facts, and not only of some of the facts.

What seems reasonable to the judge may not seem reasonable to the jury. The jury may believe testimony which the judge may not, and *vice versa*. I may refer advantageously to what I said in *Rex* v. *Dawley*, [58 B.C. 525]; [1943] 2 D.L.R. 401. Evidence carrying little weight in the mind of the judge may assume directing importance in the composite mind of the jury. Two recent cases in this Court preserve the importance of the distinction to which I have referred, *viz.*, *Rex* v. *Krawchuk* (1940), 56 B.C. 7; affirmed by the Supreme Court of Canada [1941] 2 D.L.R. 353, particularly at pp. 375 and 376, and *Rex* v. *Hughes, Petryk, Billamy and Berrigan* (1942), 57 B.C. 521; affirmed [1942] S.C.R. 517.

The distinction was illustrated also in *Rex* v. *Roberts*, [1942]

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1 All E.R. 187. Manslaughter had not been charged, and counsel for the prosecution before the Court of Criminal Appeal submitted that no reasonable jury could have reached a verdict of manslaughter. The Court of Criminal Appeal was disposed to take much the same view as counsel for the prosecution, but nevertheless recognized the question was for the jury and not for the Court. The Court said significantly at p. 193:

> . . . we cannot dive into the mind of the jury and say what they would have done if it [manslaughter] had been left open to them. We may take the view, and we are disposed to take the view, that it is extremely unlikely in this case that the jury would have returned a verdict of manslaughter, . . . We cannot, however, say that is certain that the jury would have returned a verdict of murder, if manslaughter had been open to them.

I agree in dismissing the appeal.

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

Appeal dismissed.

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March 2.

ROWLEY v. ADAMS.

Landlord and tenant—Termination of tenancy by landlord—War Measures Act and Maximum Rentals Regulations—Notice to vacate "on or before" a certain date—Notice includes undertaking to occupy premises "on or after" that certain date—Validity of notice—R.S.C. 1927, Cap. 206—R.S.B.C. 1936, Cap. 58, Sec. 119; Cap. 143, Secs. 19 to 22.

The plaintiff landlord gave his tenant a written notice on the 28th of October, 1942, pursuant to the War Measures Act and the Maximum Rentals Regulations to vacate the premises in question and give up possession thereof "on or before the 31st of January, 1943." The notice included an undertaking by the appellant that in the event of his being given possession of the premises "on and after the 31st day of January, A.D. 1943," he would occupy the same for his own personal use as a residence for one year. On receipt of the notice, the tenant gave no notice of his desire to renew his lease and on the 9th of February, 1943, the tenant not vacating, the appellant took proceedings in the county court for eviction under the Landlord and Tenant Act. On the hearing the learned judge, without hearing oral evidence, dismissed the application on the preliminary objection that the notice above mentioned was not sufficient in form in that the addition of the words "or before" rendered the notice invalid as one of less than the required three months.

Held, on appeal, reversing the decision of LENNOX, Co. J., that the preliminary objection was not well founded and the notice was sufficient in form. But if there was any doubt that the notice demanded, by the use of the phrase "on or before" termination of the tenancy at the end of the month, it was dispelled by the subsequent words "on or after" above referred to.

The appeal was allowed and the matter was remitted to the learned judge to be heard in accordance with the provisions of sections 19 to 22 of the Landlord and Tenant Act, reserving all other objections to the respondent.

APPEAL by plaintiff from the order of LENNOX, Co. J. of the 19th of February, 1943, dismissing his application as landlord of lot 37, block "B," district lot 740, group 1, New Westminster District, plan 1752, known as 1152 East 54th Avenue, in the city of Vancouver, in the Province of British Columbia, against Walter Adams, tenant, for an order for possession of said lands and premises. The facts are set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 2nd of March, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Campbell, K.C., for appellant: The appellant gave his tenant three months' notice in writing on the 28th of October, 1942, pursuant to the War Measures Act and the Maximum Rentals Regulations made pursuant thereto to vacate the premises in question and give up possession thereof "on or before" the 31st of January, 1943. On the 9th of February, the tenant not vacating, the appellant took proceedings in the county court for eviction under the Landlord and Tenant Act and without hearing oral evidence, the learned judge dismissed the application on the preliminary objection that the notice was not sufficient in form in that the addition of the words "or before" rendered the notice invalid as one of less than the required three months. It is submitted the notice is valid, that the addition of these words does not render it invalid. In any case, the subsequent words in the notice, *i.e.*, "on or after" dispel any uncertainty as to the termination of the tenancy: see *Queen's Club Gardens Estates, Ld.* v. *Bignell*, [1924] 1 K.B. 117, at pp. 122-3; *Precious* v. *Reedie*, [1924] 2 K.B. 149; *Gemeroy* v. *Proverbs*, [1924] 2 W.W.R.

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764; *Doe dem. Lynde* v. *Merritt* (1845), 2 U.C.Q.B. 410. In that case the words "in the spring" were held sufficient; see also *J. H. Munro Ltd.* v. *Vancouver Properties Ltd.* (1940), 55 B.C. 292; *Re Western Trust Co. and Feinstein* (1922), 67 D.L.R. 324; *Stuart* v. *Hampson,* [1942] 3 D.L.R. 608; *Troster* v. *British Rubber Co.,* [1942] 4 D.L.R. 785, at p. 789.

Caple, for respondent, referred to *Doe dem. Spicer* v. *Lea* (1809), 11 East 312; 103 E.R. 1024.

The judgment of the Court was delivered by

MCDONALD, C.J.B.C.: On 28th October, 1942, appellant gave to his tenant, the respondent, a written notice pursuant to the War Measures Act and the Maximum Rentals Regulations made pursuant thereto—order 108 of the War-time Prices and Trade Board—to vacate the premises in question and give up possession thereof "on or before the 31st day of January, A.D. 1943." In the said notice the appellant undertook that in the event of his being given possession of the premises "on and after the 31st day of January, A.D. 1943," he would occupy the same for his own personal use as a residence.

The respondent after receiving said notice gave no notice of his desire to renew his lease as he might have done under section 23 (1) of the Maximum Rentals Regulations, thus leaving it open to the appellant to proceed at his option either under the Landlord and Tenant Act or the said Rentals Regulations. On 9th February, 1943, the tenant not vacating, the appellant took proceedings before LENNOX, Co. J. for eviction under the Landlord and Tenant Act and procured an appointment pursuant to section 20 thereof for the 19th of February, 1943.

When the matter came on for hearing the learned judge, without hearing oral evidence, dismissed the application and from that order this appeal is taken, by leave which we granted under section 119 of the County Courts Act. Though it does not appear in the formal order, it is common ground that the main reason, if not the only reason, for the dismissal was that effect was given to the preliminary objection that the notice above mentioned was not sufficient in form in that the addition of the words "or before" rendered the notice invalid as one of less than the required three months. We are all of opinion that this objection

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is not well founded and that the notice was sufficient in form. If there was any doubt (and we think there is not) that the notice demanded, by the use of the phrase "on or before," termination of the tenancy at the end of the month, it was dispelled by the subsequent words "on or after" above referred to. On that ground, *i.e.*, the sufficiency of the notice, we allow the appeal and remit the matter to the learned judge to be heard in accordance with the provisions of sections 19 to 22 of the Landlord and Tenant Act, reserving all other objections to the respondent.

Inasmuch as these proceedings were taken under the Landlord and Tenant Act and not under the said Rentals Regulations and further for the reason that no notice of a desire to renew was given under said section 23 (1) thereof we are not called upon to express any view in this case regarding the apparent conflict between the decisions of the Ontario Courts in *Enamel & Heating Products Ltd.* v. *E. B. Thompson Co. Ltd.* [1942] O.W.N. 206, and *Stuart* v. *Hampson,* [1942] 3 D.L.R. 608, and the Quebec Court in *Troster* v. *British Rubber Co.* [1942] 4 D.L.R. 785.

The appellant will have his costs of the appeal.

Appeal allowed.

Solicitors for appellant: *Campbell, Meredith & Beckett.*
Solicitors for respondent: *Caple & Shannon.*

IN RE THE BANKRUPTCY OF DAYBREAK MINING COMPANY, LIMITED (N.P.L.). MAY *ET AL.* v. HARTIN.

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1942
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1943
Jan. 12.

Practice—Application for leave to bring action—Whether issues already disposed of—Appeal.

Minnie M. May and the liquidator of the Gibson Mining Company applied for an order for leave to bring action against the trustee in bankruptcy of the Daybreak Mining Company, Limited and the trustee personally and it was held that an examination of the numerous exhibits filed disclosed that the issues sought to be litigated were all disposed of by judgments of our Courts which are binding upon the parties and upon this Court and the application was dismissed.

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Held, on appeal, reversing the decision of MANSON, J. (McQUARRIE and O'HALLORAN, JJ.A. dissenting), that in view of the argument, the Court has considered the cases of *May* v. *Hartin* (1938), 53 B.C. 411; *Gibson Mining Co. Ltd.* v. *Hartin* (1940), 55 B.C. 196 and the order of McDONALD, J. of the 5th of July, 1937, affirmed by this Court on the 2nd of November, 1937, and has concluded, without expressing any view on what might be called the merits of the question, that much may be said for and against the contention that new issues arise in the proposed action. Seeking guidance, therefore, from the three decisions of this Court as aforesaid, it is noted that the only decision upon any exactly similar application is that made by this Court on 2nd November, 1937, affirming the order of McDONALD, J. of the 5th of July, 1937, giving leave to bring action. The course taken by the Court at such time should be followed and the question of *res judicata* should not be determined upon the present application.

APPEAL by Minnie Mead May and Jonas T. Unverzagt as liquidator of the Gibson Mining Company Limited from the order of MANSON, J. of the 13th of April, 1942, dismissing the motion of Mrs. May and Unverzagt for an order that leave be granted them to bring an action against Hilyard Hartin personally and as trustee and as representative of the Daybreak Mining Company in bankruptcy for the purpose of recovering from said company and said trustee the several mineral claims or interests therein and all other assets of the Gibson Mining Company Limited in liquidation, fraudulently obtained from the above-mentioned company and fraudulently held by said Daybreak Mining Company Limited and now held fraudulently by the said Hilyard Hartin and for all proper conveyances of titles and possession of all the said mineral claims. The necessary facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 3rd and 6th of December, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Mrs. May, in person, referred to *Gibson Mining Co. Ltd.* v. *Hartin* (1940), 55 B.C. 196, at p. 200.

Unverzagt, trustee for Gibson Mining Co. Ltd., in person, adopted the argument of Mrs. May.

Eades, for respondent: The learned trial judge cited the case of *May* v. *Hartin* (1938), 53 B.C. 411, at p. 415 and came to the conclusion that the issues now sought to be liquidated have

all been disposed of by judgments previously delivered, which are binding on this Court and it would be futile to bring the action sought to be brought.

Cur. adv. vult.

12th January, 1943.

McDONALD, C.J.B.C. agreed with FISHER, J.A.

McQUARRIE, J.A.: I agree with the learned judge who made the order appealed from that this matter is *res judicata*—see *May* v. *Hartin* (1938), 53 B.C. 411; *Gibson Mining Co. Ltd.* v. *Hartin* (1940), 55 B.C. 196, particularly the judgment of O'HALLORAN, J.A. at p. 199 *et seq.* where some of the previous actions and judgments are reviewed. The chief appellant Minnie Mead May alleged that there were new features in the proceedings for which she was asking leave to take, which gave her and her co-appellant Unverzagt the right to succeed in this appeal. She alleges that the appellants are now asking for possession of the mineral claims and for personal judgment against the respondent Hartin which were never asked for before. Counsel for the respondent was able to convince me at least that there is nothing now asked for by the appellants which was not previously before the Courts and decided against them. As far as I can see it this is only another attempt to get another hearing of matters previously decided against them. In my opinion the intention is too obvious to warrant consideration. It may be said that the appellants are entitled at least to take proceedings and it will then be for the trial Court to go into the merits which this Court should not do at this stage. I cannot agree with any such contention and think that any attempt to reopen this litigation should be frowned on right at the start as was done by the trial judge. With all deference to contrary opinion I would therefore dismiss this appeal.

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

O'HALLORAN, J.A.: I agree with my brother McQUARRIE that this matter is *res judicata* and the appeal should be dismissed. I am in accord with MANSON, J., who felt bound to

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refuse leave to the appellants to reopen this litigation again, that the issues now sought to be litigated have been disposed of finally, and the rights of action of the parties have been fully and finally determined by the Courts on at least four previous occasions.

The dispute started back in 1918 and 1919 over the title ownership and possession of what are known as the Gibson or Daybreak Mines, an undivided three-quarter interest whereof plus all equipment and a lien on the remaining one-quarter interest being sold under Court order in liquidation proceedings of Gibson Mining Company Limited (N.P.L.) on 21st July, 1922. One Joseph C. Roberts "bid" $76,000 successfully against the $75,000 "bid" made by one of the present appellants Minnie Mead May. That sale was confirmed by Court order on 2nd August, 1922. We are informed the Mays attacked the validity of the liquidation proceedings on three separate occasions on various grounds.

On the third occasion the judge of first instance on 2nd January, 1923, opened up the liquidation proceedings but on appeal to this Court that order was reversed on 5th June, 1923, *vide In re Winding-up Act and Gibson Mining Co.*, 32 B.C. 360. On 24th September, 1923, Roberts transferred the property to Daybreak Mining Company, Limited (N.P.L.) which he and associates had incorporated for that purpose. This brings us to the four judgments now described for convenience as the 1932 judgment, the 1934 judgment, the 1938 judgment and the 1940 judgment. To avoid confusion they are now examined under separate captions.

I. The 1932 judgment (MURPHY, J., unreported).

This judgment was given on 2nd April, 1932, after a ten-day trial before MURPHY, J. wherein "D. K. May personally, and D. K. May and Minnie May his wife, suing as well on their own behalf as on behalf of all the shareholders of Gibson Mining Company Limited (N.P.L.)" were plaintiffs, and Joseph C. Roberts with eight associates and Daybreak Mining Company, Limited (N.P.L.) were defendants. The learned judge concluded the liquidation of Gibson Mining Company Limited (N.P.L.) had resulted from a fraudulent plan concocted by

Roberts to enable him to buy in its properties for himself and associates and transfer them to the Daybreak Mining Company, Limited, the incorporation of which was also found to be tainted with fraud.

But while he gave relief against Roberts as a trustee *ex maleficio,* the learned judge refused to give any relief against the Daybreak Mining Company, Limited (N.P.L.) and dismissed the action against that company. He did so on several grounds. First because (quoting from his reasons for judgment):

> The fact is, that during the liquidation of the Gibson Mining Company, the whole case now set up against these judgments [my note: upon which he found fraud in Roberts] was raised in the liquidation proceedings, and was adjudicated upon as between the Mays on the one side, and Roberts and his associates on the other. See the liquidation file and particularly the numerous affidavits filed by May and his wife and the affidavits of Oughton Hobert and Busen filed on their behalf. The Daybreak Mining Company is privy in law to Roberts and his associates who are its predecessors in title. The matter is therefore, I hold, *res judicata* and the action on this branch must fail as against the Daybreak Mining Company.

But the learned judge held further that even if he were wrong in that conclusion, nevertheless he must deny any relief against the Daybreak company because

> . . . the plaintiffs were aware of the transfer of the mineral claims by Roberts to the Daybreak Mining Company at the date when such transfer took place or immediately thereafter, and were then fully aware of all the facts now set up, and that they stood by in so far as the Daybreak Mining Company is concerned for a period of over four years after they had acquired such knowledge without taking any action against that corporation. They knew of the so-called conspiracy agreement and of all of Roberts's activities in pursuance thereof before the liquidation proceedings closed, as appears from the liquidation file, and particularly from the affidavits already referred to.

MURPHY, J. then analyzed the evidence to support that finding, and proceeded (and this will be referred to again in the later discussion of the 1934 judgment in caption II.):

> Whilst the plaintiffs, with full knowledge, were thus standing by for over four years, the Daybreak Mining Company was, to the knowledge of the Mays, expending large sums of money approximating $200,000 or more in developing the mining properties formerly owned by the Gibson Mining Company. Shares were sold to innocent shareholders to obtain this money, and debts incurred in such development to such an extent that the Daybreak Mining Company has been unable to pay same, and is now in liquidation. If effect is given to plaintiffs' claim, it seems that such shareholders and creditors are to see the assets upon the faith of which they made investments

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or extended credit completely swept away, despite the fact that the title of the Daybreak Mining Company to these assets rests on a Court order.

The learned judge then gave consideration to the argument that as the Daybreak company's title was originally tainted with fraud, and being a legal entity distinct from its shareholders, therefore no consideration could be given to the interests of the shareholders and creditors to whom he had just referred. In rejecting that submission he relied on *Chassey* v. *May*, [1922] 2 W.W.R. 225, a decision of the Supreme Court of Canada affirming this Court's decision in (1920) 29 B.C. 83, concerning a quarter interest in the same mines. In that case Anglin, J. with whom Sir Louis Davies, C.J. concurred, preferred to rest his judgment on the ground that the interests of the defendant company's creditors and shareholders which had been acquired on the faith of its ownership of the mineral claims of which the legal title vested in it, could not be prejudiced by May's breach of duty to Chassey, as the latter had stood by and allowed those obligations to be incurred by the company, when he knew that the company was acting and being dealt with as sole owner of the mineral claims.

But MURPHY, J. did not rest his ground of decision there. He continued that even if the interests of such shareholders and creditors could not be considered, yet:

> The Daybreak Mining Company as an entity has expended these large sums while plaintiffs with, as I hold, full knowledge of the facts, stood by for years, and knowingly allowed such expenditures to go on, yet took no proceedings in reference to the original fraud.

He observed that while the action was not in form a suit for rescission

> It is an equitable action, and if the plaintiffs succeed against the Daybreak Mining Company, that corporation will lose its mining properties, which will be returned to the Gibson company. Such a result on the facts as I view them would be clearly inequitable.

The learned judge then stated the plaintiffs were not without a remedy; he said they could have sued Roberts and his associates for damages, and that they had in fact obtained redress against Roberts in the suit they brought in the Oregon Courts. Having thus clearly set forth several reasons why neither the Mays nor the Gibson company could have any remedy against the Daybreak company, he then gave them relief against Roberts as follows:

The plaintiffs are entitled to have that portion of the Oregon judgment which declares Roberts a trustee *ex maleficio* for plaintiffs of all benefits which he received as a result of the sale of the Gibson company's property to the Daybreak Mining Company embodied in a judgment of this Court.

Three thousand dollars in cash and 750,000 Daybreak shares was the consideration for Roberts's transfer of the Gibson Mines to the Daybreak company on 24th September, 1923.

That is plainly what MURPHY, J. was referring to, and what is meant by the clause in his formal order directing that Roberts should

> within sixty days from the date of this decree, assign and set over such stock to the plaintiffs and the stockholders of the Gibson Mining Company Limited (N.P.L.) similarly situated with the plaintiffs.

It could not mean Gibson company shares as was argued before us, because (a) Roberts bought the Gibson company properties in 1922 but did not acquire the Gibson company shares. It should be obvious that if he had the majority of the Gibson shares he would have acquired control of the Gibson company without the necessity of buying its properties; and (b) as the Gibson shareholders still held their shares in that company, any stock Roberts was directed to transfer could not be Gibson company stock, but must necessarily have been the Daybreak stock which was the consideration for the transfer of the mines by Roberts to the Daybreak company.

The 1932 judgment was a careful and thorough adjudication upon the issues between the Mays and the Gibson company on one side, and Roberts his associates and the Daybreak company on the other. No appeal was taken from that judgment. It stands as a valid judgment of a competent superior Court, and at this late stage we have no jurisdiction to review it. If error did creep into that judgment it could have been corrected by an appeal to this Court, but the time for doing so has expired ten years since. Not only did the plaintiffs not appeal, but so far as disclosed, they have never attempted to obtain from Roberts the relief granted them in the 1932 judgment.

II. The 1934 judgment (MCDONALD, J. reversed by Court of Appeal, unreported).

Instead of appealing the 1932 judgment or attempting to realize its fruits, the plaintiffs on 28th August, 1933, issued a writ to set it aside on the ground of perjury by Roberts at the

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trial. There followed an eight-day trial before McDONALD, J. (now C.J.B.C. and Chief Justice of this Court). Judgment was given on 30th May, 1934, setting aside the judgment in so far as it related to dismissal of the action against the Daybreak company and also that part of the judgment which dismissed part of the action against Roberts. The assets acquired by Roberts from the liquidator of the Gibson company on 21st July, 1922 (which sale was confirmed by Court order on 2nd August, 1922), were declared to be the property of the Gibson company, the trustee of the Daybreak company was ordered to deliver up possession thereof to the Gibson company, and Roberts was held liable in damages to be assessed.

The perjury alleged to have been committed by Roberts was his testimony before MURPHY, J. that the Daybreak company had expended upward of $200,000 on the properties, and that a large part of this money had been obtained by the company from sale of shares and by incurring debts to various creditors and *vide* reference thereto in caption I. The learned judge found perjury had been committed in that respect but did not analyze the evidence upon which he relied to support that finding. The Daybreak company and Roberts appealed from that judgment. On the conclusion of a six-day argument, this Court (MACDONALD, C.J.B.C. and MARTIN, McPHILLIPS, MACDONALD and McQUARRIE, JJ.A.) in an unreported judgment unanimously allowed the appeal on 14th November, 1934, setting aside the judgment of McDONALD, J. of 30th May, 1934.

MARTIN, McPHILLIPS and MACDONALD, JJ.A. held the 1932 judgment could be supported upon evidence not influenced by the impugned testimony of Roberts. MACDONALD, C.J.B.C. relied on grounds not related to the merits. McQUARRIE, J.A. held it was not clearly established there was perjury on the part of Roberts. The Court was clearly of the opinion that, even if Roberts did give false testimony, it did not deceive the Court to the extent in any event, of procuring a judgment from MURPHY, J. which he would not have given, if Roberts had given his evidence with mathematical particularity instead of in general and loosely exaggerated language. McPHILLIPS, J.A. said:

There was no appeal from the judgment of Mr. Justice MURPHY and as that turned upon the point whether innocent parties intervened let us follow that point up. My learned brother MARTIN indicated in the most complete terms by references showing that there were moneys spent, and large sums spent, and innocent parties had intervened. Therefore there was evidence sufficient upon which the learned judge Mr. Justice MURPHY could come to the decision which he did.

And he concludes further down the page, what must have been evident to all the members of the Court:

Here we have the facts that there were large sums spent and innocent parties intervened, and that is sufficient in itself.

Leave to appeal to the Supreme Court of Canada was refused by that Court. The appellants then applied to the Judicial Committee in October, 1936, for leave to appeal thereto *in forma pauperis*. The Judicial Committee after considering the merits of the appeal (of which later when the subsequent application to the Board in 1940 is discussed in caption III.) refused leave to appeal. The 1932 judgment therefore stood intact as a valid judgment of a competent superior Court.

III. The 1938 judgment (FISHER, J. reversed by Court of Appeal, *sub-nom. May* v. *Hartin* (1938), 53 B.C. 411.

It will have been observed the Gibson company was not a party to the actions leading to the 1932 and 1934 judgments. That company had been ordered wound up on 27th May, 1920, on the petition of a creditor. On 16th June, 1922, the liquidator was empowered by Court order to sell its assets, and as stated at the outset the sale thereof to Roberts was confirmed by Court order on 2nd August, 1922. On 7th December, 1923, the Court discharged the liquidator and ordered the company to be dissolved upon the registrar's report being filed with the Court. That report was filed on 5th April, 1924. But the company's *status* was evidently re-examined more than ten years later in the light of the decision of the Judicial Committee on 1st February, 1935, in *Ferguson* v. *Wallbridge,* [1935] 1 W.W.R. 673. For a third action was commenced in February, 1937, in which the resuscitated Gibson Mining Company Limited (N.P.L.) in liquidation appeared as a party plaintiff together with the unsuccessful plaintiffs in the two previous actions.

The Daybreak company had gone into bankruptcy, some years

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before. Kane the former trustee having died in March, 1937, Hilyard Hartin was appointed in his place in May, 1937. The plain purpose of the action was to litigate all over again with the Gibson company as an additional party plaintiff, all the issues which had been decided adversely to plaintiffs' contentions in the 1932 and 1934 judgments. The object was to obtain against the Daybreak company the relief refused in the 1932 judgment. On the 21st of December, 1937, the plaintiffs obtained judgment in default of defence in the third action against all the defendants except Hilyard Hartin as trustee of the Daybreak company. The appellants have attributed a great deal of importance to that default judgment. But quite apart from the fact the issues were not then fought out, it could not affect the title ownership or possession of the Daybreak company, since it specifically left for decision between the plaintiffs and the Daybreak company, the same main issue, *viz.*, the title ownership and possession of the Daybreak mines, which had been decided in favour of the Daybreak company in the 1932 judgment, but before the Gibson company was formally a party plaintiff.

Hartin as trustee of the Daybreak company moved on 10th January, 1938, for an order: (1) dismissing the action or staying all further proceedings against the Daybreak company on the ground the action was frivolous and vexatious and an abuse of the process of the Court; and (2) striking out the statement of cliam against the Daybreak company on the ground it disclosed no reasonable cause of action against the company. FISHER, J. (now FISHER, J.A.) refused the motion on 5th April, 1938. As I read his judgment, he considered the decision of the Judicial Committee in *Ferguson* v. *Wallbridge, supra,* governed, and that accordingly the 1932 and 1934 judgments were not a bar to the third action since the Gibson company had not been formally a party to the previous actions.

However, on appeal, this Court (MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, J.J.A., the first named dissenting) reversed that decision on 2nd December, 1938—*vide May* v. *Hartin* (1938), 53 B.C. 411, and ordered the statement of claim stricken out and the action dismissed. The majority of the Court held *Ferguson* v. *Wallbridge* did not apply for reasons com-

pendiously expressed in the judgment of MACDONALD, J.A. at p. 418. On 10th January, 1939, this Court (MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.) granted conditional leave to appeal therefrom to the Judicial Committee. This Court, in the words of MARTIN, C.J.B.C., who delivered the judgment of the Court (unreported) did so because:

> We have reached the conclusion that this is a final order [my note—the 1938 judgment] because it entirely and for all time disposes of this action in this Province . . . and therefore since it is impossible to reagitate the question between these parties in this Province, we think that it must be regarded as a final judgment.

That pronouncement was unanimous in a Court of three members, two of whom had not sat on the Court in the 1938 judgment, and the third and presiding member had dissented from the 1938 judgment. The case then proceeded to the Judicial Committee in July, 1939, before Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Romer and Sir Lyman Poore Duff, C.J. If this Court had erred in holding that *Ferguson* v. *Wallbridge* did not apply, one would expect that the Judicial Committee which had decided *Ferguson* v. *Wallbridge* less than four years before would not have been slow to say so, for that was in fact the real issue before the Court of Appeal, and the obvious reason for the further appearance before the Judicial Committee.

It is true the application to the Board was in form a petition for special leave to appeal *in forma pauperis*. But perusal of what took place as it appears at pp. 255-61, Book "B" indicates the application covered a wide field. At p. 257 Lord Thankerton refers to the judgments in the Court of Appeal and observes:

> One cannot leave out of one's mind the fact that you have been conducting other litigation on the same issue without success.

Reference was made to the appearance before the Board on the 1934 judgment referred to in caption II. Mr. Casswell, counsel for the petitioners, had stated that according to his instructions the merits of the case had not then been gone into.

But this was disputed by Mr. Wilfrid Barton, counsel for the Daybreak company, who is reported as saying (p. 258):

> My Lords, I was present at that hearing [my note—in 1936] and my learned friend Mr. Cahan, who appeared for the petitioners, addressed the Board for nearly an hour. I took the point that there should have been an application for leave to the Court below in the ordinary course, but naturally

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I did not say that that was a bar to an appeal, because it was not so, but it was a matter which should have been explained.

Counsel proceeded:

In my submission the Board did consider very fully the merits of the case. Then Mrs. May not satisfied with the decision, petitioned for and obtained a rehearing on that petition. It was heard at length by the Board on the rehearing and the Board adhered to its previous decision.

At p. 260 Lord Thankerton refers to the shorthand notes of the petition which Mr. Barton had mentioned, observing:

There was a full discussion. . . . Glancing at it one can see that there was a very full discussion and a great deal about the Daybreak company.

Counsel for petitioners urged repeatedly upon their Lordships that the Mays and the Gibson company were in their present position owing to the fraud of Roberts. And at p. 260:

Mr. Casswell: . . . It has also been decided that before the Daybreak company went into liquidation all the property of the Daybreak company did not in fact belong to the Daybreak company, but was held by trustees *ex maleficio*.

Mr. Wilfrid Barton: With great respect, that was never held. They claimed the return of the properties from the Daybreak company, and that action was dismissed with costs by Mr. Justice MURPHY. That was the 1928 action [my note the 1932 judgment].

Lord Thankerton: That is eleven years ago [my note actually then seven years after the 1932 judgment].

Lord Russell: The application to this Board was in a subsequent action?

Mr. Wilfrid Barton: In an action before Mr. Justice MURPHY [my note actually McDonald, J. the 1934 judgment] to set aside. There again, there was a claim to recover these properties from the Daybreak company, and in that action they failed, so that it is inaccurate to say that any property held by the Daybreak company was affected by any order made by any Court.

Lord Wright: The questions in the earlier action were substantially the same questions of fact as in this action?

Mr. Wilfrid Barton: Yes.

Lord Thankerton: The respondent company is in liquidation and has been for a long time.

Mr. Casswell: Yes.

Lord Thankerton: The fraudulent proceedings ran from about 1918 to 1923?

Mr. Casswell: Yes.

Lord Thankerton: That is sixteen years ago.

Mr. Casswell: Yes. . . . They [the petitioners] are in a terrible position. No doubt litigation has been going on for years; but the reason for that was the original fraud of Roberts.

Lord Thankerton: It is this continuous litigation which is so terrible. It is the same litigation under another name. It is very like the case of *Reichel* v. *Magrath* reported in 14 App. Cas. in which Lord Halsbury gave the judgment of the House saying that that was the last thing which the House would encourage.

The Board refused to entertain the matter. It did not then appear necessary to bring to their Lordships' attention another strong ground for refusal to grant leave, *viz.*, that in the 1932 judgment MURPHY, J. had found (*vide* caption I., *supra*) that during the liquidation of the Gibson company in 1920-23, the original fraud of Roberts was adjudicated upon as between the Mays on the one side and Roberts and his associates on the other. In the result the third action stood dismissed and the 1932 judgment remained intact as the valid judgment of a competent superior Court.

IV. The 1940 judgment (MCDONALD, J. affirmed by Court of Appeal *sub-nom. Gibson Mining Co. Ltd.* v. *Hartin*, 55 B.C. 196).

In the meantime the Daybreak company was in bankruptcy. On 2nd October, 1939, the liquidator of the Gibson company and the Mays moved before MCDONALD, J. (now C.J.B.C.) for the relief against the Daybreak company in bankruptcy which had been refused in the 1932, 1934, and 1938 judgments. Counsel for the Daybreak company submitted as a preliminary objection to hearing the applicants that the issues involved had been previously determined between the parties. MCDONALD, J. sustained that objection and dismissed the application. On appeal this Court (MARTIN, C.J.B.C., MCQUARRIE and O'HALLORAN, JJ.A.) upheld him on 8th March, 1940: *vide Gibson Mining Co. Ltd.* v. *Hartin* (1940), 55 B.C. 196.

The Court of Appeal held the case had been finally determined by the 1938 judgment (caption III.), which in turn rested on the 1932 judgment (caption I.). It regarded the 1938 judgment as decisive, and considered the application in the Daybreak bankruptcy to be an attempt to reagitate anew the same issues upon the same grounds, and was a refusal to accept the 1938 judgment as final. The Court regarded that judgment as a final determination of the rights of the parties and applied the ordinary principle that a person is not to be vexed twice for the same cause of action. Leave to appeal therefrom to the Supreme Court of Canada was refused by Taschereau, J. on 24th April, 1940.

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However, despite the 1932, the 1934, the 1938, and 1940 judgments to which I have referred, the Gibson company and Mrs. May in May, 1941, launched proceedings in the Daybreak bankruptcy for leave to bring an action to reopen and reagitate the same issues again. The application was dismissed by MANSON, J. in May, 1942. Hence this appeal. We have heard the parties for two days and I do not perceive any merit in the appellant's case. In the light of the four previous judgments to which I have purposely referred at some length, the present proceedings in my view at least cannot be properly regarded as anything else than an abuse of the process of the Courts.

Some attempt was made to argue that possession of the mines and damages are sought for the first time in the present proceedings. One need but read the pleadings and proceedings in the four previous proceedings to see that possession was inseparably interwoven with the questions of title and ownership there litigated. It did not need to be expressly mentioned, for the question of possession lay at the foundation of all those proceedings. MURPHY, J. had possession in mind in the 1932 judgment, for (as quoted in caption I.) he said:

> If the plaintiffs succeed against the Daybreak Mining Company, that corporation will lose its mining properties, which will be returned to the Gibson company. Such a result on the facts as I view them would be clearly inequitable.

MCDONALD, J. also had possession clearly in mind in the 1934 judgment (caption II.) for in his formal judgment subsequently reversed by the Court of Appeal he ordered

> . . . that D. P. Kane as trustee of the Daybreak Mining Company (N.P.L.) do forthwith deliver up possession of the said assets [my note—mining claims, etc.] to the Gibson Mining Company Limited.

In the statement of claim in the action leading to the 1938 judgment, sub-paragraph (n) of the prayer asks that the properties "be forthwith assigned, transferred and conveyed to the plaintiffs." Sub-paragraph (p) thereof asks for such "orders and remedies as may restore to the plaintiffs the said properties . . ." Sub-paragraph (s) thereof asks for "direction of the Court for the conveyance and transfer of the said properties . . ." The question of possession cannot be regarded as a new issue.

The damages now sought to be claimed are against the trustee of the Daybreak company "as a trespasser for fraudulently with-

holding possession" of the mineral claims from the Gibson company. Obviously that claim is consequential to the right of possession being first established. It cannot arise unless it is first found that the Daybreak company has fraudulently or wrongfully withheld possession. But MURPHY, J., the Judicial Committee, and this Court of Appeal (on three occasions) have refused to hold the Daybreak company is not properly in possession. The claim for damages so framed cannot therefore be regarded as a new and undetermined issue.

The dispute between the Mays and the Gibson company on the one side and the Daybreak company on the other, has been fully canvassed in the Courts over a long period of years. It is time that litigation is brought to a close once and for all: and *vide In re May; ex parte House* (1885), 54 L.J. Ch. 338, at p. 341 (C.A.); *Reichel* v. *Magrath* (1889), 14 App. Cas. 665; *Hoysted* v. *Taxation Commissioner* (1925), 95 L.J.P.C. 79, at p. 85; and *Green* v. *Wetherill and Croft* (1929), 98 L.J. Ch. 369, at p. 373.

The appeal should be dismissed.

FISHER, J.A.: This is an appeal by Minnie Mead May and Jonas Theodore Unverzagt, acting for and as liquidator of the Gibson Mining Company Limited (N.P.L.) in liquidation, from the dismissal of their application for an order granting leave to bring action against Hilyard Hartin personally and as trustee of and representing the Daybreak Mining Company Limited (N.P.L.) in bankruptcy, for certain relief.

Counsel for the respondent argues that the same principles ought to apply on an application for leave to bring an action as on a motion to stay an action and relies upon the decisions of this Court in *May* v. *Hartin* (1938), 53 B.C. 411 and *Gibson Mining Co. Ltd.* v. *Hartin* (1940), 55 B.C. 196. I find it difficult to understand this argument as in the *May* v. *Hartin* case this Court while allowing an appeal from myself and dismissing the action did not disagree, and MACDONALD, J.A. (afterwards C.J.B.C.) expressly stated that he agreed, with me that an order made on July 5th, 1937, by MCDONALD, J. (now C.J.B.C.) and hereinafter referred to, giving leave to sue the then appellant (now respondent) Hilyard Hartin as trustee of the Daybreak

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company in bankruptcy, affirmed on appeal to this Court on a majority decision dated 2nd November, 1937, did not stand in the way of the proceedings to stay the action. If this be so I do not see how it can be said that, on the present application for leave to sue, the former judgment made on an application for a stay necessarily stands in the way. In view of the argument, however, one must consider the three decisions of this Court as aforesaid and come to a conclusion as to which of them affords us guidance in the matter now before us.

With regard to the decision of this Court in 1940 in *Gibson Mining Co. Ltd.* v. *Hartin* I have only to say that the appeal dealt with there was not from the dismissal of an application to bring an action but was an appeal from the dismissal of an application made under rule 142 of the Bankruptcy Rules for a declaration, with ancillary relief, that certain mining claims were the property of the Gibson Mining Company Limited. With regard to the decision of this Court in 1938 in *May* v. *Hartin,* hereinafter referred to as action M. 156/1937 I have now to say, though perhaps I have already so indicated, that such decision was also upon a different kind of application from the present one, being an application to stay the action, whereas the decision of this Court in the appeal from the order of MCDONALD, J. (now C.J.B.C.) was a decision and the only decision given upon an application exactly similar to the present one, *viz.,* one for leave to bring action.

This brings me to a consideration of the decision of this Court affirming the order made by MCDONALD, J., as he then was, and the position taken by counsel on behalf of the parties as to the effect of such decision on the later application before me in the said action. In this connexion I would like to quote in part from my own reasons for judgment dated 5th April, 1938 (unreported):

> This is an application on behalf of the defendant Hilyard Hartin, trustee of Daybreak Mining Company, Limited (N.P.L.) in bankruptcy, for "an order against the plaintiffs and each of them—(1) Dismissing this action or staying all further proceedings as against this defendant on the grounds that the action is frivolous and vexatious and an abuse of the process of the Court. (2) Striking out the statement of claim herein as against the said defendant on the ground that it discloses no reasonable cause of action against the said defendant."

It is first contended by counsel on behalf of the plaintiffs that the said defendant cannot succeed in the application on the grounds that the action is frivolous and vexatious and an abuse of the process of the Court as the same grounds were put forward by the said defendant and rejected by a majority of our Court of Appeal which dismissed an appeal by the said defendant from the order of McDONALD, J. dated July 5th, 1937, and pronounced in the Supreme Court of British Columbia in Bankruptcy in the matter of the Bankruptcy of Daybreak Mining Company, Limited (N.P.L.), debtor, whereby it was ordered that "leave be granted to David Kind May and Minnie Mead May, his wife, suing personally and suing as well on their own behalf as on behalf of all the shareholders of Gibson Mining Company Limited (N.P.L.) similarly situated and Gibson Mining Company Limited (N.P.L.) in liquidation, to bring action against the said Hilyard Hartin as trustee of Daybreak Mining Company Limited (N.P.L.) in bankruptcy by joining or adding the said Hilyard Hartin in such capacity as a defendant in an action numbered M 156/1937 commenced on the 2nd day of February, A.D. 1937, in the Vancouver Registry of the Supreme Court of British Columbia for the purpose of recovering from Daybreak Mining Company, Limited (N.P.L.) in bankruptcy and from the said trustee the seven mineral claims, or interests therein, and all other assets of the Gibson Mining Company Limited (N.P.L.) in liquidation allegedly fraudulently obtained from the last-mentioned company and fraudulently held by the said Daybreak Mining Company, Limited (N.P.L.) in bankruptcy, subject to the directions of the Court in the said action No. M 156/1937." The action referred to as numbered M 156/1937 is the action herein and it is apparent from the notice of appeal and reasons for judgment in the said appeal, being part of the material before me on the present application, that the aforesaid grounds were put forward in the notice of appeal and the appeal was dismissed by our Court of Appeal. I think it must first be noted that in the reasons for judgment MARTIN, C.J.B.C., delivering the judgment of the majority of the Court of Appeal, said, in part, as follows:

"The appeal is dismissed, our brother McQUARRIE dissenting. The opinion of my brother McPHILLIPS and myself is briefly this, that we feel the learned judge was quite justified on the facts before him in making the order that he did, particularly in view of the fact that a new party has appeared; that is to say the Gibson Mining Company. . . . We understand the difficulty of the case, but we do not feel that justice requires us to interfere with the decision of the learned judge in the unusual circumstances."

In his dissenting judgment McQUARRIE, J.A. said, in part, as follows:

"The learned trial judge apparently did not give any reasons for judgment. It is common ground that the facts in the proposed claim against the said Hartin, trustee as aforesaid of the said Daybreak Mining Company, Limited (N.P.L.) in bankruptcy, will be the same as in the two previous actions which were decided in favour of said Daybreak Mining Company. It is also admitted that the said mineral claims and other assets were sold in pursuance of orders made in winding-up proceedings—numbered 855/20—and that the sale so made was confirmed by order therein. The matter of the title to the said mineral claims and assets has been in litigation for some 17 years and now for the first time the Gibson Mining Company Limited (N.P.L.). in liquidation is brought in as a plaintiff. Counsel for the respond-

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ents contends that the previous actions were not properly constituted because the Gibson company was not a party and that the addition of such company as a plaintiff enables him to reopen the whole matter although the question of title as between that company and the Daybreak company was twice in issue and was twice decided against the Gibson company in favour of the Daybreak company. He relies on the Pioneer cases: *Ferguson* v. *Wallbridge*, [1935] 1 W.W.R. 673 and *Lloyd-Owen* v. *Bull*, [1936] 3 W.W.R. 146. In my opinion, with all deference, those cases are of no assistance to him since in the judgments therein the merits were not dealt with as occurred in the previous actions herein involving the title to the said mineral claims and assets. I consider that there should be an end to this litigation and that no good reason has been shown why the whole matter should be gone into again."

It appeared to me therefore on the application to stay that on the application for leave to bring an action the majority of this Court affirmed the order giving leave without deciding the question of *res judicata,* though such question was undoubtedly raised by the then appellant (the present respondent) and my brother MCQUARRIE gave a dissenting judgment based upon his answer to such question. On this appeal counsel for the respondent submits that in the later and different application, *viz.,* one to stay the action, the majority of this Court decided the question of *res judicata* against the contention of the present appellants. Certainly MCQUARRIE, J.A. (see 53 B.C. 421-23) based his judgment upon the same reasons as he gave in the previous appeal. MARTIN, C.J.B.C. dissented and I do not find it necessary to come to a conclusion now as to whether MACDONALD, J.A. (as he then was), the other member of the Court sitting then, based his judgment upon an affirmative answer to the question of *res judicata.* Even assuming, without holding, that all the members of the Court did consider and the majority of the Court did decide the question of *res judicata* upon the second application, nevertheless, as I have already intimated, it was my view, confirmed by the agreement of MACDONALD, J.A. as aforesaid, that the majority of the Court neither considered nor decided the question upon the first application, although the whole history of the litigation would appear to have been gone over in the argument, as would appear from the judgment of MARTIN, C.J.B.C., where he says in part as follows:

It would not be profitable and indeed impossible for us to begin to recite all the multifarious and complicated circumstances of this case, the complexity of which may be gathered from the fact that the argument on the

motion went into three days, so we feel that it is sufficient to say what we have said.

In the present appeal the question of *res judicata* is again raised, the appellant alleging and the respondent denying that new issues arise in the proposed action, which never arose and were never determined in any previous action. If it were perfectly obvious that no new issue arises in the proposed action then the appeal should be dismissed. After careful consideration of the whole matter, however, I have come to the conclusion and have to say, without expressing any view on what might be called the merits of the question, that much may be said for and against the contention that new issues arise in the proposed action. Seeking guidance, therefore, from the three decisions of this Court as aforesaid I note again that the only decision upon an exactly similar application is that made by this Court on 2nd November, 1937, affirming by a majority decision the order made on July 5th, 1937, giving leave to bring action. In my view the course taken by the Court at such time should be followed and the question of *res judicata* should not be determined upon the present application.

I would, therefore, allow the appeal.

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

Solicitors for respondent: *Brown & Dawson.*

HENDERSON v. MUNCEY.

Marriage—Breach of promise—Action for damages—Plaintiff formerly married and left her husband—Husband moved to Oregon—He obtains divorce in Oregon for desertion—Domicil—Validity of divorce in Canada.

The plaintiff and defendant first met in Vancouver in May, 1933, and in the following August defendant's proposal of marriage was accepted by the plaintiff. As defendant was living with an older sister at the time, his proposal that the marriage be postponed until after his sister's death was agreed to. On the death of the sister in April, 1939, they decided to be married on January 3rd, 1940. Shortly before that date the defendant made excuses for postponement and continued to put off the marriage, resulting in an action for damages for breach of promise.

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Shortly after their engagement, the plaintiff told the defendant of her marriage to one Weier in Calgary, Alberta, in 1912. In 1914 Weier enlisted and went overseas. On his return in 1918 he lived with his wife until July, 1920, when she left him and went to Vancouver. Upon the engaged couple making enquiries, they found that Weier left Calgary for Portland, Oregon, U.S.A. where he obtained a divorce from the plaintiff (she had no knowledge of this as process had been served by publication of summons, as provided by the law of the State of Oregon). Exemplification of the proceedings in the American Court filed as an exhibit show that the jurisdictional requirement was residence in Oregon for at least one year immediately preceding the commencement of the suit and that the ground for divorce was wilful desertion by the plaintiff for the period of one year. One Eastman, an attorney from Portland, testified that he had known Weier in Portland from 1922 until his death in 1940 and he recited his activities during that time.

Held, that the question was purely one of domicil as the term is understood in Canadian law. If Weier was domiciled in Oregon, the plaintiff in law was domiciled there. The evidence is convincing that at the institution of the divorce proceedings, Weier had acquired domicil (in the English and Canadian sense) in the State of Oregon. It follows that the divorce he obtained from the plaintiff was valid in Canada and, therefore, the plaintiff was free to enter into this contract of marriage with the defendant. The plaintiff was awarded $1,500 and costs.

ACTION for damages for breach of an alleged contract of marriage. The facts are set out in the head-note and reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 8th and 9th of September, 1942, and the 1st of April, 1943.

Lucas, for plaintiff.
McAlpine, K.C., for defendant.

Cur. adv. vult.

16th April, 1943.

SIDNEY SMITH, J.: The plaintiff, who is 46 years of age and the proprietor of a beauty parlour, seeks damages for breach of an alleged contract of marriage made with her by the defendant, a stevedore dock foreman.

I accept the evidence of the plaintiff and her witnesses. There was no evidence adduced by the defence. I find that the parties first met in May, 1933, and that in August of the same year the defendant proposed marriage and was accepted. Shortly thereafter the defendant suggested that the marriage be postponed until after the death of his elderly sister with whom he lived

and who strongly objected to his marriage. To this the plaintiff agreed. Thereafter the defendant treated the plaintiff as his fiancee, introducing her as such, buying an engagement ring for her and being constantly in her company. In April, 1939, the sister died. Some time later the plaintiff broached the subject of the date of marriage. The defendant demurred but after some delay the date was fixed for January 3rd, 1940. Afterwards the defendant refused, for several reasons which I find were mere excuses, to fulfil his promise. Hence this action.

If matters stood thus and the plaintiff had the necessary *status* to enter into marriage she would be entitled to succeed. The defence of the defendant, however, apart from the general denial (which I find has no substance) is that in August, 1933, when the contract was first made, and on later dates when it was reaffirmed, the plaintiff was a married woman and so without *status* to marry (*Caulfield* v. *Arnold* (1924), 34 B.C. 404). The facts on which this contention is based must therefore be closely examined.

On 8th October, 1912, the plaintiff then a spinster was married in Calgary, Alberta, to one John James Weier, an American citizen who was born in the State of Michigan which was therefore his domicil of origin. Weier had then been in Calgary some six years and was engaged in farming. In 1914 upon the outbreak of the Great War Weier joined the British forces and was on active service overseas until the termination of the war in 1918. He then, or shortly thereafter, returned to Calgary and resumed his interrupted married life with the plaintiff. But in May, 1921, the plaintiff left him. She heard no more of him until after her acquaintance with the defendant.

I find that she was quite frank with the defendant about her former marriage. They both realized that unless dissolved this was an absolute bar to another marriage. The defendant therefore suggested that the plaintiff should obtain legal advice. This was done. Enquiry followed and it developed that her husband had himself obtained a divorce in Portland, Oregon, U.S.A. on 19th November, 1923, about which the plaintiff had no knowledge whatever. Process had been served by publication of summons in the manner provided by the law of the State of Oregon. An exemplification of the proceedings in the American Court

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was filed as an exhibit in this action. These show that the jurisdictional requirement was residence in Oregon for at least one year immediately preceding the commencement of the suit; and that the ground for the divorce was wilful desertion by the plaintiff for a period of over one year dating from the 6th day of July, 1920.

The plaintiff submits that this was a valid and legal divorce and that the marriage was thereby dissolved. On the other hand the defendant says that the divorce was invalid and of no effect, in contemplation of Canadian law, upon the ground of lack of jurisdiction of the Oregon Court, due to the parties not being domiciled in Oregon when the divorce proceedings were commenced; that consequently the plaintiff remained throughout a married woman and so could not enter into a contract to marry.

The question therefore is purely one of domicil, as that term is understood in Canadian law. Was Weier domiciled in Oregon? If so the plaintiff in law was also domiciled there, and the Oregon Court had jurisdiction (*Bater* v. *Bater,* [1906] P. 209; *Wyllie* v. *Martin* (1931), 44 B.C. 486).

Moreover, granting jurisdiction, the Oregon Court could give a valid divorce upon grounds which would not sustain a divorce in Canada (*Bater* v. *Bater, supra*).

Evidence of domicil was given by E. W. Eastman, an attorney of Portland, Oregon. He testified that he was a friend of Weier and had known him in Portland from about September, 1922, till his death in 1940. The evidence he gave of Weier's activities and interests convinces me that at the institution of the divorce proceedings Weier had acquired a domicil (in the English and Canadian sense) in the State of Oregon. It follows that the divorce he obtained from the plaintiff was valid in Canada and that therefore the plaintiff was free to enter into this contract of marriage with the defendant.

The defendant treated the plaintiff rather badly. He enjoyed her friendship and almost constant companionship for some seven years under a promise of marriage which in the end he failed to keep. I think the plaintiff lost prospects of marriage she might otherwise have had. Damages should not be vindictive but they should be substantial. I award $1,500 and costs.

Judgment for plaintiff.

TOWNE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

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Mar. 10, 11; *April* 13.

Negligence—Ultimate negligence—Truck runs into train at railway crossing — Darkness and heavy fog — Truck-driver disregards stop sign— Visibility from five to ten feet—R.S.C. 1927, Cap. 170, Sec. 308.

The plaintiff was driving his truck north on Fraser Avenue in the city of Vancouver at 5.30 a.m. in October, 1941, when it was dark with heavy fog, the range of visibility being from five to ten feet. As he approached the defendant's railway crossing, he slowed down as he knew the crossing and that there was a stop sign there. At this time a train of the defendant, going west, blew its whistle when approaching the intersection and stopped about twelve feet from the street. In about five minutes it started up again ringing its bell and crossed the street at about four miles an hour. The plaintiff ran into the second car back of the engine and was injured. In an action for damages, the jury answered questions finding the defendant guilty of negligence in failing to take extraordinary precautions and the plaintiff guilty of contributory negligence in not taking proper precautions approaching the crossing and they divided the damages between them. In answer to the question "If the defendant was negligent, could the plaintiff by reasonable care have avoided the consequences of the defendant's negligence?" the jury replied in the affirmative. It was held on the trial that the negligence of both parties from the time it arose, did not change, but continued up to the actual collision and no ultimate negligence was intended to be found.

Held, reversing the decision of LENNOX, Co. J., that the appeal be allowed and the action dismissed.

Per SLOAN, J.A.: The answer to the above question, when considered in the light of the evidence and the direction of the learned trial judge to the jury as to the effect of an affirmative answer thereto, must be regarded as a finding by the jury that the plaintiff was guilty of ultimate negligence.

Per O'HALLORAN, J.A.: Assuming both parties to be at fault, then applying *Ristow* v. *Wetstein*, [1934] S.C.R. 128 and *Butterfield* v. *Forrester* (1809), 11 East 60; 103 E.R. 926, and related decisions, the respondent was solely responsible, because he could have avoided the consequences of the appellant's fault, if he had used common and ordinary caution.

Per FISHER, J.A.: Applying the rule of construction in the light of the decision in *Greisman* v. *Gillingham*, [1934] S.C.R. 375 the jury in so answering question 6 did not intend to find ultimate negligence on the part of the respondent barring his right to recover but intended to find joint negligence. In this case, however, no jury "reviewing the evidence as a whole and acting judicially" could have reached the conclusion that there was negligence on the part of the appellant contributing to the accident and the appeal should therefore be allowed and the action dismissed.

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APPEAL by defendant from the decision of LENNOX, Co. J. and the verdict of a jury of the 25th of November, 1942, in an action for damages resulting from a collision between the plaintiff's truck and a train of the defendant. On the 24th of October, 1941, at 5.30 a.m., when there was a thick fog, the plaintiff was driving his truck southerly on Fraser Avenue and ran into a train of the defendant which was crossing the road from east to west on its tracks. The train had stopped on the east side of the road and after a short interval, it blew a warning whistle, started up and crossed the road ringing its bell and going at about five miles an hour. The plaintiff says he knew the crossing well and knew there was a stop sign, but owing to the fog, he could not see over five or six feet ahead and he did not hear the bell. He knew he was close to the railway track, but he did not stop and ran into the second car back of the engine, travelling at about four miles an hour at the time.

The appeal was argued at Vancouver on the 10th and 11th of March, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for appellant: We blew our whistle and rang the bell when crossing and were going at four miles an hour. Plaintiff did not stop at the stop sign and he knew it was there. The jury found we should have taken extraordinary care, but they found ultimate negligence on the part of the plaintiff. On duties of train at a crossing see *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81, at pp. 90 and 97-8; *Minor* v. *Grand Trunk R.W. Co.* (1917), 35 D.L.R. 106; *Bilbee* v. *London, Brighton, and South Coast Ry. Co.* (1865), 18 C.B. (N.S.) 584; *Smith* v. *South Eastern Railway Co.*, [1896] 1 Q.B. 178; Halsbury's Laws of England, 2nd Ed., Vol. 27, p. 87, par. 194; *Cliff* v. *Midland Railway Co.* (1870), L.R. 5 Q.B. 258; *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.* (1941), 56 B.C. 484, at pp. 495, 510. We were not obliged to take extraordinary precautions. There was no breach of duty on our part. The jury found there was ultimate negligence: see *Gillingham* v. *Shiffer-Hillman*, [1933] 3 D.L.R. 134, on appeal *sub nom. Greisman* v. *Gillingham*, [1934] 3 D.L.R. 472, at p.

481; *Cloney* v. *Trerrice* (1933), 6 M.P.R. 500; *British Columbia Electric Railway Company, Limited* v. *Loach*, [1916] 1 A.C. 719; *Grant* v. *British Columbia Electric Ry. Co. Ltd.* (1937), 52 B.C. 66; *Bank of Toronto* v. *Harrell* (1917), 55 S.C.R. 512; *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207.

Bull, K.C., for respondent: Regardless of the pleadings we are arguing the case according to the course of the trial. The train started 12 feet back from the street and should have given the statutory whistle, that is, two short blasts when starting. This was not done. The degree of care is commensurate with the risk. In answering the sixth question, the question is what the jury intended. The answers to the other questions must be considered with it. The answer was really a finding of contributory negligence: see *Marshall* v. *Cates* (1903), 10 B.C. 153; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263. As to construction to be placed on answers to questions by jury see *Canada Rice Mills, Ld.* v. *Union Marine and General Insurance Co.*, [1941] A.C. 55; *Scott* v. *B.C. Milling Co.* (1894), 3 B.C. 221. The record would not support ultimate negligence. There was a condition existing that required very extra care: see *Jackson* v. *Canadian National Railways*, [1942] 3 W.W.R. 177.

McAlpine, in reply: As to the statement of the fixing of damages on each negatives the finding of ultimate negligence: see *Admiralty Commissioners* v. *Owners of S.S. Volute* (1921), 91 L.J. P. 38.

Cur. adv. vult.

13th April, 1943.

MCDONALD, C.J.B.C.: I am forced by compelling authorities to hold that notwithstanding the Contributory Negligence Act, the rules relating to ultimate negligence still apply. I can imagine no case where it can be applied more simply. The jury found the defendant negligent and the plaintiff negligent in the proportions, as they put it, "fifty-fifty." They then came to deal with question 6, as to which the learned judge had said to them:

> In other words, if the defendant was negligent in doing what he [it] did or did not do, could the plaintiff, even then, have avoided the result of that negligence by reasonable care? There you have got to make up your mind

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whether, if the defendant was negligent in what it did in being there in front of him, if by reasonable care he could have avoided the result. If he could, then, of course, he has no claim against the defendant.

The jury's answer was "Yes."

The learned judge had no choice but to put the question and with respect, I do not know how he could have put the matter more simply or plainly. That being so, and there being ample evidence to support the jury's answer to question 6, I do not feel called upon to conjure up some method by which this answer can be read to mean something other than what it means. I think we should accept the answer as it is. If we do, then the plaintiff cannot succeed and the appeal should be allowed.

MCQUARRIE, J.A. would allow the appeal.

SLOAN, J.A.: It is my view that the answer to question 6, when considered in the light of the evidence and the direction of the learned trial judge to the jury as to the effect of an affirmative answer thereto, must be regarded as a finding by the jury that the plaintiff was guilty of ultimate negligence. In consequence the appeal must be allowed and his action dismissed with costs.

O'HALLORAN, J.A.: The plaintiff respondent driver of a motor-truck collided with the second car of appellant's moving freight train at the Fraser Street intersection in Vancouver at 5.30 on a foggy morning in late October. The train was going four to five miles an hour with its bell ringing. It stopped within some twelve feet when the emergency brake was applied.

The respondent testified he knew he was approaching the railway crossing and that he knew there was a stop sign there. According to his evidence his visibility in the fog was five to ten feet, his speed five to ten miles an hour, and he did not see the stop sign or the street light which was close to the railway track; nor did he see the moving train or hear its bell. He did not stop or slow down.

The jury found the appellant and respondent equally at fault. The former for "failure to take extraordinary precautions" and the latter for "not taking proper precaution approaching a crossing." But the jury then answered "Yes" to the question:

If the defendant [appellant] was negligent, could the plaintiff, [respondent] by reasonable care, have avoided the consequences of the defendant's negligence?

However, on the motion for judgment the learned trial judge concluded that too much emphasis ought not to be placed on the purely verbal aspect of that answer because, when it was read in conjunction with the answers to the other questions, the answers considered as a whole did not indicate an intention on the part of the jury to find "ultimate" negligence in the respondent.

In my view with respect, the appeal should be allowed. I should have thought that the jury's answer to that question was sufficiently explicit to defeat the plaintiff's (respondent's) action. However, I do not rest my decision upon that ground. When the evidence is interpreted in the light of appropriate legal principles, it does not, in my opinion at least, permit any conclusion other than that the respondent was solely responsible for the damage he sustained. Assuming both parties to be at fault, the question of sole responsibility is governed by legal principles. While the jury are judges of the facts, their findings cannot be upheld if established legal principles are thereby violated.

In the leading case of *Butterfield* v. *Forrester* (1809), 11 East 60; 103 E.R. 926 applied in *Davies* v. *Mann* (1842), 10 M. & W. 546; 152 E.R. 588 and approved by the House of Lords in *Radley* v. *London & North Western Rail. Co.* (1876), 46 L.J. Ex. 573, 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.

The respondent cannot avail himself of the appellant's fault. He did not himself use common and ordinary caution. For he did not stop at the stop sign at the railway crossing, both of which, on his own admission, he knew to be there. And curiously he did not see the street light which was some eight to ten feet from the railway crossing on which was the moving train with its bell ringing. If the appellant was at fault, the respondent could easily have avoided the consequences of that fault, if he had used common and ordinary caution.

But it is said because of the intense fog he did not see the stop sign or the street-light and did not know he was at the rail-

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way crossing. That does not excuse him under the principle found in *Ristow* v. *Wetstein,* [1934] S.C.R. 128, upon which the jury were not instructed. Smith, J. in delivering the judgment of the Supreme Court of Canada enunciated this principle 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.

The respondent stated his visibility at five to ten feet. It is therefore obvious from the result that he was not able to stop his truck within that distance. Accordingly his mishap must be attributed to his inadequate look-out or undue speed, unless there was present "some other factor causative of the collision." But none was alleged which was not causally associated with undue speed or inadequate look-out on his part. The fault of the appellant cannot be invoked in that respect to excuse the respondent. For that would deny the *Butterfield* v. *Forrester* principle, which is fundamental to *Ristow* v. *Wetstein, viz.,* that one cannot avail himself of the fault of another, if he do not himself use common and ordinary caution. This aspect was discussed and developed in *Brown* v. *Walton et al.* delivered on 2nd March, 1943, [58 B.C. 498] when it was found necessary to examine more fully the relevant implications of *Ristow* v. *Wetstein.*

In the circumstances, the evidence when read as it must be, in the light of governing legal principles as explained in the applicable decisions, fixes the respondent with sole responsibility. If he had used common and ordinary caution he could have avoided the consequences of the appellant's fault when he had the present ability to do so, and *vide* also *Lauder* v. *Robson* (1940), 55 B.C. 375, at p. 384 and *Alonzo* v. *Bell et al.* (1942), 58 B.C. 220, at p. 225.

The appeal should be allowed and the plaintiff's (respondent's) action dismissed with costs here and below.

FISHER, J.A.: The action was tried by LENNOX, Co. J. with a jury. The following are the questions and answers of the jury:

1. Was the defendant guilty of negligence contributing to the accident? Yes, partly due to heavy fog.

2. If so, what was such negligence? Failure to take extraordinary precautions.

3. Was the plaintiff guilty of negligence contributing to the accident? Partly.

4. If so, what was such negligence? Not taking proper precaution approaching crossing.

5. If both the defendant and the plaintiff were guilty of negligence, in what percentage did the negligence of each contribute to the accident? Fifty-fifty.

6. If the defendant was negligent, could the plaintiff, by reasonable care, have avoided the consequences of the defendant's negligence? Yes.

7. Damages: (1) Special $85; (2) General $300.

Judgment was delivered, awarding the plaintiff judgment against the defendant for $42.50 special damages and $150 general damages and from this judgment defendant appeals.

Counsel for the appellant relies especially upon the answer to question 6 and such affirmative answer would appear to be embarrassing to the respondent but it must be noted that there was no question corresponding to question 6 put as to the appellant, and it may be if there had been such a question that the jury would have answered it also in the affirmative. However, we have to deal with the questions and answers as they stand and counsel on behalf of the appellant contends that the jury found ultimate negligence on the part of the respondent and the action should therefore be dismissed. I have to say, however, that in view of the decision of the Supreme Court of Canada in the case of *Greisman* v. *Gillingham,* [1934] S.C.R. 375 affirming [1933] O.R. 543, fully discussed by MACDONALD, J.A. (later C.J.B.C.) in *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512, at pp. 522-526, I do not think that I am at liberty to conclude in the present case that the jury intended to find that the negligence of the respondent was ultimate and not simply contributory, even though in answer to question 6 the jury found that the respondent by reasonable care could have avoided the consequences of the appellant's negligence. It seems to be well established that the questions and answers must be construed as a whole. See *Canada Rice Mills* v. *Union Insurance Co.,* [1940] 4 All E.R. 169, at p. 174 and *Marshall* v. *Cates* (1903), 10 B.C. 153, at p. 157. Applying this rule of construc-

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tion in the light of the decision in the *Greisman* case, *supra,* I am forced to the conclusion that the jury here did not intend to find ultimate negligence on the part of the respondent barring his right to recover, but intended to find joint negligence, that is that both the appellant and the respondent were guilty of negligence contributing to the accident. Such a finding nevertheless in my view would be incompatible with its answer to question 6 as aforesaid and I have therefore less hesitation than I might otherwise have had in setting the verdict aside on the ground hereinafter indicated.

I pause here to say that during the argument attention was called to the finding of the jury that the appellant was guilty of negligence in failure to take extraordinary precautions and to the fact that the trial judge found that the use of the word "extraordinary" meant "proper care" outside the statutory requirements. In this connexion it is interesting to note that in the case of *British Columbia Electric Railway Company Limited* v. *Loach,* [1916] 1 A.C. 719, which is continually referred to in negligence cases, the jury found that the deceased, as distinguished from the driver of the rig, was negligent in not taking "extraordinary" precautions to see the road was clear and this would seem to have been interpreted by the Judicial Committee of the Privy Council (see p. 721) as meaning that the deceased had disregarded his duty of taking reasonable care under the circumstances. See also *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.* (1941), 56 B.C. 484, *per* MCDONALD, J.A. (now C.J.B.C.) at p. 522.

In the present case the jury, as I have already intimated, apparently intended to find that there was negligence on the part of the appellant contributing to the accident, but notwithstanding our Contributory Negligence Act the law would appear still to be that even if the defendant was negligent, nevertheless the plaintiff cannot recover if there was ultimate negligence on his part. See *McLaughlin* v. *Long,* [1927] S.C.R. 303; *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207. The question therefore arises whether the verdict should be set aside. In *Canadian Pacific Railway* v. *Frechette,* [1915] A.C. 871 Lord Atkinson said as follows at p. 881:

. . . And every appellate tribunal, conscious of the great advantage enjoyed by a jury in having seen and heard the witnesses, and in having had the whole trial conducted under their observation, must feel reluctant to disturb the decision of such a tribunal. This applies in a special degree to this Board, which has to deal with the administration of justice in distant and dissimilar parts of the Empire, and has always desired to strengthen the well-deserved confidence of the local public in their native tribunals; but if, despite this ever-present desire, the Board, after careful examination of the evidence, comes to the conclusion that the verdict of the jury cannot be sustained, no course is open to it but to set that verdict aside. Any other course would amount to a judicial wrong, the punishment of a litigant for something for which he has not been proved to be answerable.

In *McCannell* v. *McLean,* [1937] S.C.R. 341, Duff, C.J. delivering the judgment of the Court, said in part as follows at p. 343:

. . . It seems desirable, however, to add a word or two in respect of the principle on which this Court acts in setting aside the verdict of a jury, as against the weight of evidence, with a view to granting a new trial or giving judgment in favour of one of the parties.

The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported. . . .

In the present case I am satisfied that no jury "reviewing the evidence as a whole and acting judicially" could have reached the conclusion that there was negligence on the part of the appellant contributing to the accident. Even assuming that the appellant was negligent in failing to take extraordinary precautions I think it is clear that the respondent alone could have avoided the accident if he had used common and ordinary caution under the existing circumstances. In one of the answers the jury found that the respondent was negligent in "not taking proper precaution approaching crossing" and in my view reasonable men acting judicially could not have reached any conclusion on the evidence other than that by reason of such negligence the respondent was solely responsible for the accident.

I would allow the appeal and dismiss the action.

Appeal allowed.

Solicitor for appellant: *V. Laursen.*

Solicitors for respondent: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

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1943
March 9;
April 13.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* ESTATE OF MARGARET ELLEN McNAMARA.

JAMES LEWIS McNAMARA v. HYDE *ET AL.*

Testator's Family Maintenance Act—Husband and wife—Separation agreement eight months after marriage—Provision that husband gets nothing from her estate—Death of wife—Husband cut off in her will—Petition by husband under Act—R.S.B.C. 1936, Cap. 285, Secs. 3 and 4.

Petitioner and his wife were married in 1934, and owing to differences, they separated eight months later when they entered into a separation agreement whereby petitioner was to pay his wife $25 per month, which he did until her death, and further that if she died during petitioner's lifetime, all property which but for this covenant would on her death go and belong to her husband, would devolve to the person or persons to whom and in the manner which said property would have devolved if she had died intestate and unmarried. The wife died in July, 1940. She had an estate of about $4,500. By her will she made specific bequests to relatives and others, but left nothing to her husband. The husband earned $80 per month, but had no other means. The petition of the husband for provision from his wife's estate under the Testator's Family Maintenance Act was dismissed.

Held, on appeal, reversing the decision of ROBERTSON, J. (O'HALLORAN, J.A. dissenting), that the learned trial judge rightly held that the separation agreement does not preclude the petitioner from success, but the petitioner, in the circumstances, should not be excluded from the benefits bestowed by the Act. The estate amounts to some $4,000. Under the will the petitioner takes nothing. Various small specific legacies are bequeathed and the residue goes to certain named nieces, a grand-niece and a grand-nephew residing abroad. An order will be made that the petitioner be allowed $1,000, each and every legacy to abate proportionately to provide for its payment.

APPEAL by the petitioner J. L. McNamara from the decision of ROBERTSON, J. of the 29th of October, 1942, dismissing the appellant's petition for an order under the Testator's Family Maintenance Act that such provision as the Court thinks adequate be made to him out of the estate of his deceased wife, Margaret Ellen McNamara, who died 16th July, 1940. They were married on 12th May, 1934, the wife being 68 years old and the hubsand 43. Shortly after the marriage difficulties arose and after living together for eight months, they entered into a separation agreement whereby he agreed to pay her $25

per month, which he did up to the time of her death. There was a provision in the agreement that if she died during petitioner's lifetime, all property which but for this covenant would on her death go and belong to the petitioner, shall devolve to the person or persons to whom and in the manner which said property would have devolved if the said Margaret Ellen McNamara had died intestate and unmarried. The petitioner earned $80 per month and the deceased's estate was valued at $4,500.

The appeal was argued at Vancouver on the 9th of March, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Lewis, for appellant: Deceased's estate amounted to $4,533. The debts were $275 and by her will she left several specific bequests to three nieces, one nephew and strangers amounting in all to $510. Eight months after the marriage, the petitioner and deceased separated and under the separation agreement petitioner paid his wife $25 per month and he did this up to the time of her death. He also contributed $1,830 to her estate while separated from her. He has nothing except his salary of $80 per month and on the law he is entitled to the benefit of the Act: see *In re Lewis, Deceased* (1935), 49 B.C. 386, at pp. 390-1; *Walker* v. *McDermott,* [1931] S.C.R. 94, at p. 96; *Barker* v. *Westminster Trust Co.* (1941), 57 B.C. 21; *Allardice* v. *Allardice,* [1911] A.C. 730; *In re Gouge Estate* (1938), 52 B.C. 544.

Sullivan, K.C., for respondents: First, this is no proper case for the application of section 3 of the Act; secondly, section 4 of the Act should be applied owing to the conduct of the petitioner; thirdly, the effect of the separation agreement entered into when they separated eight months after they were married. The fact that the wife disinherited her husband in her will is sufficient ground to refuse the petition. There were several separations before the agreement was entered into: see *Barker* v. *Westminster Trust Co.* (1941), 57 B.C. 21; *In re Testator's Family Maintenance Act. In re Gill Estate,* [1941] 3 W.W.R. 888; *In re Fergie Estate* (1939), 54 B.C. 431; *In re Rattenbury Estate and Testator's Family Maintenance Act* (1936), 51 B.C. 321.

Lewis, replied.

Cur. adv. vult.

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IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND IN RE MCNAMARA ESTATE.

J. L. MCNAMARA *v.* HYDE ET AL.

13th April, 1943.

MCDONALD, C.J.B.C.: The appellant applied by petition to ROBERTSON, J. for an order that such provision should be made for him as the Court should think adequate, just and equitable in the circumstances, out of the estate of his deceased wife Margaret E. McNamara. The learned judge heard evidence and considered the matter carefully and so far as section 4 of the Act is concerned, found all the facts in favour of the petitioner.

This left it for him to consider whether the petitioner had made out any case for relief under the Act. He dismissed the petition, and as I read his oral reasons, this dismissal was based almost wholly upon the ground that the deceased had never done anything for the petitioner; that there is no suggestion that the petitioner requires aid at the present time; that there is no evidence that he is in bad health; that there is no suggestion that he cannot live on his salary of $80 a month as a laundryman and that he has ample means out of such salary to carry on with. Incidentally, it may be mentioned that the net salary of the petitioner is not $80 but about $68 per month. He has no other means.

I am entirely in agreement with the learned trial judge in his findings upon the facts. I think he was in a much better position to reach a conclusion on these matters than I am. I am further in agreement with the learned trial judge in his finding that the petitioner is not precluded from seeking relief by the terms of the separation agreement referred to in the proceedings. The learned judge really applied what may be called "the means test," as the main ground for his decision, though he did say the separation agreement was a matter for serious consideration. When, however, he holds, as I think rightly, that the agreement does not preclude the petitioner from success, I am unable to see just what weight he gave to it, or the basis on which it can be used to exclude the petitioner from the benefits bestowed by the Act.

I am, with respect, unable to agree with the learned judge's conclusion that for the reasons above stated the petitioner is not entitled to relief.

It ought not to be necessary (and I think it is inappropriate) at this stage of the history of this and similar legislation, for a

judge to express his own views as to the wisdom of such legislation, such views being sometimes expressed in the terms that "the Court is being called upon to make a new will for the deceased." For myself I am content to take the legislation as it reads and to accept those authorities which are binding upon me. The compelling authority in my opinion is *Walker* v. *McDermott*, [1931] S.C.R. 94, at p. 96, where Duff, J. (as he then was) stated the rules which we must apply. In my opinion the learned judge in the present case did not apply those rules, and his decision cannot stand.

As an indication of just how far the Courts will go in such cases, reference may be made to *Dillon* v. *Public Trustee of New Zealand*, [1941] 2 All E.R. 284, where the Judicial Committee reversed the Court of Appeal of New Zealand and allowed a widow's petition for "adequate provision for her maintenance and support," notwithstanding that the result of that decision obliged the executor of the estate to break a solemn contract made for good and valuable consideration by the testator sometime before his death. I am aware that this decision has been the subject of some severe criticism; nevertheless there it is, and so long as it stands no Court in the Empire need hesitate to go as far as it sees fit toward making provision for a testator's family under the legislation in question, provided, of course, that, so far at least as Canada is concerned, the rules laid down in *Walker* v. *McDermott, supra,* are observed.

Speaking in round figures, the estate amounts to some $4,000. Under the will the petitioner takes nothing. Various small specific legacies are bequeathed and the residue goes to certain named nieces and a grand-niece and grand-nephew residing abroad.

I would allow the appeal and make an order that the appellant be allowed $1,000, each and every legacy to abate proportionately, to provide for payment of same.

Costs of all parties here and below to be taxed as between solicitor and client and paid out of the estate.

MCQUARRIE, J.A. would allow the appeal.

SLOAN, J.A.: I agree with the Chief Justice.

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IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND IN RE MCNAMARA ESTATE.

J. L. MCNAMARA v. HYDE ET AL.

O'HALLORAN, J.A.: The claim of the appellant husband to his deceased wife's estate of some $4,200 was refused in the Court of first instance. Counsel for the appellant invoked *Walker* v. *McDermott,* [1931] S.C.R. 94 as interpreted in my judgment in *Barker* v. *Westminster Trust Co.* (1941), 57 B.C. 21, particularly at pp. 35-38. Counsel for the respondents replied that the principles there enunciated, when tested by the governing conditions existing in the *Barker* case, *vide* p. 39 *et seq.,* do not sanction the granting of equitable relief to the appellant husband in the present circumstances.

Counsel for the respondents urged that the wife's action in disinheriting her husband was justified in equity, and accordingly that the provisions in the will should not be disturbed. He relied on section 4 of the Testator's Family Maintenance Act, Cap. 285, R.S.B.C. 1936, reading:

> 4. The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this Act.

Two main reasons were advanced to support the propriety of the will.

First, it was urged and established the husband had been associating publicly with another and younger woman. It was not proven that association was improper. But there was evidence to justify the wife in believing it was, even if it were not actually so. The husband's conduct in that and other respects, coupled with accompanying neglect and lack of consideration for her, influenced her decision as the evidence shows, to obtain the separation agreement, and exclude him from any benefit under her will.

The wife was 68 and the husband 43 when they were married in 1934. After living together for a few months they separated, and some five or six months later they entered into the formal separation, which is the second ground upon which counsel for the respondents supports the will. The Court had the benefit of the evidence of the solicitor whom the wife instructed to prepare the separation agreement and the will. The agreement provided it should cease to be operative if the parties consented

thereafter to co-habit as man and wife. The learned judge has found on the evidence that they did not do so.

The separation agreement is not in itself a bar to the grant of relief under the Testator's Family Maintenance Act, and *vide Dillon* v. *Public Trustee of New Zealand,* [1941] 2 All E.R. 284 (P.C.). But it is germane to the question of equitable relief. It is proper to view it in the light of all surrounding circumstances. It is a factor which cannot be safely disregarded in the course of determining whether the wife has made "adequate, just and equitable" provision in the recited conditions, for a husband who is self-supporting and in no wise dependent upon her estate. Nor may a Court exercising equitable jurisdiction very well overlook the fact that the husband had freely accepted and signed the agreement which then deprived him of any share in the estate he now claims.

The reasoning which governed the views I expressed in the *Barker* case, *supra,* and in *In re Testator's Family Maintenance Act and Estate of Adrianne Dupaul, Deceased* (1941), 56 B.C. 532 applies equally here. But the special facts in the case now under review point to a different result in the application thereof.

I would dismiss the appeal.

FISHER, J.A.: I agree with the Chief Justice.

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

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

S. C.
1943
Feb. 25;
March 17.

IN RE ESTATE OF EVALINE A. C. RICHARDS, DECEASED. PITMAN BUSINESS COLLEGE LIMITED v. KIRK.

Company—Private—Managed and controlled by majority shareholder—Account in bank in name of majority shareholder—Whether held in trust for company — Majority shareholder dies — Will — Moneys so deposited bequeathed to another—Interpleader issue.

For sixteen years prior to her death in November, 1941, Evaline A. C. Richards was president, managing director and attorney in fact for the plaintiff company. She owned 229 shares of a total of 261 issued shares of the company and two other shareholders held an equal number of the remaining shares. The deceased carried on the business of the plaintiff without interference from the other two shareholders, who took no active part therein. She looked upon it as her company and the business of the company as her business and undoubtedly she contemplated, as indicated by her will, that the defendant would carry on the business after her death. The plaintiff is a private company with certain restrictions on the transfer of shares and after deceased's death, the remaining two shareholders asserted their rights to the pre-emption of her shares and denied deceased's right to dispose of them by will. Deceased's will recited: "I give, devise and bequeath unto James C. Kirk . . . , all my right, title and interest in and to my shares of stock in Pitman Business College Limited, a duly incorporated company with its registered office in the city of Vancouver, reposing in the said James C. Kirk full confidence and trust in his loyalty, integrity and ability, and in the firm hope that he will manage, guide and direct the said business college in conformity with the ideals which he knows I cherish with regard to the same. Also all money on deposit in my name in The Royal Bank of Canada at the corner of Granville and Hastings Streets in the city of Vancouver." On an interpleader issue to determine which of the parties to these proceedings is entitled to payment of the sum of $954.73 standing to the credit of the said deceased in the said The Royal Bank of Canada at the time of her death, the plaintiff claimed that the said moneys were held in trust by the deceased for the plaintiff and set aside in The Royal Bank of Canada for payment of income taxes of the plaintiff company. The defendant claimed as beneficiary under the will of said deceased.

Held, that on the evidence it was clear that these moneys deposited in The Royal Bank of Canada were the moneys of the plaintiff company held in trust by the deceased. The only inference that could be drawn from the evidence was that these moneys were paid to the deceased for one purpose and one purpose only, namely, to build up a fund which would be available to the plaintiff for the payment of income tax when required. She was trustee only of these moneys. They were not hers to deal with by her will as she presumed to do. The plaintiff is entitled to succeed.

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IN RE ESTATE OF EVALINE A. C. RICHARDS, DECEASED.

PITMAN BUSINESS COLLEGE LTD. v. KIRK

INTERPLEADER issue to determine whether Pitman Business College Limited or James C. Kirk is entitled to payment of the sum of $954.73 standing to the credit of Evaline A. C. Richards, deceased, in The Royal Bank of Canada, corner of Hastings and Granville Streets, Vancouver, at the time of her death. The facts are set out in the head-note and reasons for judgment. Heard by COADY, J. at Vancouver on the 25th of February, 1943.

Darling, K.C., for plaintiff.
G. Roy Long, for defendant.
McPhee, for estate of deceased.

Cur. adv. vult.

17th March, 1943.

COADY, J.: This is an interpleader issue to determine which of the parties to these proceedings is entitled to payment of the sum of $954.73 standing to the credit of the above-named deceased Evaline A. C. Richards in the Royal Bank of Canada at the time of her death. The said deceased died at the city of Vancouver on the 5th of November, 1941. The plaintiff claims that the said moneys were held in trust by the deceased for the plaintiff and set aside in The Royal Bank of Canada for payment of income taxes of the plaintiff company. The defendant claims as beneficiary under the will of the said deceased. The applicable portion of the will reads as follows:

I give, devise and bequeath unto James C. Kirk of Highland Valley, Escondido, California, all my right, title and interest in and to my shares of stock in Pitman Business College Limited, a duly incorporated company with its registered office in the city of Vancouver, Province of British Columbia, reposing in the said James C. Kirk full confidence and trust in his loyalty, integrity and ability, and in the firm hope that he will manage, guide and direct the said business college in conformity with the ideals which he knows I cherish with regard to the same. Also all moneys on deposit in my name in The Royal Bank of Canada at the corner of Granville and Hastings Streets in the city of Vancouver aforesaid. Both such bequests to be free and clear of all probate and succession duties.

The deceased held at the time of her death and for eighteen years prior thereto 229 shares out of a total of 261 issued shares in the plaintiff company. The remaining 42 shares were held by two other shareholders, each holding 21 shares. The deceased

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IN RE ESTATE OF EVALINE A. C. RICHARDS, DECEASED.

PITMAN BUSINESS COLLEGE LTD. v. KIRK

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was the president, managing director and attorney in fact for the plaintiff at the time of her death and for sixteen years prior thereto.

The deceased carried on the business of the plaintiff without interference from the other shareholders who, it would appear, took no active part herein. She looked upon it as her company, and the business of the company as her business, and undoubtedly she contemplated, as indicated by her will, that the defendant would carry on the business after her death. The plaintiff is a private company however, with certain restrictions on the transfer of shares, pursuant to which the remaining shareholders following the death of the deceased asserted their rights to the pre-emption of these shares and denied the deceased's right to dispose of them by will, and now claim to have acquired the said shares and to be the owners thereof. Whether or not they are so entitled is not, as stated by counsel, an issue in these proceedings.

On the evidence it seems clear to me that these moneys deposited in The Royal Bank of Canada were the moneys of the plaintiff company held in trust by the deceased. Without dealing with the evidence in detail this conclusion, it appears to me, follows logically from the following facts which in my opinion the evidence establishes:

(a) Cheques were drawn on the plaintiff's account in the Canadian Bank of Commerce from time to time made out and signed by the deceased on behalf of the plaintiff, payable to cash or to the deceased, and for the purpose, as declared by the deceased, of creating a reserve for payment of income taxes of the plaintiff. (b) The deceased advised the book-keeper of the plaintiff that the said moneys would be deposited by her in an account in The Royal Bank of Canada, and the book-keeper opened up in the ledger a tax-savings account dealing with these moneys. The deceased knew of this account. (c) The notations made by the deceased on the cheque stubs indicate the purpose for which the moneys were drawn. These notations are "Reserve for taxes" or "Reserve" and the cheques themselves which were endorsed by the deceased also bear similar endorsements. (d) The income-tax statements of the plaintiff signed by the deceased, and which the book-keeper says were checked carefully

by the deceased, show this reserve for taxes in The Royal Bank of Canada. (e) Some of the deposits in The Royal Bank account were made on dates and in amounts corresponding to the dates and amounts of cheques issued by the plaintiff for the purpose aforesaid. (f) The notation "Reserve" appears in the deceased's handwriting in the deceased's Bank of Montreal pass-book opposite a debit of $350 and a deposit by cheque of a like amount was made two days prior thereto in The Royal Bank of Canada account. (g) The deceased enquired from time to time of the book-keeper as to how much money ought to be in the reserve account and she was advised by the book-keeper as to this by reference to the account as appearing in the company's ledger. No moneys were ever drawn by her from The Royal Bank account after the time she designated this account for the purpose aforesaid.

The clear inference, if not the only inference that can be drawn from the foregoing and other evidence is that these moneys were paid to the deceased for one purpose and one purpose only, namely, to build up a fund that would be available to the plaintiff for the payment of income tax when required. She could not, it appears to me, in view of this evidence, successfully contend that the moneys were not those of the plaintiff.

This account in The Royal Bank was in the name of the deceased, not in the plaintiff's name. If the money had been deposited in the plaintiff's name there would be no necessity for her to have mentioned it in the will. But as the account stood in her own name, and as she expected the defendant to succeed her in carrying on the business of the plaintiff company it would appear a reasonable inference from the evidence that she left the money to the defendant by her will in order that it might be available for the purpose designated and would thus assist him in the carrying on of the business of the plaintiff. The defendant himself to some extent confirms this in his examination for discovery:

I mean frankly you wouldn't take it that she intended that as a gift to you apart from your managing of the college, do you? Oh, not necessarily.

How do you mean, not necessarily? It was put there expressly for me when I would take over the college.

For the purpose—— That is all I can say about it.

I am going to ask you to say more. For the purpose of assisting you to

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Coady, J.

carry on the college? Yes, to assist me if I needed it, surely. That would assist.

From your conversations it was intended that money should be used by you for the purpose of assisting in carrying on the work of the college; isn't that so? Yes.

The cheques issued by the plaintiff were not, it is true, deposited in The Royal Bank of Canada but were either deposited in the deceased's personal account in the Bank of Montreal or cashed by her at that bank, and deposits were made by the deceased in The Royal Bank account from time to time chiefly in cash except as to the last three deposits which were made by cheque, and a reasonable inference is that these cheques so deposited were drawn on her Bank of Montreal account. This practice which she thus adopted in dealing with the moneys does not in any way defeat the claim of the plaintiff when it is quite clear that this account is the one designated by her as the account where the moneys were to be kept. It is trite law that if you can ear-mark a property you can follow it. That the plaintiff has in my opinion succeeded in doing here.

Counsel for the defendant submits, as I understand, that if the deceased did declare an intention to use the money to pay income taxes this did not constitute a declaration of trust but was only an expression of an intention on her part, and that she was at liberty to change her mind, which she did, and could treat the money as her own and deal with it as she saw fit. It appears to me on the evidence here that I cannot give effect to that submission. The money was paid to the deceased by the company for a specific purpose. She was trustee only of these moneys. They were not hers to deal with by her will as she presumed to do. The plaintiff is therefore entitled to succeed in this issue. Costs will follow the event.

Judgment for plaintiff.

EX PARTE CIMINELLI.

S. C.
1943
April 2, 8.

Criminal law—Charge of stealing a pig of the value of $22—Consent to be tried by magistrate—Plea of guilty—Sentence of three months and fine of $100—Habeas corpus—Criminal Code, Secs. 369, 773 (a), 774, 778 and 1035.

Accused was tried by a magistrate on a charge "for that he on the 7th of January, 1943, in the municipality of Richmond in the county of Vancouver unlawfully did steal certain cattle, to wit, one pig, of the value of $22." Accused consented to be tried by the magistrate, pleaded guilty and was convicted and sentenced to three months' imprisonment with hard labour and to forfeit and pay $100 and in default of payment, three months' additional imprisonment. On motion for a writ of *habeas corpus*, counsel for accused contended that by reason of the reference in the warrant of commitment to "the value of $22" and to the fact that the warrant recites that the accused consented to be tried by the magistrate, that the charge is laid and the magistrate dealt with the charge as being an offence under section 773 (*a*) of the Code. He submitted that the penalty for an offence under that section is limited by section 778 to imprisonment with or without hard labour for any term not exceeding six months. Further, that upon a charge laid under section 773 (*a*), resort may not be had to section 1035 in order to give jurisdiction for the imposition of a fine in addition to imprisonment.

Held, that accused was charged with theft of certain cattle, to wit, one pig, of the value of $22. Section 369 of the Code provides that "Everyone is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle." The charge was properly laid under section 369. The magistrate had jurisdiction with the consent of the accused, which was given, to try such an offence by virtue of section 774. The charge could not be said of necessity to have been laid under section 773 (*a*). The words of the information relating to value were merely descriptive of the pig, and did not bring the charge under section 773 (*a*) to the exclusion of section 369. The motion was dismissed.

MOTION for a writ of *habeas corpus*. The facts are set out in the head-note and reasons for judgment. Heard by BIRD, J. at Vancouver on the 2nd of April, 1943.

L. H. Jackson, for the motion.
O'Brian, K.C., for the Crown.

Cur. adv. vult.

8th April, 1943.

BIRD, J.: The accused moves by way of motion for a writ of *habeas corpus* to quash the conviction herein upon the ground

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EX PARTE CIMINELLI

Bird, J.

that the magistrate has imposed a penalty in excess of that authorized by Code section 778.

The accused was tried by O. E. Darling, Esquire, a police magistrate in and for the municipality of Richmond on the charge

for that he the said Samuel Ciminelli on or about the 7th day of January, A.D. 1943, at the municipality of Richmond in the county of Vancouver unlawfully did steal certain cattle, to wit, one pig, of the value of twenty-two dollars, the property of Lew Bak and Wong Ming contrary to the form of the statute in such case made and provided.

The accused entered a plea of guilty, was convicted and sentenced to three months' imprisonment with hard labour and to forfeit and pay $100 and in default of payment thereof forthwith three months' additional imprisonment with hard labour to begin at the expiration of the previous three months.

Counsel for the prisoner contends that by reason of the reference in the warrant of commitment to "the value of $22" and to the fact that the warrant recites that the accused consented to be tried by the magistrate that the charge is laid and the magistrate dealt with the charge as being an offence under subsection (*a*) of section 773 of the Code. He submits that the penalty for an offence under that section is limited by section 778 to imprisonment with or without hard labour for any term not exceeding six months. Further that upon a charge laid under section 773 (*a*) resort may not be had to section 1035 in order to give jurisdiction for the imposition of a fine, in addition to imprisonment.

Counsel for the Crown, however, submits that the offence recited in the warrant of commitment is one for which the accused could properly have been convicted: (1) Of stealing cattle under Code section 369, pig being included in the term "cattle" under the definition contained in section 2, subsection (5) of the Code; (2) also of stealing property under the value of $25 under Code section 773 (*a*). Further, that police magistrate Darling had jurisdiction to try an offence under Code section 369 with the consent of the accused by virtue of the jurisdiction conferred upon a police magistrate under Code section 774, and that the magistrate dealt with the offence as one falling within section 369 and imposed a sentence of imprisonment and fine which he had power to do by virtue of sections 369 and 1035.

It is common ground that magistrate Darling, being a police magistrate, had jurisdiction (the accused having consented to be tried by him) under subsection 1 (*b*) and subsection 2 of section 774, which extend to any indictable offence (except homicide and offences under section 583.

The accused is charged with theft of certain cattle, to wit, one pig of the value of $22. Code section 369 provides that:

> Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle.

In my view the charge is properly laid under section 369. The magistrate had jurisdiction, with the consent of the accused which was given, to try such an offence by virtue of section 774.

I do not consider that the charge can be said of necessity to have been laid under Code section 773 (*a*). The words of the information relating to value are, in my opinion, merely descriptive of the pig, and do not bring the charge under section 773 (*a*) to the exclusion of section 369.

Consequently it does not become necessary for me to deal with the very nice question raised by counsel for the prisoner as to the power of a police magistrate acting under section 773 (*a*) alone or under section 774 in respect of an offence under section 773 (*a*) to impose a fine under section 1035 in addition to imprisonment under section 778.

A question arose in the course of the argument as to the basis of the decision of SIDNEY SMITH, J. delivered March 22nd, 1943, in *Rex* v. *Henry,* in which an order to quash the conviction against Henry was made.

It appears that Henry was charged under a separate information with the same offence as is now before me in respect of Ciminelli, and that the same penalty was imposed. I learned upon enquiry from my brother SMITH that the order made by him in the *Henry* case was not under section 369 and was in the nature of a consent order made after SIDNEY SMITH, J. had expressed doubt. The order to quash was made after the Crown had agreed, in view of the circumstances of the case, that such an order should go.

Consequently the order in the *Henry* case does not affect my consideration of this motion.

I therefore dismiss the motion for the reasons given.

Motion dismissed.

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Mar. 11, 12, 15, 16, 17, 18, 20.

STEPHEN *ET AL.* v. STEWART *ET AL.*

Trade-unions—Change of name and constitution of parent union—Status of local union not affected thereby—Suspension of local union by investigating committee—Invalid—Meetings of local union in February, 1943, invalid for non-compliance with constitution and by-laws—Elections held thereat invalid.

At the tenth regular convention of the All-Canadian Congress of Labour a new constitution was adopted and the name changed to the Canadian Congress of Labour.

Held, that this did not change the *status* of the local union in question herein which had been chartered previous to the change.

The parent body appointed three of its officers a committee to investigate the disputes amongst the local union's membership and after holding several meetings, the investigating committee purported to suspend the charter of the local union.

Held, that the suspension was illegal and void for lack of jurisdiction in that the investigating committee was not properly constituted for that purpose and moreover it failed to comply with the provisions of article 3, section 9, of the constitution of the Canadian Congress of Labour.

Held, further, that the meetings of the local union held in February, 1943, were illegal and of no effect in that they did not comply with the provisions of article 14, section 9 of the by-laws of the constitution nor with the provisions of article 14, section 3 of said by-laws. It follows that the elections held at such meetings and all resolutions passed were null and void and that the defendants are restrained from entering into office. The plaintiffs are entitled to a return of the equipment and to the accounting asked for.

ACTION by Messrs. Stephen, Bradley and Thompson on behalf of themselves and other members of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, for a declaration that the election of officers of the said union held in February, 1943, was illegal and void, for a return of equipment and for an accounting of union moneys allegedly collected by the defendants. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 11th and 12th and the 15th to the 18th of March, 1943.

Branca, for plaintiffs.

Tysoe, and *Stanton*, for all defendants, except Forster.

S. W. W. Smith, for defendant Forster.

Cur. adv. vult.

20th March, 1943.

SIDNEY SMITH, J.: The Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1 (called for brevity "the union"), was chartered by the All-Canadian Congress of Labour in May, 1928. It was then a small body of some 200 men with small funds. It operated substantially as such until the outbreak of the present war when its membership increased with increasing rapidity until it now numbers some 13,000 members with funds of some $30,000.

At the tenth regular convention of the All-Canadian Congress of Labour a new constitution was adopted and the name changed to the Canadian Congress of Labour. It was strongly urged upon me that the *status* of the local union was thereby changed in that it no longer continued a chartered union but became merely an affiliated union. A consideration of Exhibit 58 (being excerpts from the report of the proceedings of the said convention) together with the former and present constitutions, convinces me that this clearly is not so. The parent body did not dissolve. It merely amended its constitution for the purpose of widening the scope of its organization. I accordingly find that the union is now and has been from its inception a local union chartered by the Canadian Congress of Labour (formerly known as the All-Canadian Congress of Labour).

In December, 1942, the following were the officers of the union, *viz.*: President, Matthew Mills; Vice-President, Lloyd Whalen; Secretary-Treasurer, the plaintiff Stephen; Member of Executive, the plaintiff Bradley; Member of Executive, Edgar Simpson.

Elections for the year 1943 were held in the month of December, 1942. Those declared to have been elected at that time were as follow: President, the defendant Stewart; Vice-President, Lloyd Whalen; Secretary-Treasurer, Malcolm McLeod; Member of Executive, Jack Wood; Member of Executive, Edgar Simpson.

By consent judgment of this Court dated 2nd February, 1943, these elections were declared null and void.

On account of various disputes amongst the members of the union the Canadian Congress of Labour on 28th December, 1942,

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appointed its vice-president and regional director Alexander A. McAuslane administrator of the union. He, in his turn, appointed an administration board which, however, held one meeting only. By another consent judgment of this Court, also dated 2nd February, 1943, the said McAuslane and the said administration board were held to have been unlawfully appointed, and any and all acts done by them were declared null and void.

In January the Canadian Congress of Labour appointed three of its officers a committee for the purpose of investigating the said disputes amongst the union membership. Two members of this committee came to Vancouver, held several meetings, heard evidence, and on the 25th of January, 1943, purported to suspend the charter of the union. I now find that the purported suspension was illegal and void for lack of jurisdiction in that the investigating committee was not properly constituted for that purpose, and that moreover it failed to comply with the provisions of article 3, section 9, of the constitution of the Canadian Congress of Labour. No question was raised as to the ability and good faith of the two members of the committee.

In February of this year a further election was held which resulted in the election of the following officers of the union: President, the defendant Stewart; Vice-President, the defendant Cardwell; Secretary-Treasurer, the defendant MacKenzie; Member of the Executive, the defendant Lucas; Member of the Executive, the defendant Simpson.

The plaintiffs Stephen, Bradley and Thompson now bring this action for themselves and other members of the union for a declaration that this election was also illegal and void, for a return of equipment, and for an accounting of union moneys allegedly collected by the defendants.

I am anxious not to say anything in this judgment which might tend in any way to widen the disputes amongst the members of this union. But I think it right to state that I accept the evidence of the plaintiffs Stephen, Bradley and Thompson, and of their witnesses, Matthew Mills, Liston Campbell, Reginald Johnston, William Robertson and Lloyd Whalen. I have no doubt that these are all truthful, worthy and honourable men and that they

were actuated solely by motives looking to the welfare of the union and their fellow members. I formed the same opinion of most of the defendants' witnesses, particularly of those belonging to the group known as the "oldtimers" of the union.

I find that the meetings of 12th, 22nd, 23rd and 24th of February, 1943, were illegal and of no effect in that they did not comply with the provisions of article 14, section 9, of the by-laws in the constitution nor with the provisions of article 14, section 3, of the said by-laws.

It follows that the elections held at such meetings and all resolutions passed are null and void, and that the defendants are restrained from entering into office as a result of the said February elections.

The plaintiffs are entitled to a return of the equipment and to the accounting asked for.

In the special and unusual circumstances of this case there will be no order as to costs.

My duty is to find the facts and declare the law. It is no part of my task to define the policy of the union or to state what course in my opinion should now be followed. But perhaps I may be permitted to remind the members that the future of this union is in their own hands and that they must themselves work out its salvation. Another election should be held at the earliest possible moment. They should, each of them, take an immediate interest in the holding of this election and should elect officers who beyond all doubt represent the majority feeling of the union and enjoy its confidence. It is only thus that any democratic organization can successfully function.

To this end I shall be glad to hear counsel on any further directory order they think the Court might usefully make within its jurisdiction.

Judgment for plaintiffs.

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Mar. 2, 3, 4;
April 13.

JOHNSON AND STOCKDILL v. GROSSMAN.

Contract—Architects—Plans and specifications—Duty to ascertain elevation of street sewers—Drainage pipes above floor of basement in order to carry off sewage by gravity—Effect of—City building by-law—Zoning by-law.

The plaintiffs, architects, undertook to make plans, prepare specifications and supervise the construction of an apartment-building for the defendant and brought action to recover the balance of their fees based on a percentage of cost. They recovered judgment for the amount claimed, but on appeal, it was held that the plaintiffs had neglected to ascertain the elevation of the street sewer with relation to the floor of the basement and finding, after partial completion, that the street sewer was higher than the floor of the basement, the sewer pipes were of necessity carried along the walls and ceilings of the basement and garage to attain elevation for carrying off the sewage by gravity. This prevented proper plumbing in the janitor's quarters in the main basement and made it impossible to convert the garage into apartments as intimated by the defendant to the plaintiffs before the contract was entered into. The appeal was allowed and the matter referred to the registrar to ascertain the damages. The registrar reported that $250 be allowed as the cost of making right the janitor's quarters and that $1,633 be the cost of converting the garage into living-apartments, but that this sum should not be allowed on the grounds: (1) That the premises so converted would constitute a "basement" within the meaning of the city Building By-law and (2) that under the city Zoning By-law, 1929, the change is not permissible by reason of the fact that the side boundaries of the building are not more than 15 feet from the boundaries of the lot on which it stands. On motion to the Court of Appeal that the certificate of the registrar be varied by awarding the appellant $1,633 in addition to the sum of $250 awarded:—

Held, varying the certificate of the registrar (FISHER, J.A. dissenting), that the garage space is a self-contained unit separated from the main building by a fire-wall and is not more than one foot below the grade of the adjoining ground. It is not a basement and constitutes no prohibition against placing apartments therein. Converting the garage under the two storeys into apartments does not make a three-storey building and section 804 of the building by-law does not apply. Further, having found that this building is not and will not be a three-storey apartment-house when converted, the Zoning By-law has no application. Judgment will be entered on the counterclaim for the two sums, *viz.*, $250 and $1,633.

APPEAL by way of motion by defendant that the certificate of the registrar herein of the 21st of January, 1943, be varied by awarding the appellant the sum of $1,633 in addition to the sum

of $250 awarded the appellant by the registrar. The plaintiffs, a firm of architects, undertook to make plans and prepare specifications for and supervise the construction of an apartment-building for the defendant. Their fees were based on a percentage of cost, amounting to $1,481.14 of which $700 was paid when construction commenced. On suit to recover the balance of $781.14, the defence was that the services rendered by the plaintiffs were negligently and unskilfully performed and were worth less than the $700 already paid, and he counterclaimed for damages in that the plans and specifications provided for a basement in the apartments below the level of the available street sewers which the plaintiffs, by the exercise of care, should have known, the result being that during construction it became necessary to alter the plans and the sewer pipes were of necessity carried along the walls and ceilings of the basement and the garage of the apartments instead of being buried under the floor and were not connected to the sewer mains in the most direct manner, and it became impossible to instal proper plumbing in the janitor's quarters in the basement, the result being increase in cost and decrease in value of the apartment. The defendant had advised the plaintiffs before the commencement of the building that he might in the future convert the garage into one or more apartments, the result being that it is impossible to convert the garage into apartments, as the sewage pipes have been carried across the ceiling of the garage. The learned trial judge gave judgment for plaintiffs and dismissed the counterclaim. On appeal, it was held that it was the duty of the plaintiffs to definitely ascertain not only by making enquiries, but by actual examination on the site the exact position and level of the street sewer with which connection had to be made and to see that there was sufficient fall from the floor of the basement to the street sewer to carry away by gravity the sewage into the street sewer. The sewer pipes, as installed, were unsightly and not in accord with what a reasonable owner would require. The appeal was allowed and a reference made to the registrar to ascertain the amount of the damages. He found first, that the sum of $250 be allowed as the cost of making right the janitor's quarters in the basement of the main building; from this no appeal was taken; secondly, that the sum of $1,633 be

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the cost of converting the garage, forming part of the building, into proper living-apartments, but he refused to allow this sum on two grounds: (1) That the premises so converted would constitute a "basement" within the meaning of the city building by-laws and the by-laws provide that no apartment or suite shall be placed in a basement; (2) that by installing suites, it would convert the garage building into a three-storey apartment-house and the Zoning By-law, 1929, provides that every three-storey apartment-house shall be not less than 15 feet from the side boundaries of the lot, and in this case, the building on both sides is less than 15 feet from the boundary.

The appeal was argued at Vancouver on the 2nd, 3rd and 4th of March, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Davey, for appellant: The registrar allowed nothing for the cost of converting the floor of the garage into two suites. The cost was fixed at $1,633, but he held that under the Building By-law and Zoning By-law, we could not make the floor of the garage into suites. The building inspector said he saw no reason why conversion should not have been allowed. It is not a basement within the meaning of the by-law: see *Taranaki Electric-Power Board* v. *New Plymouth (Borough),* [1933] 3 W.W.R. 126. The space from the bottom of the garage up is not a basement. The garage is a self-contained unit and is separated from the basement of the main building by a thick dividing wall. From the garage floor up, it does not exceed two and one-half storeys. The first storey is the storey above the basement. On the question of damages see *Chaplin* v. *Hicks,* [1911] 2 K.B. 786, at pp. 792 and 798; *Kinkel et al.* v. *Hyman,* [1939] S.C.R. 364, at pp. 379 and 383. The injured party is entitled to all reasonable presumptions in his favour: see *Wilson* v. *Northampton and Banbury Junction Ry. Co.* (1874), 9 Chy. App. 279, at pp. 285-6; *Silver* v. *Cummins* (1940), 55 B.C. 408, at p. 418. There is presumption in our favour: see *Morse* v. *Mac & Mac Cedar Co.* (1918), 25 B.C. 417, at p. 426. On the measure of damages see *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167, at p. 178.

Foot, for respondents: This is not a proper time for this proposed change to be considered. Originally this apartment-house

was to be constructed for eight suites for which a garage was to be provided. There never was any intention of making this conversion of the garage into suites.

Davey, replied.

Cur. adv. vult.

13th April, 1943.

MCDONALD, C.J.B.C.: By our former judgment in this case we reversed the trial judge in so far as he refused to allow any damages in respect of the defendant's counterclaim, and we referred the matter to the registrar to assess damages. As the matter now stands only two items of damage arise for consideration. The first is an item of $250 which the registrar allowed as the cost of making right the janitor's quarters. As to this amount no appeal is taken by either side.

The second item involves an amount of $1,633, which the registrar finds would be the cost of converting the garage, forming part of the building, into living-apartments. The registrar refused to allow this amount upon two grounds, *viz.*, that the premises so converted would constitute a "basement" within the meaning of the city Building By-law, and secondly that under the city Zoning By-law, 1929, the change was not permissible, by reason of the fact that the boundaries of the building are not more than 15 feet from the boundaries of the lot on which it stands.

A basement under the city Building By-law is defined as

> a habitable space between two floors, the lower floor of which is placed more than one foot, but less than five feet below the grade of the adjoining ground.

In my opinion the learned registrar erred in holding, on the evidence, that the habitable space intended to be created by the alterations will be more than one foot below the grade of the adjoining ground. The portion of the building now used as a garage and intended to be converted is a self-contained unit separated from the forward part of the building by a fire-wall. The only spot at which this unit is more than one foot below the level of the adjoining ground is at the north-east corner, where an artificial fill was made during the construction of the building. The plan for conversion involves the removal of this fill.

If the habitable space in question is not a basement then section 3904 of the Building By-law constitutes no prohibition against placing apartments or suites therein.

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The registrar further held that because there is now a first storey and a second storey, the creation of an apartment space below would create three storeys; that the defendant would then have a three-storey building of Class "D" construction, and that the construction of such a building is prohibited by section 804 of the Building By-law. I cannot agree. I can find nothing in the Building By-law which justifies this contention. Reading the various sections of the by-law which are applicable, I think it is clear that in counting the storeys the basement is not included. In fact this is the only reasonable construction to give to section 804, the obvious purpose of which is to prevent buildings of Class "D" construction from being overloaded with weight above the sub-structure. In expressing this view I am assuming, though not finding, that this building is of Class "D" construction. I think the better view is that it is a combination of Class "C" and Class "D" construction.

Coming to the Zoning By-law as amended by By-law No. 2544, we find that in the case of every three-storey apartment-house the side building lines thereof are required by section 3 (r) to be not less than 15 feet from the side boundary-lines of the lot. Admittedly the side lines of the building in question are less than 15 feet from the side boundary-lines. Since I am of opinion, as stated above, that this is not and will not be a three-storey apartment-house when converted, this prohibition has no application.

In my opinion there is no reason in law why the suggested conversion should not be made and hence the learned registrar was wrong in deciding that because the suggested conversion was illegal the defendant suffered no damage.

Being of the above opinion it is not necessary that I should consider the very interesting question carefully developed by counsel, whether an action would still lie, notwithstanding the suggested prohibitions, because of the fact that a discretion to relax the rules contained in the by-laws lies in the building inspector and the appeal boards, and that we should assume that such discretion would not be exercised capriciously or arbitrarily, but reasonably. It may not be out of place, however, to say that as at present advised I think there is much to be said in favour of the argument.

For the above reasons I would allow the appeal and direct that judgment be entered on the counterclaim for the two sums, *viz.*, $250 and $1,633.

Since the plaintiffs recovered only $781.14 and the defendant raised the matters now being discussed, both by way of defence and by counterclaim, and has now recovered $1,883 the defendant (the present appellant) should have his costs of this appeal and of the trial and of the reference.

MCQUARRIE, J.A. would allow the appeal.

SLOAN, J.A.: I agree with my brothers that the learned registrar erred in his construction of the relevant by-laws and I would in consequence and with deference allow the appeal from his assessment of damage.

O'HALLORAN, J.A.: On 19th November last this Court held the respondent architects had failed in their duty to carry out the appellant's requirements in the plan and construction of the Wavell Apartments in Victoria. The Court was unanimously of opinion the learned trial judge had allowed himself to be misled in the interpretation he placed upon the evidence, and also that he had not been guided by the appropriate principles of law extracted from such decisions as *Duncan* v. *Blundell* (1820), 3 Stark. 6; *Moneypenny* v. *Hartland* (1824), 1 Car. & P. 352; *Columbus Company* v. *Clowes,* [1903] 1 K.B. 244; *Smith* v. *Brunswick Balke Collender Co.* (1917), 25 B.C. 37; and *Sansan Floor Co.* v. *Forst's Ltd.* (1942), 57 B.C. 222 and cases there cited.

Our decision involved a finding the apartment-building ought to have been so constructed as to permit proper sewer connection with the main street sewer. Instead the ground floor of the building was placed below the governing level of that main street sewer. In the result (a) the toilet and shower in the front part of the ground floor did not provide sufficient head room and (b) the connecting sewer pipes, instead of being buried under the ground floor, were installed above the level of the ground floor in that portion thereof used as a garage to accommodate six motor cars. The appellant's counterclaim for damages was then referred to the registrar of this Court for assessment.

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The learned registrar allowed the appellant $250 damages under heading (a), but disallowed him any claim under heading (b). We are now concerned only with the latter heading on the present motion to vary the registrar's certificate. The appellant founded his claim for damages under heading (b) upon the submission that the respondents' negligence to which I have referred, prevents him from converting the garage into two apartment suites, unless he spends a further sum of $1,633 to instal a sewage tank and automatic force pump to carry off the sewage therefrom to the main connecting street sewer.

The learned registrar refused this claim for damages because he did not think that Building By-law, 1938, By-law No. 2800 of the city of Victoria, permitted the conversion of the garage into apartment suites. Several reasons were then advanced and found to support that conclusion. They were fully canvassed by counsel before this Court. It seems to me, however, that the core of the matter lies in whether or not that part of the ground floor described as a garage, is a "basement" within the meaning of the city of Victoria Building By-law. The decision of this case turns upon the true interpretation of the term "basement" as employed in that by-law.

The garage portion of the ground floor area is separated structurally by a reinforced concrete wall eight inches in thickness from the other portion of the ground floor area which contains the janitor's living-quarters, laundry, furnace room, etc. D. K. Kennedy, the city building inspector, conceded that the garage is structurally a "self-contained unit." That plainly implies the garage is not a physical part of the basement proper, although in the plan of the building it appears as part of the ground-floor area which also contains the basement proper. Indeed one would think it strange if premises used to house six motor-cars were not structurally divided from, and clearly separated from the janitor's living-quarters in the basement proper.

The question for our decision is, does the city Building By-law permit the garage portion to be treated as separate from that part of the ground-floor area which contains the janitor's quarters, etc. The latter portion seems to be a "basement" within the meaning of the by-law. Putting it another way, ought all the

ground-floor area of the building to be regarded as "basement," or in the special conditions existing, may it be divided into two, one of which is admittedly a "basement" while the other is not? In the Building By-law "cellar" is defined as the space between two floors the lower of which is placed more than five feet below the grade of the adjoining ground. "Basement" as there defined shall mean a habitable space between two floors, the lower floor of which is placed more than one foot, but less than five feet below the grade of the adjoining ground.

From Exhibit "H" it is plain that on the east, south and west sides, the garage portion is nowhere more than one foot below the grade of the adjoining ground, except at one place in the north-east corner where there is at present a "fill in" of soil for a specific purpose, but which it is planned to remove if the conversion takes place. On the north side lies the eight-inch concrete wall dividing the garage from the janitor's quarters and furnace room or basement proper. The word "adjoining" used in the by-law definition of "basement" lends itself to greater precision in meaning than the word "adjacent" which is not used; and *vide* the decision of the Judicial Committee in *Taranaki Electric-Power Board* v. *New Plymouth (Borough)*, [1933] 3 W.W.R. 126.

If the garage portion may be regarded by itself as separate from the basement proper I am of the opinion it is not within the by-law definition of "basement." I am also of opinion that it ought to be regarded separately from the basement proper. The site of the building does not lie in the usual type of residential or semi-residential area. The front of the building faces a marine drive known as Hollywood Crescent, while the back faces the shore-line and overlooks the Strait of Juan de Fuca. There is a pronounced dip in the grade of the property from the street-line to the shore-line. The ground floor of the building is less than one foot below the adjoining ground where it faces the sea, but is nearly six feet below adjoining ground where it faces the street.

The nature of the land is such that the portion of the ground-floor area facing the street may be a "basement" within the sense of the by-law, while that portion which faces the sea is not so at all, but may provide quite attractive living-quarters. In the design of the building advantage was taken of the natural advan-

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tages of the site in that respect. It has virtually divided the ground-floor area into two parts, one forming the real basement and used as such, the other containing a six-car garage clearly separated from the basement proper and usable as if it were on another floor.

It is to be noted also that the portion of the building resting upon the garage is smaller in area than the portion facing the street which rests upon the basement proper. With this picture of the physical characteristics of the land and the building as constructed, we may turn back to the definition of "basement" in the building by-law with a better appreciation of the problem for decision. The definition confines itself to "a habitable space between two floors." It does not say nor does it imply that all the habitable space between two floors is included. If it did, division of the ground floor area as sought by the appellant would be negatived. But by using the apt language it does, *viz.*, "a habitable space between two floors," the by-law definition pointedly refrains from including all the habitable space between two floors. By necessary implication it permits a portion less than the whole of the habitable space, to come within the definition of "basement"

If some portion of the habitable space less than the whole, may be a "basement" within the meaning of the by-law, it necessarily follows that the remaining portion of the habitable space may not be a "basement" within the meaning of the by-law. Reading the definition further as above cited, it provides "the lower floor of which is placed more than one foot . . . below the grade of the adjoining ground." That necessarily must refer to the lower floor of "a habitable space" as above interpreted, and not to the lower floor of all the habitable space. It seems conclusive that the language defining "basement" in the by-law, when read in its ordinary and grammatical sense and *vide Victoria City (Corporation)* v. *Vancouver (Bishop)* (1921), 90 L.J.P.C. 213, at p. 215, leaves it plain for decision, that one part of a habitable ground-floor area may be a "basement" within the sense of the by-law, while another part of that ground-floor area is not a basement in that sense, and consequently, is excluded from the restrictions applicable to a "basement."

The conclusion is indicated that the garage portion of the ground-floor area is not a "basement" within the meaning of the city Building By-law. Consequently its conversion into apartment suites may not be denied upon that ground. But it is observed the learned registrar also concluded that the conversion was barred in any event by section 804 of the city Building By-law, because he was of the opinion the building would then have three storeys. But that assumes the by-law contemplates no distinction between superimposing a third floor upon a two-storey building, and the conversion into apartments of an existing garage beneath a two-storey building. Section 804 reads:

> Class "D" buildings shall not exceed forty feet in height nor more than two and one half storeys, or three storeys when the area of the third floor does not exceed one half of the area of the first floor.

Its terms are pointedly directed to (a) height of the building and (b) added weight and strain of a third storey superimposed upon two existing storeys. Neither of those dominant elements affects the conversion now planned by the appellant and section 804 is therefore excluded. The weight of a third storey naturally requires more substantial construction to support it. That such is within the purpose of the section is made clear by its allowance of a third storey when its area does not exceed one half the area of the first floor. Furthermore, the building has now in fact three floors, although in the terms used in the by-law it is considered to be a "two-storey" building.

Changing the garage into apartments will not add to the height of the building, nor will it add more weight to be borne by the existing construction. If the present construction is now substantial enough to carry the existing two storeys, the conversion of the garage beneath them into apartments will not make it less so. One would think it would tend to make it more so, if anything. In my view neither section 804 of the Building By-law nor the Zoning By-law to which we were referred, have any application to the present circumstances, in so far as conversion of the garage into apartments is concerned. As stated at the outset the decision rests upon the interpretation of the Building By-law definition of "basement."

The legal principles which dictate the foregoing conclusions are supported by authority. If we examine a test approved by

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Lord Blackburn in *River Weir Commissioners* v. *Adamson* (1877), 47 L.J.Q.B. 193, at p. 203 (H.L.) and ask ourselves what was the mischief and defect which the Building By-law attempts to cure and for which the common law failed to provide, the answer evidently is, living-quarters substantially below the level of adjoining ground with consequent deprivation of normal air and sunlight. But the garage portion of the ground-floor area is not subject to that "mischief and defect." And there is no legitimate reason to infer the by-law was directed against living-quarters not subject to that defect.

It is an accepted rule of interpretation that the language of an enactment which derogates from the common law, as this does, ought to be construed strictly. The by-law does not permit implications which are not supported by unequivocal language, or clearly dictated by a reading of the whole of the context. Furthermore, the reasonableness or unreasonableness of the provisions of the by-law may be legitimately regarded for the purpose of interpreting the applicable meaning of the terms it employs and defines, *vide Victoria City (Corporation)* v. *Vancouver (Bishop), supra,* at p. 216. The evidence reveals that the interpretation of the term "basement" now adopted is reasonable in the conditions of its application. That is a factor which compels consideration, in the absence of unequivocal language supporting a contrary and more rigid interpretation.

In the conditions existing it can hardly be contended that a ban was intended against apartment suites in a ground-floor area facing the sea, provided they are not more than one foot below the level of adjoining ground. Advantages in access, fire protection and safety, sea view, etc., might lead many people to prefer such apartments. As I read the record, no convincing ground has been advanced to support the rigid interpretation favoured by the respondent to deny the division of the ground-floor area already virtually accomplished by the plan and construction of the building assisted by the nature of the site.

As already pointed out, a grammatical interpretation of the words used in the Building By-law definition of "basement" does not permit the more rigid interpretation. Alternatively, if the Court is asked to choose a rigid interpretation when a more

flexible and grammatical sense of the words used, is equally open and more appropriate to the conditions of its application, some more convincing reason for doing so should appear than the mere submission that the definitive words are capable of the rigid interpretation.

Finally in any event, I think this is a case where the smooth and workable operation of the Building By-law calls for the application of the principle enunciated in *Stradling* v. *Morgan* (1560), 1 Plowd. 199; 75 E.R. 305, at pp. 311 and 315. The definition of "basement" ought to be construed in the prevailing circumstances, according to its "cause and necessity" and according to that which is "consonant to reason and good discretion." And there is here no context constraining us to give the term "basement" any other than the precise but flexible meaning, as defined in the by-law and above interpreted, and *vide* the *Taranaki* case, *supra,* at p. 128.

I would vary the registrar's certificate by including an award of $1,633 damages to the appellant under heading (b), *supra.* The registrar's certificate should be confirmed with that variation, and judgment entered accordingly in pursuance of our directions on 19th November last.

FISHER, J.A.: I agree with the conclusions of the registrar. With reference to paragraph 15 of his report I would add that I think the matter falls within the decision in *Kinkel et al.* v. *Hyman,* [1939] S.C.R. 364 in which *Chaplin* v. *Hicks,* [1911] 2 K.B. 786 relied upon by counsel for the appellant here, was discussed. Delivering the judgment of Rinfret, Crocket and Kerwin, JJ., Crocket, J. said at p. 383:

> For my part, I can find no authority in either *Chaplin* v. *Hicks,* [1911] 2 K.B. 786 or *Carson* v. *Willitts* (1930), 65 O.L.R. 456 justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value. Indeed the above quotations from *Chaplin* v. *Hicks* and the decision in *Carson* v. *Willitts* seem to me to point to the contrary.
>
> As already intimated, the respondent's only chance of realizing any advantage from the option granted him by the appellants rested wholly upon the extremely doubtful ratification by a majority vote of the shareholders of March Gold, Inc. of the original sale to him of the 350,000 shares, and, there

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being no evidence upon which any finding could be made that such a vote was reasonably probable during the nine months fixed for the life of the option, I have been forced to the conclusion that the learned judges of the Court of Appeal were not warranted in awarding the respondent substantial damages. . . . .

In the present case the appellant's only chance of realizing the advantage which would arise from converting the garage premises in the rear of the building into two apartments rested wholly upon his obtaining a permit for such conversion. In my view there is no evidence upon which any finding could be made that the obtaining of such a permit was reasonably probable. The appellant is therefore not entitled to the damages claimed under the heading referred to as (b) in the registrar's report and I would not vary his certificate.

Appeal allowed, Fisher, J.A. dissenting.

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Jan. 18; *April* 10.

ROBERT THOMSON v. WILLIAM THOMSON AND ANDREW THOMSON.

Interpleader—Superannuation—Death of contributor—Unexpired portion subsequent to death of his nominee—Nomination by nominee—Not effective on nominee's death—Intention of the parties—Creation of a trust in præsenti—R.S.B.C. 1936, Cap. 273, Sec. 15 (2).

One John Thomson, on retirement from Government service in April, 1935, became entitled under the Superannuation Act to superannuation allowance guaranteed for ten years. Pursuant to section 15 (2) of said Act, he nominated his wife Helen to receive the unexpired portion of the allowance subsequent to his death. He died on January 19th, 1938. The Superannuation Commissioner then sent Helen a nomination form requesting her to complete the form, which she did and deposited same with the commissioner, duly executed, whereby she nominated her son Robert to receive the superannuation allowance in the event of her decease prior to the expiration of the ten years. Helen died May 5th, 1941, leaving three sons. No reference was made to the superannuation allowance in her will. The commissioner then notified Robert of his

intention to pay accumulated arrears to the executors of Helen's estate (Helen's two other sons). A petition of right was then presented by Robert and an interpleader issue was directed to determine whether the allowance, accrued since the death of Helen, is the property of the plaintiff as against the executors. Prior to the execution of the form Helen discussed the form with one Howay to whom she stated that she proposed to nominate her son Robert because of assistance given her by Robert and his wife in the operation of her boarding-house, and she discussed the form with Robert, who deposed in relation to the discussion that "The wife and I had been good to her and she might need more help, so she was going to nominate me." Robert further assisted her and obtained a loan of $300 for the use of his mother.

Held, on the evidence, that Helen made the nomination of Robert for the reasons given by the conversations mentioned by Robert and Howay, that Helen intended to and believed she had effectively transferred to Robert upon her death the benefits of the superannuation allowance and she was led to believe, by the exchange of correspondence with the commissioner, that she was entitled to make the nomination. But the Act does not make provision for payment of a guaranteed allowance to anyone other than the contributor or his surviving nominee. It follows that the nomination of Robert, made by Helen, is not effective under the Act to create any right in him to the balance of the allowance accruing after Helen's death. However, effect can be given to what was Helen's manifest intention on the basis of a trust created in Robert's favour effective upon the execution of the form, but operative in respect of that part of the allowance accruing subsequent to her death. There was created by the execution of the nomination pursuant to the understanding reached between Robert and Helen a trust *in præsenti* though to be performed after Helen's death. Therefore, the allowance accrued since her death is the property of Robert as against the executors of her will.

INTERPLEADER issue to determine whether the superannuation allowance accrued since the death of Helen Thomson, deceased, is the property of the plaintiff as against the defendants. The facts are set out in the reasons for judgment. Heard by BIRD, J. at Nanaimo on the 18th of January, 1943.

Cunliffe, for plaintiff.
Bainbridge, for defendants.

Cur. adv. vult.

10th April, 1943.

BIRD, J.: This is an interpleader issue directed to be tried by order of SIDNEY SMITH, J. made October 16th, 1942, to determine whether the superannuation allowance accrued since the death of Helen Thomson, deceased, and for which this action

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was brought, is the property of the plaintiff as against the defendants.

The parties to the issue are sons of the late John Thomson, deceased, who on retirement from the service of the Government of the Province of British Columbia on April 30th, 1935, became entitled under the provisions of the Superannuation Act, R.S.B.C. 1924, Cap. 247 (now R.S.B.C. 1936, Cap. 273), to superannuation allowance of $51.83 per month guaranteed for a term of ten years commencing May 1st, 1935.

Pursuant to section 15, subsection (2) of the Act, John Thomson nominated his wife Helen to receive the unexpired portion of the guaranteed allowance subsequent to his death. John Thomson died January 19th, 1938, survived by his widow Helen.

On January 21st, 1938, the widow, Helen Thomson, gave notice to the Superannuation Commissioner of the death of her husband John, whereupon the commissioner sent forward to the widow under date of January 24th, 1938, a nomination form requesting her to complete the form and return it to his office.

On January 27th, 1938, the widow deposited with the commissioner the nomination form duly executed by herself, whereby she nominated her son Robert, the plaintiff in the issue

to receive the superannuation allowance under the provisions of the Civil Service Superannuation Act in the event of my decease prior to the expiration of the period guaranteed:

(see Exhibit 7). The widow died May 5th, 1941, leaving her surviving three sons, being the parties to the issue. She received the monthly instalments of superannuation allowance during the period subsequent to John Thomson's death, and until April, 1941.

By her last will made on the 19th of March, 1941, after provision for payment of debts and certain legacies she bequeathed "any money in the bank or in my home as well as the money received for sale of the house, lot and furnishing" equally among her three sons.

It is noteworthy that the will contains no reference to the superannuation allowance, nor is reference made to any residuary estate.

The widow's will was admitted to probate and on May 14th,

1941, the Superannuation Commissioner informed the solicitors for the executors that

> payment will now be made to her son Robert Thomson who was nominated by Mrs. Thomson to receive the allowance in the event of her decease, etc.

No payments of the monthly instalments of superannuation allowance were made subsequent to the death of the widow, and on April 22nd, 1942, the commissioner reversed his earlier decision and gave notice to the plaintiff Robert of his intention to pay accumulated arrears to the executors of the estate of the late Helen Thomson.

In consequence a petition of right was presented by the plaintiff Robert, upon which a *fiat* was granted. The issue herein was then directed to be tried.

The Superannuation Act, section 15, subsection (2), provides that where one is nominated by a contributor to receive an allowance for the remainder of a guaranteed term subsequent to the death of the contributor and the nominee survives the contributor, the allowance shall not for any purpose form part of the estate of the contributor.

It would appear to follow logically that upon the death of the contributor the allowance becomes the absolute property of his surviving nominee, in this instance, of the widow Helen Thomson.

It appears that prior to execution of the nomination form that the widow Helen discussed the form with the witness Howay who explained to her the purpose of it. She then told him that she proposed to nominate her son Robert because of assistance given her by Robert and his wife in the operation of her boarding-house.

She also discussed the form with the plaintiff Robert, and in the course of that conversation, according to Robert's evidence she said:

> The wife and I had been good to her and she might need more help, so she was going to nominate me.

Subsequently, Helen with Howay's assistance completed and signed the nomination form, and on January 27th, 1938, Howay, at her request wrote to the commissioner enclosing the form duly executed by her and witnessed by Howay.

I am satisfied on the evidence before me that the widow Helen

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made the nomination of Robert for the reasons given by her in the conversations mentioned by Robert and by Howay. The understanding reached between them, though loosely expressed, as one might expect would be made between an illiterate elderly woman and her scarcely more literate son, in my view amounted to a bargain between them whereby she nominated Robert in consideration for assistance previously given her, and for his promise of continued assistance both financial and otherwise. Thereafter Robert continued to give assistance to his mother in the operation of the house, and made various cash advances to her of which he kept no record with the exception of one item which he describes as a loan when he borrowed from the bank $300 for the use of his mother and which was not repaid. This, he says, was done in accordance with the understanding reached prior to execution of the nomination form.

I am also satisfied that the widow Helen intended to and believed she had effectually transferred to Robert upon her death the benefits of the superannuation allowance. By her will made less than two months before her death in which she disposed of an estate of $5,000 she mentions her assets in detail but omits any mention of the allowance which then had a value of slightly less than $2,500. In the circumstances the only reasonable inference appears to be that she then considered that the allowance had been disposed of. In fact, counsel in their arguments agreed that this was so.

There can be no doubt that the widow was led to believe by the exchange of correspondence with the commissioner and did believe that she was entitled to make the nomination. However, the Act does not make provision for payment of a guaranteed allowance to anyone other than to a contributor or to his surviving nominee, or failing such nomination, as the contributor directs by will.

It follows, consequently, that the nomination of Robert made by the widow is not effective under the provisions of the Act to create any right in him to the balance of the allowance accruing after the widow's death.

The question, therefore, arises as to what effect, if any, is to be given to that nomination, the making of which was in my

opinion intended by the widow to pass that part of the allowance to Robert.

Counsel for Robert advances two propositions: (1) That the dispatch by the commissioner of the nomination form and acceptance of that form duly completed by the widow constitutes a novation. For novation to ensue there must be consent of all parties to substitution of a new contract for the old, or of parties. Here there is not such consent in my view since the commissioner had not authority under the Act to accept a nomination other than as provided by the Act. That is, by a contributor. Helen was not a contributor. (2) That by the bargain reached between Helen and Robert a trust was created for Robert's benefit, of that part of the superannuation allowance which would become payable after Helen's death.

The Act, section 17, prohibits assignment of an allowance, but it appears to me that the prohibition was introduced for the convenience of the administrator of the fund and does not prevent the passing of the beneficial interest of the nominee of a contributor as between the nominee and another person.

A similar prohibition was under consideration in *In re Turcan* (1888), 58 L.J. Ch. 101, in relation to the assignment of a policy of insurance wherein Cotton, L.J. said (p. 105):

> He could not at that date assign to the trustees his right to go to the [insurance] office and require payment directly, but he could give them the benefit of the policy by declaring himself a trustee for them of all the benefit which he had under the policy.

Then cannot effect be given to what was in my judgment Helen's manifest intention on the basis of a trust created in Robert's favour effective upon execution of the form but operative in respect of that part of the allowance accruing subsequent to her death? In *Corlet* v. *Isle of Man Bank Ltd.*, [1937] 2 W.W.R. 209, at p. 211, Ford, J.A. held that the

> document [then under consideration] created a trust, effective, and intended to be effective, on execution of the insurance policies assigned to the trustee to be held by it until they "fell in" by reason of the donor's death, and by which they were directed to collect and receive the money payable thereunder on his death, and deal with it in accordance with the trusts declared.

It is contended, however, on behalf of the executors that the nomination is inoperative even apart from the Act, since it takes effect only upon the death of Helen, and therefore is testamentary

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in character, and does not conform as to execution to the provisions of the Wills Act.

There can be no doubt in the words of Sir J. P. Wilde in *Cock* v. *Cooke* (1866), L.R. 1 P. 241, at p. 243,

> that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

Here I consider that Robert's right was not dependent upon Helen's death for its vigour and effect, but that the right arose immediately the arrangement was made between Robert and herself. That is to say, there was a promise made by her for value to nominate Robert, a nomination which by virtue of the understanding she could not change had she desired to do so. That being so, to adopt the words of Ford, J.A. in the *Corlet* case (p. 211),

> the instrument is not one which requires compliance with The Wills Act to give it validity. It, *i.e.*, the instrument itself, does not depend for its vigour and effect upon the settlor's death.

There was created by the execution of the nomination pursuant to the understanding reached between Robert and Helen, in my opinion, a trust *in præsenti* though to be performed after Helen Thomson's death.

I therefore hold that the allowance accrued since her death on May 5th, 1941, is the property of the plaintiff as against the defendants. The costs of the issue will be payable by the defendants to the plaintiff.

Judgment for plaintiff.

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March 16;
April 13.

EX PARTE LUM LIN ON.

Criminal law—Keeper of disorderly house—Conviction—Tried by magistrate without consent of accused—Habeas corpus—Application dismissed—Appeal—Criminal Code, Secs. 229, Subsec. 1, 771 (a) (iii) and (vii), 773 (f), and 777.

The defendant was convicted by a police magistrate for keeping a disorderly house contrary to section 229 (1) of the Criminal Code. The magistrate, holding that he had absolute jurisdiction to try the accused by virtue of sections 771 (*a*) (iii), 773 (*f*) and 777, proceeded without the accused consenting to be tried by him. Accused pleaded guilty and was sen-

tenced. On applying for his release on *habeas corpus* on the ground that the magistrate had no power to try him without his consent, his application was dismissed.

Held, on appeal, affirming the order of SIDNEY SMITH, J., that the appeal should be dismissed on the ground that the "magistrate" referred to in section 777 of the Code is the magistrate defined in section 771 (*a*) (iii) and that section 771 (vii) does not derogate from the definition in subsection (*a*) (iii).

Rex v. *Berenstein* (1917), 24 B.C. 361, followed.

Per MCDONALD, C.J.B.C.: I would dismiss the appeal on the ground that no appeal lies. *Habeas corpus* is always a criminal remedy when used to question imprisonment on a criminal charge, following *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147.

Per O'HALLORAN, J.A.: The right conclusion was reached by SIDNEY SMITH, J. in holding that the learned magistrate had jurisdiction to try and convict the accused and I would further hold that the Court of Appeal has jurisdiction to hear this appeal, following *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541.

APPEAL by the accused from the order of SIDNEY SMITH, J. of the 9th of March, 1943, refusing to release the appellant on *habeas-corpus* proceedings. The appellant was convicted by a police magistrate for keeping a disorderly house, to wit, a common gaming-house contrary to section 229, subsection 1 of the Criminal Code. The magistrate proceeded to try the accused without accused's consent, holding he had jurisdiction to do so by virtue of sections 771 (*a*) (iii), 773 (*f*) and 777. The accused pleaded guilty and was sentenced.

The appeal was argued at Vancouver on the 16th of March, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Bray, for appellant: The police magistrate had no jurisdiction to try the case without the consent of the accused. Subsection (*a*) (vii) of section 771 of the Code is an exception and it was held below that it was an added power rather than an exception: see *Rex* v. *Robertson* (1915), 22 B.C. 13; *Rex* v. *Lee Guey* (1907), 13 Can. C.C. 80. Two justices of the peace have jurisdiction under section 771, but not a magistrate. On interpretation of the word "include" see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 336; *Dilworth* v. *New Zealand Commissioner of Stamps*, [1899] A.C. 99, at pp. 105-6.

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W. W. B. McInnes, for the Crown: This is the first time that the magistrate's jurisdiction under section 777 of the Code has been questioned: see *Re Holman and Rea (No. 1)* (1912), 21 Can. C.C. 7 and on appeal p. 11. The definition of magistrate is in section 771 and subsection (*a*) (vii) is an extension of the general definition in subsection (*a*) (iii). He pins his whole case on subsection (*a*) (vii). Section 777 gives absolute jurisdiction: see *Rex* v. *Berenstein* (1917), 24 B.C. 361.

Bray, in reply: The observations of the Chief Justice in *Rex* v. *Berenstein* [*supra*] are merely *obiter.*

Cur. adv. vult.

13th April, 1943.

MCDONALD, C.J.B.C.: This appeal is from refusal to release the appellant on *habeas corpus.*

Appellant had been convicted by a police magistrate for keeping a disorderly house, to wit, a common gaming-house, contrary to section 229, subsection 1 of the Criminal Code. The magistrate, holding that he had absolute jurisdiction to try the accused, by virtue of sections 771 (*a*) (iii), 773 (*f*) and 777, proceeded without the appellant's consenting to be tried by him. Appellant pleaded guilty and was sentenced, but later tried to obtain his release on *habeas corpus,* on the ground that the magistrate had no power to try him without his consent. SIDNEY SMITH, J. agreed with the magistrate's view of the sections, and dismissed the application.

I would dismiss the appeal on the ground that none lies. This point was not raised by counsel; but where an appeal is not competent, I think the Court itself should take the point.

The Court of Appeal Act purports to give an appeal in *habeas-corpus* matters generally, but I think it is clear that the Province cannot give an appeal in criminal matters that arise under the Code. All justifications that have been offered for holding that appeal lies in *habeas-corpus* proceedings have been based on the assumption that *habeas corpus* is a civil remedy, even where release is sought from imprisonment based on a criminal charge. Although this Court has so held, overruling its own contrary decision, I think the matter must be considered *de novo,* in view of the House of Lords' recent decision in *Amand* v. *Home Secre-*

tary and Minister of Defence of Royal Netherlands Government (1943), A.C. 147, which I cannot read otherwise than as laying down that *habeas corpus* is always a criminal remedy when used to question imprisonment on a criminal charge. Here the matter seems to me particularly clear, since the ground on which the writ was sought was not a mere defect in the warrant of commitment (if the distinction could help the appellant, which I doubt) but a defect in the conviction itself.

If this Court's earlier ruling is clearly in conflict with the *Amand* decision, then on the authorities we ought to renounce our former views and follow the House of Lords. Otherwise, I do not see what is to become of legal principle. On this point I may refer to an article by Hodgins, J.A. in 1 Can. Bar. Rev. 470 on "The Authority of English Decisions," which collects the rulings on our duty to follow the higher English Courts.

It is highly desirable that there should be an appeal in all kinds of *habeas-corpus* cases (and particularly to replace the present privilege of canvassing one judge after another); but until Parliament sees fit to give that appeal, I think we should not strain the law to give it "by a side wind." That is particularly undesirable where straining it involves our differing from the House of Lords.

I may state that if an appeal lay, I would dismiss it, on the ground that the "magistrate" referred to in section 777 is the magistrate defined in section 771 (*a*) (iii), and that section 771 (vii) does not derogate from the definition in section 771 (*a*) (iii). The authorities for half a century take this view, and would govern, even if the language were not clear, which it is. *Rex* v. *Berenstein* (1917), 24 B.C. 361 is a decision in point in our own Court.

MCQUARRIE, J.A. would dismiss the appeal.

SLOAN, J.A.: In my opinion the special definition of "magistrate" in section 771 (*a*) (vii) of the Code is an extension of and not a limitation upon the general definition of magistrate in section 771 (*a*) (iii) of the Code. In other words the effect of section 771 (*a*) (vii) is not to set up a tribunal with exclusive jurisdiction to deal with the class of crimes therein referred to.

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I am therefore of the view that the attack upon the jurisdiction of the convicting magistrate fails and the appeal must be dismissed.

O'HALLORAN, J.A.: I would dismiss the appeal. I think SIDNEY SMITH, J. reached the right conclusion when he held the learned magistrate had jurisdiction to try and convict the appellant as charged. That was the only point which emerged during the argument, and the appeal was dismissed accordingly on 13th April last without division of opinion. However, in his reasons for judgment the Chief Justice raised a new point by doubting our jurisdiction to entertain the appeal in consequence of the decision of the House of Lords in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government,* [1943] A.C. 147. I shall but briefly indicate one or two reasons why I do not share that view.

In my judgment the *Amand* case does not detract from or furnish any real ground for doubting the correctness of the reasoning which prompted the decision of this Court (MARTIN, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.) in *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541, when after full-dress argument, and the most careful consideration, we came unanimously to the conclusion that this Court was vested with jurisdiction, and when furthermore, because of the paramount importance of the subject-matter, we felt it to be our duty not to follow the view expressed by the majority of the Court 13 years before in *Rex* v. *McAdam* (1925), 35 B.C. 168.

The point for decision in the *Amand* case in the Court of Appeal and later in the House of Lords, as well as in *In re Woodall* (1888), 57 L.J.M.C. 71, on which it is largely founded, was confined to the interpretation of an English statute which has no counterpart in this Province. Nor did the *Amand* case seek to change *habeas corpus* from a constitutional right into the *status* of a rule of Court procedure. No doubt it contains expressions which, if not carefully examined, and if divorced or diverted from the narrow point to which they were directed may be seized upon to support propositions which the *Amand* case did not decide. But as I read it, it decides nothing which lessens the weight of previous decisions of the House of Lords, such as

Cox v. *Hakes* (1890), 60 L.J.Q.B. 89 and *Home Secretary* v. *O'Brien* (1923), 92 L.J.K.B. 830, wherein Lord Halsbury and the Earl of Birkenhead spoke of this foremost safeguard of constitutional government in authoritative and long-to-be-remembered language.

The *Woodall* case was expressly distinguished in *Ex parte Yuen Yick Jun* on grounds which must also deny the *Amand* case any present application. The English cases were concerned with a statute which denied an appeal in "any criminal cause or matter." *Ex parte Yuen Yick Jun* was concerned with a statute which expressly confers a right of appeal in *habeas-corpus* matters, and does so in terms which clearly imply it includes *habeas corpus* arising out of a criminal cause or matter. If our statute had existed in England, the objections which prevailed in the *Woodall* and *Amand* cases, could have had no foundation. The objections would have been answered by the plain language of our statute.

The objection in *Ex parte Yuen Yick Jun* that our statute was *ultra vires* as trenching upon the jurisdiction of the Dominion under section 91 (27) of the B.N.A. Act, was overruled because of the statutory language found in the B.N.A. Act and the Supreme Court Act (Canada), when read in the light of the division of powers between the Dominion and the Provinces. Neither the *Woodall* nor the *Amand* case has the remotest connection with that problem, and their introduction as authorities for the construction of unrelated statutes may rightly be described as offending a cardinal rule for the interpretation of statutes.

Moreover Canada is a Federal and not a Unitary state. That far-reaching constitutional distinction cannot be dismissed from mind, when we are asked to examine decisions rendered by Courts of a Unitary state, which do not in their decision or scope of decision affect what are often described as inalienable or imprescriptible rights. What, in a Unitary state, may amount to no more than a matter of procedure—such as in what designated Court Division the proceedings should be brought or appealed—may in a Federal state, amount in a larger and determining aspect to a denial of provincial or state rights, which, if that

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same larger aspect could arise in a Unitary state, would be equivalent to a denial of rights reaching back to Magna Carta.

I need not elaborate here upon that and other reasons which impelled this Court in *Ex parte Yuen Yick Jun* to a conclusion favouring jurisdiction. The argument in favour of our jurisdiction in that case was supported by the Attorney-General for Canada as well as the Attorney-General for the Province. It is also seen to be in accord with decisions in other Provinces of Canada there examined. It is not without grave significance that (as it points out) it is in accord with the reasoning of the Supreme Court of the United States, the highest Court of the foremost Federal system of Government. Its governing principle was recently followed in Nova Scotia in *Re Boutilier*, [1943] 2 D.L.R. 781, Sir Joseph Chisholm, C.J. at p. 783.

In conclusion I think this is a singularly appropriate occasion to call attention to what was said in *Ex parte Yuen Yick Jun*, that *habeas-corpus* proceedings ought not to be entitled *Rex* v. *Lum Lin On* (as this case is), since it wrongly implies a criminal proceeding, and betrays at once a fundamental misconception of what *habeas corpus* really is.

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

Appeal dismissed.

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REX v. LANGS, PERMAN, McKINNON AND PULICE.

Mar. 22, 23; *April* 13.

Criminal law—Conspiracy—To defraud the public—Sufficiency of indictment —Criminal Code, Secs. 444 and 863.

The appellants were convicted upon a charge "for that [they] at the city of Vancouver between the 15th day of April, A.D. 1942, and the 10th day of June, A.D. 1942, unlawfully did conspire, confederate and agree together and with each other and with divers other persons unknown to defraud the public by fraudulent means, contrary to the form of the statute in such case made and provided." On the question of whether the charge as laid is sufficient in law, objection was taken on the appeal

that it is deficient in that while it sets out "time and place," it fails to set out the necessary "matter."

Held, affirming the decision of LENNOX, Co. J., that the objection to the valdity of the charge is answered by section 863 of the Criminal Code.

APPEALS by accused from their conviction by LENNOX, Co. J. on a charge

for that [they] at the city of Vancouver, between the 15th day of April, A.D. 1942, and the 10th day of June, A.D. 1942, unlawfully did conspire, confederate and agree together and with each other and with divers other persons unknown to defraud the public by fraudulent means, contrary to the form of the statute in such case made and provided.

The accused men purported to have in operation a sawmill under the name of Dewdney Sawmills Limited (a registered company). They advertised extensively for the sale of stock. They issued cheques in the name of the company and cashed them at 14 different beer parlours in Vancouver, part of the money so received being paid into the company's account in a branch of The Royal Bank of Canada to cover the cheques. Some 354 cheques were issued and cheques totalling about $3,292.75 were actually dishonoured on presentation, and a further number, totalling $357, were not presented as it became known that they would be dishonoured. During the period these transactions were going through, the bank account showed that it began with a deposit of $1 and ended with $2. No business had been transacted with the company, in fact there was no mill.

The appeal was argued at Vancouver on the 22nd and 23rd of March, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Burton, for appellants Langs and Perman: There are two grounds of defence: (1) The indictment is bad in law; (2) conspiracy to defraud is not proven, the evidence not being sufficient for convictions. The indictment on its face is bad. It does not show the class of fraud: see *Mulcahy* v. *The Queen* (1868), L.R. 3 H.L. 306; *Rex* v. *Buck* (1932), 57 Can. C.C. 290. The charge must be sufficient to identify the subject-matter of the fraud: see *Brodie* v. *Regem* (1936), 65 Can. C.C. 289. You need not give detail, but you must put in the substance of the offence: see *Rex* v. *Adduono* (1940), 73 Can. C.C. 152; *Rex* v. *Bainbridge* (1918), 30 Can. C.C. 214; *Rex* v. *Desjardins*

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(1919), 45 Can. C.C. 100; *Rex* v. *Imperial Tobacco Co.* (1939), 72 Can. C.C. 388; *Rex* v. *O'Malley,* [1942] 1 W.W.R. 127; *Rex* v. *Madill (No. 2),* [1943] 1 W.W.R. 370; *Rex* v. *Goodfellow* (1906), 10 Can. C.C. 424. Langs was issuing the cheques to the others. He was what they call kiting. He did it all and there was no connection between him and the others. They have never connected up these sums so as to constitute conspiracy: see *Rex* v. *Miller* (1940), 55 B.C. 121. The cheques have all been paid. Langs got each of the others to do a separate act. Perman was only guilty of an error of judgment.

Murdock, for McKinnon and Pulice, adopted *Burton's* argument. My clients were neither directors nor shareholders. They signed no cheques. What they did was only accommodation for Langs: see *Reg.* v. *Blake and Tye* (1844), 13 L.J.M.C. 131; *Rex* v. *Porter and Marks* (1928), 40 B.C. 361.

Remnant, for the Crown: These were all bogus cheques. The crime has been committed because the agreement was made. In the case of *Rex* v. *Adduono* (1940), 73 Can. C.C. 152, the indictment was exactly the same as in this case: see *Rex* v. *Phillips* (1906), 11 Can. C.C. 89; *Rex* v. *Hutchinson* (1904), 8 Can. C.C. 486. The company was incorporated in 1941, there never was a lease and $190 was owing for rent. No mill was ever operating. There were 45 cheques amounting to $2,678.75 which were dishonoured. Langs was the guiding hand: see *Rex* v. *Meyrick and Ribuffi* (1929), 21 Cr. App. R. 94; Harrison on Conspiracy, 83; Roscoe on Criminal Evidence, 15th Ed., 535. The case of *Rex* v. *Porter and Marks* (1928), 40 B.C. 361, is in our favour. Pulice visited 14 beer parlours and cashed 16 cheques.

Burton, replied. *Cur. adv. vult.*

13th April, 1943.

MCDONALD, C.J.B.C.: The appellants were convicted by LENNOX, Co. J.,

> for that [they] at the City of Vancouver between the 15th day of April, A.D. 1942, and the 10th day of June, A.D. 1942, unlawfully did conspire, confederate and agree together and with each other and with divers other persons unknown to defraud the public by fraudulent means contrary to the form of the statute in such case made and provided.

On the hearing of the appeal we announced our decision that

the learned judge was right in his conclusions upon the evidence and the inferences to be drawn therefrom. We reserved two questions of law. The only one which I think requires consideration is as to whether the charge as laid is sufficient in law, the objection having been taken that it is deficient in that while it sets out "time and place" it fails to set out the necessary "matter." It may be noted that before the preliminary hearing particulars were demanded and delivered.

In *Mulcahy* v. *The Queen* (1868), L.R. 3 H.L. 306 Willes, J., dealing with an appeal from a conviction for treason felony, at p. 321 said, in answer to objections raised as to the form of the indictment:

> Moreover, and this is the substantial answer to these objections, an indictment only states the legal character of the offence, and does not profess to furnish the details and particulars. These are supplied by the depositions, and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions, which it may be intended to produce at the trial. To make the indictment more particular, would only encourage formal objections upon the ground of variance, which have of late been justly discouraged by the Legislature.

In *Rex* v. *Hutchinson* (1904), 8 Can. C.C. 486, in this Province, HUNTER, C.J., and DRAKE and IRVING, JJ. had to deal with an indictment for conspiracy to defraud, on a case stated by the trial judge DUFF, J. (as he then was). The charge was laid under section 394 (now 444) of the Code. The Court was unanimous in holding that on a charge of conspiracy to defraud by fraudulent means, the description of the means is mere surplusage so far as concerns the efficiency of the indictment.

In *Rex* v. *Phillips* (1906), 11 Can. C.C. 89, Sir John Boyd, on a motion to prohibit a magistrate from holding a preliminary inquiry before ordering particulars in a general charge of "conspiracy to defraud the public," refused the order. The charge in that case was almost identical with the one with which we now have to deal, and the learned judge, after full consideration of the cases, including *Mulcahy* v. *The Queen, supra,* held that the indictment sufficiently stated an offence under Code section 394.

I now come to the decision of the Supreme Court of Canada in *Brodie* v. *Regem* (1936), 65 Can. C.C. 289, the sheet-anchor of appellants' argument. In my opinion this case has no application. That was a charge of seditious conspiracy, and the Supreme

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Court, speaking through Rinfret, J., quashed the conviction upon the ground that the indictment as laid was inefficient for lack of particulars. The Court considered the various sections of the Code, including particularly section 853. It is important to note that Rinfret, J. was careful at p. 299 to point out that the Court was not to be taken

> as subscribing to certain generalities contained in some of the judgments to which we have been referred and which would tend to convey the idea that, notwithstanding the coming into force of the Criminal Code, the criminal law in this country should continue to be administered as though there were no Code.

No reference whatever was made to Code section 863, which, for our present purposes, reads as follows:

> No count which charges . . . any attempt or conspiracy by fraudulent means, shall be deemed insufficient because it does not set out in detail in what the . . . fraudulent means consisted.

It should be noted that section 853 is a general section while section 863 is a special section relating to three specific offences, *viz.*, false pretences, fraud, and conspiracy by fraudulent means. In my opinion this section 863 was passed for the very purpose of meeting an objection such as is raised here. It was suggested during argument that this section should be read as if the word "proper" were inserted before the word "count." I presume by the words "proper count" is meant such a count as would withstand the assaults of the most cavilling critic of the eighteenth century. If that be so, then section 863 was quite unnecessary.

I prefer to read the section in its plain meaning, and I respectfully agree with the conclusions reached by the Court of Appeal in Ontario when dealing with this section on a charge in all essential respects similar to the one now before us, in *Rex* v. *Adduono* (1940), 73 Can. C.C. 152.

Apart altogether from section 863, I can find no answer to the further argument made by Mr. *Remnant* which was this: Conceive a case where two conspirators agree together to formulate a scheme to defraud the public; suppose that this agreement is overheard by a third party who reports it to the police. A charge is laid forthwith in the words of the charge now before us and the witness swears to the agreement which he heard. The essence of the crime being the agreement itself, surely no one can say that a conviction based on that evidence and that charge would

be bad, even though the discussion which culminated in the agreement had not reached the stage where the manner in which the fraud was proposed to be carried out had been agreed upon. In such case it would be impossible to set out in the charge anything more than is set out here and yet I can see no reason why such a conviction should not stand.

I would dismiss the appeals.

McQUARRIE, J.A. would dismiss the appeals.

SLOAN, J.A.: In my view the attack upon the indictment herein is answered by the provisions of section 863 of the Code.

So far as Exhibit 11 is concerned I am satisfied under the special circumstances of this case, that it was a document prepared and kept in pursuance of the common design and as such was properly admissible against the accused.

O'HALLORAN, J.A.: In my view the appellants' objection to the validity of the charge is denied by section 863 of the Criminal Code, and *vide* also *Rex* v. *Adduono* (1940), 73 Can. C.C. 152.

I would dismiss the appeals.

FISHER, J.A.: The appellants were convicted upon a charge that they [already set out in the statement and in the judgment of McDONALD, C.J.B.C.].

The first submission on behalf of the appellants is that the charge is invalid or insufficient and that no particulars given could validate it or make it sufficient. The submission is based especially upon the decision in *Brodie* v. *Regem* (1936), 65 Can. C.C. 289 and the cases of *Rex* v. *Buck* (1932), 57 Can. C.C. 290 and *Rex* v. *Bainbridge* (1918), 30 Can. C.C. 214 referred to therein. Rinfret, J., delivering the judgment of the Court, said in part as follows at pp. 290-297:

> In the present case, the whole indictment, and in the *Buck* case, the count objected to in the indictment, charged the accused with being parties to a seditious conspiracy. In both cases, the time and place were mentioned, the accused were named and all that was charged was that, at such time and place, the accused were "parties to a seditious conspiracy." In the present case, the indictment adds: "in conspiring together and with one W. F. Greenwood, W. G. Brown, Mrs. Charles Alton and Mrs. A. M. Rose and also with other persons unknown." . . .

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It remains for us to decide whether or not a charge preferred in the form stated is sufficient under the provisions of the Cr. Code.

The general provisions as to counts and indictments are contained in s. 852 *et seq.* of the Code; and the fundamental rule is laid down in s. 852 itself, ...

Such was decidedly the view of the Appellate Division of the Supreme Court of Ontario, as expressed in its judgment in *Rex* v. *Bainbridge* [(1918)], 30 Can. C.C. 214, at p. 222, 42 D.L.R. 493, at p. 500, where Magee, J.A., says:

"It is evident from sub-sec. 2 (of s. 852) that matter which is essential to be proved is not to be omitted, and from sub-sec. 3 that the accused is to have notice of the offence and not merely of the character or class of the offence; while sub-sec. 1 requires that there is to be a substantial statement of an offence which, not the class of which, is specified, and which must be an indictable one."

In the same case, Clute, J., said (p. 227 Can. C.C., p. 505 D.L.R.):—"This (s-s. (1) of s. 852) does not mean merely naming an offence, as 'murder' or 'theft,' but the offence itself must be specified."

And a little further (p. 229 Can. C.C., p. 507 D.L.R.):—"The indictment must contain a valid count identifying the charge."

The other judges of the Court agreed either with Magee, J.A., or with Clute, J.

Following the same principle, the Chief Justice of Ontario, speaking for the Court of Appeal in the *Buck* case and, as already mentioned, with reference to an indictment preferred in precisely the same wording as in the present case, said that the count failed for insufficiency; and the insufficiency was not cured by the furnishing of particulars showing matter which, if embodied in the count, would have rendered the count adequate. . . .

If s. 852 be analysed, it will be noticed the imperative requirement ("shall contain") is that there must be a statement that the accused has committed an indictable offence; and such offence must be "specified." It will be sufficient if the substance of the offence is stated; but every count must contain such statement "in substance." . . .

As a matter of fact, this requirement of an indictment is further embodied in s. 853 of the Code, which enacts that "Every count . . . shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to." Such is the rule of the Cr. Code.

Of course, it is qualified by the proviso "that the absence or insufficiency of such details shall not vitiate the count;" and it must be granted that these words are very strong. It should be noticed, however, that the proviso, as well as the section itself, relates only to the "absence or insufficiency of details." It does not detract from the obligation resulting from s. 852 that the substance of the offence should be stated in the indictment.

. . . . .

Applying the above principles to the present appeal, it follows that the indictment must be found insufficient. It is not the case where an offence is imperfectly stated; it is a case where essential averments were wholly omitted. The so-called indictment contains defects in matters of substance.

To use the apt words of counsel for the appellants: "it does not describe the offence in such a way as to lift it from the general to the particular."

I have set out a considerable portion of what was said by Rinfret, J. as much of what was said in the *Brodie* judgment would appear to support the contention of counsel for the appellants in the present case. One must note, however, that the indictment being dealt with there was one charging seditious conspiracy and that elsewhere Rinfret, J. says as follows at p. 297:

> It need not be added that we are speaking now of counts in general, without reference to special cases such as are: libel, perjury, false pretence, or other cases which are the objects of special provisions with regard to indictment in the Cr. Code.

In the present case the charge was as hereinbefore set out and in my view this case is one of the cases referred to by Rinfret, J. in the last paragraph hereinbefore set out from his judgment. It is especially provided for in section 863 reading as follows: [already set out in the judgment of McDONALD, C.J.B.C.]. In view of the provisions of said section I am satisfied that the charge upon which the appellants were convicted was a valid and sufficient one.

The next submission is that the learned trial judge admitted and treated as evidence against all the appellants what was evidence only against one of them. As to this I think the principle to be applied is that, when concert has once been proved, each party is the agent of all the others and acts done by him in pursuance of the common design are admissible against his fellow conspirators. See Harrison's Law of Conspiracy, 153 and authorities there cited. I am satisfied that the trial judge applied this principle and I might add that in any event there is nothing in the case which discloses self-misdirection. See *Rex* v. *Bush* (1938), 53 B.C. 252, at p. 257. From his judgment or report it would appear that the trial judge treated Exhibits 11 and 14 as evidence against the appellants McKinnon and Pulice and it is strenuously contended by counsel on their behalf that neither of the said exhibits was evidence against them and he relied especially upon the case of *Reg.* v. *Blake and Tye* (1844), 13 L.J.M.C. 131. I have carefully considered both of the said exhibits in the light of such case. In my view it is clear from the evidence that neither of the said exhibits can be said

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to be a mere statement made by the writer after the conspiracy was completed and relating only to the distribution of the fruits thereof. Such a statement was held inadmissible in the case relied upon as aforesaid. Here it is a fair inference that the documents in question were made to carry the conspiracy to its end, that is in pursuance of the common design, and tended to the advancement of the common object. They are therefore admissible.

I would dismiss the appeals.

Appeals dismissed.

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SPELMAN v. SPELMAN.

Practice—Appeal—Judgment whether final or interlocutory—Dispute over title to real estate—Judgment declaring ownership and directing an accounting of rents and profits—Appointment of receiver, sale or partition of lands and costs of action reserved—R.S.B.C. 1936, Cap. 57, Sec. 14.

Motion to quash an appeal from a judgment of the Supreme Court on the ground that the judgment is interlocutory and the appeal out of time. The action involved a dispute over the title to real property in Victoria, Vancouver and Edmonton. The judgment declared the plaintiff entitled to a three-fifths' interest in the Victoria property (registered in the defendant's name), ordered the defendant to convey the interest, directed an accounting of the rents and profits while the title was in the defendant and ordered payment of the amount found due. The judgment further declared that the parties each owned a half-interest in the Vancouver property and ordered the parties to account for rents and profits received by them respectively and finally directed that the appointment of a receiver, the sale and partition of the property and the costs of the action and counterclaim be reserved.

Held, that it was a final judgment and the motion was dismissed.

MOTION before the Court of Appeal to quash the appeal on the ground that the judgment is interlocutory and the appeal is out of time. The facts are set out in the head-note and reasons for judgment. Heard by MCDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A. at Vancouver on the 13th of April, 1943.

J. A. McInnes, for the motion.
Martin, K.C., contra. *Cur. adv. vult.*

28th April, 1943.

McDONALD, C.J.B.C.: This is a motion to quash an appeal from the judgment of ELLIS, J. (settled, after his death, by ROBERTSON, J.), on the ground that the judgment is interlocutory, and the appeal out of time.

The action involved a dispute over title to real estate in Victoria, Vancouver and Edmonton. The judgment first declared that the plaintiff was entitled to a three-fifths' interest in the Victoria property (registered in the defendant's name), ordered the defendant to convey this interest, directed an accounting of three-fifths of the rents and profits while the defendant had held the title, and ordered payment of the amount found due. Secondly the judgment declared that the parties each owned a half-interest in the Vancouver property, and ordered both parties to account for rents and profits received by them respectively. It also ordered set-off of the amounts found due and judgment for the balance. The judgment did not deal with the Edmonton property, ROBERTSON, J. refusing to allow an amendment to deal with it; but this part of the judgment is not appealed against, and it need not be considered. A counterclaim was dismissed; but the dismissal likewise is not appealed against. Finally the judgment directed that the appointment of a receiver, the sale or partition of the property, and the costs of the action and counterclaim be reserved.

Appeal was not taken until nearly three months after the judgment was settled, and the respondent says this was too late. The point is governed by section 14 of the Court of Appeal Act, under which interlocutory judgments, orders or decrees must be appealed within 15 days after entry. So if this is an interlocutory judgment (I think it is clear that it is a judgment) the appeal is too late.

Section 14 was undoubtedly modelled on the English Order LVIII., r. 15, and in the days of our old Full Court the time limitation on appeals was similarly imposed by our Rules of the Supreme Court, Order LVIII., r. 15. However, there is the important distinction between our section and the English rule that the latter puts all orders on the same footing whether final or interlocutory, and similarly all judgments whether final or

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interlocutory, whereas our section requires all interlocutory decisions to be appealed in the shorter time, whether judgments or orders.

Perhaps no line of decisions better justifies the poet's gibe at "the lawless science of our law" than those that specify what judgments and orders are final and what interlocutory.

A large factor in creating the "wilderness of single instances" that confronts us in these decisions has been the inconsistent tests laid down in *Salaman* v. *Warner,* [1891] 1 Q.B. 734 and *Bozson* v. *Altrincham Urban Council,* [1903] 1 K.B. 547, the latter making any order final which as made disposes of rights, the former making an order interlocutory though final in form, if made on an application that, otherwise decided, would not conclude the matter. To the discredit of the law, it has made no final choice between these tests, but now one, now the other, is followed. In not a few cases, indeed, it is disconcerting to find the Courts making decisions without even professing to follow any principle, but only convenience in the particular case. But there is some reason to hope that the *Bozson* test will be held in Canada to be established (where there is no statutory definition of "interlocutory" and "final") by the Privy Council's decision in *Coverdhandas Vishindas Ratanchand* v. *Ramchand Manjimal,* [1920] 1 W.W.R. 850.

At all events, the test in *Salaman* v. *Warner* has never been applied to judgments, and here I think it is clear that we have a judgment, not an order. Yet the rules for distinguishing final and interlocutory judgments are as confused as those for orders, though it is not the ghost of *Salaman* v. *Warner, supra,* that disturbs them. The real trouble has been that the established meanings of the terms "final" and "interlocutory" have always been equivocal; they meant quite different things as applied to common-law judgments and Chancery decrees; yet the Judicature Act and rules thereunder ignored this fact and lumped them together. This procedure so obscured the situation that ever since, the Courts have been trying to find one test that will fit these diverse concepts, and that is really impossible.

Thus the *Bozson* case, *supra,* which refers *obiter* to judgments as well as orders, makes final judgments those that "finally dis-

pose of the rights of the parties." The expression "finally dispose" is itself rather ambiguous, and the phrase "substantially decide" substituted by others, seems preferable. This latter undoubtedly describes what was a final decree in Chancery, even though further steps might be needed to work out what the rights decided conferred, or the remedies to be applied. Nothing was interlocutory that substantially decided rights. So far so good. But the trouble is that both before and since the Judicature Act the terms "final" and "interlocutory" have equally been used in quite other senses. At common law a judgment to be final had not only to decide the rights of the parties; it had to complete and finally wind up the action. Similarly the typical interlocutory judgment at common law was a judgment for damages to be assessed. And it is quite impossible to treat this use of the term "interlocutory" as obsolete; for one thing, our own Rules of Court preserve that sense of the term; see *e.g.,* Supreme Court Rules, 1925, Order XIII., rr. 5, 6, 7, and Order XXVII., rr. 5, 6, and 9. Yet such a judgment was not interlocutory in the Chancery sense; for it decided the substantial rights of the parties, and only required working out as to *quantum.* So, clearly the term "interlocutory" not only has been, but still is, used in two quite inconsistent senses.

As we have seen, there is a firm basis for modern definitions of final judgments as those that substantially decide rights, whether fully worked out or not. But the modern decisions have failed to point out that these definitions are only valid for judgments analogous to Chancery decrees; and that failure cannot I think be justified. So long as we have no statutory definition of the terms "final" and "interlocutory," the only way in which hopeless confusion can be avoided is to use each of these terms in the common-law sense when the judgment in question is analogous to a common-law judgment, and in the Chancery sense when the judgment is analogous to a Chancery decree.

The framers of the Act governing the Supreme Court of Canada have shown more discrimination, and a review of the legislation governing that Court and the Court's decisions will bring out my point. The Legislature's general policy has always been to preclude appeals to the Supreme Court from judgments

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that do not decide substantive rights. Its various attempts to carry out this policy are instructive.

The Legislature's first plan was to distinguish between common law and Chancery proceedings. Up to 1913 (the old law can be conveniently seen in Cameron's Canada Supreme Court Practice, 2nd Ed.), in general only a "final judgment" could be appealed to the Supreme Court of Canada, and "final judgment" was interpreted by section 2 (*e*) of the Supreme Court Act to mean:

> . . . any judgment, rule, order or decision, whereby the action, suit, cause, matter or other judicial proceeding, is finally determined and concluded.

This definition, it may be observed, adopted the common-law test of a final judgment. And this was adopted purposely, because section 38, as it stood then, allowed an appeal from any judgment,

> (*c*) In any action, suit, cause, matter or other judicial proceeding originally instituted in any superior court of equity. . . .

This section probably denoted only a Chancery decision that decided some substantive right, since otherwise it would hardly be a judgment at all, but only an order.

In 1913 the definition of "final judgment" in the Act was radically altered, so that such a final judgment meant:

> . . . any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties . . .

This, it may be observed, amounted to substituting the Chancery test of a final judgment for the common-law test. And as a result, the above provision from section 38, making special provision for appeals in equity suits was felt to be unnecessary and was repealed in 1920.

The 1913 amendment was accounted for by Anglin, J. in *The St. John Lumber Company* v. *Roy* (1916), 53 S.C.R. 310, at p. 319 thus:

> The mischief which the amendment of 1913 was designed to remedy was the fact that theretofore, because no judgment was considered final for purposes of appeal to this court unless it not only disposed of the rights of the parties in controversy in the action but also concluded the action itself, in a common law action, subject to a few special exceptions, a judgment which conclusively determined that the plaintiff was entitled to the relief he sought was not appealable unless it also finally dealt with and disposed of the *quantum* of the recovery to which he was entitled. That was the result of the definition of "final judgment" as enacted by 42 Vict., ch. 39, sec. 9—a provision not unreasonable when it was made, but which afterwards became productive of consequences not anticipated owing to the

introduction into common law actions of methods of procedure formerly peculiar to courts of equity.

The result of this amendment of 1913 was to make a judgment for damages to be assessed a final judgment for purposes of appeal to the Supreme Court of Canada (*Windsor, Essex and Lake Shore Rapid Railway* v. *Nelles,* [1915] A.C. 355, at p. 361), though it was an interlocutory judgment at common law, and presumably is still an interlocutory judgment for the purposes of our Court of Appeal Act, which contains no definition.

Since we have no statutory definition of what is final or interlocutory, I feel that our only solution is to apply Chancery tests to judgments analogous to Chancery decrees and common-law tests to judgments analogous to common-law judgments.

So I feel no doubt that the judgment in the present case is a final judgment. The main relief sought was a declaration of title, and though a declaratory judgment is not now essentially equitable (*Chapman* v. *Michaelson,* [1909] 1 Ch. 238, at pp. 242-3), it certainly has no resemblance to a common-law judgment. And it undoubtedly settles the substantive rights of the parties. There are undoubtedly cases where an order to account is interlocutory; but here the liability to account follows as of course from the declaration of title. If we were to reverse the judgment as to titles, clearly the directions to account would go by the board. I point out, too, that the result of the accounting does not come back to the Court, but judgment is to be entered in the registry. However, even if this were not so, I would reach the same conclusion.

Much was made in argument of the reservation in the judgment, of the appointment of a receiver, sale or partition of the lands, and of costs. Appointment of a receiver is only an ancillary matter, and the reasons for judgment do not even mention sale or partition, which are obviously an afterthought, reserving something that could easily have been dealt with by separate action. Moreover, as was well expounded by our Full Court in *Belcher* v. *McDonald* (1902), 9 B.C. 377; [1904] A.C. 429, a judgment can be final in part and interlocutory in part; and interlocutory elements in a judgment cannot affect appeal from the final parts. The reservation of costs may be a factor in a case

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that is near the border-line, but by itself is a matter of little weight.

I have no difficulty in agreeing with the decision in *Mair* v. *Duncan Lumber Co.* (1927), 39 B.C. 260; but it has no application here. There the only part of the judgment that defined the rights of the parties was an ordinary common-law judgment which was clearly interlocutory by common-law standards. I think, however, I should mention the *dicta* with which MACDONALD, C.J.A. concluded the majority judgment in that case. At p. 262 he said:

> The idea of drawing these distinctions with regard to interlocutory and final appeals is based upon this: that the Court, when an action below comes up for appeal, shall be in a position to deal with all that the parties complain of, and that there shall not be an appeal today on a finding of liability and an appeal tomorrow on the finding of a referee.

These *dicta* appear to me misleading. It is true that the common-law type of appeal, by writ of error, only extended to final judgments (*i.e.*, those that completely ended an action) and gave no remedy against interlocutory judgments or orders: *Metcalfe's Case* (1614), 11 R. 38 a; *Samuel* v. *Judin* (1805), 6 East 333. Where, for example, an interlocutory judgment for damages to be assessed was given, the defendant had to wait until they were assessed and then bring a writ of error to reverse the final judgment embodying them. Various technical reasons were given why no writ of error lay for an interlocutory judgment, but the chief obstacle was the ancient common-law rule that once a cause was removed from a lower to a higher Court, it could never be remanded: see *Metcalfe's Case, supra,* at p. 390; Holdsworth's History of English Law, 4th Ed., Vol. 1, p. 214. Courts of error often had no machinery for completing an incomplete judgment; so they insisted on the judgment's being fully worked out before removal. No doubt the reason given by MACDONALD, C.J.A. was sometimes felt to be an additional reason for interlocutory judgments not being appealable; but the common law had disadvantages as well as advantages. Sometimes it was known that a judgment directing an involved inquiry would eventually be challenged and it would be more satisfactory to both parties to know before the expense of the inquiry was incurred whether it would prove to be thrown away; yet, the

rigidity of the common law gave no alternative but to hold the inquiry first. MACDONALD, C.J.A.'s *dicta* are open to the objection that they state what the law was, not what it is today. In view of section 6 (*a*) of our Court of Appeal Act, which gives an appeal from every judgment or order of the Supreme Court, or a judge, final or interlocutory, the common-law rule that an interlocutory judgment for damages to be assessed is not appealable seems to be completely abrogated.

One result of this is that a defendant against whom such a judgment has gone can presumably either appeal from the interlocutory judgment within 15 days or wait until damages have been assessed and judgment for them entered, when he will have a further three months from the entry, though whether he can then appeal on liability, or only on *quantum,* is a difficult point that I shall not go into here.

As I have said, the present judgment has no resemblance to a common-law judgment; and by the tests applicable to other than common-law judgments, it is clearly final.

I would, therefore, dismiss the motion to quash.

SLOAN, J.A.: In spite of all that has been said and written on the subject, the question of what is a final and what an interlocutory judgment for purposes of appeal procedure, still remains somewhat beclouded and uncertain. Perhaps the solution is definitive legislation.

For myself I do not choose to go on any exploratory adventure. In *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386, this Court indicated a fairly certain path and one which I propose to follow. It may not have been the best one but it at least has the merit of being travelled over before and since. Applying then to the facts of this case the tests this Court thought proper to apply to the facts of that case it seems to me, when the relevant passages from the judgments are not too literally nor rigidly interpreted, that the judgment herein is final and not interlocutory in character.

I would therefore refuse the motion to quash.

O'HALLORAN, J.A.: The respondent moves to quash the appeal as out of time on the ground the judgment is interlocutory and not final.

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The subject-matter of the appeal itself is a property dispute between husband and wife. After an eight-day trial the wife was awarded an undivided three-fifths' interest in the Victoria property and an undivided half-interest in the Vancouver property. An accounting of the rents and profits of each property was directed before the registrar, and judgment for the amounts to be certified by the registrar was also ordered to be entered.

It is not denied those adjudications conclusively and finally decided the issues between the parties. But it is now urged the appeal therefrom to this Court should be regarded as interlocutory, because, in the concluding paragraph of the formal judgment as entered, the Court had ordered that

> the matter of appointment of a receiver, sale or partition of the said lands and of the costs of the action and counterclaim be reserved to be dealt with on further consideration.

It must be apparent that all the matters so reserved concern the working out of the final judgment pronounced. Sale or partition of the undivided properties, or the appointment of a receiver, were different methods available to assure the successful plaintiff the fruits of her final judgment. And the appeal now taken is an appeal from that final judgment. It is not an appeal from an order directing a sale or partition of the lands or directing the appointment of a receiver or otherwise working out the judgment and thus interlocutory in its nature—for example *vide Mainland Potato Committee of Direction* v. *Tom Yee* (1931), 43 B.C. 453 and *Thorne* v. *Columbia Power Co. Ltd.* (1936), 50 B.C. 504.

However, counsel for the respondent contends that although the judgment may finally determine the issues in the action, none the less, for the purpose of appeal at least, its finality is submerged in the interlocutory character it is supposed to have acquired when the Court left the method of its working out to be spoken to subsequently. That submission leads to strange results. Under *Laursen* v. *McKinnon* (1913), 18 B.C. 10, if the trial judge finds damages and refers them to the registrar for assessment, it is a final judgment notwithstanding the reference. But under reasoning now advanced to us, if the Court instead of referring the damages to the registrar, should reserve them to itself for assessment, that would be an interlocutory judgment,

seemingly because the Court had "reserved" something to itself which was a consequence of, or pertained solely to the working out of an otherwise final judgment.

Mair v. *Duncan Lumber Co.* (1927), 39 B.C. 260 was invoked in aid of that proposition, but the head-note and statement of the case do not support it. It was an action for damages for cutting timber on the plaintiff's land and for an injunction to restrain the defendant from entry upon the land and cutting and removing the timber therefrom. The Court found the defendant had no right to enter on the land and enjoined him accordingly. The Court further directed a reference to the registrar to enquire and report upon the quantity of timber cut and removed by the defendant, but reserved to itself for subsequent adjudication, the question of the defendant's liability for the timber removed. There the judgment was held to be interlocutory, because a substantial issue in the action remained to be adjudicated upon. That is not this case.

Reliance was placed upon the concluding passage of the judgment of MACDONALD, C.J.A. in *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386, at p. 390:

> . . . that when the Court decides the substantial question of liability and merely refers the assessment of damages to a referee reserving nothing to itself, the judgment ought to be regarded as a final judgment for the purposes of appeal.

Counsel for the respondent adopts the words "reserving nothing to itself" in that passage and invites us to accept them literally. At first blush the submission is attractive, but closer examination reveals its danger. For the context does not permit it, and in *Mair* v. *Duncan Lumber Co., supra,* MACDONALD, C.J.A. clearly demonstrated his objective meaning by the manner in which he then applied that passage. It is observed that the judgment under consideration in the *Boslund* case was held to be final.

In my judgment the words "reserving nothing to itself," when read in the light of the context, should be interpreted to mean "reserving no substantial question of liability to itself." MACDONALD, C.J.A. cited and applied that passage in *Mair* v. *Duncan Lumber Co.* in which, as has been shown, the trial judge did in fact reserve to himself a substantial question of liability. Furthermore, if the phrase "merely refers the assessment of

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damages to a referee reserving nothing to itself" is read literally, it becomes meaningless. By referring a matter to the registrar for report, the Court does not "quit the case" and "reserve nothing to itself." For the adoption of the registrar's report is reserved to the judge by statute. And he may vary or discharge that report.

Section 61 (2) of our Supreme Court Act, Cap. 56, R.S.B.C. 1936, provides:

> The report of any District Registrar, official or special referee may be adopted, wholly or partially, by the Court or a Judge, and if so adopted, may be enforced as a judgment or order to the same effect.

There is really no such thing as a reference to the registrar "reserving nothing to the Court." That is why in my judgment the phrase means what it has been described to mean, and it also explains why MACDONALD, C.J.A., the author of the phrase, chose a case such as *Mair* v. *Duncan Lumber Co.* in which to apply it as he did.

In *Brown* v. *Sherwood Colliery Co.*, [1940] 2 All E.R. 25, Goddard, L.J. at p. 34 described what seems to be a convincing test of whether a judgment is final or interlocutory in such a case as the present. That is, does it finally dispose of the issues between the parties? We find it said at p. 34:

> An order may, no doubt, be final although certain things remain to be done as a consequence. An order to wind up a company or an order adjudicating a man bankrupt are instances, and so is an order in a redemption action. In these cases, the rights of the parties are determined, though results have to be worked out involving further inquiries.

That fits the situation here: The order appealed from is final, although certain things remain to be done as a consequence, *viz.*, the actual division of the property or suitable arrangements made to carry it on if it is to be held in joint interests. The rights of the parties have been determined, although the best method for division of the present undivided interests may not be ascertained without further inquiry before the Court.

In *McDonald* v. *Belcher*, [1904] A.C. 429 the Judicial Committee upheld the decision of the old Full Court of this Province in a Yukon appeal and *vide* (1902), 9 B.C. 377. The action was for payment of (a) the amount due upon a document alleged to be a promissory note, and (b) the balance due upon the "clean-up" of a mining claim. On the trial in May the learned judge

dismissed the action in so far as it related to (a), but directed a reference into the state of accounts between the parties quite apart from the document mentioned in (a). In September he confirmed the referee's report and dismissed the action with costs. The Judicial Committee held (p. 435) that the disposition of (a) in May was a final judgment "whether the costs were given at the time, or followed in due course of law."

The term "final judgment" is not defined in our Court of Appeal Act, as it is for example in the Supreme Court Act, Cap. 35, R.S.C. 1927. In reading earlier judgments of this Court which cite Supreme Court of Canada decisions, it is in point to note that prior to the 1913 amendment of the Dominion Supreme Court Act, "final" judgment for the purposes of appeal to the Supreme Court of Canada, was confined to a judgment or order "whereby the action . . . is finally determined and concluded." A judgment directing a reference as in *Laursen* v. *McKinnon, supra,* by reason of the statutory definition at that time, could not be a final judgment for the purposes of appeal to the Supreme Court of Canada. But it could be a final judgment for purposes of appeal to the appellate Court in this Province and it was so held in *Laursen* v. *McKinnon* and in the *Boslund* case, since appeals to this Court were not then or now limited by the statutory definition to which I have just referred, and *vide Stephenson* v. *Gold Medal Furniture Mfg. Co.* (1913), 48 S.C.R. 497, at pp. 504-5.

In my opinion, for the purposes of appeal to this Court, the judgment appealed from is a final and not an interlocutory judgment. I would refuse the motion to quash.

Motion refused.

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March 24, 25, 26, 29, 30, 31; *April* 28.

REX v. SIMPSON AND SIMMONS.

Criminal law—Conspiracy to defraud the Crown by false invoices—Evidence—Incriminating documents — Previous inquiry under Departmental Inquiries Act—Accused witness on inquiry—Power to compel production on inquiry—Protection of Canada Evidence Act—Indictment—Power of Acting Attorney-General to lay it—R.S.C. 1927, Cap. 59, Sec. 5, Subsec. 2—R.S.B.C. 1936, Cap. 130, Sec. 6 (1).

The accused were charged for that "they . . . did unlawfully conspire, combine, confederate and agree together and with James Maynard Limited and divers other persons unknown, by deceit, falsehood and fraudulent means, to defraud His Majesty the King in the right of the Province of British Columbia, by means of presenting certain false invoices for shoes and boots to the British Columbia Provincial Police and fraudulently obtaining for James Maynard Limited certain moneys from His Majesty the King in right of the said Province in payment thereof." After trial they were found guilty and sentenced to four years' imprisonment.

Held, on appeal, affirming the conviction, that the appeal should be dismissed.

On appeal it was contended that the indictment was bad in law in that it improperly bore the signature of the "Acting Attorney-General."

Held, that the objection is unsound and is met by the decision of this Court in *Rex* v. *Faulkner* (1911), 16 B.C. 229 and the case of *Rex* v. *Nyczyk*, 30 Man. L.R. 17; [1919] 2 W.W.R. 661.

On the trial the Crown tendered in evidence certain books and documents as evidence against both accused and the accused Simpson unsuccessfully objected to their reception. The grounds upon which the objection was based were that pursuant to the Departmental Inquiries Act, a commissioner had previously been appointed to inquire into and report, *inter alia*, upon the state of management of the quartermaster's stores of the Provincial police force. Pursuant to the terms of the commission, the commissioner caused a *subpœna* to be served on the accused Simpson (managing-director of James Maynard Limited) to attend and give evidence before him and produce the books of account of Maynard's Limited and other documents. Simpson attended, was sworn, testified and during his examination he claimed that his testimony might incriminate him and asked for the protection of the Canada Evidence Act and the British Columbia Evidence Act, to which the commissioner replied, "To the extent to which it applies to any of the evidence that Mr. Simpson gives, or to documents he may produce, he has that protection." Simpson then produced the books and documents now tendered in evidence. The books and documents were subsequently taken out of the commissioner's possession by the police under the sanction of a search warrant.

Held, on appeal, that the question comes down to the narrow inquiry as to whether or not these books and documents were under the circumstances improperly admitted in evidence against Simpson in violation of any

statutory privilege to which he might be entitled and in breach of the common-law privilege expressed in the maxim "*nemo tenetur seipsum accusare.*" Under the circumstances of this case, a submission based upon this principle of the common law cannot succeed. Under section 6 (1) of the Departmental Inquiries Act, the commissioner was appointed to hold his inquiry and was empowered to force the attendance of witnesses and compel them to testify and to produce documents. Said section compels the production to the commissioner of incriminating documents and is destructive of the common-law principle that no one can be compelled to incriminate himself. Section 5, subsection 2 of the Canada Evidence Act is limited by its express terms to an answer by a witness to a question and says nothing whatever about the use of incriminating documents produced by a witness under compulsion and after objection. This section, therefore, can have no application to the facts of this case and could not and cannot be invoked by Simpson to protect him from the use of these documents against him at the trial. The incriminating books and documents were not privileged from production by virtue of either the Canada Evidence Act or the common-law principle that no one can be compelled to incriminate himself.

APPEALS by defendants from their conviction before SIDNEY SMITH, J. and the verdict of a jury at the Fall Assize at Victoria on the 13th of November, 1942, on a charge that

they did unlawfully conspire, combine, confederate and agree together and with James Maynard Limited and divers other persons unknown, by deceit, falsehood and fraudulent means, to defraud His Majesty the King in the right of the Province of British Columbia, by means of presenting certain false invoices for shoes and boots to the British Columbia Provincial Police and fraudulently obtaining for James Maynard Limited certain moneys from His Majesty the King in right of the said Province in payment thereof.

The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Vancouver on the 24th to the 26th and the 29th to the 31st of March, 1943, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Davey, for appellant Simpson: Simpson was the managing-director of James Maynard Limited. We submit that the books and papers of that company were improperly allowed in as evidence. There was previously an inquiry under the Departmental Inquiries Act to inquire and report upon the management of the quartermaster's stores of the Provincial police force. Simpson was served with a *subpœna* by the commissioner to attend and give evidence. Simpson asked for protection under the Canada Evidence Act, which was granted, and the books and papers of

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James Maynard Limited were put in evidence on the inquiry. While the books were in the hands of the commissioner, they were seized under a search warrant. The commissioner had given an undertaking on behalf of the Crown that the books and papers would not be used in evidence against Simpson: see Taylor on Evidence, 12th Ed., Vol. 2, pp. 930-4; Phipson on Evidence, 8th Ed., 198-9; *Staples* v. *Isaacs and Harris* (1940), 55 B.C. 189. If there is compulsion, there must be protection. On the construction of section 5 of the Canada Evidence Act see *Attorney-General* v. *Kelly* (1916), 10 W.W.R. 131. The witness Francis examined the books after their seizure. His evidence would go by the board if the books had not been allowed in evidence, and the jury accepted his evidence which was based on hearsay and secondary evidence. On expert testimony see Taylor on Evidence, 12th Ed., Vol. 2, p. 904, sec. 1421; Phipson on Evidence, 8th Ed., 385; Wigmore on Evidence (Can. Ed.), Vol. 1, secs. 657 and 672; *Collett* v. *Collett* (1838), 1 Curt. 678; *Young* v. *Toronto General Trusts Corporation* (1939), 54 B.C. 284, at p. 285; *In re Dyce Sombre* (1849), 1 Macn. & G. 115; *Wilson et al.* v. *Bell et al.* (1918), 45 N.B.R. 442. Section 24 of the Combines Investigation Act, R.S.C. 1927, Cap. 26, as amended in 1935 deals with the question of privilege and differs from section 5 of the Canada Evidence Act: see *The Queen* v. *Erdheim*, [1896] 2 Q.B. 260. Simpson had a loan from his company of $400. Evidence as to the voucher was not admissible and prejudiced the accused: see *Rex* v. *Cooper* (1941), 56 B.C. 301. There was misdirection in stating that there should be evidence, but there was none supporting the hypothesis advanced by the defence that circumstantial evidence relied upon by the Crown was susceptible of an innocent and rational interpretation and consistent with the innocence of the accused: *Rex* v. *McDonald* (1942), 57 B.C. 478. There was wrongful admission of evidence relating to alleged irregularities in the books of James Maynard Limited which evidence was irrelevant to the charge against accused: see *Rex* v. *George Joseph Smith* (1915), 84 L.J.K.B. 2153, at p. 2156; *Rex* v. *Lovitt* (1907), 41 N.S.R. 240, at pp. 270 and 281; *Rex* v. *Pinsk*, [1934] 3 W.W.R. 752; *Rex* v. *Baird* (1915), 11 Cr. App. R. 186, at p. 190. The learned judge

did not put before the jury the essentials that weaken the Crown's case. There should be a new trial: see *Rex* v. *West* (1925), 57 O.L.R. 446, at p. 450; *Rex* v. *McCarthy* (1940), 57 B.C. 155; *Rex* v. *Markadonis,* [1935] 2 D.L.R. 105.

Henderson, for appellant Simmons: The books of James Maynard Limited produced on the commission were privileged and not admissible in evidence: see *Re Gartshore* (1919), 30 Can. C.C. 309; Phipson on Evidence, 8th Ed., 198. The charge was under section 444 of the Code. On the question of "or" and "and" being interchanged see Stroud's Judicial Dictionary, 2nd Ed., Vol. 2, pp. 1348-9; Maxwell on Statutes, 8th Ed., 209-10; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 365; *Mersey Docks and Harbour Board* v. *Henderson Brothers* (1888), 13 App. Cas. 595, at p. 603. Confessions obtained in consequence of promises cannot be given in evidence: see *Warickshall's Case* (1783), 1 Leach, C.C. 263. The reading of the indictment is a nullity and not a defect that can be amended: see *Reg.* v. *Boulton* (1871), 12 Cox, C.C. 87, at p. 93; *Rex* v. *Sinclair* (1906), 12 Can. C.C. 20; *Rex* v. *Goodfellow* (1906), 11 O.L.R. 359. The Acting Attorney-General laid the charge. He was not qualified to do this as the Attorney-General was present at the time: see *Rex* v. *Faulkner* (1911), 16 B.C. 229, at p. 235.

Moresby, K.C., for the Crown: This is a charge of conspiracy under section 444 of the Code. Under section 855 a count is not insufficient because it does not set out the exact wording of the section. There was no demand for particulars. Section 898 of the Code is a curative section. We rely on section 1010, subsection 2 that the indictment is sufficient after verdict notwithstanding certain objections. On the commission before Mr. *Haldane,* Simpson gave evidence and produced the Maynard books claiming protection under the Canada Evidence Act. The books were seized when in the hands of Mr. *Haldane.* That the books were admissible in evidence see *Reg.* v. *Leatham* (1861), 8 Cox, C.C. 498; *Griffin's Case* (1809), R. & R. 151; *Reg.* v. *Gould* (1840), 9 Car. & P. 364. We had the right to look at the books because we got them by a search warrant. As to sections 852 and 853 see *Rex* v. *Kelly* (1916), 27 Can. C.C. 94, at pp. 102-3. On the statement that there should be another charge

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and not conspiracy see *Brodie* v. *Regem,* [1936] S.C.R. 188, at pp. 198-9; *Staples* v. *Isaacs and Harris* (1940), 55 B.C. 189, at p. 192; *Dillon* v. *O'Brien and Davis* (1887), 16 Cox, C.C. 245, at pp. 251-2. In section 5 of the Canada Evidence Act there is not a word as to documents. Section 6 of the Departmental Inquiries Act took away the common-law right and destroyed the privilege: see *Rex* v. *Reid and Miller* (1940), 55 B.C. 321, at p. 338. The case of *Rex* v. *Barker,* [1941] 2 K.B. 381, is distinguished because of inducement. The commissioner had no power to grant privilege. He is only entitled to the protection given by the Act: see *Rex* v. *Leatham* (1861), 8 Cox, C.C. 498, at p. 502; *Entick* v. *Carrington* (1765), 19 St. Tri. 1029; Archbold's Criminal Pleading, Evidence & Practice, 30th Ed., 402; Phipson on Evidence, 8th Ed., 255; *Rex* v. *Pike,* [1902] 1 K.B. 552.

Clearihue, K.C., on the same side: The department was charged with $615 more than was entered in the books. The books were falsified. As to the appointment and holding of a commission see *Kelly* v. *Mathers* (1915), 25 Man. L.R. 580.

Davey, in reply: The cases of *Rex* v. *Leatham* and *Rex* v. *Pike* are distinguished from this case: see also *Rex* v. *Picken* (1937), 52 B.C. 264 and on appeal [1938] 3 D.L.R. 32; *D'Ivry* v. *World Newspaper Co.* (1897), 17 Pr. 387; *Paxton* v. *Douglas* (1812), 19 Ves. 225; *Rex* v. *Munroe* (1939), 54 B.C. 481.

Henderson, in reply: On the contention that the Acting Attorney-General preferring the indictment when the Attorney-General was here, was a nullity he referred to *Reg.* v. *Townsend* (1896), 3 Can. C.C. 29; *Rex* v. *Beckwith* (1903), 7 Can. C.C. 450; *Rex* v. *Duff (No. 2)* (1909), 15 Can. C.C. 454; *Rex* v. *Thompson* (1913), 22 Can. C.C. 78; *Re The Criminal Code and Lord's Day Act* (1910), 16 Can. C.C. 459; *Rex* v. *Park* (1936), 67 Can. C.C. 295; *Abrahams* v. *The Queen* (1881), 6 S.C.R. 10; *In re Robert Evan Sproule* (1886), 12 S.C.R. 140, at p. 148; *Re Legislation respecting Abstention from Labour on Sunday* (1905), 35 S.C.R. 581; *In re Criminal Code* (1910), 43 S.C.R. 434; *Reg.* v. *Hamilton* (1898), 30 N.S.R. 322; *Reg.* v. *Hargreaves* (1861), 2 F. & F. 790; *Rex* v. *Faulkner* (1911), 16 B.C. 229.

Cur. adv. vult.

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McDONALD, C.J.B.C.: The appellants were charged for that they did unlawfully conspire, combine, confederate and agree together and with James Maynard Limited and divers persons unknown, by deceit, falsehood and fraudulent means, to defraud His Majesty the King in the right of the Province of British Columbia, by means of presenting certain false invoices for shoes and boots to the British Columbia Provincial Police and fraudulently obtaining for James Maynard Limited certain moneys from His Majesty the King in right of the said Province in payment thereof, against the form of the statute. . . .

They were tried before SIDNEY SMITH, J. and a jury, and upon overwhelming evidence which was not contradicted, they were convicted and each was sentenced to four years' imprisonment.

On this appeal several objections were raised, but in my opinion none of these objections has sufficient substance or merit to call for consideration, except the objections which I shall now consider. If there be some trifling matters which might be open to criticism, then in so flagrant a case, I should have no hesitation in applying the salutary provisions of section 1014, subsection 2 of the Code.

Counsel for the appellant Simmons raised the objection that the Acting Attorney-General laid the charge and that he was not qualified to do this. If the point had any substance it ought to have been raised at the first opportunity. I think it is too late to raise it here for the first time. But, in any event, the objection is unsound. It is met by the decision of this Court in *Rex* v. *Faulkner* (1911), 16 B.C. 229 and is put beyond question by that of the Manitoba Court of Appeal in *Rex* v. *Nyczyk* (1919), 31 Can. C.C. 240. With due respect, I think these decisions are in accord with sound principle and should be followed by us without question.

The point which requires some consideration arises in this way: Pursuant to the Departmental Inquiries Act, Mr. *W. H. M. Haldane,* barrister, was on 24th February, 1942, appointed a commissioner to inquire into and report, *inter alia,* upon the statement *(sic)* of management of the quartermaster's stores of the Provincial police force. Pursuant to the terms of the said commission and the provisions of the Act, Mr. *Haldane* caused a *subpœna* to be served on the appellant Simpson, who was the

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managing director of James Maynard Limited, to attend and give evidence before him and to produce the books of account of James Maynard Limited and other documents. Appellant Simpson attended before the commissioner pursuant to the said *subpœna*, and was sworn and gave evidence. During the course of the inquiry appellant Simpson claimed that his testimony might tend to incriminate him, and asked for the protection of the Canada Evidence Act and the British Columbia Evidence Act. When this protection was claimed the commissioner said

> to the extent to which it applies to any of the evidence that Mr. Simpson gives, or to documents he may produce, he has that protection.

Thereupon appellant Simpson produced the books and documents now in question.

Thereafter, while these books and documents were in the possession of the commissioner, a search warrant was issued and the books and documents were seized. Upon the trial they were identified by George Norman Worsley, auditor for James Maynard Limited, as books and documents prepared and used in the ordinary course of the business of James Maynard Limited. It was largely upon the entries contained in these books and documents that the conviction was obtained. On the argument before us the proposition was laid down in the broadest terms that as a consequence of what took place before the commissioner these books and documents became possessed of such sacrosanct individuality that never again by any process of law could they be used in any criminal proceeding brought against Simpson. Indeed, the argument went so far as to contend that by virtue of what the commissioner said he had given an undertaking on behalf of the Crown to this effect. In my opinion this argument is based upon a fallacy and upon a complete misapprehension of the meaning of section 5 of the Canada Evidence Act. Let us see what this section says. In plain and simple language it is this: No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him. He must answer every question put to him; but if he objects to answer upon the ground that his answer may tend to criminate him, what happens? Simply this, Parliament (not magistrate, judge or commissioner) gives to him protection to the extent that his answer so given shall not be used or receivable

in evidence against him in any criminal trial. I am aware that a loose practice has grown up whereby the presiding officer often says, "yes, I extend to you the protection given by the Act." As a matter of fact, the presiding officer, and the commissioner here, have no more authority to grant or to withhold the protection than had the chauffeur who drove the witness to the Court House, or the tipstaff at the door. The protection is given by the Act itself, once the privilege is claimed, and nothing said by the commissioner can add to or subtract from the protection which the statute extends. Indeed it seems clear that the learned commissioner took this same view of the statute, for it will be observed that he was very careful in what he said. He did not say, and obviously he did not intend to say, that he was, either of himself or on behalf of the Crown, holding forth any promise or purporting to bestow any immunity which was not provided by the exact words of the Act itself.

To say that a book or a document which came into existence months or years before the witness is sworn, is an "answer" to a "question," put to that witness, is to me simply not fairly arguable.

Further, it is contended that both under section 5 and at common law, if the witness is obliged to produce a document under such circumstances as we are now considering, that document is privileged to the same extent as is the witness's answer. Certainly section 5 does not say so. It refers to questions and answers and to nothing else.

If, as contended, there are Canadian decisions which have gone in the other direction, then the authors of those decisions have adopted the dangerous course of reading into an Act something which Parliament never said, and, with all proper respect, I prefer to follow Blackburn, J. who in *Leatham's* case, *infra,* refused to do that very thing.

But it is said that, apart from the statute altogether, these books and documents are protected at common law. Nothing could be further from the fact. It is trite law that where anything is found in consequence of a statement made by a prisoner under circumstances which preclude its being given generally in evidence, nevertheless such part of it as relates to the thing

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found in consequence is receivable, and ought to be proved: see *Griffin's Case* (1809), R. & R. 151 and *Reg.* v. *Gould* (1840), 9 Car. & P. 364. If there is any difference in principle between an admission made under oath in answer to a question which the witness is compelled by law to answer and a confession made under circumstances which make it inadmissible in evidence, I am unable to see that difference.

Now I come to the decision of Crompton, Hill and Blackburn, JJ. in *Reg.* v. *Leatham* (1861), 8 Cox, C.C. 498, for I know of no case which exemplifies more clearly the conclusion at which I have arrived. There the learned judges had to consider a statute which authorized commissioners to examine as to corrupt practices at an election. Under the statute no statement made by any person in answer to any question put by a commissioner, was admissible in evidence in any subsequent proceeding, civil or criminal. During the examination of one Wainwright, the agent of Leatham, a candidate in an election, the commissioner having learned through Leatham's oral evidence of the existence of a letter written by Leatham to Wainwright, ordered the production of Leatham's said letter. On Leatham's trial later for bribery, his counsel protested strongly against the use of this letter, having regard to the manner in which the Crown's advisers had obtained its production. The judges were unanimous in holding the objection invalid, and referred especially to the law as laid down in *Griffin's Case* and *Reg.* v. *Gould, supra.* In my opinion the decision in *Leatham's* case is of the utmost value in construing section 5 of the Canada Evidence Act, and if I had any doubt about the matter (which I have not), that decision would convince me. See also *Rex* v. *Pike,* [1902] 1 K.B. 552.

I would dismiss the appeals.

Counsel for appellant Simpson on an appeal from the sentence imposed upon his client, pressed upon us the argument that it was unfair that his client, a merchant of hitherto unimpeachable character, should receive the same sentence as appellant Simmons, who was a public trustee in charge of the quartermaster's stores of the Provincial police. I have given this question my sincere consideration and I am unable to see why any distinction should be made. It seems to me that a merchant doing business

with the Government on a large scale, who conspires with a Government official to defraud the Government is just as guilty as that official himself. The appeals from sentence I must also dismiss.

McQUARRIE, J.A. would dismiss the appeals.

SLOAN, J.A.: The appellants were found guilty of conspiracy to defraud after a trial at the Victoria Assize and sentenced to four years' imprisonment. From this conviction an appeal is taken, in support of which a number of grounds were argued by respective counsel for Simpson and Simmons.

Among these submissions it was contended that the indictment was bad in law in that it improperly bore the signature of the "Acting Attorney-General." In my opinion this objection is met by *Rex* v. *Faulkner* (1911), 16 B.C. 229 and *Rex* v. *Nyczyk* (1919), 31 Can. C.C. 240. In my view the other objections to the form of indictment, while not without interest, are devoid of substance.

An attack was made upon the charge of the learned trial judge to the jury but upon reading the charge as a whole in the light of the evidence and the issues raised at the trial, I am satisfied that no substantial misdirection or non-direction amounting to misdirection has been established and that the defence was fairly and adequately put to the jury. That being so there is as a matter of law and generally speaking no obligation upon the learned trial judge to point out to the jury weaknesses in the evidence of the Crown witnesses. *Russell* v. *Regem* (1936), 67 Can. C.C. 28 (Kerwin, J.).

One point however remains to be more fully considered and as a preliminary to its understanding a short recitation of the relevant facts is required.

At the trial the Crown tendered in evidence certain books and documents as evidence against both accused, whereupon counsel for Simpson unsuccessfully objected to their reception. The grounds upon which the objection was based appear in an agreed memorandum read to the learned trial judge. It is as follows:

1. Pursuant to the Departmental Inquiries Act *W. H. M. Haldane* was on the 24th day of February, 1942, appointed a sole commissioner to inquire

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into and report, *inter alia*, upon the state of management of the quartermaster's stores of the Provincial police force.

2. Pursuant to the terms of the said commission and the provisions of the Departmental Inquiries Act, the said *W. H. M. Haldane* caused a *subpœna* to be served on the accused, John Graham Simpson, to attend and give evidence before him and to produce the books of account of Maynard's Limited and other documents.

3. On the 24th day of March, 1942, the said John Graham Simpson attended before the commissioner pursuant to the said *subpœna* and was sworn and testified under oath.

4. That during the course of the inquiry the said accused, John Graham Simpson, claimed that his testimony might incriminate him and asked for the protection of the Canada Evidence Act and the British Columbia Evidence Act which protection was extended to him by the commissioner.

5. This protection was claimed and extended to the said John Graham Simpson in the following terms:

John Graham Simpson, a witness called and sworn:

Davey: On behalf of the witness, I wish, without implying any admissions that there has been any misconduct which might constitute a charge, I wish to claim the protection of the Canada Evidence Act with respect to any evidence the witness may give this morning; and also with regard to all his evidence; and also the protection of the British Columbia Evidence Act.

Commissioner: To the extent that those Acts do apply to his protection.

Davey: I think it is necessary for the witness to claim that personally, so that the witness might adopt the language of my request, and ask the commissioner for that protection.

The witness: I ask for that protection, Mr. Commissioner.

Commissioner: To the extent to which it applies to any of the evidence that Mr. Simpson gives, or to documents he may produce, he has that protection.

6. That pursuant to the *subpœna* and during the course of his testimony and after the above protection had been extended to him, the said John Graham Simpson produced the books and documents now tendered in evidence.

7. All evidence of the said John Graham Simpson given on the said inquiry was given after the said claim of privilege and pursuant to the protection so given to him as above mentioned.

The books and documents produced by Simpson at the *Haldane* inquiry were filed as exhibits in that proceeding and were, on the 15th day of July, 1942 (the same day information was laid against Simpson in the police court), taken out of Mr. *Haldane's* possession by the police under the sanction of a search warrant, obtained under section 629 of the Code.

The question then comes down to the narrow inquiry as to whether or not these books and documents were, under the circumstances, improperly admitted in evidence against Simpson in

violation of any statutory privilege to which he might be entitled and in breach of the common-law privilege expressed in the maxim *"nemo tenetur seipsum accusare"* which is, as Lord Eldon said in *Ex parte Cossens* (1820), Buck 540 " . . . one of the most sacred principles in the law . . ."

That the common law of Canada extends to protect the production of incriminatory documents is well settled see, *e.g.*, *D'Ivry* v. *World Newspaper Co.* (1897), 17 Pr. 387; *Attorney-General* v. *Kelly* (1916), 10 W.W.R. 131; *Webster* v. *Solloway Mills & Co.*, [1931] 1 D.L.R. 831; *Staples* v. *Isaacs and Harris* (1940), 55 B.C. 189.

However, in my opinion, under the circumstances of this case, a submission based upon this principle of the common law cannot succeed. In the first place, from an examination of the Departmental Inquiries Act (R.S.B.C. 1936, Cap. 130), under which Mr. *Haldane* was appointed to hold his inquiry, it is clear that he was empowered to force the attendance of witnesses and to compel them to testify and to produce documents. This appears from section 6, which reads as follows:

6. (1.) The Commissioners or Commissioner appointed to conduct any inquiry under this Act may, by summons under their hands or under the hand of any one of them, require the attendance as a witness before them, at a place and time to be mentioned in the summons, of any person, and may in like manner by summons require any person to bring and produce before them all documents, writings, books, deeds, and papers in his possession, custody, or power touching or in anywise relating to or concerning the subject-matter of the inquiry; and the person named in and served with any such summons shall attend before the Commissioners or Commissioner and answer upon oath all questions touching the subject-matter of the inquiry, and shall produce all documents, writings, books, deeds, and papers as aforesaid, according to the tenor of the summons.

While the common-law rule was compendiously stated in *Staples* v. *Isaacs and Harris, supra,* p. 194 to be " . . . where there is no protection there can be no compulsion," that rule must give way to an invading statute which has as its dominant intent and purpose the inquisitorial discovery of facts, innocent or incriminatory. In that sense the philosophy underlying the compulsory aspect of the Departmental Inquiries Act and that of the Provincial and Federal Evidence Acts is basically distinct, but that is a matter which while meriting mention is one which it is unnecessary to enter upon in this case.

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It seems to me that the above-quoted section 6 compels the production to the commissioner of incriminating documents and is destructive of the common-law principle that no one can be compelled to incriminate himself.

At first impression one would tend to read into this section some reservation, *e.g.*, "subject to all just exceptions" but while I must confess the strong dissenting judgment of Coleridge, J. in *Scott's Case* (1856), Dears. & B. 47; 169 E.R. 909, appeals to me the majority of the Court in that case thought a similar compulsive power in the then Bankruptcy Act should not be read as containing a saving clause. And see *Walker* v. *Regem* (1939), 71 Can. C.C. 305.

The power to compel production of incriminating documents then being found in a Provincial statute—the Departmental Inquiries Act—the next step is to turn to the Canada Evidence Act, R.S.C. 1927, Cap. 59, to ascertain what protection, if any, is afforded by that statute against the use of those documents in subsequent criminal proceedings against the person compelled to produce them under a Provincial Act, which contains no concomitant protection.

Section 5, subsection 2 of the Canada Evidence Act reads as follows:

> 2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

That section is limited by its express terms to an answer by a witness to a question and says nothing whatever about the use of incriminating documents produced by a witness under compulsion and after objection. This section therefore can have no application to the facts of this case and could not and cannot be invoked by Simpson to protect him from the use of those documents against him at his trial.

It is clear of course that no self-incriminating answers Simpson

made before the *Haldane* inquiry could be used against him at his trial because he was being examined as a "witness" compellable to answer by reason of an Act of the Provincial Legislature and before answering he had sought the sanctuary of the Canada Evidence Act. The fact that, when he claimed the protection of the Canada Evidence Act, he was then being examined as a "witness" is the point of distinction on this aspect of the matter between this case and *Staples* v. *Isaacs and Harris, supra.*

If the statutory protection against the use of answers was to be extended to prevent the subsequent use of incriminating documents one would expect section 5 of the Canada Evidence Act to say so. Some support is found in *Attorney-General* v. *Kelly, supra,* for holding that the word "answers" may be given an extended meaning to include production of documents on demand. That, in a sense, may be so, but as to any limitation upon the subsequent use of the documents themselves it seems to me I must look to the statute itself and I cannot read into said section 5, subsection 2 words which are not there.

It also seems to me that the exclusion from the section in question any limitation upon the subsequent use of incriminating documents was deliberate and perhaps the explanation may be found in the reasoning of Hill, J. in *Reg.* v. *Leatham* (1861), 8 Cox, C.C. 498, at pp. 505-6. In that case he was considering the interpretation to be put upon section 8 of Corrupt Practices Act which protected the subsequent use of an incriminatory "statement." The question arose as to whether the word "statement" should be interpreted to extend beyond oral statements to documents. He said (with the concurrence of Blackburn, J.):

> The true mode of ascertaining the intention of the Legislature is this, look to the object of the Act of Parliament, and look to the language used for carrying out that object, and unless there is something directly repugnant to the object stated in the language used, the language used should be construed according to its plain grammatical meaning. Now let us look at the 8th section, the language used is: "That it shall be lawful for such commissioners, by summons under their hands and seals, or under the hand and seal of any one of them, to require the attendance before them at a place and time to be mentioned in the summons, which time shall be a reasonable time from the date of such summons, of any persons whomsoever whose evidence in the judgment of such commissioner or commissioners may be material to the subject-matter of the inquiry to be made by such commissioners, and to require all persons to bring before them such books, papers, deeds and writ-

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ings," &c. Then the following words are important: "All which persons shall attend such commissioners, and shall answer all questions put to them by such commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds, and writings required of them and in their custody or under their control, according to the tenor of the summons." Two things are required, the witnesses must in all cases attend, they must answer all questions put to them, and produce all books and documents required by the summons. There are two distinct duties, to answer the questions, and produce books and documents. Then what is the proviso: "Provided always that no statement made by any person in answer to any question put by such commissioner." That is with regard to the first part of the duty, nothing about documents or books, and "that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." Taking the plain literal construction of that proviso, it only applies to the examination of the witness, and the answers made by the witness to questions put to him; but we are asked to extend it to all documents, books, papers, and writings which he shall produce in answer to the summons calling upon him to produce documents. I think the Legislature intended nothing of the kind. I think the Legislature intended to leave that which had an independent prior existence, and which when proved would be a speaking fact against the party who wrote the particular document or made the entry on the books, to leave that as it was before, and merely to protect the witness as to any statement he might make in answer to the questions, and that we should be making and not construing an Act of Parliament, if we were to put the meaning contended for on the proviso contained at the end of the 8th section.

. . . . .

To sum up then, at this point the incriminating books and documents in my opinion were not privileged from production for the reasons I have stated by virtue of either the Canada Evidence Act or the common-law principle that no one can be compelled to incriminate himself.

The next objection taken was that the documents in question must be regarded as a confession and that such confession was inadmissible in that it was involuntary because of a promise of immunity held out by the commissioner or alternatively because the confession was the result of the force of compulsion exercised upon the mind of the confessor. With deference, even assuming for the purpose of this argument that the documents constituted a confession, in my view the objections cannot be sustained. In the first place the commissioner was exceedingly cautious in dealing with the matter. All that occurred was as follows:

The witness: I ask for that protection, Mr. commissioner [*i.e.*, of the Dominion and Provincial Evidence Acts].

The commissioner: To the extent to which it applies to any of the evidence that Mr. Simpson gives, or to documents he may produce, he has that protection.

The decision in *Rex* v. *Barker* (1941), 28 Cr. App. R. 52 relied upon in support of this proposition is to my mind clearly distinguishable on its facts.

As to the second ground, it must be borne in mind that the compulsion was the compulsion of a statute. There are basic distinctions in principle and in result between extorting a confession by force of threats and compelling a witness by statute to disclose his participation in a crime. As Sir Lyman P. Duff, C.J. put it in *Walker* v. *Regem, supra* (pp. 307-8):

In order to clear the ground, it seems to be necessary to observe at the outset that statements made under compulsion of statute by a person whom they tend to incriminate are not for that reason alone inadmissible in criminal proceedings. The term "voluntary," as employed in the summary description of the class of statements by accused persons which are admissible in criminal proceedings, is well understood by lawyers as importing an absence of fear of prejudice or hope of advantage held out by persons in authority and is interpreted and applied judicially according to lines traced by well-known decisions and by a well settled practice. But there is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible, against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them.

I am satisfied with the admissibility of the books and documents in question at the trial but yet another aspect of the matter remains to be dealt with, *i.e.*, the method of proof of these documents. No difficulty is found on this score with relation to the books of account of James Maynard Limited. They were admittedly proved *aliunde* by the evidence of the witness Worsley.

With regard to six stock inventories however it is further contended that they were not so proved. After careful consideration of the evidence I am satisfied that this contention cannot be supported as it would appear that apart from anything that occurred before the commissioner we have at the trial the following evidence from the witness Francis, an accountant called by the Crown:

And from your examination of these what do you say these are? These are the inventories regarding the physical count of stock on hand at the end of each fiscal year of James Maynard Limited.

Here we have evidence *aliunde* proving the inventories. As

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pointed out by counsel for the Crown there was also evidence from the witness Jacklin that he had seized these documents at the same time and place as the books hereinbefore referred to and the inventories themselves especially when taken along with the books so seized support the evidence given by Francis as aforesaid, so that the whole matter was clearly for the consideration of the jury.

I would therefore dismiss the appeals from conviction.

With regard to the sentence imposed upon Simpson I can only say that no grounds have been advanced which would justify our interference therewith. His appeal from sentence must also be dismissed.

O'HALLORAN, J.A.: I concur in the judgment of my brother SLOAN and dismiss the appeals accordingly.

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

Appeals dismissed.

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EX PARTE CIMINELLI (No. 2).

Criminal law—Habeas corpus—Successive applications to different judges—Charge of stealing a pig—Value $22—Consent to be tried by magistrate—Plea of guilty—Sentence—Charge under section 773 (a) of Code—Whether sentence limited to that prescribed by section 778—Application of section 1035.

Accused was tried before a magistrate on a charge "for that he . . . on or about the 7th day of January, A.D. 1943, at the municipality of Richmond in the county of Vancouver unlawfully did steal certain cattle, to wit, one pig, of the value of twenty-two dollars. . . ." Accused consented to be tried by the magistrate, pleaded guilty and was convicted and sentenced to three months' imprisonment with hard labour and to forfeit and pay $100, and in default of payment, three months' additional imprisonment. On motion for a writ of *habeas corpus*, preliminary objection was taken by the Crown to the hearing proceeding on the ground that this application had been previously heard by BIRD, J. and dismissed.

Held, that the case of *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*, [1928] A.C. 459, overruled the judgment of the Court

of Appeal of British Columbia in *Rex* v. *Loo Len* (1923), 33 B.C. 213, and this Court is bound to hear the application although heard previously by another member of this Court. Where a person is tried before a magistrate on a charge of theft of property, the value of which does not exceed $25, under section 773 (*a*) of the Criminal Code, the jurisdiction of the magistrate as to sentence is not limited to imprisonment only under section 778, but he may by virtue of section 1035, impose a fine in addition thereto and in lieu of payment thereof an additional gaol sentence.

MOTION for a writ of *habeas corpus*. The facts are set out in the head-note and reasons for judgment. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 13th of April, 1943.

L. H. Jackson, for the motion.
O'Brian, K.C., for the Crown. *Cur. adv. vult.*

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FARRIS, C.J.S.C.: In this matter the accused was tried before O. E. Darling, Esquire, a police magistrate in and for the municipality of Richmond on the charge

for that he the said Samuel Ciminelli on or about the 7th day of January, A.D. 1943, at the municipality of Richmond in the county of Vancouver unlawfully did steal certain cattle, to wit, one pig, of the value of twenty-two dollars, the property of Lew Bak and Wong Ming. Contrary to the form of the statute in such case made and provided.

The accused entered a plea of guilty, was convicted and sentenced to three months' imprisonment with hard labour and to forfeit and pay $100 and in default of payment thereof forthwith three months' additional imprisonment with hard labour to begin at the expiration of the previous three months.

The accused served the three months' sentence but did not pay the fine of $100 and is now in gaol serving the sentence imposed in lieu of payment of the fine.

Counsel for the accused contends that whereas the accused was charged under section 369 of the Code, but inasmuch as the value of the goods stolen was under $25 that the trial was in fact a trial under section 773 (*a*) of the Code, and the penalty is therefore determined by section 778 which does not provide for a fine.

Preliminary objection was taken on behalf of the Crown to the hearing proceeding on the ground that this application had been previously heard by my brother Mr. Justice BIRD and dismissed. [Reported, *ante*, p. 81]. Counsel for the Crown relied upon the

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case of *Rex* v. *Loo Len* (1923), 33 B.C. 213, in which case the Court of Appeal of this Province held that an applicant is limited to only one application for a writ of *habeas corpus* and cannot go from judge to judge of the same Court renewing his application. Counsel for the accused contended that the *Loo Len* case was overruled by the Privy Council by the case of *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*, [1928] A.C. 459.

Numerous other cases were cited by counsel for the Crown seeking to uphold the decision of the *Loo Len* case as being good law. With these cases I am not concerned, as I am bound to follow the decision of the Court of Appeal of this Province unless such case has been clearly overruled by a higher Court. The sole question therefore for me to determine is whether or not the Nigerian case has overruled the *Loo Len* case.

I quote from the words of MACDONALD, C.J.A., 33 B.C. 215, in the *Loo Len* case:

> It may be well to consider what the practice was before the Judicature Acts in England, and since. We have in this Province the common law in relation to *habeas corpus*, supplemented by the Habeas Corpus Act, 2 Car. 2. Cap. 2, and 56 Geo. 3, Cap. 100. We have no local legislation affecting *habeas corpus*, except section 6 of the Court of Appeal Act, and chapter 21 of the Act of 1920. Section 6 corresponds with section 19 of the English Judicature Act, and the Act of 1920 was intended to provide for the rearrest of a person who had been released from custody.

His Lordship proceeds then to examine the English law, and at p. 217 says:

> These cases show two things: that there never was the right to go from judge to judge of the same Court, and secondly, that where the Courts are merged and an appeal is given, that is the means by which redress, if any, is to be obtained.

The Appeal Court of British Columbia accordingly held that there was no right to go from judge to judge.

In the Nigerian case *(supra)* the judgment of their Lordships was delivered by Lord Hailsham, L.C., and at p. 466 he uses these words:

> . . . He [referring to the counsel for the respondent, the Nigerian Government] further called attention to the fact that no instance could be found in the books of applications being made to successive judges of the same Court, and he cited decisions in New Zealand in *Ex parte Bouvy* (1900), 18 N.Z.L.R. 601 and of the Court of Appeal of British Columbia in *In re Loo Len No. 2* [(1923), 33 B.C. 213]; [1924] 1 D.L.R. 910 to the same effect.

This constitutes a formidable body of judicial opinion, and their Lordships have thought it right, therefore, to examine with some care the earlier history of the writ.

It will, therefore, be noted that their Lordships in considering the Nigerian case not only had before them the decision of the Court of Appeal of British Columbia in the *Loo Len* case but that Lord Hailsham in his language almost adopted the language of MACDONALD, C.J.A. in determining that it was necessary to examine the history of the English *habeas-corpus* procedure, and at p. 467 his Lordship says:

> . . . If, therefore, the respondent is right in contending that an application for a writ of *habeas corpus* can only be entertained once by any one Court, it necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three common law Courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of *habeas corpus* is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute enacted primarily for simplification of procedure should have materially cut down that protection. But, in fact, their Lordships do not think that the Judicature Act has had this result, or that the contention of the respondent is well founded.

And again at p. 468:

> If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each judge of that Court still has jurisdiction to entertain an application for a writ of *habeas corpus* in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application.

It is, therefore, clear to me that their Lordships in the Nigerian case did overrule the judgment of the Court of Appeal of British Columbia in the *Loo Len* case and that I am bound to hear this application although heard previously by another member of this Court.

The first point to consider is whether or not section 369 is limited by section 773 (*a*) and the penalty is accordingly limited by section 778. Section 773 would appear to be all inclusive in its words where a person is charged before a magistrate. It says:

> Whenever any person is charged before a magistrate,
>
> (*a*) with theft, or obtaining money or property by false pretences, or

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unlawfully receiving or retaining in his possession stolen property, where the value of the property does not, in the judgment of the magistrate, exceed twenty-five dollars.

It would, therefore, seem to me that as the accused was charged before the magistrate and the charge itself stated that the value of the property was $22 or under $25, that the magistrate was limited in his sentence by section 778. (*Haglett* v. *Van Ross* (1934), 62 Can. C.C. 192).

It is true that section 778 does not in itself permit of a fine, but in my opinion section 778 must be read with section 1035 which does permit of a fine. I think the same principle is involved in the applying of section 1035 to the jurisdiction of the magistrate, as is involved in the application of section 387 to the jurisdiction of the magistrate which provides that if the value of anything stolen exceeds the sum of $200 the offender is liable to two years' imprisonment in addition to which he is otherwise liable for such offence, and our Court of Appeal has held that this can be added to the penalty of six months under section 778 for an offence committed under section 773 (*b*) of the Code (*Rex* v. *Blackman and Smith* (1931), 44 B.C. 115). In my opinion the magistrate had jurisdiction to sentence the accused to three months in gaol with a fine in addition thereto of $100, and in lieu of payment thereof to an additional three months in gaol.

The application is dismissed.

Application dismissed.

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GALT v. FRANK WATERHOUSE & COMPANY OF CANADA, LIMITED.

April 20, 21, 22; *May* 10, 11, 12, 13, 14, 18.

Ship—Wooden—Agreement to take over from owner and operate—Sharing of operating expenses and profits—Government inspection—Decay due to dry rot discovered—Extensive repairs required—Abandonment of contract—Warranty of seaworthiness—Action for damages.

On the 11th of September, 1940, the plaintiff, the owner of the steamship "Salvor," a wooden vessel built in 1908, entered into a written agreement with the defendant by which the defendant was to take over the operation and control of the "Salvor" from the 15th of September, 1940, until the 1st of April, 1942, the parties to enjoy the net profits and bear

the losses in equal shares. The relevant paragraph of the agreement was: "3. All operating expenses shall in the first instance be borne and paid by the Waterhouse Company, and shall be charged against the joint venture and operation of the said steamer. 'Operating expenses' shall include wages, costs of supplies, port and pilotage charges, repairs, insurance, the cost of annual overhaul, and all other costs, including claims contracted under this agreement, and expenses incidental to the use and operation of the said steamer." The vessel operated until June, 1941, when she became due for annual inspection under the Canada Shipping Act. The inspection disclosed that dry rot had set in the vessel so seriously that it was estimated the cost of necessary repairs to pass inspection would exceed $20,000, and eventually the vessel was tied up to a wharf where it remained until the expiry of the contract. In an action for damages for breach of the agreement concerning the operation of the ship, the plaintiff contends that these repairs are "operating expenses" as defined by the above paragraph of the agreement in that they fall within the words "cost of annual overhaul."

Held, that the words "annual overhaul" include only such work as is necessary to bring the vessel back to the condition in which it was after the completion of the previous annual overhaul. It is the repair of the previous year's disrepair and does not include the renewal of part of the structure of the ship in which there has been a silent and unseen deterioration from year to year.

Held, further, that this agreement was in the nature of a time charter of the vessel and was subject to an implied warranty of fitness at the commencement of the charter and there was non-compliance with this warranty. The ship was not fit for the purposes of the contract and could not be made fit within any time or at any cost which would not have frustrated the object of the venture.

ACTION for damages for alleged breach of an agreement in relation to the operation of the steamship "Salvor." The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 20th, 21st and 22nd of April and from the 10th to the 14th of May, 1943.

Locke, K.C., and *G. Roy Long*, for plaintiff.
Farris, K.C., and *Stultz*, for defendant.

Cur. adv. vult.

18th May, 1943.

SIDNEY SMITH, J.: This is an action for damages for alleged breach of an agreement concerning the operation of the steamship "Salvor."

The late Mr. John Galt for some 11 years carried on business

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at Vancouver, B.C., under the name of the Galt Steamship Company. It consisted of the coastwise operation of a small steamer called the "Salvor" of which he was the sole owner. Upon his death in 1935 the business and the vessel passed to his widow Mrs. Isabella Galt, the plaintiff in this action.

The defendant Frank Waterhouse & Company of Canada Limited is a well-known operator of freight steamers on the British Columbian Coast, and has carried on business as such for over 25 years with its office at the city of Vancouver. It is a subsidiary of and is controlled by the Union Steamships Ltd. also of Vancouver, B.C. Mr. Russell Solloway is the manager of the Waterhouse Company. Mr. Carl Halterman is the managing director of the Union Company. They both gave evidence.

The "Salvor" is a wooden vessel built in 1908 at Victoria, B.C., with the following dimensions: Tons gross 267; length 123.5 ft.; beam 29.2 ft.; draft 11.1 ft.

On 11th September, 1940, a written agreement was entered into between the parties to this action, by which the Waterhouse Company were to take over the entire operation and control of the "Salvor" from the 15th of September, 1940, until the 1st of April, 1942, and were to enjoy the net profits and bear the losses in equal shares with the plaintiff.

The relevant paragraph of this agreement is as follows:

3. All operating expenses shall in the first instance be borne and paid by the Waterhouse Company, and shall be charged against the joint venture and operation of the said steamer. "Operating expenses" shall include wages, cost of supplies, port and pilotage charges, repairs, insurance, the cost of annual overhaul, and all other costs, including claims contracted under this agreement, and expenses incidental to the use and operation of the said steamer.

The vessel operated under the terms of the agreement until June, 1941, when she then became due for annual Government inspection under the provisions of Part VII. of the Canada Shipping Act. For this purpose the vessel was delivered to Cranes' Shipyards on 20th June, 1941, and next day hauled out on their marine ways.

The steamship inspector charged with the duty of inspection was Mr. Alfred J. Squire. When going over the vessel on 24th June he found soft wood and ordered certain planking to be removed to permit examination of some of the frames. This

examination next day showed that many frames on each side were defective. There was no knowing how far the rot had spread throughout the ship. The situation looked serious.

The defective wood was variously described by surveyors as being punk, soft, ripe, rotten. By whatever name called, the deterioration arises in confind spaces in wooden ships and is due to lack of ventilation. It is briefly known as dry rot.

There followed a number of inspections by surveyors on behalf of both parties, and these finally culminated in a meeting on August 6th when it was decided to send the vessel to Victoria in the hope that she might be there repaired at less expense and in less time. This was done. But at Victoria matters drifted from bad to worse; further opening up disclosed further rot; supplementary specifications became necessary; the cost of repair stretched beyond $20,000; the estimated time for repair stretched beyond two months; until finally the vessel was tied up to a wharf and left there, neglected, until the expiry of the contract on April 1st, 1942. Later in that same month she was sold by the plaintiff to Mr. E. B. Clark, a former treasurer of the Waterhouse Company. Mr. Clark paid for the vessel the sum of $5,000, and in addition assumed payment of a mortgage on her to secure the sum of $4,000.

Mr. Clark then brought the ship back to Vancouver and had her repaired at Cranes' Shipyards at a cost of about $38,000 and in a period of four months. He changed her name to the "Island Prince" and she is now operating profitably on the run to Alaska.

I find that in all the steps that were taken between the time of the discovery of the dry rot and the laying up of the vessel at Victoria, Mr. Alexander Galt, a supercargo and a son of the plaintiff, acted as her representative, as her agent, and as her adviser. It seems to me not to matter very much who actually gave the several orders. I am satisfied that everything that was done was done with the knowledge and approval of both sides and with the intention of finding some way of saving the common venture from shipwreck. I think that no inference adverse to either party can be drawn from anything that was done during this period; and that moreover the costs of the various steps that were taken are chargeable to the joint venture.

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In my opinion when the vessel was delivered to Cranes' Shipyards on 20th June, 1941, her value did not exceed $20,000. Mrs. Galt, on July 31st, 1940, had granted an option to purchase the vessel for $23,000, but this was before the discovery of the dry rot, and it may be safe to assume that the would-be purchaser was not aware of the condition of her frames. Be this as it may, the other evidence of her worth, given by the various surveyors, shows that the value on this date was not more than $20,000.

I am also of opinion that at the same time the cost of the minimum repairs to satisfy the inspector, and so obtain a certificate, would have been at least $20,000 and would have occupied at least two months. As stated, she was ultimately repaired by Clark for about $38,000, but he did considerably more work than would have been actually necessary to pass inspection. On a consideration of the whole of the evidence on this point I think such repairs, done then, would not have cost less than $20,000.

What had happened was this: "senile decay"—to use the expression of one of the plaintiff's surveyors—had crept like a disease into the bones of the old ship, necessitating a major job in structural replacement of frames. This also meant new planking, for the old planks cannot usefully be replaced on new frames. The decay due to dry rot is usually a slow process, and in this case may have extended over a period of 30 years, but undiscovered until the overhaul in June, 1941. In this regard the condition of the frames in September, 1940, would not have been appreciably different from their condition as disclosed in June, 1941. Mr. Squire gave evidence that if in September, 1940, he had known of the then condition of her frames, he not only would have refused to grant a new certificate, but he also would have cancelled her existing certificate.

When the discovery of dry rot was made Mr. Halterman and Mr. Solloway on 27th June, 1941, called upon Mrs. Galt and her son with a piece of the soft wood for their inspection. They said that in view of the condition of dry rot that had been disclosed the cost of repair to pass the annual inspection would amount to approximately $20,000; that they were not required to advance such a sum under the agreement; that in their opinion the cost of a normal annual overhaul should not exceed $5,000; that they

were willing to bear their one-half portion thereof but that anything beyond $2,500 must be paid by the plaintiff.

They never deviated from this position. It is true that at later meetings they expressed the view that if the repairs could be carried out for not more than $20,000 they might be prepared to pay for them. But I find that this was for the purpose of negotiating a new agreement. They made it clear that they were not prepared to pay such a large sum of money unless they obtained some equity in the ship.

In this regard I accept the evidence of Mr. Halterman. I think he correctly appreciated the legal position and lost no time in placing it before the plaintiff. Thereafter he and Mr. Solloway used every effort to get the vessel into operation by trying to negotiate a new agreement which would be satisfactory to all parties. That these efforts failed was none of their fault but was due to the plaintiff's failure in her turn to appreciate the situation that had developed.

Much was said at the trial about information given by two former officials of the Waterhouse Company to Mr. Solloway about the condition of the "Salvor." It is doubtful if a great deal of weight should be put on this evidence. I do not question the integrity of these officials, but it is easy to place undue emphasis at a trial on what may have been mere casual conversations of some years before. So I find that while both parties knew that the "Salvor" was an old ship, neither of them knew of the defective condition of her frames.

In the circumstances which have been described the plaintiff contends that these repairs are "operating expenses" as defined in paragraph 3 of the agreement of 11th September, 1940, in that they fall within the words "cost of annual overhaul, and all other costs, including claims contracted under this agreement, and expenses incidental to the use and operation of the said steamer."

There was testimony at the trial as to what is included within the term "annual overhaul." The plaintiff's expert witnesses said generally that it includes all work required to be done by the inspector for the grant of the annual certificate. But I prefer the definition given by Mr. W. D. McLaren, for the defendant, and not the less so because it corresponds with the views of Mr. Squire and other experts. He said it is only such work which is

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necessary to bring the vessel back to the condition in which she was after completion of the previous annual overhaul. In other words, it is the repair of the preceding year's disrepair and does not include the renewal of part of the structure of the ship in which there has been a silent and unseen deterioration from year to year.

I think this definition is in harmony both with common sense and with the language of the agreement. The frames of the vessel had never before been renewed. As to them the overhaul was not annual—it was after 33 years. To say that under this language, in a contract of 18 months with only nine months to go, the Waterhouse Company was obliged to advance for a structural renewal a sum of money equal to or greater than the then value of the ship; and to wait a period of at least two months, during the most profitable freighting period, while these repairs were being made is, to me at least, quite untenable. The language would have to be intractable to permit of such a conclusion.

Moreover, I am prepared to find and I do find that this agreement was in the nature of a time charter of the vessel, and was subject to an implied warranty of fitness at the commencement of the charter, and that there was non-compliance with this warranty. (*Giertsen* v. *Turnbull & Co.*, [1908] S.C. 1101; Scrutton on Charterparties and Bills of Lading, 14th Ed., 104).

But should I be wrong in this I am of opinion that in the circumstances outlined above the ship was not fit for the purposes of the contract and could not be made fit within any time nor at any cost which would not have frustrated the object of the venture (*Tully* v. *Howling* (1877), 2 Q.B.D. 182). It seems to me that to take any other view is to lose sight of the commercial realities behind such contracts.

There was a claim for an accounting. But accounts were rendered, and I am satisfied that there was no proper demand made on the defendant for further accounts. In any event the defendant was at all times and still is ready and willing to give any accounting that may be required. There would therefore seem to be no good reason for referring the matter to the registrar.

It follows that the action must be dismissed with costs.

Action dismissed.

REX v. SUTHERLAND.

C. A.
1943
May 18.

Criminal law—Charge of obstructing a peace officer—Accused playing bagpipes on street—Followed by a number of children—Told to move on by police—Accused refused to do so—City by-law prohibiting objectionable noise.

At about 6.30 in the evening of the 12th of April, 1943, the accused was playing his bagpipes on 23rd Avenue in Vancouver. There were six or eight children following him on the road; a police officer told him to move on, but he refused to do so. Twenty-five minutes later the policeman returned with another policeman. Accused was still playing and the children were marching with him. The policeman again told him to move on and he refused to do so. There was the occasional passing of cars on the street. Accused was convicted of obstructing a police officer in the execution of his duty.

Held, on appeal, reversing the decision of deputy police magistrate Matheson, that there was no evidence to justify the finding that accused was obstructing traffic on 23rd Avenue, and on the suggestion that the conviction might be sustained under the city by-law which prohibits the making of any loud and objectionable noise, there is no legal evidence even to suggest that the music produced by the bagpipes is a loud and objectionable noise.

APPEAL by accused from his conviction by deputy police magistrate Matheson at Vancouver on a charge that on the 12th of April, 1943, in the city of Vancouver he did unlawfully and wilfully obstruct a police officer in the execution of his duty. The facts are set out in the head-note.

The appeal was argued at Vancouver on the 18th of May, 1943, before McDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

J. A. Grimmett, for appellant: Accused was walking on 23rd Avenue in the city playing the bagpipes and was followed by half a dozen children. The police officer told him he was obstructing and that he should move on. The policeman went away and came back a short time later and found accused doing the same thing. He told him to move on, but accused refused to do so. He was then taken into custody. It is submitted he was doing nothing unlawful and was not obstructing; there was very little traffic on the street. The policeman made no reference to noise: see *Rex* v. *Golden* (1936), 51 B.C. 236; *Rex* v. *Buhay,* [1930] 1 D.L.R. 540.

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Fisher, for the Crown: The city by-law as to noise applies here. There is amplification of noise in blowing the bagpipes in certain circumstances and it may be looked on as a loud and objectionable noise.

Grimmett, replied.

The judgment of the Court was delivered by

MCDONALD, C.J.B.C.: The magistrate convicted the appellant for that he did unlawfully and wilfully obstruct a peace officer, in the execution of his duty. It is clear that the conviction was based upon the premise that the appellant was obstructing traffic on 23rd Avenue in this city. There was no evidence to justify any such finding. He was not obstructing traffic and therefore the officers, when they interfered, were not executing any duty and hence could not have been obstructed by the accused in the exercise of any duty. Under the circumstances no such duty had arisen and no such duty existed.

To the suggestion that the conviction might be sustained under the city by-law, which prohibits the making of any loud and objectionable noise, the simple answer is that there is no legal evidence to even suggest that the music produced by the bagpipes is a loud and objectionable noise.

I would allow the appeal and quash the conviction.

Appeal allowed.

CASTRON v. THE EMPIRE HOME BENEFIT ASSOCIATION.

S. C.
1943
April 29;
May 4.

Insurance, benefit—Policy—Lapse of—Default in payment of dues—By-laws of association interpreted—Forms of proof of death and claim—Obligation to study forms for filing.

The plaintiff, as beneficiary, brought action to recover the moneys alleged to be payable under a certificate of membership issued to her husband, now deceased, by the defendant association and the benefit contract between him and the association.

Held, that as the husband failed to pay his dues to the association within the time provided by the contract and the by-laws of the association, the contract had lapsed and whether or not the evidence supported said finding, it is clear that the contract had lapsed because of his default in paying the last assessment levied on him prior to his death.

Held, further, that as the defendant had repudiated liability on deceased's death and advised the plaintiff that claim forms were supplied only upon the death of a member in good standing, in the circumstances the plaintiff was relieved of any obligation to file such forms.

ACTION by the wife of Fred Castron, deceased, as beneficiary named in a certificate of membership and benefit policy made between the defendant association and her husband, to recover the moneys payable under the said policy. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 29th of April, 1943.

Denis Murphy, Jr., for plaintiff.
J. G. A. Hutcheson, for defendant.

Cur. adv. vult.

4th May, 1943.

COADY, J.: The plaintiff, as beneficiary named in a certain certificate of membership and benefit policy made between the defendant association and her husband Fred Castron now deceased, sues to recover the moneys payable under the said policy. The defendant denies liability on two grounds: first, that the said contract had lapsed prior to the death of the insured by reason of failure to pay the dues and assessments within the time provided by the contract and by the by-laws of the association and, secondly, on the ground that no proof of death or claim forms were filed by the plaintiff as required by the by-laws of the

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defendant. I am of opinion that under the special circumstances here as disclosed by the evidence the plaintiff was relieved of any obligation to file such forms when the defendant repudiated liability and advised that claim forms were supplied only upon the death of a member in good standing. It is only necessary therefore to consider the first ground of defence.

The contract is dated the 26th day of August, 1927. It is the usual printed form. On the first page, however, in typewriting, appear the words "Annual dues payable July 2nd of each year" and on the endorsement on the back of the contract is a memorandum to the effect, "Annual dues $5.00 due July 2nd of each year commencing July, 1928." The annual dues for the first year were paid in advance.

In addition to the annual dues assessments are made from time to time on the membership to make up a fund sufficient to pay the claims arising on contracts of deceased members, the assessment being $1 per member if the membership is 2,500 or less, and if more than 2,500 then a proportionately smaller assessment to make up the sum of $2,500.

The contract herein contains an agreement by the member

> to pay all dues, fees and assessments hereafter levied or required to be paid by the member to the association as provided by the by-laws of the association.

The last payment made by the insured was on August 5th, 1941. The receipt (Exhibit 4) issued by the defendant shows a payment of $7.75 on that date made up of $6.50 for assessments up to July 1st, 1941, and $1.25 for quarterly dues up to September 30th, 1941. A further call was made on October 1st, 1941, for payment of $7.10 made up of $5.85 for assessments and $1.25 for current quarterly dues covering the period from October 1st, 1941, to January 1st, 1942. This notice was duly received by the insured but no payment was made. November 5th is stated in the notice as the final date of payment. Pursuant to the by-laws assessments are payable within 30 days from the date of the posting of the notice of assessment.

Paragraph 7 (b) of the by-laws provides that

> a member in good standing shall mean a member who has paid all dues and assessments owing to the association within the time or times fixed by the by-laws, or by his certificate for payment thereof.

The certificate issued to the member here provides as above stated, that the dues shall be paid annually on July 2nd each year. These dues are by this contract payable therefore each year in advance. The by-laws at the time that this certificate was issued provided by article 5 thereof, appearing in the contract, that

the yearly dues for each member shall be $6.00 payable as follows: $3.00 on January 1st of each year and $3.00 on July 1st of each year, and shall be deemed to be in arrears if not paid within 15 days of its due date, provided that any member paying his full yearly dues on or before July 1st shall be entitled to a rebate of $1.00.

These by-laws were subsequently amended on the 18th day of July, 1938, to provide as follows:

The annual dues to be paid by every member shall be $5.00 payable in quarterly instalments on the 1st days of October, January, April and July, and shall be deemed to be in arrears if not paid within 30 days from the due date of any such instalment.

Counsel for the plaintiff submits, as I understand, that the payment of dues made by the insured on August 5th, 1941, pursuant to the call made on July 1st, 1941, was the annual payment as called for by the contract, and consequently no further dues were payable until July 2nd, 1942. Alternatively counsel submits that as provided in the by-laws (article No. 5 appearing in the contract) the dues were payable on the 1st of January and the 1st of July in each year and that no further dues were payable until January 1st, 1942, and the member would not be in arrears until 15 days after that date. Death took place on the 12th of January and the submission is that there were no arrears for dues at that time. These, however, in my opinion, are not sound submissions. The insured, while his contract provided for payment of the annual dues of $5 in July in each year in advance, seems to have been making payment quarterly pursuant to the by-laws as amended on the 18th of July, 1938, hereinbefore referred to. He had the option to pay according to the terms of the contract or as provided by the by-laws, but he seems to have chosen the latter. His July payment made on August 5th, 1941, indicates that $1.25 was paid by him at that time on account of dues for the quarter ending October 1st, 1941. A further call as stated was made for the payment of quarterly dues on October 1st, 1941, payable by November 5th, 1941. This was not paid

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before the last-mentioned date, and in my opinion upon failure to pay there was default and the contract lapsed. The evidence is not as complete on this point as it might have been, but is in my opinion sufficient to support the above conclusion. But in any event whether I am right as to the default in payment of dues or not, it seems amply clear to me on the evidence that there was default with respect to the payment of the assessment levied on October 1st, 1941. As I read the contract there is nothing in it to indicate when the assessments are to be paid. These assessments are made following the death of members of the association. The practice, it would seem, has been not to make a separate assessment following each death but to levy these assessments quarterly, the amount depending on the number of deaths that had occurred among the membership in the preceding quarter. The time for payment of the assessments is provided in the by-laws. Section 7 (a) provides:

> Every assessment in respect of the death of a member shall be due and payable forthwith upon notice thereof given in the manner provided by these by-laws and shall be deemed to be in arrears if the same is not paid within 30 days of the date of the posting of the notice of such assessment.

The insured was bound by this in the absence of anything in the contract to the contrary. The assessment made on October 1st, 1941, payable by November 5th, was not made. The evidence of the plaintiff is that payment is not made because the insured was not financially able to pay. The by-laws provide (section 9) that

> any member in arrears of his or her annual dues or assessments shall thereby without any act on the part of the association automatically cease to be a member of the association and to be entitled to any rights, benefits and privileges in the association, and shall become absolutely deprived of same without formal notice being given to such member in arrears.

I must conclude, therefore, in view of the foregoing that the contract herein had lapsed by non-payment of assessments. The plaintiff's action must be dismissed.

Action dismissed.

MARSHALL v. ROGERS.

C. A.
1943
May 4, 5, 6.

Physicians and surgeons—Diabetic patient—Negligence in treatment—Findings of fact—Credibility of witnesses—Duty of Court of Appeal.

In an action for damages for negligence in treating the plaintiff, a patient suffering from diabetes, it was found by the trial judge that the defendant had not exercised proper and reasonable care and skill in treating the plaintiff when, as the defendant knew, the treatment he was giving was dangerous, and the damages sustained were due to this negligence.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C., that there was evidence to justify said findings, and as the judgment was based on the credibility of witnesses, it should not be reversed unless the Court was convinced that the judgment was wrong. There may be cases in which certain duties might be properly delegated by an attending physician to others, but in a case such as this, where admittedly a dangerous remedy was being tried, the appellant was negligent in delegating to the patient himself the duty of deciding what his real condition was from time to time from what it might be called only his subjective symptoms without having daily tests made.

APPEAL by defendant from the decision of FARRIS, C.J.S.C. of the 18th of January, 1943, in an action for damages for injury to the plaintiff from the defendant's negligence and malpractice as a physician. In May, 1942, the plaintiff retained and employed the defendant as a medical practitioner for reward to attend and treat him for diabetes from which the plaintiff was then suffering. The plaintiff claimed the defendant negligently and unskilfully treated the plaintiff for said malady. In particular, he failed to exercise proper care and skill in diagnosing the malady then suffered by the plaintiff and in prescribing the proper treatment and remedy therefor, and prescribed a treatment which was harmful and damaging to the plaintiff and in consequence the plaintiff suffered great pain and incurred great loss and injury to his health.

The appeal was argued at Victoria on the 4th, 5th, and 6th of May, 1943, before SLOAN, O'HALLORAN and FISHER, JJ.A.

Crux, for appellant: The plaintiff consulted Dr. Rogers on Friday, May 1st, 1942, asking him if it would be possible for him to go on the doctor's diet to stop taking insulin for the treatment of diabetes from which he had been suffering for 11

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years. The doctor tested his breathing, lungs and blood pressure. The patient had been taking 48 units of insulin a day and the doctor put him on a diet and reduced the insulin to 24 units a day on the Sunday following and to 12 units on Monday. On Tuesday he tested his urine for the first time and finding a little sugar, he gave instructions to increase the insulin treatment to 15 units. On Wednesday he was not so well and on Thursday he was worse, not being able to retain his food, and he had abdomen pains. The doctor did not see him on the Wednesday, but on Thursday he gave instructions, owing to his being worse, to take ten units of insulin every two hours. The patient did not follow the instructions and later the patient called in Dr. Funk and the patient was taken to the hospital. The trouble was owing to the fact that the patient did not follow instructions. In such cases they do not see the patient every day and the fact of not having a 24-hour test of the urine had nothing to do with any injury that happened. It was not the cause of his going into a state of pre-coma. He did not follow instructions: see *Town* v. *Archer* (1902), 4 O.L.R. 383, at p. 392; Beven on Negligence, 4th Ed., Vol. 2, p. 1361; *M'Quay* v. *Eastwood* (1886), 12 Ont. 402. The burden of proof is on the plaintiff: see *Hodgins* v. *Banting* (1906), 12 O.L.R. 117, at p. 118. In this case there was no error in diagnosis: see *Rickley* v. *Stratton* (1912), 4 D.L.R. 595.

Hodgson, for respondent: The orthodox method of dealing with such a case is safe. The method used by Rogers was very dangerous and required the utmost care. He did not take the care he should have in such a case. There was failure to take 24-hour test of the urine and the blood. The system of diet prescribed was not of sufficient nutrition. He left to the patient matters that in the circumstances he should have looked after himself. Substantially his only defence is that his instructions were not followed. In fact, his failure to follow instructions was of little effect: see *Jewison* v. *Hassard* (1916), 28 D.L.R. 584.

Crux, replied.

Cur. adv. vult.

6th May, 1943.

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

O'HALLORAN, J.A.: I concur in the reasons and conclusions of my brother FISHER and would dismiss the appeal accordingly.

FISHER, J.A.: This is an appeal by a medical practitioner from the judgment of the Chief Justice of the Supreme Court whereby it was adjudged that the respondent should recover from him damages in the amount of $370 and costs in an action alleging negligence and malpractice.

The evidence discloses that on May 1st, 1942, the respondent, a young man of about 25 years of age, employed the appellant as a medical practitioner for reward to attend and treat him for diabetes. The respondent had suffered from this disease for some 11 years and according to his evidence had been taking "regular insulin treatments right along" but was not on any rigid or supervised diet. The respondent stated that he had gone to the appellant on Friday, May 1st, 1942, with the hope of eliminating the insulin dosage if possible and of improving his eyesight as cataracts had been developing for a couple of years. He was then taking 48 units of insulin a day.

In the course of his evidence at the trial the respondent said in answer to questions as follows:

What were Dr. Rogers' instructions to you? I was to start on the diet the following Sunday morning, May 3rd.

And what did the diet consist of? The diet consisted of just tomato juice and one bran muffin in the morning.

What were you to have for lunch? Salad with different vegetables, tomato juice, and one muffin.

And supper? Tomato juice, one muffin and vegetable salad.

. . . . .

What were the instructions the doctor gave you with respect to the amount of insulin you were to take? The day I started my diet I was to cut the amount of insulin in half.

That is, to 24 units? Twenty-four units a day, and the second day, Monday, I was to cut it half again to 12 units.

It is clear that such a speedy reduction of insulin was surrounded with danger to the respondent. The learned trial judge accepted the evidence of Dr. William Wesley Simpson, a diabetic specialist, who said as follows:

But this diet of tomato juice and one bran muffin for breakfast and lunch, and possibly a little salad added at supper, would that be the kind of a diet you referred to that would increase the consumption of the fats in the body? Quite. That diet is very low. I can't tell you off-hand the caloric value but

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it is certainly under the basal need for that patient, and the materials will have to be made up from body fat, and the result is ketones will develop.

With a diet of that kind, would you say the insulin should be increased, rather than decreased? That could only be remedied by following a daily quantitative analysis for sugar. The amount of insulin necessary depends on that. You can have ketones with a very small trace of sugar in the urine. Coma isn't due to the sugar, it is due to these ketones, but the control of diabetes is easier to measure by that method.

So, cutting the insulin from 48 units on the first day under that diet, and 24 on the second, and 12 the third, and continuing on the 12 units, you say is a very dangerous practice? I think it certainly would be, yes.

The appellant knew that the procedure being followed by him was dangerous. He gave evidence in part as follows:

Well, did you expect him to go into a coma? Anything can happen. Taking a man off insulin is one of the most dangerous procedures in the world but it can be successful.

. . . . .

In treating a diabetic person, or discontinuing insulin entirely, is that a dangerous procedure? There is always danger.

Elsewhere in his evidence the appellant's own words were:

. . . it is impossible to tell what is going to happen in any given case.

The appellant nevertheless subjected the respondent to a rapid reduction of insulin without any tests or personal observation being made by him of his patient until Tuesday, when a slight increase in the insulin was ordered, and after Tuesday, until he saw the respondent again on Thursday afternoon, the appellant relied upon the respondent's unskilled interpretation of his own symptoms. What happened is told by the respondent in his evidence as follows:

Now then on Wednesday you had your first sign of a reaction? Not a sign of a reaction. I just didn't feel well. I never had any laboured breathing or pains or anything like that.

Wednesday was the first day you didn't feel well? Yes.

. . . . .

Now the doctor had told you that any time anything occurred of interest or any time you wanted, you were to 'phone him and get in touch with him and keep him advised? Yes.

But on Wednesday you didn't do that? No. It wasn't bad enough to 'phone the doctor.

. . . . .

Go ahead and tell us your condition on Wednesday and the following day? Wednesday afternoon I went back to work again and in the evening I began feeling bad and I stayed in bed that evening and the next morning I was sick —real sick.

What was your condition? I wasn't too bad until 11 o'clock and then I began throwing up and I couldn't keep down anything I had eaten and I began to have severe pains.

Where were the pains? In my abdomen and laboured breathing.

According to the evidence of Dr. Simpson and Dr. Funk called on behalf of the respondent the pains and laboured breathing would have indicated to them that the respondent was probably in what is called by them a pre-coma condition. On this phase of the matter Dr. Simpson said:

Abdominal pain, and the very laboured breathing, what is that a symptom of? That is a symptom of acidosis.

And if not corrected, would lead to what? Unconsciousness and death.

And is a stage near the coma stage? The term coma refers to a patient after having lost consciousness. The stage here described with this laboured breathing and nausea and pain, is referred to as pre-coma. Diabetic acidosis and a pre-coma. There are various degrees of pre-coma, depending on the necessary stimulation to revive the patient.

The witness Dr. Edward Henry Funk, a general practitioner, says in his evidence in part as follows:

Then on Thursday, May 7th, I understand you were called in to attend him? Yes, May 7th. . . .

Just describe his condition then. Well, he was what I would consider in a condition approaching coma.

What they call the pre-coma stage? The pre-coma stage.

. . . . .

. . . I considered that he was probably in a condition of pre-coma, and I asked that a specimen of urine be examined, and also that the blood be taken for blood sugar. The result of that showed his sugar 303 milligrams, and his urine showed plus four sugar, and plus four ketone. That, to my mind, was a proof that he was suffering from the lack of insulin.

. . . . .

Is that serious? Very serious.

What did you do? We ordered intravenous solutions, with glucose and insulin. After he had the first one, his condition markedly improved, and he had intravenous twice a day following. In addition to that, daily examinations of his blood and his urine were done, to check the improvement in his condition. He was in the hospital until the 17th of May, when he was discharged in a safe condition.

At this juncture it might be helpful to consider for a moment the obligation of a physician to his patient. There should really be no disagreement as to the principle applicable. In *Jewison* v. *Hassard* (1916), 28 D.L.R. 584 and *Hughston* v. *Jost,* [1943] O.W.N. 3, two of the cases referred to on the argument, reference is made to the case of *Lanphier* v. *Phipos* (1838), 8 Car. & P. 475, in which the principle was originally enunciated by Lord Tindal, C.J. that the professional man undertook to bring to the exercise of his profession a reasonable, fair and competent degree of skill. Tindal, C.J. said as follows at p. 479:

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. . . Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill, and you will say whether, in this case, the injury was occasioned by the want of such skill in the defendant. The question is, whether this injury must be referred to the want of a proper degree of skill and care in the defendant or not.

Applying such principle to the facts of this case counsel for the respondent sought to show that the appellant was guilty of negligence in adopting what counsel called an unorthodox or improper method of changing the diet and reducing the insulin at once from 48 units to 24 on the first day and 24 to 12 on the following day when the orthodox method was that the reduction should be very gradual. It may be noted, however, that the learned trial judge stated:

I do not find, for the purpose of this case, it is necessary for me to decide whether it should be reduced three units or 20 units at a time. The point in this case is to consider whether or not he exercised proper and reasonable care with this patient recognizing this was a dangerous thing he was doing.

I think therefore, having in mind this statement and other statements of the learned trial judge at the time he gave judgment, that he carefully considered whether the damages sustained by the respondent should be referred to the want of a proper degree of care and skill on the part of the appellant, not in using a speedy rather than a slow method of reducing the insulin but in not exercising proper and reasonable care and skill in his treatment of the respondent patient at a time when he was knowingly doing a dangerous thing.

On this aspect of the matter appellant sought to excuse himself by blaming the respondent for not following his instructions and testified that the respondent's condition would have been avoided if he had followed his instructions on Thursday afternoon. In his testimony this appears:

Did you warn the plaintiff as to the danger of this procedure that was about to be undertaken? I did.

What did you tell him? I told him he might expect reactions, and that I couldn't guarantee he would continue to work, but that he might lose a few days' work, he might expect to be ill in various ways, that I didn't know exactly what form it would take, but he could expect reactions.

Did you instruct him what he was to do in the event of any symptoms of reaction? He was told that if he had anything untoward, he was either to get in touch with me, or come up.

. . . . .

If you had been informed Wednesday morning by the patient that he was feeling ill, and didn't want to go to work, what would that have indicated to you? I would have arranged for him to come to see me, and would have checked his urine and blood sugar, if necessary, and increased the insulin.

And if that had been done, would that condition have arisen he has described, arising on Thursday, and which Dr. Funk has described? No.

If your instructions had been followed on Thursday about 1.30, when you instructed insulin to be given, ten units every two hours, would his condition of approaching coma have arisen? It would have avoided all this patient's trouble.

It is obvious from what the learned trial judge said that the position taken by the appellant in this evidence did not commend itself to him. He says as follows:

The procedure was this: he was to go on a certain diet, and on Tuesday, he was to bring in a sample of his urine. I think the doctor told him if he saw any general changes, to report it to him. Now, the doctor is leaving him, which to my mind, is gross carelessness and negligence, right there, to depend on his own judgment when they are trying a dangerous remedy. I do not think I have to go that far, but it struck me as rather shocking that a doctor should rely upon his own patient to really prescribe his own treatment.

The danger of delegating to the patient himself in such a case the doctor's own professional duty of deciding the true meaning of the patient's progressive symptoms is quite apparent from the evidence and especially that given by the respondent when he was asked why he did not follow the doctor's instructions on Thursday afternoon. He said in answer to questions as follows:

So that you and your mother had come to the conclusion you were suffering from too much insulin? As far as we knew those are the signs of insulin shock though we didn't know what was the matter with me.

That is why you didn't follow the doctor's instructions? We didn't follow the doctor's instructions because there was so little sugar showing in the urinalysis.

You thought you were suffering from too much insulin? Yes.

The appellant contends that, if his instructions had been followed on Thursday afternoon about 1.30, all the respondent's trouble would have been avoided, but it must be noted that Dr. Funk when questioned on this phase of the matter said as follows:

You have been asked about the importance of giving the increased insulin theatment. You gave it about 5.30 in the afternoon as near as can be

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placed. Supposing that had been given four hours earlier, what effect would that have upon his general condition other than to immediately alleviate the symptoms? I don't think just the one treatment—it alleviated his symptoms but it took a whole week to get him into a normal state.

And would that have been so if that treatment had been at 2 o'clock in the afternoon? I think it would be because he had so little to eat; there was so little piling up in a few hours like that; I don't think this could all have happened in five or six hours. I think it had piled up. He had been gradually getting worse for several days and it was the accumulation of several days.

As to the procedure that should have been followed under the circumstances I note that Dr. Simpson gave evidence in part as follows:

And would you say that a patient having gone on this diet, say on Friday, that there should be a urinal examination before he goes on the diet? I should think from my own way of handling things, and the way in orthodox treatment it should be done with 24-hour samples right from the start of the change.

The change of the diet? Yes.

Then before the reduction of the insulin on Sunday, there should have been two 24-hour tests made of the urine? Yes, and if there is sugar, further reduction should not have been made, but an increase should have been made.

I think also, notwithstanding the contention of counsel on behalf of the appellant, that this is a case where the judgment of the learned trial judge was based on the credibility of witnesses. In such case though the judgment may be reversed by an appellate Court, nevertheless the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision is right but be convinced that it is wrong. See *In re McCann* v. *Behnke*, [1940] 4 D.L.R. 272 where Davis, J., with whom Sir Lyman P. Duff, C.J. concurred, said at pp. 273-4 in part as follows:

More recently Lord Wright in the House of Lords in the *Powell* case [*Powell and Wife* v. *Streatham Manor Nursing Home*], [1935] A.C. 243 at pp. 265-66 restated the rule: "First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong;'" quoting the words of Lord Kingsdown in *The Julia*, [(1860)] 14 Moore, P.C. 210 at p. 235, 15 E.R. 284, which had been cited with approval by Lord Sumner in the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack*, [1927] A.C. 37 at pp. 47-48.

Counsel on behalf of the appellant contends that there was really no contradiction in the evidence of the parties as to what the instructions and warning of the appellant were and that the

evidence of the appellant was uncontradicted with regard to all the damages suffered by the respondent being due to his own negligence in not following out the instructions of the appellant. However as to what the instructions and warning given by the appellant to the respondent really were there was conflict of testimony on at least some points between the appellant and the respondent, *e.g.*, as to the time and nature of the expected reaction, and the learned trial judge stated that he accepted the testimony of the respondent. Then there was certainly evidence on behalf of the respondent from which the learned trial judge might have inferred, as he apparently did, that the taking of a small quantity of insulin on Thursday, May 7th, which was not taken by respondent and which the appellant claims should have been taken according to his instructions on that afternoon, would not have been sufficient to take care of the condition of the respondent at the time. Even assuming, however, without finding, that there was no direct contradiction of the evidence of the appellant that, if his instructions had been followed by the respondent on Thursday, all the respondent's trouble would have been avoided my conclusion is that the learned trial judge did not accept such evidence and in my view, as the evidence stood, he was not obliged to do so. It may be noted the learned trial judge said that, where there was any conflict between Dr. William Wesley Simpson and the appellant, he accepted the evidence of Dr. Simpson and it may be noted that the learned trial judge also said as follows:

> I accept the plaintiff's evidence as to what took place that he warned him and that is all the warning he gave him that he might expect a reaction, and might have to lay off work for several days, and that, I think, was the height of the warning he gave.
>
> . . . . .
>
> . . . On Wednesday, he did not feel very well, and he was unquestionably trying to use a mental effort to try and carry on with this treatment, trying to believe himself better. On Wednesday, he was nauseated, and went back to work, and apparently believed himself not ill by this treatment and if he changed it, he was not a proper person to decide what his condition was. . . .

Speaking of the contention on behalf of the appellant that the damages were the result of the failure of the respondent to follow the doctor's instructions the learned trial judge said:

> The only question that you can find is on Thursday afternoon that he

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took a little salad some time about 3 o'clock in the afternoon. That was the only failure to follow the doctor's instructions that has been proved to this Court, and I find that there was no other that I can accept—no other failure to follow the doctor's instructions, excepting eating the salad on Thursday afternoon, and it would appear to me that anything that occurred after Dr. Rogers' telephone call at 12.30 was immaterial to the real results.

Elsewhere the trial judge says:

> Then I find this as a fact that 24-hour tests should have been made, and that the doctor was negligent in not making those tests, that there was no test made on Monday, . . . ,
>
> . . . . .
>
> . . . there was none on Wednesday, when it was most critical, and it should have been done, and neither was there one made on Thursday morning, and the doctor was therefore negligent in not having those tests made, and watching very carefully over the patient. I find that as a fact from the evidence of the doctors, and from the admissions made by the defendant himself.

I am satisfied that the learned judge also found that the damages sustained by the respondent were due to the negligence of the appellant as aforesaid. I have no hesitation in coming to the conclusion that there was evidence on which he could so find.

Applying the rule then as restated by Lord Wright in the *Powell* case, *supra,* I have to say that in the present case I am not convinced the decision of the learned trial judge is wrong. On the contrary, I am convinced that he was right in holding as he did that the appellant, having admitted that the method followed by him was dangerous, was negligent in not having the daily tests made and watching very carefully over the patient. There might be cases in which certain duties might be properly delegated by an attending physician to others—see *Jewison* v. *Hassard, supra,* but in a case such as this, where admittedly a dangerous remedy was being tried, it would seem to me that the appellant was negligent in delegating to the patient himself the duty of deciding what his real condition was from time to time from what might be called only his subjective symptoms without having daily tests made. According to the evidence accepted by the learned trial judge daily tests under the circumstances should have been made and if made should have resulted in avoiding the very dangerous condition from which the respondent suffered damages.

I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Crux & Kennedy.*
Solicitor for respondent: *C. W. Hodgson.*

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May 26.

Negligence—Theatre—Duty to invitee — Patron enters theatre — Steps on small piece of wood—Slips and sprains ankle—Damages.

The plaintiff, with a friend, entered the defendants' moving-picture theatre in the evening where they were directed by the man in charge to the left aisle, where they were met by an usher with a flash-light, who escorted them down the aisle to the front seats. They did not want front seats and they asked the usher to take them farther back. They turned and went back, but on the way they met new patrons and the usher left them to show the new patrons seats. While the usher so turned away, the plaintiff and friend went along without her and found seats. The plaintiff said as he was entering his seat without the usher's light, he stepped on a small piece of wood about one-half the size of a lead-pencil on which his foot rolled and sprained his ankle.

Held, that the duty of an occupier of premises towards an invitee is to take reasonable care that the premises are safe. On the evidence, the defendants' cleaning system was amply sufficient for a theatre of the size and with the patronage of the theatre in question. The defendants had taken every reasonable precaution for the safety of the plaintiff. They supplied an usher with a flash-light, who was in the course of showing the plaintiff to his seat, when the plaintiff, taking advantage of a momentary diversion of the usher's attention, left her and found his own seat. Neither in this nor any other respect, did the defendants fail in their duty to the plaintiff and the action must be dismissed.

ACTION for damages resulting from injuries sustained by the plaintiff when about to take a seat in the defendants' theatre by stepping on a small piece of wood about one-half the size of a lead-pencil on which his foot rolled and he sprained his ankle. The facts are set out in the reasons for judgment. Tried by WHITESIDE, Co. J. at Vancouver on the 19th of February, 1943.

Sedgwick, for plaintiff.
L. St. M. Du Moulin, for defendants.

Cur. adv. vult.

26th May, 1943.

WHITESIDE, Co. J.: The plaintiff is a logger and the defendants at all times material to this action owned and operated the Colonial Moving Picture Theatre situated at 601 Granville Street in the said city of Vancouver. The plaintiff according to his evidence attended a show at the defendants' theatre on the

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evening of May 29th, 1942, along with a friend named Gerald Hughes to whose evidence I shall hereafter refer. When the plaintiff and his friend arrived at the theatre they were directed by the man in charge to enter by the left aisle, and they did so.

As they entered the left aisle they were met by an usher with a flash-light who escorted them down the aisle towards the front of the theatre and indicated seats for them to enter. They did not care to be seated so far forward in the theatre and requested the usher to escort them farther to the rear. The usher acquiesced and all three, the plaintiff and his friend and the usher, turned about and started back up the said aisle to the rear of the theatre. Some conflict appeared at the trial between the evidence of the plaintiff and his friend Hughes as to what occurred between the usher and the plaintiff and his friend Hughes as to how the latter became seated after turning about as aforesaid and walking to the rear. The usher, Miss Zeswick says that she escorted the plaintiff and Hughes to their seats with her flash-light, pointed with her flash-light and said, "mind the step." The plaintiff and Hughes say to the contrary that as they proceeded to the rear they met two incoming patrons coming down the same aisle and that the usher left them whilst she turned aside to show these new patrons to a seat off the same left aisle. While the usher so turned away from them the plaintiff and Hughes went along without the usher, and found their own seats. The plaintiff says that as he was entering his seat without the usher's light he stepped on a small piece of wood about one-half of the size of a lead-pencil on which his foot rolled, and as a result of which he sprained his ankle. This small piece of wood was described in the evidence as the handle of an all-day sucker, of which children are very fond. The plainiff's ankle about that time became sore enough to require medical attention, and I am accepting the evidence of the plaintiff and his friend Hughes that they did find their own seats while the usher Miss Zeswick was momentarily attending to the two new patrons mentioned.

Around the incident of the sprained ankle the plaintiff has built up a rather comprehensive and formidable series of allegations which are set out in his particulars of negligence referred to in paragraph 3 of the plaint supplemented by his answer to the defendants' demand for particulars.

The plaintiff in and by his particulars alleges that the defendants (a) failed to provide sufficient light under the circumstances, (b) failed to properly warn the plaintiff of the existence of obstructions on the said premises and in the passageway or aisles thereof, (c) failed to properly conduct and escort the plaintiff to a seat in the said premises, (d) permitted a trap to exist on the said premises. As to whether any of the said allegations of negligence are supported by the evidence I think it convenient to refer now to the evidence of Mr. John C. Reid, the building inspector of the city of Vancouver. Mr. Reid's evidence is that he has been building inspector of the city of Vancouver for the past 21 years. He inspected all public buildings of the city of Vancouver and has been inspecting the said Colonial Theatre for the last 18 years and made his last inspection of the said theatre on or about December 10th, 1942. Mr. Reid said that in his opinion the condition of the Colonial Theatre building is good and conforms to good practice. Mr. Reid said that he remembered when the said theatre was constructed and the seats were placed in accordance with good practice. In two other leading theatres of the city of Vancouver, namely, the Stanley and Lyric Theatres, the seats are of the same type as in the Colonial Theatre and Mr. Reid says that the type of floor in the Colonial Theatre is safe and compared favourably with the floors in other theatres of the city of Vancouver, and as to the arrangement of seats in the Colonial Theatre, Mr. Reid says that the same conforms to the requirements of the building by-laws of the city of Vancouver relating to such matters in particular. Mr. Reid says the aisles are four feet wide, the seats are 32 inches wide, the step from the aisle has a four-inch rise and the seats are placed on a level deck cubicle which in Mr. Reid's opinion is alright. On his cross-examination Mr. Reid affirmed again that in the main the said Colonial Theatre as to its structure and lighting and seating arrangements complies with Vancouver City regulations.

I do not think that in view of the evidence of so competent and reliable a witness as Mr. Reid, evidence which was not contradicted in any way, further reference need be made to the structure and seating and lighting arrangements of the said Colonial Theatre. I find that the same are in good order and did not in any way contribute to the plaintiff's accident.

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It can be properly inferred from a perusal of questions 98 and 130 of the plaintiff's examination for discovery that he has been a frequent attendant at moving-picture theatres during the past eight years both in Eastern Canada and Western Canada. The above questions were put to the plaintiff on his cross-examination and he agreed that his answers to same were as set out in his examination. The plaintiff knew that on entering a moving-picture theatre it would take a short interval for his eyes to become accustomed to the dim light he would encounter on entering such a theatre.

Referring to question 129:

When you went in all those other theatres I suppose you found them dark each one? Yes they are all dark. Some of them have a good system of lighting and some of them have a poor system and some of them have little lights at the edge of the seats.

Question 30:

And others have not? That is right.

On cross-examination at the trial question 265 of the plaintiff's examination was read by defendant's counsel to the plaintiff and he agreed that the answer thereto was as stated in the examination. Question 265 is as follows:

I say is not what caused you to slip that piece of wood? That is it, sir.

Question 266:

The floor that the piece of wood was on was level approximately, was it not? So far as I think.

We have now arrived at a point where we can eliminate for our consideration any suggestion of negligence on the part of the defendants in respect of the structure of the said Colonial Theatre or in respect of the lighting or seating arrangements of such theatre. The plaintiff has narrowed the issues down to whether or not the defendants are liable because under the said circumstances the plaintiff stepped on the small piece of wood mentioned and sprained his ankle.

It is necessary to consider on this point the defendants' system of care and management of their said theatre, for on the sufficiency of such system depends, I think, the answer to the question as to whether or not the defendants are liable to the plaintiff in damages. The defendant Hector Quagliotti Romano said in his evidence in chief that the said Colonial Theatre was built in 1912 and 1913, and he commenced to operate the same on the

4th of March, 1914, and from the latter down to the present time only one accident other than the one now under consideration has occurred during his management. Mr. Hector Quagliotti said that it is the defendants' system that all accidents must be reported to him and the case of the one accident above referred to was that of a lady who tripped and fell because as she left the theatre she continued to look at the pictures. And in the case at Bar when the plaintiff reported his accident to the defendant he simply said he had sprained his ankle but did not say how. The defendant Hector Quagliotti says that the defendants maintain ushers at their theatre shows, one on the left aisle of the theatre, one on the right aisle, and another upstairs. The said theatre has a patronage of from 1,400 to 1,500 patrons per day. There were three ushers on duty at the said theatre on the 29th of May, one on the left aisle, one on the right aisle and one upstairs. The ushers use a flash-light in escorting patrons to their seats, and are instructed that as they seat the patrons they must warn them to mind the step. Furthermore defendants' ushers are instructed to watch for and pick up any debris they may see on the floor as they go about in the course of their duty. The four-inch step which patrons are requested to mind on being seated can be seen without using a flash-light. The defendants, according to this defendant, employ a janitor who comes on duty at 11.30 p.m. daily and continues on duty until 8.30 a.m. the following day, and in addition to the janitor work three women are employed each Sunday to clean the theatre.

Josephine Zeswick was the usher on duty on the left aisle of the said theatre when the plaintiff and his friend Gerald Hughes entered it. As agreed by the latter Miss Zeswick met them in the left aisle with her flash-light and escorted them to their seats. They objected to going so far forward and asked to be taken back towards the rear. As I have pointed out, Miss Zeswick says she took the plaintiff and his friend Hughes all the way back to their seats with her flash-light while the latter claim that Miss Zeswick left them without a light to attend to some incoming patrons on the same aisle. I am accepting the plaintiff's evidence and that of his friend Gerald Hughes as against that of Miss Zeswick on this point because Clifford Johnson says that he saw

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the plaintiff enter his seat and stumble in doing so, and that he saw no usher there at the time. It seems to me that Miss Zeswick was not acting unreasonably or negligently if when escorting the plaintiff back to the rear of the theatre she momentarily turned aside to show the said incoming patrons to a seat a step or two to the right or left side of the same aisle along which the plaintiff and his friend and the usher Miss Zeswick were walking. When several hundred patrons are entering a moving-picture theatre at once it must be expected that they cannot all be seated at once and it should not I think be held in the case at Bar that the defendants were negligent in not providing more ushers than they had on duty on the night in question. No doubt the case of *Edglie* v. *Woodward Stores Ltd.* (1934), 50 B.C. 403 was the inspiration of the case at Bar. In the *Edglie* v. *Woodward* case the plaintiff, a customer of the defendant's department store slipped on an orange peel on the stairs in the store and was injured. There was no evidence that he did not use reasonable care and it was held that the defendant was negligent in allowing pieces of orange peel to remain on the stairs for a long time without being swept up and that the defendant's cleaning system had not been properly functioning for more than an hour prior to the accident and that pieces of orange peel had during the whole of that time been allowed to be on the stairs on which the plaintiff slipped and fell. Such was the evidence and it was held that the plaintiff had shifted to the defendant the *onus* of proving that the particular piece of orange peel was not there by the defendant's negligence and that it was blameless in respect of the cause of the accident and since the defendant did not satisfy this *onus,* it was liable..

In the case at Bar the plaintiff alleges that he sprained his ankle because his foot slipped and rolled on a small piece of wood about one-half the size of a lead-pencil. This small piece of wood was resting on a level wooden-floor surface and I think that of all obstructions, if one may so refer to such a small piece of wood, the one in question would be the least likely to turn a logger's ankle. There is a great difference as to potential danger to traffic between an orange peel on a stairway and the small piece of wood referred to lying on a level wooden-floor space in the darkened

or dim light of a moving-picture theatre where it might be impossible for any theatre usher or patron to see it without the help of a flash-light.

The plaintiff is an invitee in respect of the defendants. The plaintiff paid his way into the defendants' theatre on the night in question and as held by FISHER, J. in the *Edglie* v. *Woodward* case, the duty of an occupier of premises towards an invitee is to take reasonable care that the premises are safe. I have referred to the defendants' cleaning system. It seems amply sufficient for a theatre of the size and with the patronage of the Colonial Theatre. As I have pointed out, there is a janitor on duty from 11.30 each night until 8.30 the following morning. There are three women employed every Sunday to clean the theatre. There were three ushers on duty on the night in question, all of whom were instructed to look out for and pick debris that might be found on the floor. Miss Zeswick, the only usher on duty on the night in question who was called as a witness said that she was on that night from time to time picking papers off the floor. The defendants in my opinion have taken every reasonable precaution for the safety of the plaintiff. They supplied an usher with a flash-light who was in the course of showing the plaintiff to his seat when the plaintiff taking advantage of a momentary diversion of the usher's attention, left her and found his own seat. I do not think that in this or any other respect the defendants have failed in their duty to the plaintiff and the plaintiff's action must be dismissed with costs.

Action dismissed.

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Criminal law—Charge of manslaughter—Accused found not guilty of manslaughter but guilty of reckless driving—Whether sufficient evidence to go to jury on charge as laid—Criminal Code, Secs. 285, Subsec. 6 and 951, Subsec. 3.

Shortly after 11 o'clock on the night of January 14th, 1943, the deceased Alexander McRae was standing at a point on Broadway close to the south track about 50 feet west of the Vine Street intersection, when he received fatal injuries in a collision with a motor-car driven by the accused easterly on Broadway and carried as far as the pedestrian lane on the west side of Vine Street. At the west end of the block immediately west of Vine Street (about 500 feet long) the accused passed a motor-car coming out from the kerb driven by one Lovell (with his wife as a passenger) and he then passed an east-bound street-car which was going at about 20 miles an hour and was about 200 feet ahead of the street-car when he struck the deceased. Mrs. Lovell saw a man walk out from the south kerb at the south-west corner of the intersection to the south track and although she did not see the impact, she saw deceased's body rolling under accused's car and accused continued on without stopping. The motorman on the street-car did not see the impact, but he saw the body rolling under the car. A head-light was broken and the radiator and left front side of accused's car was damaged by the collision. The visibility was good, the street was dry and there was no other traffic on the street. The jury acquitted the accused on a charge of manslaughter, but applied section 951, subsection 3 of the Criminal Code and convicted him of "reckless driving."

Held, on appeal, affirming the decision of ROBERTSON, J. (O'HALLORAN, J.A. dissenting), that there was evidence to go to the jury on the charge of manslaughter. The state of the radiator is a matter of irresistible inference that accused's car ran into the deceased. There is strong evidence of the car running at an illegal speed and running down a man under good lighting conditions. Further, the accused never stopped after running over deceased.

Per MCDONALD, C.J.B.C.: On the point raised that there was no *prima-facie* case of manslaughter to go to the jury and that that was necessary before the jury could even consider the matter of reckless driving, under section 951, subsection 2 of the Code, where the charge is murder and the evidence does not make out a *prima-facie* case of murder, but there is evidence on which the jury could find manslaughter, the case cannot be taken from them. By analogy I think that if the charge is manslaughter and there is evidence of reckless driving (assuming that there is a difference in the evidence needed to establish the two offences) the case must go to the jury.

APPEAL by accused from his conviction before ROBERTSON, J. and the verdict of a jury at the Spring Assize at Vancouver on

the 7th of April, 1943. The appellant was charged with manslaughter and the jury convicted him of reckless driving under section 951, subsection 3 of the Criminal Code. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 1st, 2nd and 3rd of June, 1943, before McDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

Guild, for appellant: The accident was at night, near the corner of Broadway and Vine Street. The charge was one of manslaughter and accused was found guilty of reckless driving. There was no evidence upon which the jury could properly find a verdict of manslaughter, so section 951, subsection 3 of the Criminal Code does not apply and the jury cannot then convict him of reckless driving: see *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193, at p. 197; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 536; *Rex v. Bateman* (1925), 94 L.J.K.B. 791, at p. 796; *Rex* v. *Costello,* [1932] 2 D.L.R. 410, at p. 417; Harris and Wilshere's Criminal Law, 16th Ed., 436. There is a matter of law as to whether the case should go to the jury to be decided by the trial judge. It is submitted this is a clear case: see *Rex* v. *Joiner* (1910), 74 J.P. 200; *Rex* v. *Fraser* (1911), 76 J.P. 168; *Rex* v. *Leach* (1909), 2 Cr. App. R. 72. No person saw accused's car strike deceased. One Lovell and his wife were starting to go east in their car from their home at the west end of the south block. The wife saw accused's car pass them and she said she saw deceased rolling under accused's car and the driver of the street-car going east said that when 200 feet back he saw deceased under accused's car. This is all the evidence there is to connect the accused with the accident. We have the right to have the learned judge exercise his judgment on the law as to whether there was any evidence on which the jury could find manslaughter. The Crown must prove that the duty to take care was not discharged, that the neglect to take care was the cause of the death, that the default amounted to a crime and to prove a crime a high degree of negligence must be proved: see *Rex* v. *Bateman* (1925), 94 L.J.K.B. 791, at p. 793; *Andrews* v. *Director of Public Prosecutions* (1937), 106 L.J.K.B. 370, at p. 373; *Rex* v. *Wilmot,* [1941] S.C.R. 53, at

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p. 63. They must prove the negligence caused the death: see *Wakelin* v. *London and South-Western Rail. Co.* (1886), 56 L.J.Q.B. 229; *Rex* v. *MacDonald,* [1942] 4 D.L.R. 782; and on appeal, [1943] O.W.N. 127; *Rex* v. *Wilmot* (1940), 74 Can. C.C. 1, at p. 3. Section 951 of the Criminal Code does not interfere with the power of the learned trial judge to determine whether there is evidence to go to the jury: see *McKenzie* v. *Chilliwack Corporation* (1912), 82 L.J.P.C. 22; *McGowan* v. *Stott* (1923), 99 L.J.K.B. 357 n.; *Cotton* v. *Wood* (1860), 8 C.B. (N.S.) 568. If the learned judge says there is no manslaughter then they can never get to reckless driving. Once a case of manslaughter properly goes to the jury, then section 951 of the Code applies. On the presumption of innocence see *Clark* v. *Regem* (1921), 61 S.C.R. 608, at p. 618; *Regina* v. *White and Others* (1865), 4 F. & F. 383; *The King* v. *Burdett* (1820), 4 B. & Ald. 95, at p. 122; *Rex* v. *Wilson* (1919), 32 Can. C.C. 96.

Clark, K.C., for the Crown: There was ample evidence to allow the case to go to the jury on manslaughter. Even if the evidence is short of that and there is sufficient for reckless driving, the learned judge was right in allowing the case to go to the jury. There is additional evidence to that referred to. There were a number of witnesses and no one was seen in the vicinity of the accident except the deceased. He was seen under accused's car by Mrs. Lovell and by the driver of the street-car. Accused gained 200 feet on the street-car in a block and was travelling at nearly 40 miles an hour. His not seeing the deceased, who was standing on the road waiting for the street-car, was due to his excessive speed. There was no obstruction and he should have seen him: see *Swartz Bros. Ltd.* v. *Wills,* [1935] 3 D.L.R. 277; *Rex* v. *Robertson* (1942), 58 B.C. 37. The cases of *Rex* v. *Wilmot* and *Rex* v. *MacDonald* [*supra*] are in conflict and the *MacDonald* case is not against us. Section 285, subsection 6 of the Criminal Code is similar to section 11 of the Road Traffic Act, 1930 (20 & 21 Geo. 5), Cap. 43 (Imp.): see *Rex* v. *Bowman,* [1939] 3 D.L.R. 551, at p. 553; *Rex* v. *Bower,* [1941] 2 D.L.R. 269, at p. 270; *McCarthy* v. *Regem* (1921), 35 Can. C.C. 213; *Rex* v. *Carr,* [1937] 3 D.L.R. 537. The simple ques-

tion is "Was there evidence that McRae was killed by the car of the accused? Was there evidence that Brunton could see him?"

Guild, replied.

Cur. adv. vult.

25th June, 1943.

McDONALD, C.J.B.C.: This appeal was so persuasively argued by Mr. *Guild* that when the hearing ended I was almost convinced that he was right. However, further consideration and reperusal of the evidence bring me to the conclusion that we cannot interfere with the conviction.

Appellant was charged with manslaughter and the Crown's case was that he ran down with a motor-car and killed one McRae on Broadway in Vancouver, near the intersection of Vine Street. McRae was killed at night, but witnesses say that the visibility was good and the street dry. Appellant, having failed in a motion to take the case from the jury, gave no evidence, and the jury convicted him of reckless driving under section 951, subsection 3 of the Code.

One of Mr. *Guild's* points was that there was no *prima-facie* case of manslaughter to go to the jury, and that that was necessary before the jury could even consider the matter of reckless driving. I am not satisfied that that argument is sound. Under section 951, subsection 2, where the charge is murder and the evidence does not make out a *prima-facie* case of murder, but there is evidence on which the jury could find manslaughter, the case cannot be taken from them. By analogy I think that if the charge is manslaughter, and there is evidence of reckless driving (assuming that there is a difference in the evidence needed to establish the two offences) the case must go to the jury. I see nothing against this view in *Rex* v. *MacDonald,* [1943] O.R. 158 or *Rex* v. *Wilmot,* [1941] S.C.R. 53. Great stress was laid on the difference in phraseology between section 951, subsections 2 and 3. In the latter case it is said that the charge of manslaughter must of necessity go to the jury before they can say "they are satisfied that the accused is not guilty of manslaughter." Upon consideration I am convinced this was not the intention of Parliament and that the analogy holds. Here I do

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not think even a verdict of manslaughter could have been disturbed.

One of the peculiarities of this case is that though there were several persons at hand who were able to give evidence, no one actually saw the motor-car knock down the deceased. Naturally, appellant's counsel stressed this point. However, several witnesses saw deceased's body "bouncing about" under a car, and I think there is not the least doubt that this was a car being driven by the appellant. The argument based on the want of any witness of the impact must be that there is nothing to show that McRae was not already down when appellant ran over him. That view however seems untenable. Though no one saw appellant hit McRae, several witnesses heard the "crash" of an impact and the sound of breaking glass a few seconds before they saw his body under the car. This, taken with the condition of appellant's car when it was found next day with a broken head-light and dented mud-guard and radiator, provides plenty of evidence that appellant ran McRae down, and ran him down while he was standing.

Appellant's next point was that even if he did so, there was no evidence that he was criminally culpable in doing so, and that at most it might be a case of civil negligence. We were told that there was no evidence that appellant was driving fast or failing to keep a proper look-out.

I think the witness Findlay's evidence was quite sufficient to justify the jury in holding that appellant was driving at a dangerous rate. This witness was driving a street-car; he estimated his speed at 20 to 22 miles per hour, and said that appellant's car passed him "at a good rate of speed." Later he described it as going "quickly" and "quite quickly." It is true that Findlay somewhat weakened his evidence by foolish statements about how he estimated speeds, and finally conceded that this was "guess-work." This however does not seem important. All estimates, where a witness is not timing a car over a measured distance with a stop-watch, are guess-work; but one can form a very fair estimate of speeds by guess-work, and I should expect to find that a motorman, who was used to driving a vehicle, was better qualified than most to make a good guess. It is true that

Mrs. Lovell, the only other witness to notice appellant's speed, did not think he was going fast; but the jury were entitled to prefer Findlay's opinion to hers. Men, I think, are usually better judges of such matters than women. Reading Findlay's evidence, I find him an unusually observant witness, and I should not say the same of Mrs. Lovell.

We have not only the rather vague statements that appellant was driving "quickly"; we have Findlay's much more concrete testimony that appellant's car dragged McRae's body for 50 feet from the point of impact.

Findlay also gives us other definite evidence of appellant's speed. Appellant passed his street-car in the same block as he ran McRae down in. This block is 500 feet long. I feel no doubt that appellant struck McRae down some 50 feet short of the end of the block, and was then some 200 feet ahead of the street-car. This meant that he had gained 200 feet in something less than 450 feet on a street-car that Findlay says was travelling at least 20 miles per hour and probably more. These facts could easily satisfy a jury that appellant was travelling at a dangerous speed.

I turn to the question of look-out. There is no direct evidence on this, naturally; and the case has been argued as though this is a defect in the Crown's case. But I am far from ready to hold that when visibility is good, and a motor-car kills a pedestrian, the *onus* is not on the driver to excuse himself even in a criminal case, unless the known facts suggest that he was not to blame. Otherwise it seems to me that a driver might run down a pedestrian purposely, at a moderate speed, and then rely on the fact that there was no evidence of inadequate look-out. I see no reason why, when a driver of a motor-car kills a pedestrian, this homicide should be regarded otherwise than a shooting affair. One can equally shoot another without fault, but the mere fact of unexplained homicide calls for the killer to make his excuses.

In saying this, I do not overlook the cases like *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462, which hold that the *onus* remains on the Crown throughout. This may be so in a legal sense; but that does not undo the effect of presumptive evidence, nor require the Crown to negative every possible explanation consistent with innocence. It may be noted

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that in the *Woolmington* case the accused met the presumptive evidence by taking the box. The quashing of the conviction there is explained, not by the jury's inability to convict on the Crown's evidence, but by the facts that there was misdirection, and that in England a new trial cannot be ordered.

Here I should mention that several cases were cited against the hazarding of conjectures as to how a person met his death, where direct evidence is lacking. The strongest of these decisions is *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41. That case, however, has little resemblance to this. There a man's body was found near defendant's railway, close to, but not on, a crossing, and it was common ground that he must have been killed at night. There the evidence ended. There was no evidence of what happened and no negligent act was alleged against the railway except the failure to whistle. The House of Lords held, without deciding whether this was negligence, that the railway's liability was not shown, because even if it was negligent, the negligence was not proved to be connected with the accident. As Lord Halsbury said (p. 45):

> One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?

Here, however, in my view, there can be no doubt that the car ran into the man. The state of the radiator, as shown in the photograph before us, leaves no room for conjecture. It is a matter of irresistible inference. Then here we have strong evidence of the car's running at an illegal speed, and running down a man under good lighting conditions on a public highway. This is entirely different from a railway's running down a man on its own property at night, where there is no lighting, except what is supplied by the head-light of a locomotive running at a high rate of speed (authorized by statute) which would preclude the avoidance of a person seen suddenly. And as Lord Halsbury pointed out, there was no evidence even that the locomotive ran into the deceased. I cannot see therefore how the *Wakelin* case has any resemblance to this.

There is still another element to be considered. Speed and

want of look-out are not the only possible elements of criminality in a running-down case. Here the appellant never stopped at all after running over McRae. His car slowed down and then speeded up again. I think the jury might in this case have reached the conclusion that he never intended to stop his car, and that the slowing of it may have been due only to rocking action caused by its bouncing over the body, which it carried for some 50 feet. If so, it would be a legitimate conclusion, even if the original impact was not culpable, that appellant showed a recklessness and callousness, in itself criminal, in his efforts to get away. Injuries to McRae, not necessarily fatal if the car had been stopped as soon as possible, might well have been made fatal by appellant's conduct. This does not seem to me a mere conjecture; it is an inference that the jury might reasonably draw on the evidence.

Furthermore, apart from possible aggravation of injuries, I think the jury were entitled to infer from appellant's flying the scene that he had been criminally culpable. In all cases of homicide the killer's failure to notify the authorities, and his attempts to conceal what he has done, have always been taken as cogent evidence of criminal culpability, sufficient to get over want of evidence of exactly what he did. I think this can be made clear by an illustration.

Suppose A is last seen alive entering a wood with B. Both carry axes. B is seen emerging alone with blood-stained clothes. On being asked about the stains he gives what later proves to be a lying explanation. A's body with axe-wounds in it is found soon after, and when B is sought, he is found to have fled the country. Can it seriously be questioned that such flight is cogent evidence that he has murdered A? Evidence of the above facts, if unanswered, would clearly justify a conviction for murder, and a conviction could not be questioned on the ground that the evidence was consistent with innocence. B may have parted from A and acquired the blood-stains by killing pigs. Or he may have been attacked by A and killed him in self-defence. Or, after parting from A, he may have heard him shout for help and gone back to find him mortally wounded, acquiring blood-stains in trying to staunch his wounds. All these explanations are

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possible; but without evidence to show that one or the other is true, the known facts justify conviction, and none is more cogent than B's attempt to flee the country. Yet even this is consistent with innocence; B, knowing that he will be wrongly suspected, may have rushed off in sudden panic. His lying explanation, like the appellant's untrue statement to the police, may have been due to panic. That possibility, unsupported by evidence of innocence, is not, however, enough.

In the present case, it has been put to us that appellant's attempt to escape is a subject for a separate charge, as a separate offence. This, however, merely beclouds the issue. Quite apart from the question whether he can be prosecuted for that separately, his attempt to make off is in itself evidence of criminal culpability in running down McRae; and, I should say, cogent evidence.

In view of these considerations, I think it is impossible for us to disturb the conviction.

I would dismiss the appeal.

O'HALLORAN, J.A.: The appellant was charged with manslaughter and acquitted, but the jury applied section 951, subsection 3 of the Code and convicted him of "reckless driving" within the meaning of section 285, subsection 6. He seeks to quash that conviction and the argument addressed to us raises points of great importance.

His counsel submits there was no evidence of manslaughter, and that the case ought to have been withdrawn from the jury. If the trial had taken that proper course, no evidence could then have been left with the jury as judges of fact, and hence he reasons, it would have been impossible for the jury to act under section 951, subsection 3 and convict the appellant of an offence within section 285, subsection 6. That submission is consistent with the course of the defence at the trial. At the close of the case for the prosecution, defence counsel moved to withdraw the case from the jury, and, upon being overruled, called no evidence, but confined the defence to the point of law that there was no evidence whatever to go to the jury upon the charge of manslaughter.

Study of the testimony has failed to satisfy me evidence was adduced of causal connection between the unfortunate death of McRae and any unlawful act or omission of the appellant. The mere fact the pedestrian received fatal injuries in a collision with the appellant's motor-car is not evidence of that causal connection. There is no general principle that a sequence of events raises a presumption of the existence of causal connection between those events. It may raise a supposition (*viz.*, a hypothesis) of causal connection. But hypothesis cannot be accepted as proof until it is verified. If a motorist makes a mistake in judgment, or in the light of subsequent critical appraisal of his conduct, is said to have acted carelessly, or, for that matter recklessly, and happens to collide with a pedestrian who dies from his injuries, that is not *eo ipso* evidence of manslaughter.

To constitute evidence of manslaughter, there must be evidence direct or by legitimate inference, that the collision from which death ensued was causally connected with a criminal act or omission of the motorist. Nor is that reasoning escaped by attempting to treat as indivisible, the two distinctive essentials of proof to which I have just referred. If it may be legitimately inferred from the proven facts that McRae met his death in a collision with a motor-car recklessly driven by the appellant, that cannot be regarded as evidence of causal connection to found manslaughter, if it does not create a presumption of law accordingly. One of the consequences of the latter is, that it may cause to be accepted as if proven, facts which could not be so accepted or perhaps proven at all, if the presumption of law did not exist and the acceptance or proof of such facts depended upon logical presumptions commonly called presumptions of fact.

It seems to be inherent in the case for the prosecution as a presumption of law that, if a motorist driving recklessly collides with a pedestrian who dies from his injuries, it is *eo ipso* evidence of manslaughter. But that fundamental error—implicit in the reasoning of some of the decisions cited to us—was "finally expunged from the law" in *Andrews* v. *Director of Public Prosecutions* (1937), 106 L.J.K.B. 370 (H.L.). Lord Atkin with whom the other Law Lords agreed, in speaking of section 11 of the English Road Traffic Act, 1930 (20 & 21 Geo. 5), Cap. 43,

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which is comparable with our section 285, subsection 6, said at p. 373:

> . . . it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter.

And further at p. 374 Lord Atkin said that it would have been misdirection if the learned trial judge had not corrected his initial misstatement of law to the jury,

> that if a man kills another in the course of doing an unlawful act he is guilty of manslaughter.

That part of the summing-up to the jury of du Parcq, J., set out in the *Andrews* case as reported in (1937), 26 Cr. App. R. 34, at p. 36, clearly indicates the necessity of causal connection between reckless driving and the death in a manslaughter charge:

> . . . "If he is driving [a motor-vehicle] recklessly, he commits an offence whether he kills anybody or whether he does not, but if because he is driving recklessly somebody is killed, then he is guilty of manslaughter." . . . "If you thought that although he drove recklessly, and although he drove at a speed or in a manner dangerous to the public, within the words of [section 11 of Road Traffic Act, 1930], but that it was not because of that [the deceased] was killed, the law would entitle you to convict him not of manslaughter, but of dangerous driving."

That passage was approved in the House of Lords subject to what was said of criminal negligence. It is to be noted, however, that it related to a case where there was direct evidence of causal connection, and is thus to be distinguished from the present case in that respect. The *Andrews* case concerned the interpretation of the English Road Traffic Act, 1930, section 11 whereof is comparable with our section 285, subsection 6, and section 34 whereof (B.C. Stats. 1934, Cap. 50) bears a resemblance to our section 951, subsection 3 before the latter was re-enacted in 1938. They are quoted *verbatim* in another aspect in the latter part of this judgment.

The *Andrews* decision was applied in *Rex* v. *Wilmot* (1940), 74 Can. C.C. 1. The accused there was intoxicated and driving on the wrong side of the road, when he collided with an oncoming bicyclist who died of his injuries. The learned trial judge (under the Alberta practice without a jury) found him guilty, not of manslaughter as charged, but of an offence under section 285, subsection 6, since he was unable to find causal connection

between the dangerous driving and the collision from which death ensued. That decision was upheld by a majority of the Alberta Appellate Division. An appeal to the Supreme Court of Canada was dismissed by a majority on jurisdictional grounds, but two of the learned judges (Davis and Hudson, JJ.) supported the judgment appealed from on its merits, *vide Rex* v. *Wilmot,* [1941] S.C.R. 53, at pp. 61 and 63. *Rex* v. *Godin* (1938), 71 Can. C.C. 262 is also noted.

The point which governs my disposition of the appeal is that whatever the appellant did or did not do, the evidence does not disclose it had any causal connection with the collision from which the death of McRae ensued. For that purpose, I am prepared to assume there was some evidence of reckless or dangerous driving within section 285, subsection 6, although I find it a difficult assumption in view of the decisions of the House of Lords and the Supreme Court of Canada in the *Andrews* case and in the *Dickson* case respectively. If this were a civil action, the principle laid down in *Ristow* v. *Wetstein,* [1934] S.C.R. 128, at p. 132 would apply.

But the latter principle has no place in a criminal prosecution for reasons later given. In my judgment, the evidence in this case fails to reveal any characteristics of criminality in the conduct of the appellant; and *vide* the observations of Taschereau, J. (with whom Rinfret, J. and Kerwin, J. concurred) in *American Automobile Ins. Co.* v. *Dickson,* [1943] S.C.R. 143, at p. 149, in a case where there was evidence of illegal and excessive speed (50 miles per hour) and of disregard of the rule of the road, which does not exist here. In *Akerele* v. *Regem* (1942), 112 L.J.P.C. 26 a manslaughter appeal from West Africa to the Judicial Committee, Lord Porter observed at p. 30:

> . . . it must be remembered . . . that neither a jury nor a Court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation.

The appellant was not charged with reckless or dangerous driving within section 285, subsection 6. He was charged with manslaughter, and in my opinion it was incumbent upon the learned trial judge in view of the decisions to which I have referred, to determine if there was evidence of causal connection in addition to evidence of criminally reckless or dangerous driv-

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ing, before he could legally decide whether or not there was evidence of manslaughter to submit to the jury. It was not enough for the trial judge to find evidence of criminal conduct and then leave it to the jury to find whether or not there was evidence of causal connection between it and the death. That in my view is an abdication of the judicial function and amounts to an attempt by a trial judge to confer on a jury a jurisdiction they cannot possess.

I must hold that it is as much the duty of the trial judge to decide if there is evidence of causal connection as it is his duty to decide if there is evidence of criminal conduct. If we examine the testimony as to speed, which the learned trial judge told the jury "seems pretty weak to me," together with the testimony as to look-out, which he described as "the real bite of the case," the dominant facts which emerge do not furnish affirmative proof of causal connection between the appellant's driving and the collision from which the death of McRae ensued. On the contrary, they reveal why no such evidence is available, particularly if studied in the light of the decisions of the House of Lords in the *Wakelin* and *Craig* cases later discussed.

(1) No one saw the pedestrian and the motorist come together. (2) No one saw the deceased for any appreciable period before the crash. No one knows whether he was crossing the street, standing in the street or what he was doing when the fatal crash occurred, or shortly before it when the lights of the appellant's approaching car would give warning of its approach. (3) The collision did not occur in a pedestrian lane, or in the street intersection. From measurements made after the accident, it appears to have happened at a point some 20 feet from the Broadway kerb, and some 53 feet west of the Vine Street intersection, *viz.*, about one-third of the way across Broadway and about 53 feet from the Vine Street corner.

If the deceased were crossing Broadway at that point, he was crossing a much frequented motor thoroughfare at an obviously dangerous time and place, and at a place where three prosecution witnesses, who ought to have seen him if he were clearly visible, did not see him. If he were waiting for a street-car (there was no safety zone) he was standing dangerously in the east-bound

motor traffic lane, and at a time when the street-car was still half a block away (250 feet) for Findlay said the street-car was 200 feet away at the actual time of the crash. (4) Although three prosecution witnesses had the deceased within their frontal range of vision for at least half a block, yet not one of them saw the deceased within that distance before the crash.

Mrs. Lovell saw a man start to cross the street when she was three-quarters of a block away, but did not see him again before the crash. Mrs. Lovell and Findlay both testified the appellant's car was being driven close to the street-car tracks, immediately prior to the crash. From that it follows there was ample room between it and the kerb for anyone waiting for a street-car. There is no explanation of how the accident happened. The event which caused it is left to pure conjecture. For aught we know, the pedestrian may have suddenly stumbled or suffered from a momentary physical faintness. (5) The Lovell car kept close to the kerb, and we are left without any explanation of the failure of Mr. and Mrs. Lovell to see the deceased immediately prior to the accident, although he was within their frontal line of vision from the time Mrs. Lovell saw him once about three-quarters of a block away. However, there was evidence of deceptive street lighting.

Lovell testified the pavement was blackish, and that the lighting "was not any too good along there." "There were dark patches toward the centre of the street between the light standards." Support is given that testimony by the fact that Findlay (the street-car driver) did not see the Lovell car at any time in that block, although it was always in front of him. If the prosecution intended to submit the appellant ought to have seen the deceased, it is strange no explanation was first forthcoming why these three vital prosecution witnesses did not see the deceased, if in fact he was really in full view of the appellant. The failure of the prosecution witnesses, in the circumstances, to see the deceased points rather convincingly to the hypothesis, that he was not easily seen by a motorist at that place and time of night. It is certainly inconsistent with a hypothesis that the appellant ought to have seen the deceased.

In the case at Bar there was no suggestion of intoxication,

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while there was evidence of it in the *Wilmot* and *Godin* decisions. In the *Dickson* case there was evidence of excessive and illegal speed, while in this case evidence of undue speed was sketchy, for the trial judge described it as "pretty weak." In both the *Wilmot* and *Dickson* cases there was evidence of driving on the wrong side of the road. There is none in this case.

Counsel for the Crown respondent adopted a *res ipsa loquitur* type of argument, somewhat after this fashion: "Was there evidence the appellant ought to have seen the deceased? If there was, it constituted evidence of manslaughter. Secondly, if he did not see McRae, why not? The only reasonable explanation is the appellant was not keeping a proper look-out." But that form of argument has several fatal defects: It assumes, that if the appellant did not see the deceased his failure to see amounted to criminal negligence because the man died as a result of the collision. It concludes from effect to cause, instead of reasoning from cause to effect. And it insinuates into the mind conclusions which the mind cannot form, unless the *onus* is shifted to the accused motorist to show his driving had no causal connection with the death.

The evidence to which I have already referred when compared with the factual bases for the *Wakelin* and *Craig* decisions as it is shortly, leaves no room for a presumption of fact that the collision was due to negligent conduct of the appellant. Nor are there any presumptions of law against the appellant in this corner of the criminal law. There is no more reason to presume that the motorist negligently ran down the pedestrian than to presume the pedestrian negligently collided with the motor-car.

In *Wakelin* v. *London and South-Western Rail. Co.* (1886), 56 L.J.Q.B. 229, Lord Halsbury, L.C. at p. 231 after assuming that the pedestrian was knocked down by the train on a level crossing, mentioned two things which the law does not presume in the case of a collision: (1) That it is more true to conclude that the vehicle ran down the man, rather than the man ran against the vehicle; and (2) that people are careful and look before they cross a railway, or that they never cross in front of a train, even when they see it dangerously near. That was spoken generally. It is of general application. If people are not pre-

sumed to refrain from crossing in front of a locomotive when it is dangerously near, *a fortiori* no such presumption of law exists in the case of a less danger-inspiring vehicle such as a motor-car.

Lord Halsbury spoke of "ships or carriages, or even persons," bringing them even verbally within the ambit of his observations. In the *Wakelin* case, the defence called no witnesses and argued there was no case for the jury. That objection was overruled, but the subsequent verdict of the jury in favour of the plaintiff was set aside on that ground by the Divisional Court which was upheld in the Court of Appeal and in the House of Lords. In *McKenzie* v. *Chilliwack Corporation* (1912), 82 L.J.P.C. 22, the action was dismissed on the motion for non-suit, and that course was upheld in this Court and in the Judicial Committee. It is plain, I think, that the ground for decision in each case was the lack of evidence of causal connection between the act complained of and the death of the deceased.

The criticism of concluding from effect to cause, instead of reasoning from cause to effect, speaks for itself. But an appropriate observation of Tindal, C.J. appears in *Rex* v. *Fenton* (1830), 1 Lewin, C.C. 179, at p. 180; 168 E.R. 1004:

> The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; . . .

I do not think that section 247 of the Code recently considered in *American Automobile Ins. Co.* v. *Dickson,* [1943] S.C.R. 143 can be said to extend beyond a statutory restatement of the common law. The criminal responsibility for the "consequences of omitting without lawful excuse" to take reasonable precautions to which it applies, must necessarily refer to consequences which follow as an effect from a cause, and not to consequences which are not proven to be causally associated with the act or omission complained of. Hence, in the lack of a presumption of law that failure to take care is in itself evidence of manslaughter, there must be evidence that the failure to take care was causally connected with the death.

When a motorist collides with a person or object at night, and damages are sought against him in a civil action, then under *Ristow* v. *Wetstein,* [1934] S.C.R. 128, at p. 132, he is faced

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with the dilemma of undue speed or inadequate look-out, unless it appears there is some other causative factor of the collision. The presumption of law which the *Ristow* v. *Wetstein* principle involves, confines itself to civil actions for negligence. The *onus* of proving the guilt of the accused rests on the prosecution to the very end of the case, *vide Woolmington* v. *Director of Public Prosecutions* (1935), 104 L.J.K.B. 433 (H.L.), at pp. 429-440. I find nothing to the contrary in *Mancini's* case (1941), 28 Cr. App. R. 65. There is no *onus* upon the accused to explain the collision was accidental or due to some causative factor unconnected with his own reckless driving or criminal negligence. That is matter of defence which cannot arise unless and until the prosecution has affirmatively proven practical certainty of guilt in the sense that term is used herein.

In refusing to withdraw the case from the jury, the learned judge relied mainly on the Scottish case of *Craig* v. *Glasgow Corporation* (1919), 35 T.L.R. 214 (H.L.). But in that case there was direct evidence of causal connection coupled with other affirmative evidence directly pointing to it, which is not to be found in the *Wakelin* case or in this case. Moreover it concerned a civil action over a collision at night, to which the *Ristow* v. *Wetstein* principle would apply in a Canadian Court. It would appear, with respect, that a fundamental error in this case has been the application of the *Ristow* v. *Wetstein* principle to a criminal prosecution. But the nature of the proof required in a criminal prosecution negatives that presumption of law. In a civil action the *onus* is on the plaintiff to show facts from which it may reasonably be inferred the probability is greater that the collision was caused by the negligence of the defendant motorist.

It must be founded on facts which permit that legal inference, and not on facts which, while they may beget a natural inclination to that conclusion, do no more than justify conjecture. The plaintiff is said to have made out a *prima-facie* case in a civil action when he has adduced evidence which is capable of showing a greater probability that what he alleges is more correct than the contrary, *vide* Atkin, L.J., in *McGowan* v. *Stott* (1923), 99 L.J.K.B. 357 n, at p. 360. In a civil case, one side may win a decision by the narrowest of margins upon reasons which seem

preponderating, although they are not in themselves decisive. The Court's decision may rest on the balance of probabilities.

But in a criminal prosecution, as the late Chief Justice MARTIN often remarked, there is no such thing as a *prima-facie* case. Before it may be said there is evidence to go to a jury, the prosecution must advance beyond the stage of greater probability, and have adduced evidence which is capable of compelling practical certainty of guilt: *vide* Pollock, C.B., quoted in *Reg.* v. *Kohl* (1865), mentioned in 4 F. & F. 930 (foot-note). That is to say, evidence of guilt which, to the legal mind of the judge envisioning it as submitted to the jury and accepted by them, would not merely be consistent with guilt, but would necessarily exclude any reasonable hypothesis of innocence. It might be said generally that a discussion of the requirements of proof in a civil action gives little help in deciding if proof exists in a criminal prosecution.

But this is a case where that is not true. For, if the nature of the evidence adduced here as practical certainty of guilt would not be acceptable in a civil action as a *prima-facie* case indicative of greater probability, then the reasoning governing the civil case would *a fortiori* rule out the more severe requirement of proof in a criminal prosecution. For that reason the *Wakelin* and *Craig* cases are now examined, and their *ratio decidendi* compared. In the former, there was no direct evidence that the train hit the man who was found dead near the unguarded level crossing. But for the purpose of Lord Halsbury's proposition to which I am about to refer, the House of Lords assumed, first, that the man was hit by the train; and, secondly, as Viscount Cave, L.C., noted in *Mersey Docks and Harbour Board* v. *Procter* (1923), 92 L.J.K.B. 479, at p. 484, that there was negligence on the part of the company, *viz.*, that its train did not whistle or otherwise give warning of its approach. On these two assumptions, it was held there was no evidence to connect the negligence with the death, and accordingly that there was no evidence to go to the jury.

The factual similarity of the *Wakelin* case to the one at Bar becomes strikingly apparent in that (a) the death of the pedestrian in each case ensued from a collision unobserved by any

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witness; (b) there was evidence of reckless driving in each case; the train failed to give warning of its approach, and the motorist drove too fast or did not keep a proper look-out; and (c) in any aspect of the principle with which we are now concerned, nothing depends on the difference between a train and a motor-car. The issue in the two cases is thus actually the same, *viz.*, on the facts stated was there inferential (*viz.*, presumptive) evidence of causal connection between the collision and the negligence? The significance of Lord Halsbury's proposition in the present case lies in the circumstance that it was stated in a civil action, where the criterion of proof, *viz.*, greater probability, is so much less exacting than the practical certainty of guilt demanded in the criminal prosecution with which we are concerned. That proposition is this (p. 230):

> It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition.

It necessarily excludes any presumption of law from which it would follow that the deceased did not cause his own misfortune. Lord Halsbury's express exclusion of that presumption of law has been discussed previously.

The *Wakelin* principle was not departed from in the *Craig* case, but, as Lord Finlay said the decision in the *Craig* case depended upon what was the reasonable inference from its own distinguishing facts. Its decision was based purely on presumptions of fact and not of law. The *Craig* case is easier to read as reported in [1919] S.C. (H.L.) 1, at p. 6 *et seq.* From that report, it appears that the fact the driver of the tramcar admittedly ran into the cow through his failure to keep a proper look-out, made it easy to associate his negligence in that respect with his running into the man at the same time. That is to say, the causal connection between the death and the driver's negligence had a reasonable foundation in the evidence, and was not projected on mere conjecture as it was held to be in the *Wakelin* case, and as I think it is in this case.

As reported in [1919] S.C. (H.L.) Lord Buckmaster said in the leading speech, at p. 7:

> The matter that impresses me most . . . is the statement made by the driver when he said that, if he had seen the man or the cows, he would have been going slower, coupled with the evidence of witnesses who speak to having seen the man, not actually at the moment of the accident, but at a time which preceded it by only a few minutes, witnesses who say that they found no difficulty whatever in seeing the man and the cows, and in two cases witnesses who even noticed the number that was found upon the cow's back showing the lot mark under which it had been sold.

The two considerations there mentioned as governing the decision of the House of Lords in the *Craig* case do not appear in any degree either in this case or in the *Wakelin* case. In the first place, the testimony of the driver in the *Craig* case amounted to an admission his own speed was causally connected with the collision. In this case there is no such evidence.

In the second place, witnesses in the *Craig* case testified they could see the man and cow at a reasonable distance. One witness said he could have seen the deceased 100 yards away. But in the present case the three prosecution witnesses who had the deceased within their range of vision for at least 250 feet, did not see the deceased at all within that distance prior to the crash. Two other witnesses approaching from another direction (a motorist and a pedestrian), did not see the deceased or the motor-car, although they saw the result of the crash almost as soon as it happened. The case at Bar seems to have been regarded as if the testimony disclosed that one or more witnesses had observed the deceased standing well out in plain sight of anyone who would look, and at such distance from the oncoming motorist that the latter ought to have seen him because other witnesses saw him at the same distance. But there is no such evidence, direct or capable of that implication.

In the *Craig* case, the evidence disclosed negligence in the tram-driver for failure to see the man whom positive affirmative testimony showed he ought to have seen. The causal connection between that negligence and the death was established by the tram-driver's own direct evidence. But in the case at Bar, the evidence of all five material prosecution witnesses, when tested by what they themselves testified they did not see, points away from negligence of the appellant for failure to see the deceased. That

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evidence supports a reasonable hypothesis the collision was not caused by negligence on the part of the appellant for failure to see the deceased. The facts in the *Craig* case did not permit that hypothesis. Furthermore the testimony in this case supports a second reasonable hypothesis which is intimately associated with the first, *viz.*, that the appellant collided with the deceased because he could not reasonably avoid him. Such a hypothesis was distinctly negatived in the *Craig* case by its own facts.

Hence the present case falls within the principle of the *Wakelin* decision, and its distinguishing facts render the *Craig* decision inapplicable. But even if the evidence did establish greater probability for purposes of a civil action, nevertheless in this criminal prosecution it fails completely to compel practical certainty of guilt in the sense that term is used in this judgment. For such evidence as the prosecution has advanced, if accepted *in toto* with all legitimate inferences of which it is capable, does not exclude a reasonable hypothesis of innocence. It lacks affirmative proof of causal connection. At its best it extends no further affirmatively, than a surmise the accident was possibly due to negligence of the appellant.

> It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no *data* from which an inference can be reasonably drawn that as a matter of fact it was so occasioned:

per Lord Watson in the *Wakelin* case, p. 233. It does not in my view extend beyond plausible conjecture as that term may be interpreted in the light of the *Wakelin*, *Craig*, *Wilmot* and *Dickson* decisions.

The argument that reckless driving plus the death present such a cogent combination that the accused may be found guilty of manslaughter if he does not offer a satisfactory explanation, really means that the combination compels practical certaintly of guilt. But that argument must fail in this case where no one saw the collision, unless its premise, *viz.*, the cogency of the combination, rests solidly on a presumption of law or of fact. But a presumption of law—such as the *Ristow* v. *Wetstein* principle, is expressly ruled out by the *Woolmington* and *Andrews* decisions. And a presumption of fact must be founded on objective facts from which an inference—as distinguished from suspicion,

guess or conjecture—may be legitimately drawn of the existence of causal connection between the reckless driving and the death. The chasm between the two in this case has not been crossed by a bridge of orthodox reasoning as tested by the *Wakelin* and *Craig* decisions.

As I must conclude there is no evidence of causal connection between the death of McRae and any act or omission of the appellant criminally negligent or otherwise, and consequently there cannot be evidence of manslaughter, hence section 951, subsection 3 does not apply. That section as re-enacted in its present form in 1938 provides that, upon a charge of manslaughter arising out of the operation of a motor-vehicle:

> The jury, if they are satisfied that the accused is not guilty of manslaughter but is guilty of an offence under subsection six of section two hundred and eighty-five may find him guilty of that offence, . . .

Prior to its amendment in 1938, it read:

> The jury may find the accused not guilty of manslaughter but guilty of criminal negligence under section two hundred and eighty-four, . . .

Section 34 of the English Road Traffic Act, 1934 (24 & 25 Geo. 5), Cap. 50, considered in the *Andrews* case, *supra*, provided:

> Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section eleven [my note—comparable with our section 285, subsection 6] . . . to find him guilty of that offence, . . .

Section 951, subsection 3, before its re-enactment in 1938, was interpreted by the Manitoba Court of Appeal in *Rex* v. *Preusantanz*, [1936] 2 D.L.R. 421 and *Rex* v. *Kennedy*, *ib.* 448, to give the jury an option to find an accused guilty of criminal negligence within section 284, although they were satisfied he was guilty of manslaughter. One of the purposes of the 1938 amendment seems to have been the elimination of the option held to exist by those two decisions, for the re-enactment made it a condition precedent to the jurisdiction of the jury to convict of an offence under section 285, subsection 6, that they shall first be "satisfied" the accused is not guilty of manslaughter.

Before a jury has jurisdiction to "satisfy" itself that a person is guilty or not guilty of manslaughter, a charge of manslaughter must be properly before them for decision. It cannot be properly

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before them, if the judge has decided or ought to have decided as a matter of law, that there was no evidence adduced by the prosecution which, if the jury should believe it, would enable them to convict of manslaughter. The jury, in exercising the jurisdiction conferred by section 951, subsection 3, are called upon to exercise not an original or general jurisdiction but a specially limited statutory jurisdiction. Their jurisdiction in that respect is confined to the statutory powers given, and its exercise is therefore subject to the same principle of law which, in my judgment, applies to any judicial tribunal when it exercises purely statutory powers, *viz.*:

> Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised.

That was said by Lamont, J. (with whom Duff and Cannon, JJ. concurred) in *Samejima* v. *Regem,* [1932] S.C.R. 640, at p. 646, of conditions precedent required by statute. Sir Lyman P. Duff, C.J. said of section 951, subsection 3 in *Rex* v. *Wilmot,* [1941] S.C.R. 53, at p. 56:

> Section 951, subsection 3, provides in the most explicit way that it is a condition of the jurisdiction of the jury to find the accused guilty of an offence under subsection 6 of section 285 that they shall be "satisfied that the accused is not guilty of manslaughter."

The majority in the Supreme Court of Canada in *Rex* v. *Wilmot* was not concerned with the issue involved here. The point on which the decision turned was the Court's jurisdiction to entertain the appeal, and depended upon whether a finding of not guilty of manslaughter but guilty of an offence under section 285, subsection 6 was an acquittal within the meaning of section 1023, subsection 2 of the Code.

It was to this latter point the majority of the Court were addressing themselves, and not to the essentially different issue now before us, when they made use of expressions with which counsel for the Crown respondent here sought to question the jurisdictional condition precedent to which I have referred and which seems to sit so plainly in the middle of section 951, subsection 3. I think that study of the judgments of Sir Lyman P. Duff, C.J., Davis, Kerwin, and Hudson, JJ. supports that view of the *Wilmot* case. It is observed also the Ontario Court of Appeal distinguished the *Wilmot* case in *Rex* v. *MacDonald,*

[1943] O.R. 158. I am in entire agreement with the observations of Robertson, C.J.O. at pp. 163-4 relating to sections 285, subsection 6 and 951, subsection 3.

It seems to follow naturally that if the learned judge had held as a matter of law there was no evidence to support a charge of manslaughter, then there could have been no duty which the jury had jurisdiction to perform. They could not deal with an offence under section 285, subsection 6 except as incidental to a charge of manslaughter. And if manslaughter were not properly before them, the point could never appear at which their jurisdiction would fasten itself upon section 285, subsection 6. The latter offence was not charged and if it were a lesser or included offence within the meaning of section 951, subsection 1, then no occasion could have arisen for the enactment of section 951, subsection 3. Section 951, subsection 3 ought not to be interpreted as if it had transferred to the jury, the jurisdiction which is vested in the judge alone, to decide as a matter of law, whether there is evidence of manslaughter to be submitted to the jury as judges of fact.

I would allow the appeal and quash the conviction.

FISHER, J.A.: The appellant was tried on a charge of manslaughter arising out of the operation of a motor-vehicle and convicted of reckless driving under section 951, subsection 3 of the Criminal Code. No evidence was called on behalf of the appellant at the trial but it was submitted by counsel on behalf of the appellant that there was not any, or any sufficient, evidence upon which the jury could properly find a verdict of manslaughter and that therefore section 951, subsection 3 of the Criminal Code did not apply so as to enable the jury to find him guilty of reckless driving.

Dealing with the first issue raised by the submission of counsel as aforesaid I have to say that it is or must be common ground that it was for the Court to decide, as a matter of law, whether there was some evidence upon which a verdict of manslaughter could properly be found, but, assuming there was some evidence, then I think it was for the jury to find what facts had been established and to say whether the accused was guilty of manslaughter

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or, if not, of reckless driving. When one comes to consider the evidence it must be noted that, though several witnesses said they heard the noise of the impact, no witness called said he actually saw the motor-car strike the deceased man except the witness Findlay and he later on said he did not see the man until after he was struck. However, after careful consideration of all the evidence and after keeping in mind the rule to be applied by a jury in respect of circumstantial evidence, stated by Baron Alderson in *Hodge's Case* (1838), 2 Lewin, C.C. 227, I do not agree that there was no evidence or no sufficient evidence to establish some of the facts hereinafter set out or that another finding would be equally consistent with the admitted and proved facts and my view is that a jury could properly find that by direct evidence or fair inference the following facts, *inter alia,* had been established, *viz.*:

1. That about ten minutes after 11 o'clock on the night of January 14th, 1943, one Alexander McRae was standing at a point on Broadway adjacent to the south street-car rail waiting to board an east-bound street-car which was then approaching on Broadway and which would take him nearly to his place of residence on Pender Street West, in the city of Vancouver, and that such point was about 53 feet west of the spot where his body was found lying after the accident, such spot being "in the roadway about seven feet south of the south car rail of Broadway and approximately in the centre of what would be the pedestrian crossing on the west side of Vine Street," as the evidence of the police who took measurements shows.

2. That while the said Alexander McRae was at the point aforesaid he was struck down and killed by a motor-car driven by the accused east on Broadway and that it was the said motor-car (hereinafter called the appellant's car) which had its radiator and left front side damaged by the collision, that ran into the man and not the man that ran into it.

3. That somewhere in the block immediately west of Vine Street on Broadway the appellant's car had passed another motor-car being driven east by the witness Mr. W. H. Lovell and also in the same block, which is 500 feet long, had passed the said east-bound street-car when the street-car was going from 20

to 22 miles an hour, that the appellant's car "went by quite quickly," as the motorman on the street-car said, and was about 200 feet ahead of the street-car when it struck the said Alexander McRae at the aforesaid point and that McRae's body did not come to rest until it had gone at least 50 feet from the point of impact.

4. That the motor-car driven east by the said W. H. Lovell had started from in front of an apartment building situate on the south side of Broadway near the extreme westerly end of the said block which is between Balsam and Vine Streets and that Mrs. W. H. Lovell, while riding in the said car with her husband and before the car had gone far from where it started, noticed a man step from the south kerb of Broadway near the corner of Broadway and Vine and start northerly across the street and, as their car neared the said corner, she saw a man rolling under the appellant's car, which had passed them not far from the said apartment building and had "stayed close to the car tracks till it got past the corner" as she states.

5. That the man seen by Mrs. Lovell stepping from the kerb was McRae and that the appellant having knocked him down drove away without stopping.

6. That the visibility was good, the paved street dry, the width of the roadway between the south kerb of Broadway and the said south street-car rail 24 feet, and the traffic in the neighbourhood at the time of the accident consisted of the said street-car, Mr. Lovell's car, the car driven by the appellant, and the unfortunate man McRae.

However, even on the assumption that the jury might find the facts as aforesaid it was or may be submitted that there was no evidence on which the jury could properly find the appellant guilty of manslaughter because there was nothing to show that the death of McRae was caused by negligence on the part of the appellant. Many authorities were cited on the argument and counsel for the appellant relied especially upon *Wakelin* v. *London and South-Western Rail. Co.* (1886), 56 L.J.Q.B. 229; 3 T.L.R. 233; 12 App. Cas. 41. However, the case relied upon by the learned trial judge, namely, *Craig* v. *Glasgow Corporation* (1919), 35 T.L.R. 214, in which the *Wakelin* case was consid-

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ered, seems to me to be very much in point here. In that case the plaintiff had been rendered insensible and suffered from concussion of the brain, in consequence of which he had no recollection of the circumstances which immediately preceded the accident. According to the report Lord Buckmaster said in part as follows at pp. 215-6:

> The action itself was an ordinary action to recover damages for personal injury. It was now well established that in such an action it was incumbent on the plaintiff to prove both that the defendant was guilty of negligence and that that negligence caused or materially contributed to the accident. It was said here that proof had failed under the second of these heads. . . . The Lord Advocate contended that there was nothing to show either that the car struck the man at all or that if it did it was due to the fact that the driver had been guilty of negligence in not keeping a proper look out. There was no evidence by any person who actually saw the accident itself. It was, therefore, necessary to rely upon the evidence of the admitted and proved facts. But that, though it might add to the difficulty of the case, afforded no difficulty in the present instance. If, in their Lordships' opinion, the facts above stated admitted of the inference that the man was knocked down by the car and that the reason why he was knocked down was that the driver was not keeping a proper look out, then the learned judge who tried the case and who was acting as a jury had found as a fact that that was the true inference to be drawn. It was argued that the facts did not bear that inference because they were absolutely equivocal and were equally consistent with any of a series of possibilities which might have produced this result without any liability on the part of the Corporation. His Lordship found it difficult to follow that reasoning. As to whether the car struck the man, it was impossible to avoid the irresistible conclusion, which the driver himself had formed at the moment of the accident, namely, that after the car had struck the cow the man was struck by the car and fell down. The driver found the man unconscious immediately afterwards. It was suggested that the man might have slipped or been knocked down by the cow, but that suggestion existed only in the realms of conjecture. A bump was felt when the vehicle was moving and a man was found immediately behind the vehicle injured on the road. The inference that the injury was due to contact with the vehicle in motion was irresistible. But then it was said on that assumption that the matter was not concluded against the defenders unless it was shown that the blow occurred in such a way that the absence of the look out caused it. He thought that the answer to the question whether the man struck the car or the car struck the man was to be found in the fact that the driver said that if he had seen he man he would have driven slower, but that he did not see him, coupled with the evidence of the witnesses who had seen the man pass only a short time before the accident and said they could see him perfectly. There was such a short interval that it was beyond doubt that a careful look out must have discovered the existence of the man and the cows, and having regard to the fact that the car could stop within its own length when

travelling at nine miles an hour, there was very little doubt that if a proper look out had been kept the accident would never have occurred. *Wakelin* v. *London and South Western Railway Company* (3 The Times L.R., 233; 12 App. Cas., 41) was relied on. In that case a man was found dead on a railway by a level crossing, and there was nothing to show how the man had met with his death, but it was suggested that the train had not whistled at the crossing. It was found by this House that there were no sufficient facts from which the inference could be deduced that the negligence of the railway company had caused the accident. That was far away from the present case, where the negligence was closely connected with the accident which had occurred. It was shown here that the second branch of the duty cast upon the pursuer as well as the first branch had been discharged, and he thought that the circumstances of this case scarcely admitted of any other inference being drawn than that drawn by the Lord Ordinary, and that he was quite right in finding the defenders liable.

Lord Finlay in concurring said in part as follows at p. 216:

The question was under the circumstances of the present case, What was the reasonable inference? There was here little direct evidence with regard to the accident itself, because the pursuer was made insensible by the very severe concussion which he sustained, and did not pretend to recollect anything about it. But circumstantial evidence might be just as valuable as direct evidence.

Lord Dunedin said in part as follows at p. 216:

But here the negligence was shown to be the cause of the accident for without the negligence the driver would not have run into the man and the cows. There was all the difference between the case of a man run into on a railway and that of a man run into on the road. In the latter case the man had an absolute right to be there and it was the duty of drivers of vehicles not to run him down.

Although the *Craig* case was concerned with civil liability for negligence I think that much that was said in such case could well be said in the present case. There as here it was argued that the facts did not admit of the inference that the man was knocked down by the car and that the reason why he was knocked down was that the driver was not keeping a proper look-out, because the facts were absolutely equivocal and were equally consistent with any of a series of possibilities which might have produced the result without any negligence on the part of the appellant. In the *Craig* case the Court could not follow this reasoning and in the present case I cannot follow it and I would say that the evidence before the jury at the end of the Crown's case, in the absence of explanation, plainly inculpated the accused and the jury, giving the accused the benefit of every reasonable doubt and applying the rule as to the value of circumstantial

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evidence, could draw the inference that the accused's negligence was the cause of the accident which resulted in the death of the deceased. This does not amount to saying that the burden of proof of innocence was upon the accused, who, as the judge properly charged the jury, was not called upon to satisfy the jury that he was not guilty. It is simply saying that the case as it stood was complete and that the *onus* was not on the prosecution in such case to negative every possibility consistent with innocence. At one time the case of *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462 might have been cited to the contrary but, at least since Lord Simon's speech in *Mancini's* case (1941), 58 T.L.R. 25, at p. 27, the language employed by Lord Sankey (in *Woolmington's* case) should not be interpreted as meaning that the *onus* is on the prosecution, at any rate in cases of constructive murder, always to negative provocation. See article in 58 L.Q.R. at p. 35 and compare two much earlier cases in this Province, *viz., Rex* v. *Aho* (1904), 11 B.C. 114 and *Rex* v. *Jenkins* (1908), 14 B.C. 61; and also *Rex* v. *Ferrier* (1932), 46 B.C. 136 especially at pp. 140-146, *per* MARTIN, J.A. (later C.J.B.C.). If the jury here found the facts to be as hereinbefore set out, then the jury might well be satisfied that the inculpatory facts were such as to be inconsistent with any other rational conclusion than that the accused was guilty of criminal negligence, either in driving at an excessive speed or in failing to keep a proper look-out or in both, causing the death of McRae. The judge's charge clearly pointed out the difference between criminal negligence and civil negligence and in this connection reference might be made to the annotation in 69 Can. C.C. on pp. 1 to 27, to which our attention was called by counsel for the Crown, though it may be noted, as he pointed out, that the article was written before the amendment of said section 951, subsection 3 in 1938. Many of the authorities referred to therein were discussed during the argument and, having carefully considered the whole matter, I am convinced that the case was clearly one in which it was for the jury to say whether or not the conduct of the accused was such as to make him guilty of manslaughter. The verdict was "not guilty of manslaughter, but guilty of reckless driving" and I do not think we should set it

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aside. I am satisfied that this case is clearly distinguishable from *Rex v. Dawley,* [58 B.C. 525]; [1943] 2 D.L.R. 401, as in my view this Court could not decide on the evidence that the facts were such as to be equally consistent with the innocence as with the guilt of the accused.

My conclusion therefore is that there was evidence to go to the jury on the charge of manslaughter and in view of such conclusion I do not find it necessary to deal with the second issue raised by the submission of counsel for the appellant with regard to said section 951, subsection 3 and express no opinion on how the matter would have stood if my conclusion on the first issue had been otherwise. I have only to add that I think with deference that in dealing with the first issue I have dealt with all the substantial points raised in favour of setting aside the verdict of the jury and I would dismiss the appeal.

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

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Criminal law—Murder—Voluntary oral admission of by accused—Written confession given including admission of theft of a revolver—Admissibility of written confession—Effect of admission of theft—Instructions to jury—Criminal Code, Secs. 69, Subsecs. 1 and 2 and 1014, Subsec. 2.

On the morning of the 10th of October, 1942, the accused, a soldier, was detained by the police for questioning in connection with the theft of six army-service revolvers from the Seaforth Armouries on September 18th, 1942. Accused admitted he had a revolver and on request handed it over. An hour and a half later he was again interviewed by a detective who told him he would be charged under section 115 of the Criminal Code with carrying an offensive weapon and gave him the usual warning. The accused then confessed he had stolen the revolver. On the 11th of October the body of one Phil Davis, a taxi-driver, was found in a bush in a cemetery in Burnaby. On the 12th of October, the detectives had a third interview with accused when they told him he would also be charged with theft. They also told him the body of a missing taxi-driver was found. When the interview appeared to be concluded and the detectives were leaving, the accused suddenly blurted out "you will likely

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find out anyway. I killed Phil Davis." The usual warning was given and accused agreed to have his confession of murder taken down in writing in which he confessed to the murder and also to the theft of the revolver. He then gave the detectives an account of his activities from midnight on October 2nd until 4 o'clock on the morning of October 3rd, including a description of the murder. The written statement, including both confessions was admitted in evidence on accused's trial for murder, it having been found to be free and voluntary. The accused testified, denied that he shot Davis and swore that he loaned the revolver to one Spike Williams, who some hours later had returned the revolver to him together with some money, a watch and a flash-light and he pawned the watch and flash-light which later were found to belong to the deceased. The judge instructed the jury that they could find the accused guilty of murder either on the confession itself or apart from it, on his evidence given in the witness box when he repudiated the confession and explained his possession of deceased's watch and flash-light. The accused was convicted of murder.

Held, on appeal, O'HALLORAN, J.A. dissenting, that under all the circumstances, the fact of the illegal possession of the revolver was admissible and the appeal should be dismissed.

Per FISHER, J.A., SLOAN, J.A. concurring: The revolver in question was the weapon from which, as the Crown alleged and attempted to prove, the fatal shot was fired, and evidence tracing its possession to the accused was relevant and cogent even if in the process of proof the fact might emerge that he had stolen it. On the application of section 69 (2) of the Criminal Code to a common intention to commit a crime, what was said in the judge's charge to the jury in that regard was not objectionable and even if there was any irregularity in the charge in this or any other respect, section 1014, subsection 2 of the Code applied, since any jury properly instructed and acting reasonably must have found on the evidence the accused was guilty as charged.

APPEAL by accused from his conviction before ROBERTSON, J. and the verdict of a jury at the Spring Assize at Vancouver on the 16th of March, 1943, on a charge of murder. The body of one Phil Davis, a taxi-driver, was found on the 11th of October, 1942, in a cemetery in Burnaby. He had been shot through the head by a 38-calibre bullet. The accused, a lance corporal, was arrested on the 10th of October and charged with being in possession of an offensive weapon, he having on him at the time a 38-calibre revolver. Shortly before, six revolvers disappeared from the Seaforth Armouries and, on being questioned, he denied that he had stolen the revolver. On the 12th of October and after discovery of Phil Davis' body, accused was again questioned and when the questioning had been finished, he suddenly stated

"I killed Phil Davis." He then agreed to sign a statement and did so, in which he recited that he had shot Davis and that he had stolen the revolver from the Armouries. It was proved later that on the 3rd of October he was seen with a wrist watch that belonged to the deceased and he sold the watch to a second-hand dealer on the 6th of October. On the 8th of October he sold a flash-light which was identified as belonging to deceased. On the trial accused testified and denied that he shot Davis, and testified that he had loaned the revolver to one Spike Williams on the 2nd of October, who some time later returned the revolver to him with some money, the wrist watch and the flash-light. Spike Williams did not testify nor was there any other evidence of his existence.

The appeal was argued at Vancouver on the 25th, 26th and 27th of May, 1943, before SLOAN, O'HALLORAN and FISHER, JJ.A.

Paul Murphy, for appellant: The defence was not properly put to the jury; the written confession made by accused was not properly put to the jury. The learned trial judge pointed out to the jury what facts they could consider as corroboration of the written confession and these facts do not amount to corroboration. The jury were not instructed as to the law they were entitled to have given to them. They were instructed that their problem was to decide whether the oral evidence accused gave was true and they were not directed as to reasonable doubt and that the accused should have the benefit of it. There was misdirection in instructing the jury that if the accused's evidence as to his not being at the place where Davis was killed is believed, they could still find him guilty under section 69, subsection 1 of the Code upon other evidence: see *Rex* v. *Lomas* (1913), 9 Cr. App. R. 220; *Rex* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148; *Prudential Exchange Co. Ltd.* v. *Edwards,* [1939] S.C.R. 135, at p. 144. That the written statement was improperly admitted in evidence see *Thiffault* v. *Regem* (1933), 60 Can. C.C. 97, at p. 101. Other crimes were disclosed to the jury. On the admission of evidence of other crimes see *Rex* v. *Barbour,* [1938] S.C.R. 465, at pp. 467 and 469; *Maxwell* v. *The Director of Public Prosecutions,* [1935] A.C. 309; *Koufis* v. *Regem,* [1941] S.C.R. 481, at pp.

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489-90. The confession cannot be used, except to refresh one's memory: see *Rex* v. *Sampson* (1934), 62 Can. C.C. 49. Accused goes into the box and says the statement is not true: see *Rex* v. *Prince,* [1941] 3 All E.R. 37. The statement discloses provocation and it was not put to the jury: see *Rex* v. *Krawchuk* (1941), 75 Can. C.C. 219; 58 L.Q.R. 34-6. That the defence was not properly put see *Rex* v. *Pais,* [1941] 3 W.W.R. 278; *Rex* v. *Anderson* (1942), 58 B.C. 88; *Rex* v. *Brown,* [1931] O.R. 154, at p. 160. The confession was substantially the Crown's case: see *Rex* v. *Rubletz,* [1940] 3 W.W.R. 577, at pp. 588-91. The jury were not told that if the defence raised a reasonable doubt, accused should have the benefit of it: see *Rex* v. *Whitehouse* (1940), 55 B.C. 420, at p. 426. On accused's statement as to Spike Williams see *Rex* v. *Davis* (1940), *ib.* 552, at p. 556; *Woolmington* v. *Director of Public Prosecutions* (1935), 30 Cox, C.C. 234; *Rex* v. *Prince,* [1941] 3 All E.R. 37.

Clark, K.C., for the Crown: As to the Spike Williams story, there are facts from which the inference may be drawn of common purpose. As to the evidence that accused gave Spike the loaded gun see *Rex* v. *Hughes, Petryk, Billamy and Berrigan* (1942), 57 B.C. 521; *Rex* v. *Dunbar* (1936), 51 B.C. 20; Crankshaw's Criminal Code, 6th Ed., 64. He would be an accessory before the fact: see *Rex* v. *Lomas* (1913), 78 J.P. 152; *Reg.* v. *Campbell* (1899), 2 Can. C.C. 357; *Rex v. M'Daniel* (1755), 19 St. Tri. 746; *Reg.* v. *Taylor* (1875), 13 Cox, C.C. 68; *Reg. v. Bernard* (1858), 1 F. & F. 240; *Rex* v. *Pridmore* (1913), 8 Cr. App. R. 198. After finding the body of deceased the police officers questioned accused, but it was after they finished questioning him that the accused said he killed deceased and he said he would make a statement without being pressed to do so. It was a voluntary confession and the fact of his having stolen the revolver was an incident in the surrounding circumstances: see *Sankey* v. *Regem,* [1927] 4 D.L.R. 245; *Thiffault* v. *Regem* (1933), 60 Can. C.C. 97; *Rex* v. *Krawchuk* (1941), 56 B.C. 382; *Rex* v. *Flett* (1943), [*ante,* p. 25]; 79 Can. C.C. 183. There was no reason for directing the jury on the question of provocation.

Cur. adv. vult.

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SLOAN, J.A.: The reasons of my brother FISHER reflect precisely my own opinions on the various issues raised by the able argument of appellant's counsel and I am in complete agreement therewith. I would add, however, a reference to *Rex* v. *George* (1934), 49 B.C. 345. In that case the accused were charged with the murder of constable Gisbourne, and in retailing the circumstances of that killing and of the disposal of his body the Crown's evidence disclosed as part of the surrounding circumstances, the murder of another man, constable Carr. The evidence of the commission of the other crime of murder was held admissible by this Court. It was, as MARTIN, J.A. said at p. 365, quoting *Attorney-General* v. *Fleming*, [1934] I.R. 166, at p. 181,

> so . . . inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances.

That language, it seems to me, is singularly appropriate in relation to the evidence in this case of "the history of the guilty act" which could properly include as part of the circumstance the history of the weapon with which the guilty act was committed.

Then, too, I would add that in the case at Bar and on the question of prejudice I would think, with deference, that if the evidence of previous criminal acts of the accused was properly admitted, as I think it was, as part of the full disclosure of the background of the confession, it would be idle to say that the inclusion of those same facts in the written confession itself must lead to its exclusion in whole or in part.

I would, therefore, dismiss the appeal.

O'HALLORAN, J.A.: The appellant signed a written statement confessing he had shot and killed the deceased Davis with a revolver, which he then also confessed, he had stolen from the Seaforth Armouries. The written statement embodying both confessions was presented in evidence at the trial by the prosecution, after the learned judge had found it to have been free and voluntary, following the "trial within the trial." The appellant entered the witness box in his own defence, and denied he had shot Davis.

He testified he had loaned the revolver to one Spike Williams, who some hours later, had returned it to him together with some

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money, a watch and flash-light. He pawned the watch and flash-light, which later were found to belong to the deceased Davis. The learned judge instructed the jury they could find the appellant guilty of murder, either on the confession itself, or apart from it, on his evidence given in the witness box, when he repudiated the confession, and explained his possession of the deceased's watch and flash-light. Several points were argued before us, but I find it necessary to consider one only, *viz.*, the inadmissibility of testimony regarding theft of the revolver admittedly in the appellant's possession.

It is submitted by his counsel, that how or where the appellant might have obtained that revolver was not material to the case, as there was abundant and ample proof of his possession without introduction of testimony not only irrelevant to the crime of murder but also prejudicial to the character of the appellant. The point is taken that introduction of the testimony of theft, served, not as an element of proof of the murder of Davis, but instead as a prejudicial irrelevant circumstance which deprived the appellant of a fair trial, by impregnating the minds of the jury with distrust and suspicion of him as the kind of a person more than likely to have murdered Davis in the peculiar circumstances the jury had to consider.

It is a fundamental principle of our criminal law, that apart from express statutory enactments, evidence of bad character of the accused or of other crimes committed by him, is inadmissible, unless such evidence is essential to or tends to proof of the crime with which the accused is charged. It is of the utmost importance to the accused

> . . . that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge.

That is an extract from the judgment of Mr. Justice Kennedy in *Rex* v. *Bond,* [1906] 2 K.B. 389, at p. 397 cited with approval by Sir Lyman P. Duff, C.J. when delivering the judgment of the majority of the Court in *Rex* v. *Barbour,* [1938] S.C.R. 465, at p. 467. The House of Lords in *Maxwell* v. *The Director of Public Prosecutions,* [1935] A.C. 309, at p. 317 emphasized the

principle stated in *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57, at p. 65, describing it as "one of the most deeply rooted and jealously guarded principles of our criminal law," that:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

And *vide also Koufis* v. *Regem,* [1941] S.C.R. 481, Kerwin, J. at p. 487 and Taschereau, J. at p. 490.

As I view it, the decision of this appeal involves three considerations: (a) Was evidence of theft of the revolver essential to or did it tend to the proof of the crime of murder with which the appellant was charged and convicted? (b) If not, was it nevertheless admissible as a part of the narrative of a free and voluntary confession? Or stated in another way, must the confession be accepted or rejected *in toto?* and (c) if the answers to (a) and (b) render that testimony inadmissible, did its reception occasion some substantial wrong or miscarriage of justice within the meaning of section 1014, subsection 2?

First for consideration, is the question whether testimony of theft of the revolver was essential to or tended to prove the appellant murdered Davis? It must be conceded it was essential for the prosecution to prove possession of the revolver, since the deceased appeared to have been killed by a bullet from a revolver of that calibre. But proof of possession presented no difficulty, since the appellant in his written confession as well as in his oral evidence, admitted the revolver was in his possession for nearly two weeks before the murder. In the special circumstances of this case, I fail to apprehend how the manner in which the appellant obtained possession of the revolver could have any probative value.

The theft of the revolver crept into the written confession in an odd way. It was not a relevant circumstance leading up to the murder of Davis. The confession of the theft was made under conditions which did not relate to the police investigation of the murder of Davis. The appellant, a soldier absent from his battalion without leave, had been detained by the police for ques-

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tioning in connection with the theft of six army-service revolvers from Little Mountain Barracks. He was interviewed by the police on three different occasions. The first interview occurred at 9.50 a.m. on 10th October. Detective Whalen then told him the police were investigating the theft of six army-service revolvers from Little Mountain Barracks, and that they had heard he had a revolver in his possession. The appellant admitted he had an army-service revolver on his person and on request then handed it over to detective Whalen who booked him for investigation.

The second interview occurred about an hour and a half later. Detective Whalen told the appellant he would be charged under section 115 of the Criminal Code with carrying an offensive weapon, and gave him the usual warning. The appellant thereupon confessed he had stolen the revolver from the Seaforth Armouries about 18th September previous. Not one word had been said about Davis in either of the two interviews. The third interview occurred two days later, which was one day after Davis' body was found. Detective Whalen then told the appellant that in addition to being charged with illegal possession of the revolver, he would probably also be charged with its theft. The appellant said "he expected to plead guilty to both charges because he did not see what else he could do."

The appellant was then asked if he had met any soldiers in the city who had the guns stolen from Little Mountain Barracks. When detective Lougheed was asked:

> Did he [Whalen] tell him why you were anxious to locate these guns?

he replied:

> Yes. He [Whalen] said "We have found the missing taxi-driver." Beatty replied that he had not seen any soldiers around town with guns or the guns in Little Mountain. At this time detective Whalen called to the gaoler to return Beatty to his cell.

The interview appeared to be concluded and detectives Whalen and Lougheed were leaving when the appellant suddenly blurted out, "you will likely find out anyway," and then added "I killed Phil Davis."

The usual warning was given and the appellant agreed to have his confession of murder taken down in writing. Whalen got a typewriter and described what followed:

I typed out a leading paragraph which I read over to the accused and asked him if it was correct. He said it was. From there Beatty took up the narrative and gave us an account of his activities starting approximately midnight on the night of October 2nd, and finishing somewhere about 4 a.m. on the morning of October 3rd.

That was the confession Beatty signed and which was introduced in evidence. From the foregoing it appears the appellant confessed the theft of the revolver on the 10th of October, after he had given it up to inspector Whalen, and two days before anything was said about the missing taxi-driver. It also appears Davis' body was not found until 11th October, the day after the appellant had confessed to stealing the revolver. Obviously until the body was found the police could not know Davis had been shot with a revolver.

In reducing the appellant's oral confession to writing the police took an account of the appellant's activities beginning, not with the theft of the revolver on 19th September, but with the night of October 2nd, that is, the night before the murder of Davis. The oral confession of murder did not include an admission of theft of the revolver. Its inclusion in the written confession of murder was not justified by the disclosure therein, of the remotest connection between the theft as such and the murder of Davis. It would seem demonstrably clear that the theft of the revolver related entirely to the police investigation of the Little Mountain revolver thefts, and that the police did not themselves even remotely connect the confession of its theft with the murder of Davis.

Whether the appellant had owned the revolver for years, whether it was loaned to him or whether he had stolen it, could not in the surrounding conditions be a probative circumstance in the case for the prosecution. Possession was an essential evidential fact, it is true. But the manner of obtaining possession was not an evidential fact essential to prove the appellant murdered Davis or tending to its proof. It did not touch the fact of guilt. It did not connect the appellant with participation in the crime of murder with which he was later charged. It was inadmissible because it had no relation to any conduct of the appellant connecting him with the murder, and again because testimony of such criminal conduct or character on his part was

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calculated to prejudice him, by creating a strong belief in the minds of the jury that, in the surrounding suspicious circumstances, he was likely to murder Davis.

In the circumstances of this case possession of the revolver provided a probative *nexus*. But there was no probative *nexus* between its theft and the murder of Davis. It is true a probative *nexus* between theft of the revolver and the murder of Davis might exist, if its possession could not have been proven without evidence of that theft, or if the theft were inseparably linked with other evidence tending to show intent in the appellant to murder Davis; for example, if it had appeared the appellant had declared his resolution to obtain a gun by some means or other in order to kill Davis. But evidence which, if inseparably linked with the theft of the revolver would supply a probative *nexus* permitting its reception, does not exist in this case.

As I read what occurred, the learned trial judge recognized that the theft of the revolver was not relevant to the murder of Davis, but misdirected himself and the jury that it was admissible nevertheless as a part of the narrative of the prosecution's case. In my view this is shown by his stated reason for overruling the objection of appellant's counsel when the point arose during the "trial within the trial" on the admissibility of the written confession. The learned judge then said:

> . . . I cannot see how it could be said it could not be admissible as part of the Crown's case as prior to the 3rd of October the accused had in his possession this revolver. If in order to prove it [my note: possession], it comes out it was stolen that is unfortunate but I do not see that that in any way affects the validity of the evidence. It seems to me that that is an essential part of the Crown's case and therefore is something upon which the Crown can give evidence.

The learned judge thus indicates he did not regard theft of the revolver *eo ipso* to be an element in proof of the murder. This is confirmed by what took place when the appellant testified in his own defence, and counsel for the prosecution sought to elicit from him where he had obtained the revolver which he had previously admitted was in his possession since 19th September—nearly two weeks before the murder. Crown counsel asked the appellant where he got the revolver. Appellant counsel's objection was sustained by the learned judge, who then said:

> It is not necessary to go into that [my note—where he got the revolver]. He has the gun, that is all.

That is a clear statement that possession of the revolver was an essential evidential fact touching guilt, but that the manner of obtaining its possession was not. The jury heard that ruling, but unfortunately its effect upon their minds was lost when he came to charge them and said:

> The accused is not being tried for the theft of the revolver. That has nothing to do with the case except to show where he got the revolver.

In the result, the learned judge excluded oral testimony of the theft of the revolver because it was irrelevant to the fact of its possession, but later he instructed the jury that it was admissible as revelant to the fact of possession. This conflict between the learned judge's ruling and his charge emphasizes the seriousness of the objection to the testimony. The jury would naturally govern themselves by the charge. In the result they had before them the damaging testimony that the appellant was a thief, although, whether he was a thief or not, had not the slightest connection with the murder of Davis.

Once the learned judge was satisfied, as he apparently was, that theft of the revolver lacked any probative *nexus* with the murder of Davis, it was his duty with respect, to exclude that testimony from the jury as irrelevant and plainly prejudicial to a fair trial of the accused. For example, if the appellant in his written confession, instead of saying he had stolen the revolver, as he did, had said he had taken it from the body of a man he had murdered a few days before, the damaging influence of that admission upon the minds of the jury trying him on the charge of murdering Davis would be overwhelming, notwithstanding the fact the previous murder would not have the slightest probative connection with the murder of Davis.

Whether or not a probative *nexus* exists may often be hard to decide with convincing finality, but I think it is well recognized that where that happens, the issue ought to be resolved in favour of the accused *propter favorem vitæ*. *Rex* v. *Long* (1833), 6 Car. & P. 179; 172 E.R. 1198 and *Reg.* v. *Butler* (1846), 2 Car. & K. 221; 175 E.R. 92 are illuminating cases of confessions, the former including and the latter excluding, evidence of other criminal acts. Their reasoning supports the view that

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admissibility of evidence of other criminal acts, lies not only in their forming part of the same transaction as the offence charged, but also in whether or not they are essential to or tend to the proof of the particular crime with which the accused is charged.

In *Reg.* v. *Butler* cited with approval in *Rex* v. *Bond, supra,* evidence of theft of other money certainly appears to have been part of the same transaction as stealing "one piece of current silver called a shilling," which had been previously marked and placed in the owner's till. But that evidence was held inadmissible. It was clearly not essential to proof of stealing the marked shilling which was the specific crime charged. In *Rex* v. *Long,* burning the three ricks was held to have been part of the same transaction. But admission of the confession in the indictment for burning the third rick, clearly depended upon the view that evidence of burning the first two ricks was essential to proof of the burning of the third rick, since the three ricks were set on fire one immediately after the other and were within sight of each other.

On this first aspect of the case I am of opinion that testimony of theft of the revolver was inadmissible: (1) On principle and authority it had no probative connection with the murder of Davis. (2) The conditions under which the confession of the theft was obtained do not relate it in any intelligible way to the murder of Davis or the police investigation of that murder. It was obtained in the course of an investigation of another crime after the appellant had given up the revolver to the police, and before Davis' body was found and it was known he had been shot. (3) Counsel for the prosecution in pressing for the admission of the confession *in toto* said:

> . . . but at the same time, my Lord, the source from which he obtained the gun probably isn't material in any event.

(4) The learned judge as already pointed out, excluded oral evidence of the theft when it was tendered, ruling it was irrelevant once possession was proven as it had been.

This brings us to the second consideration, *viz.,* if testimony of theft of the revolver was not in itself admissible, is it nevertheless admissible as part of the written confession? The evidential relevancy of a fact does not undergo a change because it happens to appear in a free and voluntary written confession. A fact

otherwise not evidence does not become evidence by its inclusion in an otherwise admissible confession. In *Rex* v. *Sampson* (1934), 62 Can. C.C. 49 in the Appellate Division of Nova Scotia, Mellish, J., with whom Chisholm, C.J. and Carroll and Ross, JJ. concurred, said at p. 51:

> A prisoner's whole confession oral or written for obvious reasons should be put in evidence if admissible, and if in any part inadmissible, that part should be unequivocably and effectively excluded, and given no credit or consideration whatever.

In *Thiffault* v. *Regem,* [1933] S.C.R. 509, Sir Lyman P. Duff, C.J. speaking for the Court, said at p. 514:

> " . . . a document . . . , which includes a record of an admission of a fact that would be inadmissible against him, and which was calculated to prejudice him, could not properly be received in evidence. It, no doubt, might in a proper case be used by a witness to refresh his memory; but the use of the document itself as evidence could not be justified."

As *Wigmore* (Can. Ed.), Vol. 1, p. 930, points out, an acknowledgment of a subordinate fact not directly involving guilt, or in other words, not essential to the crime charged, is not a confession at all. For to be a confession the fact confessed must contain some quality of guilt of the crime charged. The learned author adds that all admissions other than those which touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions. In *Markadonis* v. *Regem,* [1935] S.C.R. 657, Davis, J. puts it in another way at p. 664:

> But quite apart from that, [failure to show proper warning] it was inadmissible because it was irrelevant. The evidence . . . proved nothing relevant to the issue, and was inadmissible from its own lack of evidential value.

Counsel for the appellant pressed the analogy of dying declaration decisions to extend to the exclusion of inadmissible testimony from confessions. That submission has much to support it. It is noted that in *Markadonis* v. *Regem, supra,* Cannon, J. cited the dying declaration case of *Chapdelaine* v. *Regem, ib.* 53 in support of his opinion. Also in the dying declaration case of *Schwartzenhauer* v. *Regem, ib.* 367, at p. 378 Dysart, J. (*ad hoc*) cited *Thiffault* v. *Regem, supra,* as authority for the proposition that if any portion of a dying declaration is inadmissible, the admissible parts should be placed before the jury separate and apart from the document. And note the judgment of Davis, J. in the same case at pp. 370-371.

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It seems to me, with respect, that the reasoning to be found in dying declaration cases is equally applicable to written confessions. I am unable to satisfy myself that the basic characteristic of the former, *viz.*, being made *in articulo mortis,* distinguishes them to the extent of lessening in the latter the protection the law gives the accused against the introduction of testimony otherwise inadmissible and prejudicial to his fair trial. For the foregoing reasons I must conclude that inadmissible testimony of theft of the revolver contained in the written confession did not become admissible because it appeared in the written confession. With respect, that testimony ought to have been excluded.

The foregoing conclusions render it necessary to decide if the misreception of the testimony referred to occasioned some substantial wrong or miscarriage of justice within the meaning of section 1014, subsection 2. In *Stein* v. *Regem,* [1928] S.C.R. 553 Anglin, C.J.C. in rendering the judgment of the Court, said at p. 557:

> The present provision of the Criminal Code of Canada (s. 1014 (2)) is substantially the same as that dealt with in the *Makin* case [*supra*] and in *Ibrahim* v. *R.*, [1914] A.C. 599). This Court had, in the *Allen* case (1911), 44 S.C.R. 331 already taken the same view of the effect of the former section 1019 of the Criminal Code and, since the substitution for it in 1923 of s. 1014 (2) in its present form, the statement of the law made in the earlier case (*Allen* v. *The King*) was reaffirmed in *Gouin* v. *The King,* [1926] S.C.R. 539.

In determining whether the introduction of evidence of theft of the revolver occasioned some substantial wrong or miscarriage of justice to the appellant, it is not enough to conclude there was sufficient evidence without it to enable the jury to convict of murder. It has been so decided in *Allen* v. *Regem* (1911), 44 S.C.R. 331; *Larson* v. *Boyd* (1919), 58 S.C.R. 275, at p. 281 and *Gouin* v. *Regem,* [1926] S.C.R. 539.

In *Allen* v. *Regem,* as pointed out by Rinfret, J. in *Gouin* v. *Regem,* all the judges below as well as in the Supreme Court of Canada appeared to agree, that apart from the improper evidence, there was abundant legal evidence of guilt. Sir Charles Fitzpatrick, C.J., with whom Duff, J. (as he then was) agreed, explained in *Allen* v. *Regem* at pp. 336-37 and 339, why, despite the presence of abundant legal evidence of guilt, the conviction could not be sustained by an appellate Court:

> The underlying principle . . . is that, while the court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no substantial wrong or to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue . . . —and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that in our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions . . . and the answers . . . did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiassed verdict of the jury that the accused was entitled to have.

For an appellate Court to find that substantial wrong occurred it must be satisfied, as Sir Charles Fitzpatrick emphasized, that the inadmissible evidence did not influence the jury in their conclusion. However an appellate Court cannot so satisfy itself, if, in the language of Rinfret, J. delivering the judgment of the majority of the Court in *Gouin* v. *Regem, supra* (p. 544), the inadmissible evidence

> . . . might have operated prejudicially to the accused upon a material issue, although it had not been and could not be shown that it did, in fact, so operate, and although the evidence properly admitted warranted the conviction, . . .

If the inadmissible evidence might have influenced the jury prejudicially to the accused, it is not within the jurisdiction of an appellate Court to decide whether it did or did not do so. That also necessarily excludes all reasoned tests designed to acertain if it did or did not do so. For this Court to so engage itself, would be to usurp the functions of the jury, by seizing for itself the determination of a question, which the appellant under the tradition and practice of our law has the right to have tried by a jury, *vide Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57, at p. 60; *Allen* v. *Regem, supra,* and *Gouin* v. *Regem, supra,* at p. 545.

In my opinion in the conditions existing, theft of the revolver is a circumstance, which in the above-cited language of Anglin, C.J.C. "might have operated prejudicially to the accused upon a material issue," that is to say, upon the charge of murder. To my mind that is conclusive if we are to be guided by human experience and conduct. In *Thompson* v. *Regem,* [1918] A.C.

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221, at p. 234, Lord Sumner (with whom Lord Parker of Waddington concurred) said:

> All lawyers recognize, as part of their professional premises, that there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is the man. Laymen are apt to think that the difference, if any, is in favour of admitting the former. There must be something to connect the circumstance tendered in evidence, not only with the accused, but with his participation in the crime.

In the ordinary affairs of men evidence of bad character militates seriously against a person charged with an offence or even suspected of an offence. It begets an unreasoned belief that such a person is more likely to have committed the offence suspected or charged. And that belief in turn leads more easily to conviction than if evidence of bad character were absent. It is impossible to estimate its damaging influence on the minds of laymen, who, as Lord Sumner has indicated, are more apt to be swayed by it than by the reasoned rules of evidence. For the foregoing reasons, I am of opinion that while there may have been sufficient evidence (apart from the inadmissible testimony) to justify conviction, it is nevertheless impossible for me to say that the inadmissible testimony may not have prejudicially influenced the minds of the jury against the appellant, particularly so when they were engaged in weighing the truth of the evidence he gave when he entered the witness box at the trial in his own defence and denied the murder of the deceased as described in his written confession. In a criminal case the verdict is to be founded exclusively upon such evidence as the law allows.

In *Maxwell* v. *The Director of Public Prosecutions*, [1935] A.C. 309 Viscount Sankey, L.C. observed at p. 323, that although

> it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed . . . [nevertheless] the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues.

The Lord Chancellor concluded (pp. 323-4):

> It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

With deference, the appeal should be allowed and a new trial directed.

FISHER, J.A.: Counsel on behalf of the appellant first submits

that there was error in the directions given to the jury by the learned trial judge in reference to section 69 of the Criminal Code. It is contended that the jury was instructed that, if the evidence of the appellant that he was not at the place where Philip Davis was killed was accepted, the first part of section 69 (hereinafter referred to as 69, subsection 1) was applicable to make him guilty of the murder of Davis upon other evidence which might be accepted. Counsel relies especially upon *Rex* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148 and *Rex* v. *Lomas* (1913), 9 Cr. App. R. 220 to support his argument that section 69, subsection 1 would not apply in such case. I do not find it necessary to consider whether or not the said cases relied upon support the argument of counsel as my view is that the learned trial judge did not direct the jury that the accused in such case could be found guilty under section 69, subsection 1 alone, but in effect directed them to the contrary. I am satisfied that he instructed them to the effect that, if the evidence of the appellant as aforesaid was accepted the jury could not find him guilty of murder unless they accepted other evidence from which an inference could be drawn to found a common intention as provided for in section 69, subsection 2. In his charge the learned trial judge said in part as follows:

> Now the Crown bases its claim here, as I understand it, on three grounds. . . . The third is that, accepting the accused's story, his evidence, rather, that he did not actually accompany Spike, if there was such a person, to the place where Davis was murdered, still he is liable because he and Spike arranged together that Spike should go out with a loaded gun supplied to him by Beatty and hold up someone and that the consequences which might be expected from that might be the death of the person whom he held up. Now, of course, that depends on all together whether you accept the statement of the accused that he thought Spike was going to sell the gun. If he thought Spike was going to sell the gun that part of the case fails. . . .
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> . . . . .
>
> . . . Now the law here is this: Everyone is a party to and guilty of an offence who actually commits it first of all, (b) does or omits an act for the purpose of aiding any person to commit an offence, (c) abets any person in commission of the offence. Now then if several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was or ought to have been known to be a probable consequence of the prosecution of such common purpose.
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Then does the accused come within this section? Did he do an act for the purpose of aiding Spike to commit an offence? Did he know of the offence which Spike proposed to commit, to hold up a man, and did he give the gun to him for that purpose—the loaded gun? If so, was that not a common intention to prosecute an unlawful purpose and to assist each other therein, and did not the accused know that the commission of that offence—that is the hold-up—or ought he not to have known that the probable consequences of the prosecution of such common purpose would be the death of the person sought to be held up?

Now to make it clear, if you come to the conclusion the accused thought Spike was going to sell that gun, if you come to the conclusion there was a Spike and Spike intended to sell that gun, and the accused thought that, then you cannot find the accused guilty under this view of the case.

It may be that the trial judge in dealing with the section and illustrating the matter did not clearly distinguish between the two parts of the section, but I do not think that any misunderstanding on the part of the jury could possibly arise. The charge must be read as a whole and in the light of the evidence and I am satisfied that the jury would understand that in saying what he did on the section referred to the learned judge was instructing them that, even if they accepted the evidence of the accused as aforesaid, the jury might apply the section and find the accused guilty of murder only if it found common intention as provided for in section 69, subsection 2. If I should be wrong in this or, if there was any irregularity in the charge of the trial judge in this or any other respect, then I would say that section 1014, subsection 2 of the Code applies. I think that any jury properly instructed and acting reasonably must on the evidence inevitably have found the accused guilty as charged.

In connection with the further submission of counsel on behalf of the appellant that there was no evidence of common intention, I have to say that in my view there was and the jury might accept part of the evidence of the appellant and still reasonably draw an inference from all the surrounding circumstances that he knew of the unlawful purpose and that there was a common intention to prosecute such purpose and to assist each other therein. I think the case is clearly distinguishable from the *Lomas* case, *supra*, in which the accused was charged with housebreaking and the verdict of the jury was a special verdict finding certain facts as follows:

Lomas guilty: that he had a certain knowledge that the jemmy was

wanted for an illegal purpose—that he handed the jemmy to King with the knowledge that it was wanted for a burglary. He did not know that it was wanted for this particular burglary.

As I view the *Lomas* case the Court held only that the facts as found by the jury were not enough to make Lomas an accessory before the fact to the commission of the burglary. Compare (1913), 78 J.P. 152. In the present case the jury found the accused guilty of the offence and there was ample evidence upon which they could so find even on the assumption that the jury accepted the evidence of the accused "that he did not actually accompany Spike if there was such a person, to the place where Davis was murdered," as the trial judge puts it. See *Rex* v. *Hughes, Petryk, Billamy, Berrigan,* [1942] S.C.R. 517, especially at p. 522, approving of what Anglin, J., as he then was, says in *Graves* v. *Regem* (1913), 47 S.C.R. 568, at p. 583.

Counsel on behalf of the appellant also submitted that the learned trial judge erred in his charge to the jury by not leaving it open to them to bring in a verdict of manslaughter based upon provocation as allegedly disclosed in the evidence. Assuming for the present purpose that the alternative defence of provocation can now be raised, I have only to say that in my view there was no error on the part of the judge in this respect as there was no "material before the jury which would justify a direction that they should consider it." See *Mancini* v. *Director of Public Prosecutions* (1941), 28 Cr. App. R. 65, at p. 72; *Rex* v. *Flett,* [*ante,* p. 25]; [1943] 1 W.W.R. 672, at p. 678 and cases there cited.

I now come to deal with the submission that the written statement of the appellant put in evidence was inadmissible because it contained a declaration admitting another crime, *viz.,* theft. The statement reads in part as follows:

> . . . I had a .38 cal. Smith and Wesson revolver on me at the time. The gun was loaded and is the one I stole from the Seaforth Armouries the day before I was A.W.O.L. This is the same gun that detective Whalen found on me when I was arrested. I produced the gun and told him to drive to Broadway and then go east on Broadway.

It must first be noted that we are not dealing simply with the question whether the fact admitted would be admissible evidence but whether a document professing to be a confession by the accused and containing such a declaration relating to another

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crime was properly received in evidence. Counsel for the appellant relies especially upon the judgment of the Court delivered by Sir Lyman P. Duff, C.J. in *Thiffault* v. *Regem*, [1933] S.C.R. 509, especially at p. 514. The rule as laid down in such judgment must of course be applied but I think its application leads to a different result in the present case which is clearly distinguishable from the *Thiffault* case. I think that, with respect to a document professing to embody admissions made by the accused, the judgment is authority only for the proposition that such a document could not properly be received in evidence if it included a record of an admission of a fact "that would be inadmissible against him and which was calculated to prejudice him." In other words, the admitted fact must not only be inadmissible against him on the ground of irrelevancy but the reception of the evidence of it must be calculated to prejudice the accused before the document could be held inadmissible.

I pause here to point out that, although *Rex v. Sampson* (1934), 62 Can. C.C. 49, at p. 51, *per* Mellish, J., may be cited as an authority for the proposition that, if part of the written statement of the accused is inadmissible, that part alone should be excluded, the *Thiffault* judgment as I interpret it means that if any part is inadmissible the better practice is that an emasculated statement should not be used as evidence but the document should only be used by a witness to refresh his memory.

Reverting now to the present case I note that the accused in the written statement aforesaid identified the gun with which he killed Davis as one he had previously stolen from the Armouries. Under all the circumstances of this case I have no doubt that the illegal possession of the army gun by the accused before and after as well as at the time of the killing was admissible in evidence. It was the weapon from which the Crown alleged and attempted to prove by scientific evidence the fatal shot was fired and evidence to trace its possession to the hand of the accused was relevant and cogent evidence even if in the process of proof the fact might emerge that the accused himself had stolen it. If this evidence could have been properly adduced by the Crown from any independent source is the written statement of the accused admitting all these facts to be ruled out as inadmissible

evidence because the accused included in the statement the admission that he stole the gun at a certain time and place? I think not and after careful consideration am of opinion that *Thiffault's* case, *supra,* while decisive in principle is, as I have said, distinguishable on the facts. In that case the fact admitted in the document and objected to, *viz.,* that the accused at one time had been arrested for another criminal offence and had paid the costs was totally unconnected with the offence charged and wholly irrelevant. If I should be wrong in holding admissible for the above reasons the admissions of the accused as to how he got possession of the gun nevertheless I would say that the written statement as a whole is admissible in evidence because the admission of the theft of the gun admittedly used to kill Davis could not under the circumstances of this case be "calculated to prejudice" the accused and that must be the consequence before the written confession itself can be excluded if I have correctly interpreted the principle of the *Thiffault* case. I might point out that here I am applying solely the tests of admissibility in *Thiffault's* case which in my view has special application to this particular subject, and I am not considering how the matter would stand if I were dealing with the general subject of admissible evidence. Compare *Gouin* v. *Regem,* [1926] S.C.R. 539, especially at p. 544.

Yet another matter remains to be considered. It was submitted by appellant's counsel that in the unfolding of the circumstances preceding the confession evidence prejudicial to the accused was improperly admitted in evidence. These passages are contained in the evidence of police officers, wherein reference is made to the booking of the accused for investigation, the warning to him that he was to be charged with carrying an offensive weapon dangerous to the public peace, the probability he would be charged with the theft of it, and his admission to them that he had stolen the gun in his possession from the Seaforth Armouries "the day he was absent without leave from the army." In my opinion the objection to the admissibility of this evidence cannot be sustained. It was the duty of the police officers to disclose all the facts which might have exercised an improper influence or inducement upon the free mind of the accused both in relation

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to the admissibility of the confession and the weight to be attached thereto by the jury. *Sankey* v. *Regem,* [1927] 4 D.L.R. 245; *Rex* v. *Anderson,* [1942] 3 D.L.R. 179, at p. 183. Especially is this so when it is remembered that the psychiatrist called by the defence testified in part as follows:

> Now, Major Alcorn, from all this, your observation and your own findings, what opinion did you form? In my opinion he is an individual of dull intelligence, extremely limited education, and one who as a consequence wouldn't be able to appreciate adequately or fully circumstances in which he found himself particularly complicated circumstances or a new situation to which he wasn't accustomed.
>
> You have heard, Major Alcorn, the history of his arrest and the interviews that the police had with him on the Saturday morning and again later on Saturday morning, and also Monday morning in the corridor. Now you have stated that in your opinion he would not appreciate a new situation to which he was not accustomed or the circumstances in which he was placed. What is your opinion of his appreciation of the situation and circumstances in which he was placed at this time, and by this time I mean the point where the detectives started to walk away from him and before he called them back? Frankly I don't think he would have an adequate appreciation of the circumstances. I say adequate because he had some appreciation. Of course, if he had none at all he would be insane. At least he would have so many defects as to amount to idiocy or psychiatric. I feel a great many factors contributed to that. As I said before his dull intelligence, his lack of education, the environment in which he found himself, such as his home, his reading of detective stories. He had been questioned repeatedly and he had been questioned about quite a number of different offences apparently, or crimes; at least different matters that came to the notice of the police. He has testified in Court, and he told me also, that he was afraid he would get third degree; he had seen a man in the hands of the police who had been apparently rather badly mauled; he had heard quite a few stories from his friends about the treatment which they or people they had known had received at the hands of various police forces—third degrees, and so on; he had read also about these; he regarded the warnings, the cautions he had received as a formality. He had only been in the hands of the police then about two days. He knew he would have to face one charge from the civil authorities and there was another charge also, both of them based largely on his own admissions. He was getting more and more involved in the situation, anyway. These difficulties, I think, are quite consistent with his intelligence and with his reading. He didn't know—he couldn't have known in my opinion to what extent the law did protect him in a situation. Under these circumstances and supposing that the statements made are correct, in my opinion he would not regard himself as a free agent.

It seems to me that from this evidence it was essential to the fair trial of the accused that full disclosure of events preceding the repudiated confession be laid before the jury for their con-

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sideration when deciding it worthy or not of credence. The fact that in so doing it was disclosed to the jury the accused had admitted the commission of other crimes of relatively minor degree cannot under the circumstances herein be said to be prejudicial to him—in truth he sought to turn the activities of the police in investigating his criminal activities to his own advantage as rendering him not a free agent when confessing to the murder.

It was further submitted the learned trial judge erred in leaving the question of the admissibility of the confession to the jury. If that is the construction to be placed upon the passage in his charge, to which objection was taken, then it seems to me it militated against the Crown and not against the accused.

In the result I would dismiss the appeal.

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

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Contract—Sale of goodwill of business and chattels—Action to recover balance of purchase price due—Defence of misrepresentation as to premises and machinery—Election by defendant to affirm contract and make repairs—Counterclaim for damages.

By written agreement the plaintiff sold the defendant the assets, undertaking and goodwill of a business known as the Main Fancy Sausage for $2,500 payable $1,500 in cash, the balance in $50 monthly payments. The plaintiff represented "the business was in good condition and ready to be taken over and operated by the defendant as a going concern and that the machinery and equipment were in good working order." The defendant paid the $1,500 and went into possession when he found the representations were not true, but he remained in possession, making the necessary repairs, including the painting of the premises which were insisted on by the health officer and this necessitated a two-weeks' close down of the business. The first ten monthly payments were not paid and the plaintiff brought action for these instalments. The defendant counterclaimed for damages for fraudulent misrepresentation. The action was dismissed, but $500 damages were allowed on the counterclaim.

Held, on appeal, reversing the decision of BOYD, Co. J. in part, that as the defendant purchaser had affirmed the contract by remaining in posses-

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sion, the action to recover the instalments due on the purchase price should not have been dismissed, but as to the counterclaim by combining the three elements of damage, namely, repairs, painting, and loss of business during the consequential close-down, the figure of $500 appears to be a fair assessment of the loss and damage directly resulting to the defendant from the plaintiff's fraudulent misrepresentation which induced him to buy the business.

APPEAL by plaintiff from the decision of BOYD, Co. J., of the 2nd of February, 1943. By agreement of the 17th of March, 1942, the plaintiff sold the defendant the assets, undertaking and goodwill of a business known as the Main Fancy Sausage on Main Street in Vancouver for $2,500, payable $1,500 in cash and the balance of $1,000 at $50 per month. The first ten monthly payments not being made, the plaintiff brought action to recover $500. The defendant claimed that prior to the above-mentioned agreement, the plaintiff verbally representetd that the business was in good condition and fit and ready to be taken over and operated by the defendant as a going concern and in fact, the said business and premises occupied by it were unfit for carrying on the business of sausage manufacturing and the premises occupied by it were dangerous to the public health. Further, the plaintiff represented that the machinery and equipment of said business were in good and commercial working order and fit and appropriate for the business of sausage manufacturing and sale, whereas the machinery and equipment were in very poor condition and unfit for the sausage business. He had to make repairs to the premises and to the machinery and equipment costing $264 and lost the time required for making the repairs for carrying on the business. He counterclaimed for damages for misrepresentation in the sum of $1,000.

The appeal was argued at Vancouver on the 18th of May, 1943, before SLOAN, O'HALLORAN and FISHER, JJ.A.

Bartman, for appellant: The purchaser did not repudiate the contract. He elected to continue on the premises and made the improvements and repairs he thought were necessary. There was error in refusing our claim for the balance of the purchase price now due. He must show that the machinery was defective at the time the contract was made.

Freeman, for respondent: We were forced to make necessary repairs to put the premises in a proper condition for carrying on, including painting the premises and the evidence shows the machinery required repairs. We had to close down while the repairs were in progress.

Bartman, replied.

Cur. adv. vult.

On the 26th of May, 1943, the judgment of the Court was delivered by

O'HALLORAN, J.A.: During the argument, the Court intimated it was satisfied on the evidence, the appellant had fraudulently misrepresented his sausage business in its sale to the respondent.

The appellant had represented "the business was in good condition and ready to be taken over and operated by him [the respondent] as a going concern"; and also "the machinery and equipment were in good working order; and that they were O.K. for the sausage-manufacturing business." Those representations were not true, as the respondent found out when he went into possession and began operation. Repairs and painting necessitated a two-weeks' close down.

The respondent had paid $1,500 cash on purchase. The balance of $1,000 was payable in monthly instalments, some of which are not yet due. The respondent did not repudiate the contract of purchase when he discovered the representations were false. Instead, he elected to affirm the contract by remaining in possession, making repairs and exercising acts of ownership, consistent only with affirmation of the contract. When the appellant sued him for $500 of the purchase price then due, he counterclaimed for damages for fraudulent misrepresentation. The learned county judge dismissed the action but allowed $500 damages on the counterclaim. Since the respondent purchaser had affirmed the contract, it should be obvious the action of the appellant vendor ought not to have been dismissed. The appeal must be allowed in that respect.

The award of $500 damages on the counterclaim is affirmed for reasons presently stated. But it should be said now, that the evidence does not permit the appellant's statement of his earnings

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to be accepted as a ground for misrepresentation, as was done in the Court below. If the appellant did make an untrue statement of his earnings, it was not an inducing cause of purchase, for the respondent testified in chief:

> I told him [Zauscher] I am not interested in how much you are making. He put the figure quite high, . . . I told him if she [the business] only makes $100 a month, I am satisfied.

In my opinion the applicable measure of damages is to be found in *Wertheim* v. *Chicoutimi Pulp Co.* (1910), 80 L.J.P.C. 91, at p. 93. It is, that the party complaining ought to be placed in the same situation in so far as money can do it, as he would have been if the contract had been performed according to its tenor. To accomplish that, three elements were proven here: (a) essential repairs to machinery and equipment totalling $177.72; (b) necessary painting of the premises $92.15; (as agreed by counsel); (c) loss due to close-down of the business for two weeks directly attributable to (a) and (b).

Allowance of (a) repairs, and (b) painting, is based on the principle that if one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in doing so: *vide Erie County Natural Gas &c. Co.* v. *Carroll* (1910), 80 L.J.P.C. 59, at p. 63. The business could not be operated without the repairs. Furthermore, the health officer had insisted the premises should be painted, and the appellant knew he would not be permitted to continue operation if it were not done. In short, he knew that unless he did the painting, the sausage business was not "ready to be taken over and operated as a going concern," as he had represented to the respondent.

The repairs and painting necessitated the business closing down for two weeks. That entailed disruption of business and loss of custom at a critical time for the respondent, then in the course of taking it over as a new business. The evidence as to loss of profits during that time does not enable it to be estimated with any degree of certainty. It is borne in mind also, that loss of purchaser's profits resulting from the close down when viewed as an element in the *quantum* of damages, is quite a different matter from evidence of vendor's earnings put forward as a ground for fraudulent misrepresentation in the sale of the business.

However, combining the three elements of damage, repairs, painting, and loss of business during the consequential close down, the figure of $500 appears to be a fair assessment of the loss and damage directly resulting to the respondent from the appellant's fraudulent misrepresentation which induced him to buy the business. As stated at the outset, the respondent purchaser did not repudiate the contract, but instead elected to affirm it and continue in possession and operate the business. The respondent did not distinctly plead a set-off in his defence, but his cross-claim is distinctly pleaded by way of counterclaim.

The observations of MACDONALD, C.J.A. in giving the majority judgment of the Court in *Victoria and Saanich Motor Transportation Co. v. Wood Motor Co.* (1915), 21 B.C. 515, at pp. 521-2 seem to be in point:

> In the case at Bar defendant has not distinctly pleaded a set-off. It is true it has alleged that the plaintiff was indebted to the defendant in certain sums . . . , but this cross-claim is distinctly pleaded by way of counterclaim. Defendant has made its election to proceed in that way, and I am, therefore, entitled to treat this litigation as claim and counterclaim. The result on the question of costs is indicated by what I have already said.

In the result the judgment on the counterclaim in favour of the respondent for $500 and costs is affirmed, but judgment should also be entered for the plaintiff appellant in the Court below for the sum of $500 as claimed, together with costs. Nothing now decided affects payment of the balance of $500 of the purchase price which was not the subject-matter of this litigation.

The appeal is allowed to the extent indicated. We think the appellant's partial success merits allowance of one-half his costs of appeal. The cross-appeal is dismissed, but, in the circumstances, without costs.

Appeal allowed in part.

Solicitor for appellant: *N. J. Bartman.*
Solicitors for respondent: *Freeman & Freeman.*

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1943
June 14.

REX v. BAKSHISH SINGH.

Criminal law—Rape—Accused employs female taxi-driver—Instructions to drive to lonely spot—Brutal assault on taxi-driver—Appeal from sentence of ten years—Dismissed.

The accused, having been convicted on a charge of rape, appealed from a sentence of ten years' penal servitude. The complainant was a female taxi-driver hired by the accused in Alberni, who instructed her to drive to Sproat Lake and then to Great Central Lake. On reaching a lonely spot on the way he made her stop the car, proposed sexual intercourse with her and on refusal, he attacked her with violence and brutality in accomplishing his purpose.

Held, that the Court must be sensible of the fact that today in many industries and occupations a large number of women and girls are employed doing an important part in the prosecution of the war. Their work takes them into closer proximity to men at night and in lonely places, and the Courts must see that they are protected. The facts disclose an aggravated and brutal case of rape and the sentence imposed should not be interfered with.

APPEAL by accused from the sentence of ten years imposed by BIRD, J. at the Spring Assize at Nanaimo on the 19th of April, 1943, on a charge of rape.

The appeal was heard at Vancouver on the 14th of June, 1943, by SLOAN, O'HALLORAN and FISHER, JJ.A.

J. A. Grimmett, for appellant.
Cunliffe, for the Crown.

SLOAN, J.A.: The appellant, a Hindu, was convicted of rape at the Nanaimo Assize and sentenced by BIRD, J. to ten years' penal servitude. He has not appealed from his conviction and we are concerned only with his plea for a reduction of the sentence imposed. The facts are briefly stated in the report of the learned trial judge from which I quote the following excerpt:

It was established that the prisoner had, on many occasions prior to the date of the offence charged, made use of a taxicab driven and operated by the complainant J. H. I considered that it could fairly be inferred from the evidence, in fact, that the only reasonable inference one could draw, was that the assault was the culmination of a deliberate plan on the part of the

accused. On the occasion in question, the prisoner employed the H. taxicab, driven by J. H., to drive him from a point within the town of Alberni, to his residence within the town. Upon arrival at the residence, the prisoner directed the driver to proceed to Sproat Lake, and on arriving at the point, to continue on the road to Great Central Lake. When the car had reached a desolate spot about half way to Great Central Lake, the prisoner requested the driver to stop, as he was ill. The prisoner then proposed sexual intercourse to the woman, and endeavoured to force her into the back seat of the car. The woman eluded him, but was finally run down. The prisoner then locked the woman's head beneath his arm, and pulled her, in that position, for some distance down the road. Meantime, the woman, with a view to attracting the attention of others moving by the road, dropped various articles of her wearing apparel on the roadway. First, her gloves; later, a shoe; still later, another shoe.

The evidence established that a scuffle ensued on the roadside some 300 yards from the car, during which another motor-car passed. The accused attempted to smother the woman's cries, by lying on top of her. It subsequently appeared that her cries had been heard by the car passengers, notwithstanding. The accused then dragged the woman a considerable distance further into the bush, and succeeded in accomplishing his purpose.

It is manifest that the crime was committed with deliberation, violence and brutality. The Court of Criminal Appeal in England has recently had occasion to express its opinion on the modern trend toward lighter sentences, saying in *Rex* v. *Duerden* (1942), 28 Cr. App. R. 128:

> There must sometimes be cases of such gravity and of such a character as to require a sentence of ten years' penal servitude to be passed, but undoubtedly, within the memory of the members of the Court, the habits of the age have led to a reconsideration of sentences of this severity. Although a generation ago sentences of ten years' penal servitude were common, today they are rarely passed, and, in the opinion of the Court, should be very rarely passed.

This principle was reiterated in *Rex* v. *Kirk* (1942), *ib.*, 129, at p. 130, wherein this appears:

> As this Court said yesterday in *Duerden*, [*supra*] sentences of the length of ten years are not usually passed in this age of moderation and leniency, unless the circumstances show an offence or offences of the utmost gravity.

In *Rex* v. *Metzler* (unreported) this Court recently reduced the sentence of a soldier convicted of rape from ten years to six; but, apart from the simple fact that in this case and in that both appellants were convicted of the same crime, there the parallel ends, as the circumstances and facts of the two cases are basically dissimilar.

In consideration of this case we feel we must as a Court be sensible of the fact that today in many industries and occupations

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a large number of women and girls are employed doing an important part in the prosecution of the war. Their work of necessity takes them into close proximity to men at night and in lonely places. The Courts must see to it that they are protected.

In this case, as counsel for the appellant was frank to admit, the facts disclose "an aggravated and brutal case of rape." We think we ought not to interfere with the sentence imposed.

The appeal is dismissed.

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

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

Appeal dismissed.

THOMPSON v. BRITISH COLUMBIA TELEPHONE COMPANY AND WESSELS.

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June 11, 15.

Injunction—Action for specific performance—Sale of dental practice and goodwill—Whether telephone and its number assignable—Application by vendor to obtain old number in new office—Regulations of British Columbia Telephone Co.

By agreement in writing in 1940 the defendant sold to the plaintiff his dental practice including the lease of the premises and the use of the telephone and telephone number. In consideration therefor the plaintiff was to pay the defendant half the net profits until the sum of $7,000 was paid. The full amount was paid in March, 1942. In December, 1942, the defendant opened an office in another building and gave the telephone company instructions to disconnect the telephone number in the plaintiff's office and instal a telephone with said number in his new office. The regulations of the telephone company provide that a subscriber shall not assign his contract with the company nor any rights thereunder and shall have no property right in the telephone number assigned to him and the company may change the telephone number at its own discretion. The plaintiff brought action for specific performance and obtained *ex parte* an *interim* injunction restraining the defendants from removing the telephone and telephone number from his office. On motion of the defendant company the *interim* injunction was dissolved.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C., that the Court should not interfere by way of injunction pending litigation unless the applicant who seeks the aid of the Court shows a fair *prima-facie* case in support of the title which he asserts. The material does not show a fair *prima-facie* case in support of the title which the plaintiff asserts to the telephone number by assignment from the defendant Wessels who was the telephone subscriber, but on the contrary shows that Wessels had no property right in the said telephone number and could not assign his contract with the company nor any rights thereunder.

APPEAL by plaintiff from the order of FARRIS, C.J.S.C. of the 28th of April, 1943, whereby the injunction granted by SIDNEY SMITH, J. of the 31st of March, 1943, was dissolved. The plaintiff brought action against the defendant Wessels for specific performance of an agreement in writing and signed by the defendant on the 16th of November, 1940, whereby the defendant sold to the plaintiff his dental practice, including the lease of the premises and the use of the defendant's telephone and telephone number in the Dawson Building, 193 East Hastings Street, Vancouver. The agreement provided that the defendant

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was to receive half the profits of the practice until he had received $7,000. In March, 1942, the defendant was paid in full. In December, 1942, the defendant gave instructions to the telephone company to have the plaintiff's name removed from the telephone directory, to disconnect his telephone number (Pacific 6424) and remove the same from the plaintiff's office to an office recently obtained by the defendant in the Standard Bank Building. An officer of the telephone company advised the plaintiff that the telephone and number for his premises were to be cut off on March 31st, 1943. The plaintiff then applied for the *interim* injunction first above mentioned.

The appeal was argued at Vancouver on the 11th of June, 1943, before SLOAN, O'HALLORAN and FISHER, JJ.A.

Bray, for appellant: This is an appeal from an order vacating our *ex parte interim* injunction. The plaintiff entered into a written agreement to purchase the defendant's dental practice including the goodwill which carries with it the telephone and telephone number. He was to pay the defendant one-half the net profits until it reached the sum of $7,000 and this was paid in full. For three years he had been practising and using the telephone with the original number when the defendant attempted to take it away. We bought his practice and goodwill and the telephone number goes with it: see *Daniel* v. *Ferguson,* [1891] 2 Ch. 27; *Von Joel* v. *Hornsey* (1895), 65 L.J. Ch. 102. The telephone service was never changed until May, 1943.

A. deB. McPhillips, for respondent company: A full and fair statement of the facts was not disclosed on the application for the *interim* injunction and the injunction should be dissolved: see *Ley* v. *McDonald* (1851), 2 Gr. 398; *Hall* v. *Canada Land and Colonization Co.* (1883), 8 S.C.R. 631.

McAlpine, K.C., for respondent Wessels: This is an action for specific performance and he can go no further without amendment. There was concealment and misrepresentation on the application for the *interim* injunction: see Kerr on Injunctions, 6th Ed., 15.

Bray, in reply: There was no concealment whatever. We knew nothing of the contract between the telephone company and Wessels.

Cur. adv. vult.

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On the 15th of June, 1943, the judgment of the Court was delivered by

FISHER, J.A.: This is an appeal by the plaintiff from the order made herein by the Chief Justice of the Supreme Court of British Columbia on April 28th, 1943, whereby the injunction contained in the order of SIDNEY SMITH, J. made March 31st, 1943, was dissolved. By the last-mentioned order an injunction was granted restraining the defendants their agents and servants from cutting off or transferring telephone number Pacific 6424 from the plaintiff or from certain premises of the plaintiff until the trial of the action or further order.

In such a case as this the Court should not interfere by way of an injunction pending litigation unless the applicant who seeks the aid of the Court shows a fair *prima-facie* case in support of the title which he asserts. He is not required to make out a clear legal title but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent. Kerr on Injunctions, 6th Ed., pp. 15 and 16 and cases there cited. See also *Hall* v. *Canada Land and Colonization Co.* (1883), 8 S.C.R. 631.

The injunction as I have indicated was an *interim* one and the trial has yet to be heard. I wish therefore to refrain from saying anything more than is necessary to say in order to indicate my reasons for my conclusion which is based upon the material which was before the Court upon the application to dissolve the injunction. Such material included the regulations of the British Columbia Telephone Company, one of the defendants, filed with and approved by the Board of Transport Commissioners for Canada, reading in part as follows:

> The subscriber shall not assign his contract with the company nor any rights thereunder.
>
> . . . . .
>
> TELEPHONE NUMBERS.
>
> The subscriber shall have no property right in the telephone number assigned to him or any right to continuance of service through any particular central office, and the company may change the telephone number or central office prefix, or both, at its own discretion.

The plaintiff is suing for specific performance and having in

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mind all the material before the Court including the regulations as aforesaid I have to say that in my view the material does not show *prima facie* a case for which specific performance would lie. It does not show a fair *prima facie* case in support of the title which the plaintiff asserts to the said telephone number by assignment from the defendant Wessels who was the telephone subscriber but on the contrary shows that the said defendant Wessels had no property right in the said telephone number and could not assign his contract with the said company nor any rights thereunder.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *Milton Gonzales.*
Solicitor for respondent company: *A. deB. McPhillips.*
Solicitor for respondent Wessels: *Thomas A. Dohm.*

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June 7, 8, 25.

FEWSTER v. MILHOLM AND VALLIERES AND McANDLESS.

Negligence—Collision of motor-vehicles at intersection—Right of way—Substantial prior entry into intersection—Effect on right of way—Highway Act, R.S.B.C. 1936, Cap. 116, Sec. 21.

The plaintiff, a passenger in a taxicab owned by the defendant Milholm and driven by the defendant Vallieres, was proceeding westerly along Matthews Avenue in Vancouver about the noon hour on November 17th, 1941. When they reached the intersection of Cypress Street and were about one-third of the way across, the plaintiff, who was in the back seat looking to his right, saw the car of the defendant McAndless coming from the north on Cypress Street about 50 feet away and drew this to the taxi-driver's attention, but they proceeded on and when about three-quarters of the way across, the right rear of their car was run into by the McAndless car and the plaintiff was severely injured. On the trial it was held that both drivers were to blame and apportioned the liability 65 per cent. on the taxi-driver and owner and 35 per cent. on Mrs. McAndless.

Held, on appeal, reversing the decision of SIDNEY SMITH, J. (McDONALD, C.J.B.C. dissenting), that the cause of the accident was the failure of Anna McAndless to see the taxicab when it was well within the inter-

section more than 50 feet in front of her. Her right of way then became subject to the reasonable and substantial prior entry of the taxicab into the intersection. She was bound to look in front of her and to see what was then plain to be seen. The taxi-driver, having made a reasonable and substantial prior entry into the intersection, was entitled to believe that other cars not yet within the intersection would respect the priority of his position.

APPEAL by defendants Milholm and Vallieres from the decision of SIDNEY SMITH, J. of the 30th of January, 1943, in an action for damages for injuries sustained owing to a collision between two motor-cars at the corner of Matthews Avenue and Cypress Street in the city of Vancouver. The plaintiff was a passenger in a car owned by the defendant Milholm and driven by the defendant Vallieres, a taxi-driver in the employ of Milholm. The defendant Anna McAndless was driving her car south on Cypress Street on the 17th of November, 1941, at about 12 o'clock noon. At the same time Vallieres, the taxi-driver, was proceeding with the plaintiff as a passenger in a westerly direction on Matthews Avenue. As Vallieres proceeded across Cypress Street and was nearly across, the rear right side of his car was struck by the McAndless car as it came out of Cypress Street into the intersection.

The appeal was argued at Vancouver on the 7th and 8th of June, 1943, before MCDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellants: The taxi-driver had made a substantial entry on the intersection at a reasonable speed before the McAndless car reached it and he had the right of way: see *Lloyd* v. *Hanafin* (1931), 43 B.C. 401; *Reed* v. *Lawson* (1934), 48 B.C. 103; *Hanley* v. *Hayes et al.*, [1925] 3 D.L.R. 782; *Carter* v. *Wilson*, [1937] 3 D.L.R. 92; *Cornish* v. *Reid and Clunes* (1939), 54 B.C. 137, at p. 139; *Swadling* v. *Cooper*, [1931] A.C. 1; *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207; *Alonzo* v. *Bell et al.* (1942), 58 B.C. 220. We had the right of way by being well within the intersection. Assuming we are partly to blame, we were penalized too much when ordered to pay 65 per cent. of the damages.

J. G. A. Hutcheson, for respondent McAndless: The driver

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of the taxi totally disregarded the warning of his passenger the plaintiff. Assuming he had the right of way, he knew the driver of the car on his right did not see him. The driver on the left must be sure of his right to proceed: see *Swartz* v. *Wills*, [1935] S.C.R. 628, at p. 629; *Sershall* v. *Toronto Transportation Commission*, [1939] S.C.R. 287, at p. 303; *Long* v. *Toronto Rway. Co.* (1914), 50 S.C.R. 224; *Robt. Simpson Western Ltd.* v. *Goldman*, [1936] 3 W.W.R. 429; *Manitoba Motor Transit Ltd.* v. *McGregor*, [1939] 2 W.W.R. 513; *Mess* v. *Calver*, [1929] 2 W.W.R. 442; *Thompson* v. *McCaig*, [1938] 3 D.L.R. 487. The taxi-driver was falling asleep from overwork and his passenger tried to keep him awake. This applies very materially to the accident and constitutes negligence: see *Lajimodiere* v. *Pritchard and Duff*, [1938] 1 W.W.R. 305; *Lloyd* v. *Hanafin* (1931), 43 B.C. 401.

G. E. Housser, for respondent (plaintiff).

McAlpine, replied.

Cur. adv. vult.

25th June, 1943.

MCDONALD, C.J.B.C.: The facts of this case are well set out in the reasons of SIDNEY SMITH, J., the learned trial judge. With respect, I think he took a sound view of what happened. Here we have a collision in broad daylight. Had either driver exercised reasonable care there would have been no accident. If I had been trying the case, I should have found it difficult to attribute more blame to one driver than to the other. The trial judge finds the driver of the automobile 35 per cent., and the driver of the taxicab 65 per cent. to blame. I am far from holding that he was wrong.

I would dismiss the appeal.

SLOAN, J.A.: I agree with my brother O'HALLORAN.

O'HALLORAN, J.A.: The respondent Fewster, a passenger in a taxicab owned by the appellant Milholm and driven by the appellant Vallieres, was injured when the taxicab was run into at a Vancouver street intersection, by an automobile owned and driven by the respondent Anna McAndless approaching from the right of the taxicab. The learned trial judge found the appel-

lants 65 per cent., and the respondent Anna McAndless 35 per cent. to blame.

The learned judge accepted the evidence of the respondent Fewster, observing, that of the three persons involved at the time (*viz.*, Fewster, Vallieres and Anna McAndless), he "was the only one to keep his wits and his eyes about him." He summarized Fewster's evidence thus:

> His evidence is that after entering the intersection he saw the automobile about 50 to 100 feet away coming south . . .

That is an acceptance of Fewster's evidence in cross-examination that when he first saw the McAndless car to his right, the taxicab was then "about a third, somewhere about a third or half way across the intersection."

The learned judge also found the respondent Anna McAndless did not see the taxicab until after the accident. Her car ran head on into the right rear side of the taxicab, the back portion of which had not yet completed passage through the intersection. It is clear therefore that the taxicab was well within the intersection when the McAndless car was more than 50 feet away from the entrance to the intersection. It is clear also that the driver of the McAndless car did not see the taxicab when it was substantially within the intersection which she was approaching. This is not a case therefore where the two cars reached the entrance to the intersection at approximately the same time as happened in *Carter* v. *Wilson,* [1937] 3 D.L.R. 92 in the Ontario Court of Appeal.

Nor is this a case where the taxi-driver increased his speed in an effort to enter the intersection before the car approaching from his right, as happened in *Swartz* v. *Wills,* [1935] S.C.R. 628. But this is essentially a case where the taxi-cab had made reasonable and substantial prior entry into the intersection before the other car had reached the entrance to the intersection. In my view it comes within the principle stated by MACDONALD, C.J.B.C. in *Lloyd* v. *Hanafin* (1931), 43 B.C. 401, at p. 402:

> The vehicle coming from the right has by statute or by-law the right of way, but where the other vehicle has reached the intersecting street substantially ahead of the one having the right of way he is not obliged to wait upon the other if the way appears to be clear.

The learned judge appears to have held the taxi-driver negli-

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gent because he was not alert in looking to his right after he had entered the intersection. But having made a reasonable and substantial prior entry into the intersection, he was entitled to believe that other cars not yet within the intersection would respect the priority of his position. He was not then under any duty to look up or down the street for approaching cars which might come into the intersection before he had left it, and *vide Crowell* v. *Williams* (1937), 11 M.P.R. 454, Sir Joseph Chisholm, C.J. (with whom Mellish, Ross and Hall, JJ. concurred) at p. 463. But even if there was such a duty upon him, and he was not as alert as he might have been in that respect, there was still a duty upon the McAndless car to at least attempt to avoid the consequences of any lack of alertness on his part.

The cause of the accident in my opinion was the failure of the respondent Anna McAndless to see the taxicab when it was well within the intersection more than 50 feet in front of her. Her right of way then became subject to the reasonable and substantial prior entry of the taxicab into the intersection. Under the *Davies* v. *Mann* principle, her right of way could not be exercised with impunity when there was danger of colliding with a car in front of her. She was still bound to look in front of her and to see what was there plain to be seen. *Vide* also *Hanley* v. *Hayes* (1924), 55 O.L.R. 361, at p. 367 described in *Carter* v. *Wilson, supra,* as the leading Ontario authority upon the rights of motor-drivers at an intersection.

In so far as the evidence discloses, Anna McAndless made no attempt whatever to avoid the collision. She made no attempt to stop, to slow down, or to swerve to her left to avoid the taxicab. She did not see it. She admits frankly that if she had seen the taxicab 50 to 60 feet away she could have come to a complete stop within that distance. She also admits frankly that travelling at 30 miles an hour, if she had seen the taxi even when it was ten feet in front of her, she could have avoided the collision by swerving to her left. In my judgment this aspect of the case is very close in principle to *Lauder* v. *Robson* (1940), 55 B.C. 375 (that was a case of a pedestrian crossing a highway in the country but not at an intersection). It was pointed out there at p. 384 if the motorist had kept his eyes on the road he should have

seen the pedestrian in time to have avoided hitting her, and *vide* also *Powell* v. *Martin and O'Connor* (1928), 62 O.L.R. 436, at pp. 442-3.

In the circumstances I think the conclusion is inescapable that the respondent Anna McAndless could have avoided the collision by exercising ordinary care and judgment. She was virtually in control of the situation, but failed in her duty to avoid the risk of collision. Whether or not the taxi-driver was careless, she is solely responsible in my view, because she did not avoid colliding with the taxicab when she had the present ability to do so.

I would allow the appeal and dismiss the action of the respondent Fewster as against the appellants Milholm and Vallieres.

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

Solicitor for appellants: *C. L. McAlpine.*
Solicitor for respondent (plaintiff): *G. E. Housser.*
Solicitor for respondent McAndless: *J. G. A. Hutcheson.*

MURDOCK v. O'SULLIVAN AND O'SULLIVAN.

Motor-vehicles — Negligence — Accident — Gratuitous passenger injured— Action by her against driver—Question whether accident caused by "gross negligence"—B.C. Stats. 1941-42, Cap. 25, Sec. 4.

Prior to 1938 a gratuitous passenger was in the same position as any other person when suing the driver of a motor-car causing injuries to the passenger. In that year the Legislature took away that right. In 1942 an amendment to the Motor-vehicle Act was passed providing that an action lies by such passenger in a case where there has been gross negligence on the part of the driver contributing to the passenger's injuries. In an action by a gratuitous passenger for injuries sustained owing to the alleged gross negligence of the defendant Agnes O'Sullivan, who was driving her husband's car with his consent, it was held on the trial that the plaintiff was entitled to recover judgment. The act of the defendant under the circumstances of this particular road, driving at the rate of speed that she did, and without slowing down when meeting another car, was the cause of the accident, and under all the circumstances a prudent or responsible or competent person would not have driven in that manner.

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Held, on appeal, reversing the decision of FARRIS, C.J.S.C., that the defendant was driving on an ordinary gravel road in a reasonably fair state of repair and her speed was about 25 miles per hour. No expert opinion was offered to indicate that 25 miles per hour was an excessive speed under the circumstances and there was no evidence to support such a finding. No case of gross negligence was made out. In other words, there was no very marked departure from the standards by which responsible and competent people in charge of motor-cars habitually govern themselves.

APPEAL by defendants from the decision of FARRIS, C.J.S.C. of the 12th of March, 1943, in an action for damages for personal injuries sustained as a result of the gross negligence of the defendant Agnes O'Sullivan, while driving a certain motor-vehicle in which the plaintiff was a passenger, which said motor-vehicle belonged to the defendant James O'Sullivan and was driven by the defendant Agnes O'Sullivan with his knowledge and consent and which said injuries were sustained by the plaintiff on the 25th of July, 1942, on a highway in the vicinity of Deep Cove, British Columbia. At about 11 p.m. the defendant Agnes O'Sullivan was driving her husband's car from the plaintiff's summer-house to Deep Cove a distance of from one-quarter to one-half a mile. The plaintiff and another were in the front seat with the driver and two were in the rumble seat behind. When they neared Deep Cove they went across a bridge and met a car going in the opposite direction just after crossing. The driver turned to the right to avoid the oncoming car, but turned too far to the right and her two right wheels went off the road into a shallow ditch from 14 to 17 inches deep. The right wheels bumped over two ramps built across the ditch and came to a stop against a rock shoring on the right side of the ditch. The plaintiff suffered a lacerated wound on the right side of her face that left a permanent scar, a fracture of three ribs and bruises on her arms and legs. It was found on the trial that the defendant driver was guilty of gross negligence and the damages were assessed at $1,837.50.

The appeal was argued at Vancouver on the 9th of June, 1943, before MCDONALD, C.J.B.C., SLOAN and O'HALLORAN, J.J.A.

Guild, for appellants: By section 4 of the Motor-vehicle Act Amendment Act, 1941-42, it is only in the case of gross negli-

gence that a gratuitous passenger can sue. There was error in holding that the passing of the cars took place on the bridge or just after passing the bridge and gross negligence was found in a case neither pleaded nor proved. There is no finding of gross negligence in respect of the case pleaded and proved. On the facts proven there was no negligence. Gross negligence has been defined in three fields of law: (a) In bailment: see *Coggs* v. *Bernard* (1703), 2 Raym. (Ld.) 909; 92 E.R. 107; (b) in municipal responsibility: see *The City of Kingston* v. *Drennan* (1897), 27 S.C.R. 46, at p. 60; *Holland* v. *City of Toronto* (1926), 59 O.L.R. 628; (c) in the field of motor-vehicle accidents: see *Murray* v. *McCulloch,* [1941] 3 D.L.R. 42; [1942] 2 D.L.R. 179, at p. 180. On the evidence the speed did not exceed 25 miles per hour. It is submitted that the speed at which the car was driven in the present circumstances falls very far short of establishing gross negligence and speed appears to be the only thing complained about in the particulars of negligence furnished by the plaintiff in her statement of claim. The damages are excessive. On the evidence the wound in the face would disappear or nearly so in a year, leaving only a "very narrow scar." Two months after the accident she enlisted in the Canadian Women's Army Corps and her ribs were healed before she enlisted.

Crux, for respondent: The course of Mrs. O'Sullivan's car given by the police officer after leaving the bridge was that she travelled over to the left of the road, then across the road to the right, her right wheels going into the ditch on the right side of the road and then proceeding in the ditch until coming to the point of impact with the stone wall. When faced with the oncoming car, she turned too far to the right, her right wheels going into the ditch. After leaving the bridge she never slackened her speed and she was warned that she was going too fast. The right wheels bumped over two ramps that crossed the ditch before coming to a stop against the stone wall. The learned judge intimated that the driver had driven in a reckless manner and applied the law as set forth in *McCulloch v. Murray,* [1942] S.C.R. 141. In that case the gross negligence consisted solely of reckless driving. On the definition of gross negligence see *Nix* v. *Godfrey,*

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[1936] 2 W.W.R. 497; *Krause v. Rarity* (1930), 210 Cal. 644; 283 P. 886; *Carlisle* v. *G.T.R.* (1912), 25 O.L.R. 372; *Wilson* v. *Brett* (1843), 11 M. & W. 113; 152 E.R. 737; *Grill* v. *General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600, at p. 613; *Hinton* v. *Dibbin* (1842), 2 Q.B. 646; *Lord* v. *Midland Railway Co.* (1867), L.R. 2 C.P. 339, at p. 344; *Giblin* v. *McMullen* (1869), L.R. 2 P.C. 317, at p. 336; *Fitzgerald et al.* v. *Grand Trunk R.W. Co.* (1880), 4 A.R. 601; (1881), 5 S.C.R. 204; *The City of Kingston* v. *Drennan* (1897), 27 S.C.R. 46. The finding of the trial judge should not be interfered with by the Court of Appeal: see *Bartlett* v. *Winnipeg Electric Ry. Co. and Canadian Northern Ry. Co.*, [1920] 1 W.W.R. 95; 29 Can. Abr. 516 to 519; *Toronto Railway* v. *King*, [1908] A.C. 260; *Shortt* v. *Rush and British American Oil Co. Ltd.*, [1937] 2 W.W.R. 191.

Guild, replied.

Cur. adv. vult.

25th June, 1943.

MCDONALD, C.J.B.C.: This is an appeal from a judgment of the Chief Justice of the Supreme Court awarding the respondent damages for injuries sustained by her while a gratuitous passenger on 25th July, 1942, in a motor-car owned by the defendant James O'Sullivan, being driven by his wife Agnes O'Sullivan.

Prior to 1938 a gratuitous passenger in this Province stood in the same position as any other plaintiff when suing the driver of a motor-car causing injuries to the plaintiff. In that year our Legislature took away that right. In 1942 the door was opened again, but only partly, for by an amendment to the Motor-vehicle Act by Cap. 25, Sec. 4, B.C. Stats. 1941-42 it was provided that an action lies by such passenger in a case where there has been gross negligence on the part of the driver contributing to the plaintiff's injuries.

It will be observed that our statute differs from that of some of the other Provinces, which allow for a cause of action in such cases only where there is gross negligence, or wilful or wanton misconduct on the part of the driver.

In my opinion it would be an utter waste of time to analyze

the scores of cases in which an attempt has been made to define what is meant by the phrase "gross negligence." I shall content myself with respectfully adopting what was said by Sir Lyman P. Duff, C.J. in *McCulloch* v. *Murray,* [1942] 2 D.L.R. 179, at p. 180, where the learned Chief Justice said:

> . . . All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, I think it is entirely a question of fact for the jury whether conduct falls within the category of gross negligence, or wilful misconduct, or wanton misconduct. These words, after all, are very plain English words, not difficult of application by a jury whose minds are not confused by too much verbal analysis.

While I take this rule as a guiding principle, I may also say that, in addition to the fact that *McCulloch* v. *Murray* was tried by a jury who found reckless driving, constituting gross negligence, the facts in that case are so different from those before us that they are not fairly comparable.

The defendant in the present case was driving a coupe at night over what has been called a narrow, winding country road. She had not far to go but, within the distance, she had to cross two bridges which were narrower than the travelled highway; and she knew she could expect oncoming cars and pedestrians. She was driving on an ordinary gravel road, in a reasonably fair state of repair, and her speed was 25 miles per hour.

Early in the trial the learned judge adopted the view that the real cause of the accident was excessive speed under the circumstances, and he held to that view throughout, stating in his reasons for judgment at the conclusion of the trial:

> I find that the act of the defendant, under the circumstances of this particular road, driving at the rate of speed that she did, and without slowing down, was the cause of the accident, and that under all the circumstances that a prudent or responsible or competent person would not have driven in that manner.

While there is no express finding of gross negligence it is common ground that such a finding is implicit in the judgment, for otherwise the plaintiff could not recover.

Since I have concluded, with due respect, that the learned judge reached the wrong conclusion, I may state at once that in my view the reason he went wrong was that he misapprehended the evidence. The defendant's evidence was as follows:

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You proceeded westerly, and did you come to a bridge on the road? Yes. Do you remember passing that bridge? Yes.

Tell the Court what took place from the time you passed the bridge until the time of the accident. I don't really remember while on the bridge, but just after crossing the bridge there was a car coming in the opposite direction. I have a recollection of one.

There was plenty of other evidence making it clear that Mrs. O'Sullivan did meet an oncoming car after she had crossed the bridge in question, and I have no doubt at all on the whole of the evidence that such a finding ought to be made. If there were any doubt on the question it would be solved by the fact that the plaintiff in the particulars contained in her statement of claim pleaded that:

The said defendant was driving the said automobile on a narrow country road at night-time and failed to slow up for an approaching automobile in order to permit her to safely pass the approaching automobile and failed to keep her automobile under proper control. . . .

Notwithstanding the evidence and this plea, the learned judge stated definitely that in his view the passing of the oncoming car was an irrelevant matter and had nothing to do with the accident. With respect, I think it had everything to do with the accident, and I am satisfied that the accident was the result of the fact that Mrs. O'Sullivan, when meeting the other car, had to turn out somewhat to her right, with the result that the shoulder of the road did not adequately support her car, thus allowing the right wheels to sink into a shallow ditch where they remained until the car was stopped by an obstruction. The sudden stopping of the car caused the plaintiff, who was riding in the front seat, to receive her injuries through her head striking against the windshield.

No expert opinion was offered to indicate that 25 miles an hour was an excessive speed under the circumstances. This conclusion was really an opinion reached by the learned trial judge without evidence to support it. As I view the case, a decision that the occurrence was the result of inevitable accident would not be totally unsound. In any event, I have no difficulty in deciding that no case of gross negligence—in other words, no very marked departure from the standards by which responsible and competent people in charge of motor-cars habitually govern themselves—is made out. It must be remembered, as Sir Lyman

P. Duff, C.J. said in *McMillan* v. *Murray*, [1935] S.C.R. 572, at p. 574 (a case involving negligence *simpliciter*): "The standards to be applied are not standards of perfection."

I would allow the appeal and dismiss the action.

SLOAN, J.A.: I would allow the appeal and dismiss the action for the reasons given by the Chief Justice.

O'HALLORAN, J.A.: I agree the evidence does not disclose "gross negligence" within the meaning of the 1941-42 amendment of the Motor-vehicle Act.

The term "gross negligence" has been subjected to considered criticism, as for example in the decisions referred to by Sir Joseph Chisholm, C.J., of Nova Scotia (with whom Hall and Smiley, JJ. concurred), in *Murray* v. *McCulloch*, [1941] 3 D.L.R. 42; affirmed [1942] S.C.R. 141. 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": *per* Lord Wright in *Grant* v. *Australian Knitting Mills, Ltd.* (1935), 105 L.J.P.C. 6, at p. 14. *Vide* also *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1933), 102 L.J.P.C. 123 described as an "epoch-making decision" in the preface to the 8th edition of Salmond on Torts.

The Provincial Legislature has seen fit to introduce the term "gross negligence" into legal currency without any guide to its interpretation. However, the statutory context of civil liability in which the term is employed, appears to indicate it is there used to connote conduct of an aggravated or reprehensible character which often accompanies (although it is not an essential ingredient of) that more common breach of duty which denotes the distinctive tort of negligence. It suggests the concept of aggravated negligence.

The appeal should be allowed and the action dismissed.

Appeal allowed.

Solicitor for appellants: *W. S. Lane.*
Solicitors for respondent: *Crux & Kennedy.*

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May 3.

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May 20;
June 30.

HEADS v. BROWNLEE AND McALPINE.

Insurance, automobile — Accident — Repudiation of liability by insurer— Offer of insurer to defend without waiver of repudiation—Refusal of insured to accept condition—Appearance entered by insurer—Application by insured to strike out appearance.

The defendant in an action for damages resulting from an automobile accident, was insured in The Yorkshire Insurance Company, and under the terms of the policy, the company was authorized to defend the action on behalf of the defendant. On December 11th, 1942, the company notified the defendant that it repudiated all liability under the policy. On February 17th, 1943, the defendant, through his solicitors, wrote the company asking whether it was prepared to take over the defence of the action on behalf of the defendant. The company's solicitors then notified the defendant's solicitors that they would take over the defence of the action on condition that the company would not waive its notice of repudiation of liability under the terms of the policy. The defendant's solicitors then replied that the defendant could not agree to the company's proposal and that the company must assume the defence of the action in accordance with the contract or stand by the notice of repudiation of liability. There was no further correspondence and on March 16th, 1943, the company, through its solicitors, entered an appearance on behalf of the defendant. On an application by the defendant for an order setting aside the appearance on the ground that it was entered without the consent or authority of the defendant, it was held that the entering of appearance was authorized, but by entering it the insurer accepted the terms laid down by the defendant, namely, that it waived its former repudiation and could not now be heard to say that it did not intend to repudiate.

Held, on appeal, reversing the decision of FARRIS, C.J.S.C. (SLOAN, J.A. dissenting), that the company did not intend to waive and did not waive its right to repudiate liability. That being the case, the company had no right to take up the defence of the action and the appearance entered by its solicitor should be struck out and the appeal allowed.

APPEAL by defendant Brownlee from the decision of FARRIS, C.J.S.C. dismissing the defendant's application to have the appearance entered on behalf of the defendant vacated on the ground that the solicitor entering the appearance did so without the knowledge or authority of the defendant. Heard by him in Chambers at Vancouver on the 12th of April, 1943. The facts are sufficiently set out in the head-note and reasons for judgment of FARRIS, C.J.S.C.

Tysoe, for the application.
McAlpine, K.C., contra. *Cur. adv. vult.*

3rd May, 1943.

FARRIS, C.J.S.C.: This was an application before me to have the appearance entered on behalf of the defendant vacated on the ground that the solicitor entering the appearance did so without the knowledge or authority of the defendant. The facts are briefly these:

That the defendant was insured by The Yorkshire Insurance Company Limited. It was conceded by counsel for both parties that under the contract of insurance between the defendant and The Yorkshire Insurance Company Limited that The Yorkshire Insurance Company Limited was by the terms of such policy authorized to defend the action on behalf of the defendant which would of course give the implied authority to enter an appearance on behalf of the defendant. However, on the 11th of December, 1942, The Yorkshire Company through its solicitors notified the defendant as follows:

We are instructed by The Yorkshire Insurance Company Limited to advise you that that company repudiates all liability under its policy with you, as above described, for any damage or loss arising out of the accident in which you were involved at or near the intersection of Pender and Carrall Streets, in the city of Vancouver, in the Province of British Columbia, on or about the 30th day of May, A.D. 1942.

In the face of this repudiation the defendant through his solicitor on February 17th wrote The Yorkshire Company as follows:

On behalf of Mr. Edgar Brownlee, the assured under the above policy, I enclose copy of writ of summons served today on Mr. Brownlee, wherein one William Joseph Heads is plaintiff, claiming damages for personal injuries as a result of an accident on or about May 29th, 1942, at the intersection of Carrall and Pender Streets, Vancouver, when Mr. Heads received injuries when it was alleged he was struck by Mr. Brownlee's motor-car.

Will you kindly let me know at once if you are prepared to take over the defence of this action on behalf of Mr. Brownlee, otherwise in accordance with the rules, I must enter an appearance on his behalf within eight days from this date.

Will you kindly acknowledge receipt.

I am sending a copy of this letter to your solicitors, Messrs. *Farris, McAlpine, Stultz, Bull & Farris.*

And on the following day The Yorkshire Insurance Company Limited acknowledged the letter to the defendant in the words following:

We acknowledge receipt of your letter enclosing copy of writ of summons served on Mr. Brownlee and wish to advise that we have forwarded the writ to A. E. Howard & Co., the adjuster in this case.

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It would appear from the affidavit of Mr. *Pratt,* solicitor for Mr. Brownlee, that on or about the 23rd of February Mr. *Pratt,* as solicitor for the defendant, received a proposal from Mr. *McAlpine* of the firm of *Farris, McAlpine, Stultz, Bull & Farris* that that firm take over the defence of the action on behalf of The Yorkshire Insurance Company Limited on condition that the same insurance company would not waive its notice of repudiation of liability under the terms of the policy of insurance issued to the company by the defendant, such repudiation being set out in the letter before referred to of December 11th.

Following this the defendant through Mr. *Pratt* wrote to the solicitors for The Yorkshire Company as follows:

I have submitted your proposal to my client that your firm take over the defence of the above action on the understanding that your client, The Yorkshire Insurance Co. Ltd., do not waive its notice of repudiation of liability under the terms of the above policy by so doing.

I am instructed to advise you that Mr. Brownlee cannot agree to your proposal. Either your company must assume the defence of this action in accordance with its contract with the assured or stand by the notice of repudiation of liability contained in your letter to Mr. Brownlee of November 11th, 1942.

Unless, therefore, I hear from you by return, I shall enter an appearance on behalf of my client in the above action.

And on the 24th of February The Yorkshire Company's solicitor replied to the defendant's solicitor as follows:

I have your letter of the 23rd instant, for which please accept my thanks. I am today writing my client requesting instructions, and assume that there will be no difficulty in having the time for an appearance extended sufficiently long to enable me to obtain a reply.

No further correspondence or conversations took place between the defendant and The Yorkshire Company or its solicitor, and on the 16th of March The Yorkshire Company through its solicitor entered an appearance on behalf of the defendant.

It was contended on behalf of the defendant that inasmuch as The Yorkshire Company had repudiated its liability under the policy it no longer had authority to enter an appearance on behalf of the defendant, and the appearance thereafter should be vacated.

Counsel for the defendant submitted in support of this contention: Annual Practice, 1942, p. 134, under the heading "Unauthorized Appearance," and the cases—*Beattie* v. *U.S.*

Fidelity & Guaranty Co. Lindal v. *U.S. Fidelity & Guaranty Co.*, [1933] 1 W.W.R. 334; *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595, at pp. 602, 606; *North Lethbridge Garage Ltd.* v. *Continental Casualty Co.*, 24 Alta. L.R. 390; [1930] 1 W.W.R. 491; 20 C.J. 3; *Clough* v. *London and North-Western Railway Co.* (1871), L.R. 7 Ex. 26, at p. 34; *Morrison* v. *The Universal Marine Insurance Co.* (1873), L.R. 8 Ex. 197, at p. 203; *Dufferin Paving* v. *Canadian Surety* (1935), 2 I.L.R. 525, at p. 533; *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110, at foot of p. 120; *Chamberlain* v. *North American Accident Ins. Co.* (1916), 10 W.W.R. 686.

Counsel for the solicitors for the insurance company contended that inasmuch as authority had been given The Yorkshire Insurance Company Limited to defend, that this did not deprive the right of the insurance company to repudiate under the policy and at the same time defend, and relied upon the case of the *Home Insurance Co. v. Lindal and Beattie,* [1934] S.C.R. 33.

On this branch of the submission I find no difficulty whatever in holding that the facts in this matter are quite distinguishable from the facts in the *Home Insurance Co.* v. *Lindal and Beattie* case, *supra.*

In the *Home Insurance Co.* v. *Lindal and Beattie* case a simple point was decided that a contract of indemnity against the commission of a criminal offence is an illegal contract and even although an insurance company had undertaken the defence it had not thereby waived its right to repudiate liability when it had been established in the trial that the indemnity sought from the insurance company was to recompense the defendant for damages assessed against him as a result of his criminal act.

In the present case the insurance company did not limit its repudiation to the liability incurred by commission of a criminal offence but repudiated the policy in its entirety and therefore in my opinion by so doing thereby forfeited or waived its right to defend on behalf of the defendant. However, in this case further steps were taken after the repudiation. The defendant did not accept such repudiation but instead sent the writ to the insurance company and enquired by the letter of February 17th whether or not the insurance company was prepared to defend.

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As it appeared from the affidavit of Mr. *Pratt,* the insurance company on or about the 23rd of February again agreed to defend but without waiving the repudiation. The defendant refused to accept this, and by his letter of February 23rd the defendant in effect stated that he would only permit the insurance company to defend if the insurance company waived the repudiation demanding an immediate reply. The solicitor for the insurance company immediately replied, stating that he was communicating with his principals the insurance company, and would arrange for the extension of time for the entering of an appearance until the insurance company could reply. Some three weeks later, *viz.,* on the 16th of March and without further notice to the defendant, the solicitor for the insurance company entered an appearance on behalf of the defendant.

It would seem clear to me that the defendant did authorize the insurance company to appear if the repudiation was waived and that the insurance company by, without further communicating with the defendant, entering an appearance did so unqualifiedly in accordance with the authority granted by the defendant, and did thereby in fact waive the repudiation theretofore made.

Counsel for the applicant contended that inasmuch as by letter of 26th of March the insurance company again reiterated its position of repudiation that there was repudiation throughout. With this I cannot agree. The insurance company cannot blow hot and cold. It had repudiated and thereby lost its right to enter an appearance on behalf of the defendant. The defendant restored this right conditionally, namely, the condition being that the repudiation should be withdrawn. The insurance company by entering an appearance on behalf of the defendant accepted the terms laid down by the defendant, and in so doing waived the repudiation and cannot now be heard to say that it did not intend to repudiate.

The application is dismissed with costs.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 20th of May, 1943, before MCDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Tysoe, for appellant: This is an action for damages for injuries sustained by the plaintiff, who alleges he was negligently

run down by defendant when driving his automobile. The defendant was insured in The Yorkshire Insurance Company, Limited, indemnifying him for any claim for personal injuries to third parties when operating his automobile. The company repudiated liability and later entered an appearance on behalf of the defendant. The company claims by so doing it withdrew its repudiation, but claims it has the right to repudiate again when it sees fit to do so. This is a motion to strike out the company's appearance. Having waived his repudiation, he is estopped: see Everest & Strode on Estoppel, 3rd Ed., 242. In the case of election see *Wilson* v. *Thornbury* (1875), 10 Chy. App. 239; *Worthington* v. *Wiginton* (1855), 20 Beav. 67; 52 E.R. 527, at p. 530; *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616. The company has not the right to defend after repudiating the policy: see *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595, at pp. 602 and 606; *Home Insurance Co.* v. *Lindal and Beattie,* [1934] S.C.R. 33; *Dufferin Paving* v. *Canadian Surety* (1935), 2 I.L.R. 525; *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110, at p. 120; *Chamberlain* v. *North American Accident Ins. Co.* (1916), 10 W.W.R. 686.

McAlpine, K.C., for respondent: By his letter of February 23rd, I was given instructions to act and I accepted his offer and entered an appearance. There is no conflict of interest up to the time of disposing of the action. I can, however, repudiate at any time because the insured has been guilty of a criminal offence. My repudiation is gone when I enter an appearance, but no law says I have only one chance as to repudiation. I can repudiate at any time. As to the effect of withdrawal see *Ex parte Clarke; re Burr* (1892), 67 L.T. 232; *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595, at p. 602.

Tysoe, replied. *Cur. adv. vult.*

30th June, 1943.

MCDONALD, C.J.B.C.: The facts involved in this appeal are sufficiently set out in the reasons for judgment of the learned Chief Justice in the Court below, with the exception of the two letters to which I shall later refer.

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The point to be decided is a rather neat one. Clearly the insurance company, prior to March 15th, 1943, had repudiated liability under the policy. However, the company contends that by entering an appearance on behalf of the appellant on that day it withdrew such repudiation and that this is clearly shown by the fact that it chose to enter such appearance after receiving the letter of February 23rd from appellant's solicitor, in which he said:

> Either your company must assume the defence of this action in accordance with its contract with the assured or stand by the notice of repudiation of liability contained in your letter to Mr. Brownlee of November 11th, 1942.

Counsel for the respondent, however, also maintains that notwithstanding the company's election to enter the appearance, nevertheless it did not thereby waive its right to repudiate at any time it might thereafter choose.

I think it is clear that the matter should be looked at as one of election or no. Inasmuch as there could be no election to waive the right of repudiation unless there was a clear intention so to elect, I think we are entitled to pursue the investigation as to whether or not there was any such intention. While a good deal may be said for the proposition that, had the appellant moved to strike out the appearance on the day after it had been entered, it would probably be held, on the evidence as it then stood, that the company had intended to elect and did elect to withdraw its previous repudiation, the fact is that the appellant did not choose to move so promptly, but decided rather to clear the atmosphere and find out, if he could, what in fact the company intended to do.

The appellant's solicitor, therefore, chose the very reasonable course of writing to the company's solicitor in the hope of ascertaining just what the company's intention was. The company's reply is contained in Mr. *McAlpine's* letter of the 26th of March, and reads as follows:

> My client, of course, still stands by its repudiation, and has no intention whatsoever of withdrawing from that position. The company, however, is of the opinion that it is entitled under its policy, whether repudiated or not, to defend this action.

With respect, I think the learned Chief Justice erred in not taking these last two letters into consideration, for I know of no

better evidence of the company's intention than that disclosed by Mr. *McAlpine's* letter.

On the whole of the evidence I therefore conclude that the company did not intend to waive and did not waive its right to repudiate liability. That being the case, the company had no right to take up the defence of the action, and the appearance entered by its solicitor should be struck out and the appeal allowed with costs here and below.

This being my conclusion, it is not necessary to dilate upon the inconsistency involved in the company's presuming to defend the appellant and at the same time repudiating any obligation to indemnify him if the defence should fail.

SLOAN, J.A.: In my view the Chief Justice of the Supreme Court reached the right conclusion and I am in substantial agreement with his reasons for judgment. In consequence I would dismiss the appeal.

O'HALLORAN, J.A.: As I read the terms of the policy, the privilege there given the insurance company to represent the insured defendant, is conditioned upon its prior acceptance of the validity of his claim under the policy.

If that were not so, an insured defendant might easily find himself in the incongruous situation this case illustrates, that the law has been changed to compel him to accept as his sole defender and spokesman, one (insurance company) whose interest is in direct conflict with his, in that, its financial advantage is as equally served if the action is dismissed, as if he is proven guilty of that degree of negligence which the law may regard as a crime.

The insurance company through its counsel took the bold position that the insurance policy gives it the legal right to defend the action upon behalf of the insured defendant even after it has rejected his claim under the policy. I am not able to conceive that it was the purpose of the Legislature to manœuvre an insured defendant into that inequitable and dangerous predicament.

I would allow the appeal.

Appeal allowed, Sloan, J.A. dissenting.

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REX v. THERIEN AND SANSEVERINO.

Criminal law—Charge of robbery with violence—Identity of the accused—Rebutting evidence on behalf of the prosecution—Admissibility—Discretion of trial judge.

Whether or not rebutting evidence on the part of the prosecution ought to be admitted at a criminal trial after the close of the evidence for the defence is a matter in the discretion of the judge at the trial. On the submission that the record shows the trial judge exercised no discretion:—

Held, that it is not necessary in order to show that the trial judge exercised a discretion that some long argument should take place and that the judge should say "I exercise my discretion," etc. Here the discretion was exercised even though no objection was taken and the Court of Appeal ought not to interfere.

APPEALS by accused from their conviction before ROBERTSON, J. and the verdict of a jury at the Spring Assize at Vancouver on the 21st of April, 1943, on a charge of robbery with violence. One Krysiuk occupied a room in a rooming-house known as the Belmont Rooms on Hastings Street in Vancouver. At about 12.30 in the morning of the 27th of February, 1943, when Krysiuk was in bed two bandits broke into his room, violently assaulted him and robbed him of $180. Krysiuk, who is a Russian, was badly hurt and gave his evidence through an interpreter. The evidence was contradictory as to the identification of the accused, but the jury found that they were the guilty men.

The appeal was argued at Vancouver on the 14th and 15th of June, 1943, before MCDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Wismer, K.C., for appellant Sanseverino: The main question is the identity of Sanseverino as the man who committed the robbery. Evidence was given in rebuttal confirmatory of the Crown's case. That this was improper see *Rex* v. *Stimpson* (1826), 2 Car. & P. 415; *Rex* v. *Hilditch* (1832), 5 Car. & P. 299; *Rex* v. *Marsh* (1940), 55 B.C. 484; Phipson on Evidence, 8th Ed., 37; Roscoe's Criminal Evidence, 15th Ed., 108. There was nothing in the defence that required rebuttal in this manner: see *Rex* v. *Brooks* (1906), 11 Can. C.C. 188, at p. 192; *Rex* v.

Monroe (1939), 54 B.C. 481, at p. 488. On the refusal to allow in new evidence see *Rex* v. *Gilling* (1916), 12 Cr. App. R. 131.

Hurley, for appellant Therien, referred to sections 1013 (*b*) and 1014 (*a*) of the Criminal Code.

Clark, K.C., for the Crown: At the end of defendant's case, one Amato testified that he, with one Gordon, committed the crime and that two days before the crime was committed he visited the Belmont Rooms and asked the landlady (Sadie Moirkowik) where Krysiuk's (the victim) room was. Sadie Moirkowik was called in rebuttal and when asked if she could recognize the man who visited the Belmont Rooms on that occasion, she pointed at Sanseverino and not at Amato. We say the question was admissible and relevant. The defence had the right to meet this evidence and no harm was done: see *Rex* v. *Froggatt* (1910), 4 Cr. App. R. 115, at p. 117; *Rex* v. *Fisher,* [1910] 1 K.B. 149, at p. 156; *Rex* v. *Howarth* (1918), 13 Cr. App. R. 99; *Rex* v. *Peckham* (1935), 25 Cr. App. R. 125, at p. 127; *Rex* v. *Firth* (1938), 26 Cr. App. R. 148; *Rex* v. *Wattam* (1941), 28 Cr. App. R. 80, at p. 82; *Rex* v. *Featherstone* (1942), *ib.* 176; *Rex* v. *Day,* [1940] 1 All E.R. 402; *Heep* v. *Thimsen* (1940), 55 B.C. 487; *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555; *Rex* v. *Higgins* (1902), 36 N.B.R. 18, at p. 29; *Regina* v. *Jones* (1869), 28 U.C.Q.B. 416, at p. 423; *Rex* v. *Dora Harris,* [1927] 2 K.B. 587; *Rex* v. *Sullivan* (1922), 27 Cox, C.C. 187. As to the effect of counsel consenting to the evidence being allowed in see 13 Can. Abr. 1431; *Rex* v. *Soanes* (1927), 33 O.W.N. 207. What happened would not affect the verdict.

Cur. adv. vult.

25th June, 1943.

MCDONALD, C.J.B.C.: The appellants were convicted before ROBERTSON, J. and a jury, of having robbed with violence one Alex Krysiuk at about 12.30 in the morning of 27th February last. Krysiuk occupied room 19 in a rooming-house on Hastings Street known as the Belmont Rooms. These rooms were under the management of Andrew Moirkowik and his wife Sadie.

Krysiuk at the time mentioned was asleep in bed when two bandits burst into his room and violently assaulted him and

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robbed him of $180. The jury has found on contradictory evidence that the appellants were the guilty men.

So far as Therien's appeal is concerned, I would dismiss it without the slightest hesitation. In his case what we are asked to do is to retry a case which has already been properly put to a jury and decided by them. I do not think such appeals should be encouraged for, if they are, then the administration of justice must appear even more farcical than to the layman it must sometimes do.

Appellant Sanseverino applied to us to hear further evidence. Having regard to all the facts and to what took place at the trial, as stated on the hearing, I have no hesitation in dismissing this application.

This appellant does, however, raise one question of law, and in my opinion one only, which deserves careful consideration and demands an examination of what took place at the trial.

After the Crown had closed its case both the appellants entered the witness box. Sanseverino set up an *alibi,* and from the last witness called for the defence we have the evidence of Sanseverino's friend Amato. This witness, being already in custody on a sentence of 15 months' imprisonment for desertion from the army, swore (and he gave his evidence in considerable detail) that the crime was in fact committed not by the appellants but by himself and a man named Gordon. This evidence of course came as a complete surprise to Crown counsel and his advisers. Adjournment was taken at 5.20 in the afternoon and during the interval before the opening on the next morning the Crown naturally made such investigations as were possible to meet Amato's evidence.

Now it should be noted that in the cross-examination of Amato it was brought out during counsel's efforts to test the truth of the witness's statements, that Amato had, three or four days before the night of the crime, visited the Belmont Rooms and asked the landlady (Sadie Moirkowik) where Krysiuk's room was, and was told by her that it was number 19. He stated further that he went upstairs and looked at the room and then went away.

This was the state of affairs when the Court opened the fol-

lowing morning, and the following took place as Crown counsel proceeded to call Sadie Moirkowik to rebut the evidence given by Amato:

Clark: This witness, my Lord, is called on the question of the identification of the man who called at the rooming-house a day or two or three days before the burglary, and I do not see Amato in the court room. I think he should be here, as I want this witness, if possible, to pick out a certain man who called.

THE COURT: Where is he? [obviously meaning Amato].

Clark: He is downstairs. I asked that he be here. I can go on with the preliminary questions, my Lord.

You are the wife of Mr. Moirkowik, the proprietor of the Belmont Rooms We have been calling them the Balmoral Rooms—I find they are the Belmont—at what number Hastings Street East? 241.

241 Hastings Street East. Do you remember on a day in February, 1943, shortly before Alex's room—before this burglary, someone coming to see you about Alex's room? Yes.

Now, just tell the Court what occurred on that occasion? Well, he knocked at the door. . . . He knocked at the door, and I opened the door, and he asked for Alex. I said "Alex. who?" And he said "Well, the Russian guy that stays in room 19,"—I told him he stays in room 19—he asked for the Russian guy, and I told him he stayed in room 19 upstairs, so he just left.

What did that man look like? Pretty tall and dark.

Dark? Dark haired. He wore a moustache.

He wore a moustache? Yes.

What kind of a mousache? A dark moustache.

[Amato brought in]

Clark: Do you think you can—I don't want him standing there [indicating Amato]—take him over there. Do you think you could recognize the man again? Well, I am not sure I could, because I seen him the once.

Will you look around the Court room. Stand up and look around the Court room, and look and see if you can see the man. This fellow in the dark suit.

What? The fellow in the box.

Which one? The other side.

That is to your left? Yes.

Will you stand up. Is that the man [indicating Sanseverino]? Yes, that is the man.

Cross-examination by Mr. *Ponsford*:

Will you stand up. You see this man [indicating Amato]? No, I never see him.

THE COURT: You are speaking with your back to the jury. Speak up.

Ponsford: What time of the day was that?

THE COURT: Did you ask a question, and did she answer?

Ponsford: Take a good look at this boy here.

THE COURT: That is——

Ponsford: Amato.

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THE COURT: Do you know him? No.
Ponsford: Have a good look at him. No.

In cross-examination the witness finally said that, to tell the truth, she could not positively say that Sanseverino was the man who had called, though she did say "he resembles him quite a bit." Obviously if Sanseverino did call as stated this would be cogent evidence that he was implicated in the crime.

Appellant's counsel, as I understand it, admits that it was quite proper to call the landlady in rebuttal to prove that Amato had not in fact called, as he had stated, but strongly contends that her evidence to the effect that Sanseverino had called to make enquiries about Krysiuk's room was not evidence that could be given in rebuttal as confirmatory evidence proving the case for the Crown. Counsel admits that the witness's evidence was greatly weakened, if not actually destroyed, in cross-examination, but asserts that this evidence, whatever its weight, greatly prejudiced his client's case, having regard to the point in the trial at which it was introduced.

This submission is based on a quotation from Phipson on Evidence, 8th Ed., 38 and the authorities there cited:

> Whenever the accused, in defence, gives evidence of fresh matter which the prosecution could not foresee, . . . , the prosecution is entitled to contradict it, provided such evidence be not merely confirmatory of the original case, for then it should have been tendered at first.

What counsel failed to note is that the learned author has used the words "not merely confirmatory." It is trite law, of course, that the Crown must not divide its case, but that is not what happened here. The Crown could not possibly have foreseen that Amato would give the evidence which he did, and Sadie Moirkowik was called solely as a rebuttal witness. It is too late now to argue that the evidence which she gave is not admissible. I do not understand that it is argued otherwise. What is argued is, that it was not admissible by way of rebuttal. The clear answer is that that was a question solely in the discretion of the trial judge. But it is said the trial judge exercised no discretion, as the record shows. This argument is unsound. It is not necessary, in order to show that a trial judge exercised a discretion, that some long argument should take place and that the judge should say "I exercise my discretion so and so." It is the trial

judge's duty throughout the whole case, a duty which the learned trial judge here was very alert to observe throughout, and on several occasions without objection from counsel, to exclude all evidence which was not clearly admissible. I am satisfied that here the discretion was exercised, even though no objection was taken, and that no Court of Appeal can interfere. This was clearly decided in *Rex* v. *Crippen*, [1911] 1 K.B. 149.

One of the chief complaints of counsel for this appellant is that appellant was legally prejudiced by the fact that the impugned evidence was given at a time when he had no opportunity to meet it. This is not so. That he could, if he saw fit, ask for leave to call Sanseverino to meet Sadie Moirkowik's evidence, was decided in the old Full Court in this Province composed of HUNTER, C.J., DRAKE, J. and DUFF, J. (now C.J.C.) in *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555, and a similar decision was given by the Full Court in New Brunswick in *Rex* v. *Higgins* (1902), 36 N.B.R. 18.

What I think really happened here was that counsel were so pleased with the triumphant conclusion of their cross-examinations of Sadie Moirkowik that they did not care to take the risk of putting Sanseverino on the stand again.

It follows from what I have said that I would dismiss the appeal.

As to the appeals from sentence, we would not interfere in Therien's case. As for Sanseverino, we have been greatly concerned. Having regard to all the circumstances, and to the helpful and reasonable attitude taken by Crown counsel, we have decided to reduce this sentence to two years less one day in Oakalla gaol, and we can only hope that the leniency so extended may induce this young man to forsake the error of his ways.

SLOAN, J.A.: I agree that the appeals from conviction must be dismissed, and concur in the reduction of sentence of Sanseverino.

O'HALLORAN, J.A.: I agree that the appeals should be dismissed but that the sentence of the appellant Sanseverino be reduced as stated.

Appeals dismissed.

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June 1, 3, 4, 30.

BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES *ET AL.*

Company law—Allotment of shares to person now deceased—Payment therefor secured by delivery of stock certificate of shares duly endorsed—Liability for payment—Action granting leave to enforce the pledge by sale of shares—Order for leave to issue writ against heirs—Service out of jurisdiction—Rule 168.

The British American Timber Company, incorporated in the State of South Dakota in 1907 and registered as an extraprovincial company in British Columbia, owned certain timber lands in this Province. Said company (called the Dakota company) entered into a contract with one Jones (called Jones, Sr.) who was vice-president of the company, on the 1st of June, 1917, for the purchase of 1,038 shares of the company's stock in payment for which he gave two promissory notes for the par value of the shares. It was a term of the contract that the notes were to be held by the Dakota company until paid or until such time as the dividends declared and paid by the company would pay the principal and interest and that the stock certificates be endorsed by Jones, Sr. and held by the company as collateral security for the notes. Those in control of the Dakota company decided to form a British Columbia company of the same name (adding the word "Limited" to it) to take over its timber holdings. The plaintiff company was accordingly incorporated in British Columbia on December 10th, 1917. On the 17th of December, 1917, a contract between the two companies was filed with the Registrar of Companies whereby the Dakota company transferred its timber lands to the plaintiff and was to receive 9,276 fully paid up shares of the plaintiff company, these to be issued to such persons as the Dakota company might nominate. Of those nominated, Jones, Sr. was to receive 1,038 fully paid up shares and he was allotted these shares in December, 1917. The two companies had the same directorate. Jones, Sr. prior to incorporation of British Columbia company had disposed of 285 shares of the Dakota company, consequently share certificate No. 75 was issued for the remaining 753 shares, in name of Jones, Sr. endorsed by him and held by the plaintiff as collateral security for the said notes. Jones, Sr. died in August, 1919. By order of FISHER, J. of the 14th of January, 1942, leave was granted the plaintiff to issue a writ against the heirs of Jones, Sr., notice thereof to be served on Jones, Jr. (son of deceased) on behalf of himself and the heirs and next of kin of Jones, Sr. and to represent them in the action. The action was for a declaration that Jones, Sr., deceased, was indebted at the time of his death to the plaintiff company for $120,865.98; for a declaration that he pledged 753 shares of the capital stock of the plaintiff company to secure payment of the debt to the plaintiff and for an order granting the plaintiff leave to enforce the pledge by sale of said shares. In the alternative, for a declaration that the plaintiff has a lien upon the said 753 shares for payment of said

debt and for an order granting the plaintiff leave to enforce the lien by sale.

Held, that in view of the foregoing, the plaintiff is entitled to a declaration that the late Ray W. Jones, deceased, at the time of his death was indebted to the plaintiff company in the sum of $120,865.98 for the payment of which he, prior to his death, had deposited with the plaintiff by way of pledge certificate No. 75, evidencing 753 shares of the plaintiff company. The plaintiff will have judgment accordingly.

On the submission that the action is improperly constituted for the purpose of considering the issues to be determined in that the personal representative of Jones is not before the Court:—

Held, that the Court may in all the circumstances proceed to determine these questions under the order of FISHER, J. and this is a case in which rule 168 may properly be invoked in the absence of a legal personal representative.

ACTION for a declaration that one Ray W. Jones, deceased, at the time of his death, was indebted to the plaintiff company for $120,865.98 with interest at 6 per cent. since June 17th, 1917. For a declaration that said Jones pledged 753 shares of the capital stock of the plaintiff at the date of allotment of said shares to secure payment to the plaintiff his said debt and for an order granting the plaintiff leave to enforce the pledge by sale of the said shares. In the alternative, for a declaration that the plaintiff has a lien upon the said 753 shares for payment of said debt and for an order granting the plaintiff leave to enforce the lien by sale of said shares. Tried by BIRD, J. at Vancouver on the 1st, 2nd and 4th of June, 1943.

Farris, K.C., and *Campbell, K.C.*, for plaintiff.
Bull, K.C., and *Carmichael*, for defendants

Cur. adv. vult.

30th June, 1943.

BIRD, J.: The plaintiff's claim in this action arises out of the allotment on December 29th, 1917, of 1,038 shares of the capital stock of the plaintiff company to the late Ray W. Jones, deceased, who died in Seattle, Wash., U.S.A., on or about August 1st, 1919.

The action is brought against Ray W. Jones, Jr., a son of the deceased shareholder, both personally and as the representative of the heirs and next of kin of the late Ray W. Jones, deceased, and against National Bank of Commerce of Seattle and Ryan Hibberson Timber Co. Ltd.

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By order of FISHER, J. made in this action January 14th, 1942, leave was granted to the plaintiff to issue a writ against the heirs and next of kin of the late Ray W. Jones, deceased, and to serve notice thereof upon Ray W. Jones, Jr., the defendant in this action, on behalf of himself and the heirs and next of kin of the late Ray W. Jones, deceased, and the said defendant was thereby authorized to represent himself and the heirs and next of kin of the late Ray W. Jones, deceased, in this action and to defend the action on behalf of those parties.

The defendant Ray W. Jones who resides beyond the jurisdiction of this Court, upon being served in this action, took no objection to the order of FISHER, J., and on January 26th, 1942, caused an appearance to be entered in the following terms:

For the above-named defendants pursuant to the terms of the order of the Honourable Mr. Justice FISHER dated the 14th day of January, 1942.

The prayer of the statement of claim presents a variety of claims of which counsel for the plaintiff in the course of the argument abandoned the claims set out in paragraphs of the prayer lettered "a," "c," "d," "e," "f," "g" and "l." He asked that the claim made in paragraph 36 of the statement of claim be added to or taken as part of the prayer.

The prayer thus amended is reduced to the claims made under paragraphs "b," "h," "l," "k," and "m," being shortly:

1. For a declaration that the late Ray W. Jones, deceased, at the time of his death was indebted to the plaintiff company in the sum of $120,865.98, together with interest at the rate of 6 per cent. per annum from the 17th day of June, 1917.

2. For a declaration that the late Ray W. Jones, deceased, pledged 753 shares of the capital stock of the plaintiff, evidenced by certificate No. 75, to the plaintiff on or about the date of allotment of the said shares to secure repayment to the plaintiff of Jones' debt in the sum of $120,865.98, and for an order granting the plaintiff leave to enforce the pledge by sale of the said shares.

3. In the alternative for a declaration that the plaintiff has a lien upon the said 753 shares for payment of the said debt, and for an order granting the plaintiff leave to enforce the lien by sale of the said shares.

4. For an order declaring that the defendants, National Bank of Commerce of Seattle and Ryan Hibberson Timber Co. Ltd. have no interest, equitable, legal or otherwise in the said 753 shares.

Since the trial I have considered questions raised by counsel for the defendant as to admissibility of various documents introduced by the plaintiff and which were marked for identification under the following numbers: 9, 14 to 17 inclusive, 19, 23 to 27 inclusive, 32, 34, 39, 40, 51, 55, 59, 79 and 80. I propose to admit those marked 26, 27 and 37. The admissibility of the remaining documents so marked for identification in my opinion was not established.

The evidence adduced before me in support of the plaintiff's claim is almost entirely documentary. The following facts in my opinion are established by those documents and the oral evidence:

1. That prior to the month of December, 1917, a company known as British American Timber Company (which will be referred to hereafter as the Dakota company) incorporated in the State of South Dakota and registered in British Columbia as an extraprovincial company, was the owner of certain valuable timber limits and licences situated in British Columbia. 2. That the late Ray W. Jones, deceased, was one of the major shareholders of the Dakota company, having registered in his name in December, 1917, 1,038 shares of its capital stock. 3. The said 1,038 shares had been allotted to Jones from time to time pursuant to a resolution made June 8th, 1908 (Exhibit 4, p. 33), later confirmed by agreement between him and the Dakota company, dated June 1st, 1917, set out in paragraph 8 of the statement of claim (Exhibit 10) under the terms whereof Jones was entitled to allotment of 14 per cent. of the capital stock of the Dakota company allotted in any year, payment of the par value thereof to be made by Jones by his promissory note payable on demand, same to be held by the Dakota company until paid out of dividends declared thereon or otherwise paid, share certificates evidencing shares so allotted to be endorsed by Jones and held by the Dakota company as collateral security. The evidence does not show that Jones paid for any of the Dakota

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company shares registered in his name otherwise than by delivery of his promissory notes. 4. Jones' indebtedness to the Dakota company in respect of shares so allotted was consolidated in June, 1917. Jones then delivered to the Dakota company two promissory notes, being in the sum of $95,483.17 with interest at 6 per cent. per annum, and $25,582.81 without interest, both dated June 30th, 1917, payable on demand, together with share certificates for 753 shares of the Dakota company duly endorsed for transfer by Jones, same to be held as collateral security for payment of the said promissory notes. 5. During the month of December, 1917, the Dakota company caused the plaintiff company to be incorporated under the Companies Act of British Columbia, the expressed intention of all parties concerned therein including Jones and Hawkins, the president of the Dakota company then being that the Dakota company would transfer all its assets, thereby leaving the Dakota company without assets or debts, to the plaintiff company for shares of capital stock of the latter, such shares to be allotted directly to nominees of the Dakota company, being all the shareholders of the Dakota company, and that thereafter the Dakota company should be dissolved. 6. The timber lands of the Dakota company were then transferred to the plaintiff company under terms of an agerement in writing made between the two companies and shares of the capital stock of the plaintiff company were duly allotted as fully paid to the shareholders of the Dakota company, in accordance with their holdings therein, in consequence whereof Ray W. Jones was allotted 1,038 shares of which part, *i.e.*, 753 shares are the subject-matter of this action. 7. The Dakota company was then dissolved by order of the Circuit Court of the State of South Dakota (Exhibits 38, 38B). 8. No reference is made to Jones' notes or to his indebtedness in the agreement between the companies before mentioned, nor is any such reference made in the minutes of meetings relating thereto. The rsolution of directors of the plaintiff company covering allotment of 9,276 shares of its capital stock (of which 1,038 to Jones) to nominees of the Dakota company shows that the same were allotted as fully paid, the consideration therefor being the transfer of timber lands and licences. 9. Jones was vice-president

and a director of the Dakota company during 1917, and also of the plaintiff company subsequent to incorporation and until his death in August, 1919. He was an active participant in, and familiar with all matters relating to the incorporation of the plaintiff company, the transfer of the assets of the Dakota company, and distribution of shares allotted as consideration therefor by the plaintiff company. 10. At or prior to dissolution of the Dakota company Jones received from the plaintiff company share certificates evidencing 1,038 shares of the capital stock of the plaintiff company. Thereupon he endorsed those certificates and sent them (including certificate No. 75) for 753 shares to the secretary-treasurer of the Dakota company (who also held the same office in the plaintiff company) to be substituted for shares of the Dakota company, which company then held Jones' certificates evidencing 753 shares of the Dakota company as collateral security for the payment of his indebtedness to the Dakota company. 11. Jones as vice-president of the company signed the annual statement and report to shareholders of the Dakota company for the year 1917 (Exhibit 45) in which appears under the head of "bills receivable' the item $95,485.17. 12. Jones as vice-president of the plaintiff company signed the annual statement and report to shareholders of that company for the year 1918, in which appears under the head of "bills receivable" the item $120,865.98, being the total of Jones' indebtedness to the Dakota company as consolidated in June, 1917. This report contains the following:

> With regard to the capital stock account I would call your attention to the fact that 74 shares being 14% of the assessments made in the years 1917 and 1918 still remain to be issued in my name in accordance with the agreement (Exhibit 58). This will increase the capital stock to $967,500 and consequently bills receivable account will be increased by $7,460.

(Exhibits 66A, 66B). 13. The 1918 statement and report was adopted at the annual meeting of the plaintiff company held April 15th, 1919 (Exhibit 30A, p. 17). 14. Ray W. Jones died intestate prior to October 10th, 1919, leaving him surviving his widow Pauline B. Jones, now deceased, Munroe F. Jones and defendant Ray W. Jones, Jr.—the only heir legatees and devisees of his estate. 15. Munroe F. Jones, a son of the deceased Ray W. Jones, took out letters of administration in the

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State of Washington, administered and distributed the estate—there being no unpaid creditors—as to half thereof to his widow Pauline B. Jones and quarter thereof to each of Munroe F. and Ray W., Jr.—and thereupon was discharged as such administrator (Exhibit 66B). 16. Munroe F. Jones as administrator of the estate of Ray W. Jones, deceased, in the administration of the said estate, made oath that included in the inventory of the estate coming into his hands was "1,038 shares B. A. Timber Co. Ltd. valued at $175.67 each, less liability on above. Appraised value—nil." 17. The value of the shares registered in Jones' name at the date of the trial does not exceed $100 per share, that is to say, $75,300.

In my opinion it is made abundantly clear by the documents adduced in evidence that it was intended by the directors of the Dakota company who soon after incorporation became directors of the plaintiff company, as well as by Jones, that Jones' liability to the Dakota company should be transferred to the plaintiff company along with all other assets of the Dakota company, and that in respect of shares of the plaintiff company Jones' rights and liabilities should continue as theretofore in respect of shares of the Dakota company.

There is nothing in the evidence to suggest that Jones or the directors of the two companies intended or that Jones expected the indebtedness to be forgiven. All the documents with the exception of the agreement between the two companies covering transfer of the timber lands point to the intention to continue in the plaintiff company the *status* which then existed between Jones and the Dakota company.

That agreement provides for transfer to the plaintiff company of the timber lands only, and contains no reference to Jones' indebtedness or to other assets of the Dakota company. No explanation is found in the evidence of the omission if such it was, unless it be in the conversation between Jones and McKay, the solicitor engaged on organization of the plaintiff company referred to by the witness Norma Jones who said that she had heard McKay berating Jones for the latter's failure to inform him of the existence of the notes. That conversation does suggest an omission to include the notes in the assets transferred by the

agreement. If that be so, then the omission was attributable to Jones himself since he instructed McKay as to the assets to be transferred.

It therefore appears to me that the only reasonable inference to be drawn from the evidence, particularly (1) the exchange of correspondence between Jones and officers of the Dakota company (Exhibits 43, 52, 53 and 56) and Jones' endorsement of share certificate No. 75 of the plaintiff company, and delivery thereof to the secretary of the Dakota company who later became an officer of the plaintiff company; (2) the annual reports to shareholders of the Dakota company for the year 1917 and of the plaintiff company for the year 1918 (Exhibits 45 and 55), both signed as vice-president of the respective companies by Jones; (3) the adoption of the latter report by the shareholders of the plaintiff company at its annual meeting held April, 1919 (Exhibit 30A, p. 17); (4) the fact that the promissory notes and share certificate 75 were held by the plaintiff company to the date of Jones' death and subsequently down to the trial; (5) the fact that with Jones' knowledge steps were taken immediately which led to dissolution of the Dakota company in April, 1918; (6) the declaration by Munroe Jones, a son of Ray W. Jones, deceased, and administrator of his estate, filed in the Probate Court of the State of Washington (Exhibit 66A), is that at a time subsequent to the transfer of the timber lands Jones and the directors of the two companies, acting for the respective companies mutually agreed that Jones acknowledge the liability to the plaintiff company in the amount of the then existing liability to the Dakota company, that 753 fully paid up shares of the plaintiff company to which Jones became entitled by virtue of his holdings in the Dakota company be deposited with the plaintiff company as collateral security for payment of that liability, and that Jones' liability to the Dakota company be discharged. That Jones recognized and adopted the plaintiff company as his creditor appears to me to be established by the documents before mentioned. It appears to me that the only reasonable inference to be drawn from the acts and conduct of the parties is that such an agreement had been reached between them. (*In re Thomas. Ex parte Poppleton* (1884), 14 Q.B.D. 379, at p. 384).

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In my view of the matter there was a novation which may be inferred from such acts and conduct. (*Dell* v. *Saunders* (1914), 19 B.C. 500.)

Novation is said by Lord Selborne, L.C. in *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, at p. 351, to mean

> that there being a contract in existence, some new contract is substituted for it, either between the same parties . . . or between different parties; the consideration mutually being the discharge of the old contract.

That novation may arise from the intervention of both a new creditor and a new debtor in the new arrangement—see the opinion of Ritchie, C.J., in *Harris* v. *Robertson* (1866), 11 N.B.R. 496, at p. 502.

It appears to me that all the essential ingredients referred to by Lord Selborne are present here.

The correspondence shows that the consideration for the transfer of timber lands, that is to say, share certificates of the plaintiff company evidencing 9,276 shares, were sent to Hawkins, president of the Dakota company, for distribution among its shareholders, and that in the course of the distribution Jones was requested to endorse and did endorse and return certificate No. 75 of the plaintiff company for 753 shares to be deposited as security for his debt, a debt which at that time the documents appear to me to establish that he acknowledged to be due to the plaintiff company. Such acknowledgment, in my opinion, is confirmed by Jones' report to the shareholders of the plaintiff company for the year 1918 wherein he particularly calls attention to an increase in bills receivable account. Jones' conduct was such as in my opinion—in the words of Fry, J. in *Willmott* v. *Barber* (1880), 15 Ch. D. 96, at p. 105 "would make it fraudulent for him to set up those rights"—he would have been estopped. The defendants can occupy no better position.

Counsel for defendant submits that if the plaintiff company has the debt which he concedes was owing by Jones to the Dakota company prior to the incorporation of the plaintiff company, then that debt must be held by the plaintiff company by assignment and that notice of assignment is a prerequisite of an action in the name of the assignee in this case in the plaintiff's name. Since in my view of the transaction Jones was a party to it or

acquiesced in it, that constitutes acknowledgment of the debt to the plaintiff company.

Even in the absence of notice an assignee may enforce a debt without bringing in the assignor when in the words of Lord Macnaghten in *Tolhurst* v. *Associated Portland Cement Manufacturers (1900),* [1903] A.C. 414, at pp. 420-1

> the assignor is a mere name, . . . , without any means and without any executive or board of directors, if indeed it has any corporate existence at all.

Here the assignor the Dakota company has not had existence since 1917 when that company was dissolved by order of the Dakota court.

Counsel for defendants further submits that if there was a debt secured upon the company's own shares, such a transaction is illegal and void upon the ground that enforcement of the pledge is likely to effect a reduction of capital. He refers to *Hopkinson* v. *Mortimer Harley & Co., Limited,* [1917] 1 Ch. 646, which, as I read the judgment, is authority for the proposition that a power of forfeiture of fully-paid shares for debts generally due the company is illegal and void.

We are not concerned here with a question of forfeiture. The plaintiff asks for a declaration that the shares were pledged to secure the debt which involves the right to hold and sell.

I do not appreciate that a reduction of capital can arise by virtue of a sale of the Jones shares to satisfy the debt whether under terms of a pledge or a lien.

The validity of a lien on shares of a company for debts generally "is fully recognized"—*per* Lord Watson, in *Bank of Africa* v. *Salisbury Gold Mining Company,* [1892] A.C. 281; *France* v. *Clark* (1884), 26 Ch. D. 257, is authority for the proposition that a deposit of shares as security for a debt may be regarded as a bailment by way of pledge.

At the opening of the trial counsel for the defendants took the position that the action is improperly constituted for the purpose of considering the issues to be determined, namely, foreclosure of the interest of the late Ray W. Jones, deceased, in the shares of the plaintiff company, in that the personal representative of Jones is not before the Court.

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Bird, J.

This position was taken notwithstanding the appearance of Ray W. Jones, Jr. in the terms of the order of FISHER, J.

Counsel for the plaintiff replied in the course of the trial, and the question was then reserved. Subsequently the plaintiff abandoned the claims as to equitable mortgage and foreclosure made by the prayer of the statement of claim.

Upon the argument the same position was taken by counsel for the defendant in relation to the remaining claims made by the plaintiff. The question then to be determined is this: Should this Court proceed in the absence of some one representing the estate of the deceased Ray W. Jones to determine the question of the plaintiff's right to a pledge or lien upon 753 shares of the plaintiff company registered in the name of Jones, deceased?

The estate was administered in the State of Washington by Munroe F. Jones, a son of the deceased who upon his application to the Washington Court for discharge as such administrator, declared that all creditors were paid and that the estate had been distributed among the widow of the deceased who has since died, the defendant Jones and the administrator himself. The plaintiff made in the statement of claim an allegation which was denied by the defendant, that Munroe F. Jones was dead, but in the course of the trial the Court was assured by counsel for defendants that "he is very much alive." In the absence of evidence of his death and in view of counsel's statement, I take it that he is alive. Consequently, the only person interested in the estate of Ray W. Jones, deceased, who is not before this Court is Munroe F. Jones, the administrator in the State of Washington, who in 1919 declared to the Probate Court in that State that the net value of the shares, after taking into account the liability of the deceased, was nil.

I do not appreciate that Munroe F. Jones, if made a party to this action, would be heard to deny the debt to the plaintiff or the pledge of the shares in view of his declaration to the Washington Court.

Who then is prejudiced if this Court proceeds to determine the questions now before it, in the absence of a legal personal representative of the deceased? The defendant Jones by his appearance accepted the representative capacity. In my view

the Court may in all the circumstances proceed to determine these questions under the order of FISHER, J. or in the absence of a legal personal representative under rule 168, B.C. Supreme Court Rules, 1925. It appears to me that this is a case in which rule 168 may properly be invoked. That is, that this is such an exceptional case as is referred to by Harvey, C.J., in *Abbot* v. *Browns,* [1921] 1 W.W.R. 1188, at p. 1189, relied upon on this point by counsel for the defendant, wherein the Court of Appeal of Alberta had under consideration a rule of Court identical to B.C. Supreme Court rule 168.

In view of the foregoing I am of opinion that the plaintiff is entitled to a declaration that the late Ray W. Jones, deceased, at the time of his death was indebted to the plaintiff company in the sum of $120,865.98 for the payment of which he, prior to his death, had deposited with the plaintiff by way of pledge certificate No. 75 evidencing 753 shares of the plaintiff company.

The plaintiff will have judgment accordingly with costs against the defendant Jones.

No evidence was led before me relative to the defendant bank or the defendant company. Counsel may speak to the disposition of the claim against those defendants, as well as to the matter of costs in relation to them.

Judgment for plaintiff.

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Landlord and tenant—Written agreement for lease—Certain terms not included—Signed by one of four owners—Letters "O.K."—Interpretation—Warranty of authority—Amendment of pleadings—Statute of Frauds—R.S.B.C. 1936, Cap. 104, Sec. 4.

On the 3rd of June, 1941, the plaintiff by letter offered to rent a 30-foot frontage premises in Victoria, owned by the defendant, his two brothers and a sister, that he would renovate the front of the building at his own expense in accordance with a certain sketch, the lease to be for a term of five years at $125 per month with the right of renewal for a further five years. On receipt of same, the defendant wrote at the bottom thereof "O.K. Kenneth Drury." It was orally agreed at the time that

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the plaintiff would keep the sewer clear and keep the inside walls in repair and the defendant would repair the outside walls and secure an easement over an alleyway to a lane at the back of the premises. The sketch for the frontage improvements was submitted to contractors (Luney Brothers Limited) who made a tender for the work at $1,850, which was accepted. Later, owing to the former tenant (one Stewart) wanting to sublease part of the premises, at the instance of the defendant, a meeting was arranged and the parties met on July 22nd, 1941, when the plaintiff adhered to his original agreement, but desired to accommodate the parties interested. It was then agreed that Stewart would sublease 12 feet frontage of the premises. This necessitated a change in the frontage improvements. The architect made further plans and when submitted to the contractors, it was so changed from the original sketch that the cost of the improvements increased to $4,250. The plaintiff refused to agree to this expenditure. In an action for specific performance of the agreement for a lease and for damages for breach, the plaintiff at the trial, having only served Kenneth Drury and his sister, abandoned his claim for specific performance and claimed only damages for breach. The action was dismissed as against the sister, but liberty was given the plaintiff to amend his statement of claim by inserting therein a claim for damages against Kenneth Drury for breach of warranty of authority and the plaintiff was awarded damages against Kenneth Drury for breach of warranty to be assessed.

Held, on appeal, reversing the decision of ROBERTSON, J., that the evidence did not admit of the inference that the defendant represented to the plaintiff that he had authority from his co-owners to enter into an agreement for a lease and there was error in holding the defendant liable for damages for breach of warranty of authority.

Per MCDONALD, C.J.B.C.: The letter of the 3rd of June did not contain all the terms of the agreement and the letters "O.K." followed by the defendant's signature were not an acceptance of the offer, the defendant intended to say and the plaintiff knew, that the terms in so far as expressed would be satisfactory, if satisfactory to the other owners, and further, the writing does not satisfy section 4 of the Statute of Frauds because it does not contain all the terms of the agreement.

APPEAL by defendant from the decision of ROBERTSON, J. of the 13th of January, 1943, in an action against Kenneth C. Drury and his two brothers and a sister for specific performance of an alleged agreement for a lease of the premises at 1613 Douglas Street in the city of Victoria, dated the 3rd of June, 1941, and for damages for breach of the agreement. Kenneth and the sister Nora only were served and the action proceeded against them. At the trial the plaintiff abandoned his claim for specific performance and claimed only damages for breach. The judgment awarded the plaintiff damages against the defendant

Kenneth for breach of warranty of authority in making the contract sued on and leave was given to make all necessary amendments to the statement of claim. The action was dismissed as against the sister Nora.

The appeal was argued at Vancouver on the 16th, 17th, 18th and 21st of June, 1943, before McDONALD, C.J.B.C., SLOAN and FISHER, JJ.A.

Davey, for appellant: Judgment was for breach of warranty of authority and the plaintiff was given leave to amend his statement of claim, but he has never done so and he must be deemed to have abandoned his right to amend. First, the question arises whether the letter of June 3rd, 1941 (Exhibit 4), on which the judgment is founded evidenced a concluded contract or was merely a basis for further negotiation. Drury O.K.'d the letter and it was held this made a complete agreement. It is submitted this was wrong: see *British Russian Gazette, Etc., Ld.* v. *Associated Newspapers, Ld.,* [1933] 2 K.B. 616; *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311; Phipson on Evidence, 8th Ed., 566. The matter was still in a state of negotiation only. There were a number of terms in the negotiations that were not in the letter of June 3rd, 1941. One was the entrance to the alleyway which was essential to the whole transaction: see *Jameson* v. *Kinmell Bay Land Co., Limited* (1931), 47 T.L.R. 410. If Exhibit 4 constituted an agreement, it is only an agreement for a lease and is within section 4 of the Statute of Frauds: see *Chaproniere* v. *Lambert,* [1917] 2 Ch. 356; *Thursby* v. *Eccles* (1900), 17 T.L.R. 130; *Pachal* v. *Ludwig,* [1921] 3 W.W.R. 551, at pp. 553-4; *Duncan* v. *Beck* (1914), 6 W.W.R. 1149; *Burt* v. *Woodward* (1942), 58 B.C. 65. The memorandum was insufficient because it did not disclose all the terms of the agreement. The case of *North* v. *Loomes,* [1919] 1 Ch. 378 does not apply here. Even if Exhibit 4 is complete and binding, it was rescinded by what happened at the meeting of July 22nd following. They say they went to the meeting of July 22nd "without prejudice." What was agreed to at that meeting is not affected by these words: see *Walker v. Wilsher* (1889), 23 Q.B.D. 335, at p. 337; *Latimer* v. *Park* (1911), 2 O.W.N. 1399; *Omnium Securities Co.* v. *Richardson* (1884), 7 Ont. 182;

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Vardon v. *Vardon* (1883), 6 Ont. 719. Kenneth previously indicated he could not act for his brothers and sister. He could only bind his own interest. The learned judge allowed warranty of authority to be set up by amendment of his own motion. The cases he cited, namely, *Symonds* v. *Clark Fruit and Produce Co.* (1919), 26 B.C. 548; *Bligh* v. *Gallagher* (1921), 29 B.C. 241; *Levi* v. *MacDougall,* [1941] 4 D.L.R. 340, and *Wilkinson* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 161, do not apply as in this case; the defence had not been pleaded or argued or suggested in any way at the trial. The discussion must be governed by the pleading: see *Milnes* v. *Mayor, &c., of Huddersfield* (1886), 11 App. Cas. 511, at p. 534.

Grossman, K.C., for respondent: Kenneth Drury and his agent Davies were working at cross-purposes. Drury wanted the place improved at the expense of a proposed tenant and then would receive a larger rent, but Davies was acting in a dual capacity and trying to assist Stewart, the former tenant, and was more interested in him as against the landlord. The learned judge found as a fact that the document of June 3rd (Exhibit 4) was a completed agreement. Drury admits that on the signing of this document, all the plaintiff had to do was go into possession and pay his rent. It is submitted the defendant had authority from his co-owners. If he did not, then he warranted that he had such authority and the plaintiff is entitled to damages for breach of such authority as found by the trial judge. He represented he had such authority; such representations were untrue, and the respondent is entitled to damages: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 80, par. 112. On the allegation that the document does not satisfy the requirements of the Statute of Frauds, it was found by the trial judge that it contains all the essential terms of a contract and complied with the statute: see *McKenzie* v. *Walsh* (1920), 61 S.C.R. 312. The memorandum of June 3rd was not abrogated at the meeting of all the parties on July 22nd. The plaintiff and his solicitor *Tait* stated they were there "without prejudice" and that they stood by the agreement of June 3rd. The meeting was for the purpose of trying to arrange with Stewart. A plan of improvements was agreed to and arrangement was made with Luney

Brothers Limited, contractors, for making the improvements at a cost of $1,850 and subsequently Davies and the defendant submitted different plans for improvements which entailed more than double the cost of improvements. The other matters, namely, the repairing of the roof, an alleyway at the rear of the premises and water rates, were all stipulations in favour of the plaintiff and the plaintiff at the trial specifically waived the benefit of such stipulations. The facts are sufficient to establish part performance: see Halsbury's Laws of England, 2nd Ed., Vol. 7, pp. 130-32 and Vol. 29, pp. 245-48; Foa on Landlord and Tenant, 6th Ed., 412-418; Fry on Specific Performance, 6th Ed., 278-80. *Rawlinson* v. *Ames,* [1925] Ch. 96; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *McLean* v. *Little,* [1943] 2 D.L.R. 140.

Cur. adv. vult.

30th June, 1943.

MCDONALD, C.J.B.C.: In this case the learned trial judge, after reserving judgment, took the very precarious course of giving a decision based upon a ground that was not pleaded, not suggested in argument, and in my decided view, not justified by the evidence. *Hinc illæ lacrimæ!*

The action was brought against the appellant and his two brothers and sister Nora for specific performance of an alleged agreement for a lease of the premises known as 1613 Douglas Street, in the city of Victoria, which agreement bears date the 3rd of June, 1941. The appellant and his brothers and sister are co-owners of these premises and none of them has any authority to bind the others by way of any agreement respecting the same. The two brothers were not served with the writ and so disappear from the picture. At the trial the claim for specific performance was abandoned and the action proceeded as one for damages against the appellant and his sister for breach of the said agreement. This action for damages was dismissed as against the sister. The trial judge found, in the first place, that Kenneth C. Drury, acting for himself and as agent for his co-owners, entered into a concluded and binding agreement for a lease. Then he proceeded to hold that the appellant had warranted his authority to bind his co-owners by the alleged agree-

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ment and held him liable for damages for breach of his warranty of authority inasmuch as he possessed no such authority.

It may be said at once that these findings are inconsistent. The first presupposes a valid and subsisting contract which the appellant had authority from his co-owners to make; the second presupposes that no such contract was ever made, for the reason that the agent who purported to act had no authority to make it. Aside from what I shall have to say later, I would have thought it better to read the reasons and the formal judgment as holding that no agreement was ever made. The difficulty, however, is that the learned trial judge took great pains to show that one was made. I shall dispose of that in as few words as I can. The supposed agreement consists of an offer in writing dated 3rd June, 1941, addressed by the respondent to Empire Realty Co. Ltd. who were negotiating on behalf of the appellant, to rent the premises for a term of five years at a rental of $125 per month, with the privilege of renewing same for a further period of five years at an appraised rental. When this offer was presented to the appellant he wrote on it "O.K. Kenneth Drury." The evidence is overwhelming and it comes from both sides, that this document did not contain and was not intended to contain all the terms of the agreement. Both sides agree that three important terms were omitted, while the respondent claims there was a fourth term which he considered absolutely essential. These terms were: (1) The landlord was to repair the roof and outer walls; (2) the tenant was to keep the sewer clear; (3) the tenant was to make extensive improvements, and to maintain the interior in repair; (4) the tenant was to have an easement over the alleyway at the rear of the premises.

Dealing with the fourth term first, the learned judge disposes of it by stating that this was for the benefit of the tenant who had a right to waive it and did waive it. This is not so, for the respondent on discovery stated categorically that he would not even have considered taking the lease unless he had the right to use this alleyway; and what he said on discovery is the only evidence we have from him.

As to the other three matters mentioned, they have been held to be collateral to the main agreement. In my opinion the

authorities cited below do not justify such a conclusion. The test to be applied is set out in the judgments of Talbot and Finlay, JJ. in *Jameson* v. *Kinmell Bay Land Co., Limited* (1931), 47 T.L.R. 410, *viz.*: that such terms are held to be collateral, only where there was not one contract, but in truth two contracts. No such view of the evidence, I think, can be soundly taken.

Further, I cannot agree with the conclusion that the words written by the appellant on Exhibit 4 constitute or were intended to constitute an acceptance of the offer. The learned judge held that the appellant by writing the letters "O.K." and signing them thereby accepted the offer. I would not so hold. These letters have been the subject of judicial interpretation in *British Russian Gazette, Etc., Ld.* v. *Associated Newspapers, Ld.*, [1933] 2 K.B. 616. While they may be used as evidence that the terms set out in a contract are satisfactory to the parties, nevertheless they may be explained. In the case mentioned there were, aside from the "O.K.," definite words of offer and acceptance. Here I feel no doubt upon the evidence that the appellant knew he had no authority to bind his co-owners, that the respondent knew it, and that when the appellant wrote the letters "O.K." he intended to say, and respondent knew he intended to say, that the terms in so far as they were expressed, would be satisfactory to the appellant if they turned out, upon enquiry, to be equally satisfactory to the other owners. In my opinion there was no concluded agreement on 3rd June, 1941.

There is also a further impassable obstacle on this branch of the case and that is, that in any event the writing does not satisfy section 4 of the Statute of Frauds because it does not contain all the terms of the agreement: see Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 44; Foa on Landlord and Tenant, 6th Ed., 407; Fry on Specific Performance, 6th Ed., 242 and 243; *Watson* v. *Raymond* (1891), 9 N.Z.L.R. 216. The decision in *McKenzie* v. *Walsh* (1920), 61 S.C.R. 312, relied upon below, does not help the respondent, for it has no application. All that was decided there was that, given a writing complete on its face, and sufficient to satisfy the statute, it was no defence to an action on the contract, to say that on a day subsequent to the agreement, a further agreement was made for delivery of possession on a

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certain day. A perusal of the judgment shows very clearly that, far from disclosing an intention to depart from the well-established rule that the writing must contain all the terms agreed upon, the Court was careful to adhere to the rule. I entertain no doubt that the finding in the present case should be that the agreement, even if it be an agreement, is not enforceable.

If I had any doubt on the questions so far mentioned, I should enter upon a detailed discussion of the further question whether, in any event, if an agreement was made on 3rd June, it was abrogated by agreement at the meeting of 22nd July. Since I entertain no such doubts, I shall simply say that in my view, this defence is amply made out, as appears from the correspondence, and from the evidence of *Tait,* Stewart and Drury (on discovery). The findings below on this phase of the matter are not borne out by the evidence; and this may be a convenient place to remark that if the respondent was not satisfied with the evidence as given, one would have expected him to take the witness box. I think the learned judge was in error in holding that the respondent intended or understood certain things, when he deliberately refrained from giving evidence that this was so.

Now as to the holding that the conversation on 22nd July was had without prejudice: even so, that does not make it privileged, since such negotiations carried on with a view to settling a dispute are never privileged, when, as here, they terminate in a settlement.

Having, as he considered, surmounted all the above difficulties, the learned trial judge, as stated above, proceeded to find the appellant liable, and in his reasons and in his formal judgment, the latter bearing date 13th January, 1943, gave leave to the plaintiff to amend his "statement of claim in such manner as he may be advised, by inserting therein a claim for damages against Kenneth Charles Drury for breach of warranty of authority." The respondent hesitated to accept this gift-horse without first examining its teeth, and yet he could not decide to reject the gift. Accordingly, it was not until some five months later that he made his amendment. I can see no possible answer to appellant's objection that this amendment was made too late, for it is provided in unequivocal terms by Order XXVIII., r. 7 that:

> If a party who has obtained an order for leave to amend does not amend accordingly . . . within fourteen days from the date of the order, such order to amend shall, on the expiration . . . of such fourteen days, . . . , become *ipso facto* void, unless the time is extended by the Court or a Judge.

It does not appear from the record that any such extension of time was asked for, and the position taken by counsel before us is that he needs no amendment, but that if we should hold him to be wrong in this, then he would ask us to make the amendment now. I suppose there can be little doubt that we have power to do this, if it be just; but I should hesitate long before making such order. However, I prefer to abjure any technicality (if so it may be called) and to found my judgment upon the view that even if the amendment were made, as I have already stated, there is no evidence upon which to find that the appellant warranted his authority to bind his co-owners. The finding below is that by his conduct he represented himself to have such authority. I have examined the evidence carefully and I cannot agree. There is a decided difference between authority to negotiate and authority to enter into a contract. *Peacock* v. *Wilkinson* (1915), 51 S.C.R. 319, at p. 332. The present case is even stronger, for the appellant was in fact a part owner and in that capacity of itself, could quite consistently negotiate and even contract, and still not pretend to bind anyone but himself.

I would allow the appeal and dismiss the action with costs here and below.

SLOAN, J.A.: I have had the advantage of reading the reasons for judgment of the Chief Justice and of my brother FISHER, in which the relevant facts and law are fully canvassed. I do not think that I can add anything of advantage thereto.

I agree with my brothers that the appeal should be allowed.

FISHER, J.A.: This is an appeal by the defendant Kenneth Charles Drury from the judgment of ROBERTSON, J. The action was brought for specific performance of an alleged agreement in writing made on June 3rd, 1941, and for damages for breach of agreement but at the trial the plaintiff abandoned his claim for specific performance and claimed only damages for the breach against two of the four defendants, namely, the said appellant

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and the defendant Nora Charlotte Drury, the other two defendants not having been served with the writ. The judgment appealed from dismissed the action as against the defendant Nora Charlotte Drury but gave liberty to the plaintiff to amend his statement of claim by inserting therein a claim for damages against the appellant for breach of warranty of authority and awarded the plaintiff damages against the appellant for such breach of warranty, to be assessed.

The four defendants were the owners of store premises known as the Drury Block, 1613 Douglas Street, in the city of Victoria, British Columbia, partly occupied at all times by a shoe merchant named Stewart, and in or about May, 1941, the respondent opened negotiations through William H. Davies, manager of the Empire Realty Company Limited, the rental agents for the said Drury Block, with a view to obtaining a lease of the said store premises. During the early weeks of the negotiations the respondent had various conversations not only with Davies but also with the appellant himself. On or about the 3rd of June, 1941, Davies drew up a document dated 3rd June, 1941, addressed to the Empire Realty Co. Limited and the said document was signed by the respondent who carried on business under the firm name and style of Victoria Upholstery Company. Then on the said 3rd June, 1941, the respondent and Davies saw the appellant at his office in Victoria and placed the document before him. After some conversation appellant wrote on the document "O.K." and signed it. The said document then read as follows (Exhibit 4):

I hereby offer to rent the above building as from November 1/41 or at an earlier date if arrangements can be made with the present tenant to vacate same, and remodel the front thereof at my expense in accordance with sketch supplied by C. E. Watkins for a term of five (5) years at a rental of $125.00 per month with the privilege of a renewal of said lease for a further period of five (5) years at an appraised rental.

This is the document on which the respondent relied and he contended it constituted a lease or an agreement for a lease. In his examination for discovery he said in answer to questions:

. . . I show you a memorandum dated June 3rd, 1941, purporting to be signed by you and to be witnessed by Mr. Davies, and to be marked o.k. by the defendant Kenneth C. Drury. Yes.

That is your signature to that document, is it? Right.

And is that the document which you say constitutes the lease between you and Mr. Drury of the premises known as 1613 Douglas Street? Yes.

The respondent did not testify or call anyone else as a witness on his behalf at the trial so that the whole of the oral evidence before the Court was that of the appellant and his witnesses. In his reasons for judgment the learned trial judge found, *inter alia*, that the appellant represented to the respondent that he had authority from his co-owners to contract, that as a matter of fact he had no authority to do so, that if he had been duly authorized the document would have constituted an enforceable agreement for a lease and that the agreement was not superseded by a later one on July 22nd, 1941. My conclusion on the whole matter, as hereinafter indicated, is such that I propose to deal at length with only one of the issues before us, *viz.*, whether the appellant represented to the respondent that he had authority from his co-owners to enter into an agreement for a lease and thereby induced the respondent to enter into such an agreement to his loss.

Part of the examination for discovery of the appellant, which it may be noted was put in by the respondent, reads as follows:

In any event you might complete what occurred on June 3rd? Davies brought this in and he had been trying to get something concrete and this was the first time the two had been able to get together and he recommended it to me and asked whether it would be acceptable to me as a basis for a deal.

. . . . .

I am not suggesting that Mr. Saperstein didn't know there were four owners? He knew that the lease had to be approved by four different people in different places and he presented such lease on that first draft, so that was never in question.

Is it because he presented this draft lease that you say he knew you had to get consent from other people? That is pretty definite proof that he knew.

Anything else? In the conversations when I told him I thought it would be alright that I thought I could possibly get it through with the rest.

When did you tell him that? I remember telling him that one day at his own store.

When? Either late in May or early in June.

Before the 3rd June document was signed? About that time.

Before it was signed? Yes, I think it is about a year ago now.

I suggest to you Mr. Drury that ever after that there was never any reason for you to mention it afterwards and you never did mention it afterwards, is that not so? As I said a few minutes ago, it was mentioned on two or three occasions.

But before the 3rd June document? That is when some points had come

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up Saperstein and I talked this thing over quite freely in the early weeks of the negotiations and that was during the time that Malleck was trying or pressing him to get out of the store.

That was all before the 3rd June? Yes.

In his evidence at the trial the appellant said in part as follows:

Was there any discussion between you and Mr. Saperstein on those occasions about the position of the co-owners? I said I thought they would be willing or interested in some such offer or some such proposal as had been outlined at that time.

. . . . .

What was said at the meeting Mr. Drury, just give me an outline of what was said by Mr. Davies, Saperstein and by you? They came in and they said something to the effect that they had got together and had reached an agreement on the rental and Mr. Saperstein wants to know if this is satisfactory to you and asked me to O.K. it and I O.K.'d it with my name.

. . . . .

. . . Now Mr. Drury what was your relationship to your co-owners at the time these letters were written? . . . Well, my *status* is that I was here, the others were in other parts of the continent and someone had to take the initiative in any negotiations and any arrangement arrived at would naturally have to be satisfactory to me before it was passed on to the others because if I refused to sign that would block it and if I refused—my recommendation would carry weight especially if I made a negative recommendation would have been almost absolute, although they could have overriden me but we had the agreement and the intentions about leasing this property which were well understood by us two or three years before, we had examined it and talked it over.

Mr. Davies gave evidence on cross-examination at the trial as follows:

I want you to come to the June 3rd meeting and tell me exactly what you said and what Mr. Saperstein said and what Mr. Drury said when that document was signed, I want the exact words as far as you can give me? Which is to the effect that Mr. Saperstein had called upon me and at his request I had drawn this letter which was submitted to Mr. Drury for his approval subject to the ratification and acceptance of the other interested partners.

Now, Mr. Davies did you say any such thing to Mr. Drury? I have always done so in all such negotiations with the Drury estate.

I have no doubt you may have said that to Mr. Saperstein—but you want this Court to believe when you went to get Mr. Drury to sign it would be subject to ratification? Certainly.

. . . . .

This uncontradicted evidence would appear to settle the issue in favour of the appellant. It might be argued, however, that the learned trial judge was not obliged to accept the evidence of the appellant or his witnesses even though it was uncontradicted. From the reasons for judgment I think it is apparent that the

learned trial judge refused to accept the aforesaid evidence of Davies as to what he said to Drury on the 3rd of June, 1941, but did not refuse to accept the evidence of Drury as to what he said prior to the said 3rd of June but drew an inference against him because he didn't say it again on June 3rd. In a part of his judgment he says as follows:

> Drury said he told the plaintiff in various conversations with him, sometime in April or May, that "they were open to an offer to have something done to our building"; that they wanted the front improved and divided into two stores; that they would be responsible for the roof and three walls; and that the front was up to the tenant; that they didn't care what he did with the inside; that he and his two brothers and his sister owned the property and he thought they would be interested in some such proposition; "that we would be likely to get this through"; "that he could possibly get it through" and that he thought maybe the "others would accept it."
>
> Now all this took place prior to the 3rd of June. The alleged condition was not mentioned on the 3rd June.

From the questions and answers as hereinbefore set out I also think it is quite apparent that at the trial counsel for the respondent was admitting that the respondent knew there were four owners and had been informed by Davies before the said 3rd of June that no arrangement could be made without the approval of all the owners.

The position taken on behalf of the respondent would appear to be that, though the respondent had been informed as to the situation being as aforesaid before the 3rd of June, 1941, he understood that the situation was different on and after the said date. It is suggested that the respondent might have been informed before the said 3rd of June, when the respondent was making lower rental offers, that no arrangement could be made without the approval of all the owners simply in order to get a higher rental offer and that the respondent thinking this understood that the rental offer of $125 per month made on June 3rd did not rquire any such approval. However, this suggestion existed only in the realm of conjecture. There is no evidence to support it and there is no evidence from the respondent testifying to any such understanding on his part. It may well be that the respondent assumed and acted on the assumption that, if the appellant was satisfied and put his O.K. on the letter, his co-owners would give the required approval to the proposed arrangement and that, if the appellant was not satisfied, he could likely

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block any progress in the matter. One must remember, however, that the respondent, in order to succeed on a claim for damages for breach of warranty of authority, must establish at least that the appellant represented to him that he had authority from his co-owners to enter into an agreement for a lease and that he relying on such representation of fact, acted upon it to his loss.

The learned trial judge in his reasons for judgment says:

I am of the opinion that Drury did on the 3rd June approve of the contract made by Davies; that by his conduct he represented to the plaintiff that he had authority from his co-owners to enter into the contract; that as a matter of fact he had no authority to do so, and the plaintiff acted upon such representations to his loss.

Under these circumstances he would be liable for damages for breach of warranty of authority—see *Collen* v. *Wright* (1857), 8 El. & Bl. 647; *British Russian Gazette, Etc., Ld.* v. *Associated Newspapers, Ld.*, [1933] 2 K.B. 616; and cases cited in Halsbury's Laws of England, 2nd Ed., Vol. 1, pp. 300-301.

It will be noted that in this passage the learned trial judge speaks of "the contract made by Davies." However, it is or in my view must be common ground that, though Davies as rental agent for the said Drury Block had been receiving offers from the respondent and trying to get a rent proposal, his agency was a limited one and he had no authority, and did not purport, to enter into a contract on behalf of the owners. I think the judge makes this clear in the latter part of the passage just quoted. He states that the appellant by his conduct represented that he had authority to enter into the contract but does not therein specify the conduct. Elsewhere, however, he apparently gives the basis for such conclusion when he says:

Drury also knew that immediately he put his "O.K." on the letter of the 3rd June the plaintiff would try to arrange with Stewart to vacate the premises before the 1st November. Therefore if he wished to impose any condition as to his co-defendants' consent he should have told the plaintiff so on 3rd June. The letters of the 14th August, the 7th October and the 28th October, 1941, would indicate that Drury had or thought he had power to act for the owners.

As already intimated the first part of this passage would seem to mean that some inference unfavourable to appellant was drawn from his not repeating on June 3rd what he had already told the respondent but I do not think that from its non-repetition misrepresentation could properly be inferred under the circum-

stances here, even on the assumption that the evidence of Davies as aforesaid was rejected. With regard to the letters I would say with respect that under the circumstances they would not indicate that Drury had or thought he had power to act for the owners and in any event it is not what power Drury thought he had but what he represented he had on June 3rd, 1941. I pause here to note that counsel on behalf of the respondent states in his factum that

> all correspondence discussions and negotiations after 3rd June, 1941, were matters between the respondent and Stewart and had nothing to do with the agreement Exhibit 4 . . . between the respondent and the defendants which remained in full force and effect.

I agree, however, that the representation in fact which the respondent had to prove might be implied in certain circumstances from conduct and conduct might be proved by evidence of a course of dealing between the parties. Compare *Brogden* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 666. Nevertheless by direct evidence or fair inference the respondent must prove his case and therefore all the evidence has to be carefully considered in the light of the authorities.

Collen v. *Wright* (1857), 7 El. & Bl. 301; 8 El. & Bl. 647 was relied upon by the learned trial judge but it must be noted that in such case the testator signed the document which gave rise to the action thus: "W. agent to G. lessor." Similarly in *Halbot* v. *Lens,* [1901] 1 Ch. 344, one of the cases cited in Halsbury's Laws of England, 2nd Ed., Vol. 1, *supra,* the defendant Lens signed the document "for self and wife and Dr. Clarke." In *British Russian Gazette, Etc., Ld.* v. *Associated Newspapers, Ld.,* [1933] 2 K.B. 616, at p. 641,

> the . . . document [which] was initialled as agreed by each side, or as Mr. Talbot [one of the parties] said, O.K.'d, the Court being informed by evidence that O.K. means "Orl Korrect,"

read in part as follows:

> I accept the sum of . . . in full discharge and settlement of my claims against [Associated Newspapers] and the claims of the [British Russian Gazette and Trade Outlook Ltd.] and the officers of that company, ...

These cases are undoubtedly authorities to be considered in an action for breach of warranty of authority but in my view they are clearly distinguishable from the present case. In the first two cases the signature itself was at least *prima-facie* evidence

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that the party signed the document professedly as agent for someone else as principal and in the last-mentioned case the document itself was evidence that one party was professing to have authority to settle the claim of the company and the officers of the company as well as his own claim. In the present case the appellant under the circumstances disclosed by the evidence simply wrote "O.K." and signed his own name on a document reading as hereinbefore set out. In my view the written and the oral evidence combined do not admit of the inference that the appellant represented to the respondent that he had authority from his co-owners to enter into an agreement for a lease or that the respondent relied upon the existence of authority in fact. With all deference I have to say that, having carefully considered all the evidence and the apparent basis for the conclusion of the learned trial judge, I am convinced that he was wrong in holding the appellant liable for damages for breach of warranty of authority. In such case the judgment will be set aside even if based on the credibility of witnesses. See *McCann* v. *Behnke*, [1940] 4 D.L.R. 272 and *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462. Assuming without finding that the said document constituted an enforceable agreement if the appellant had been duly authorized and that it is open to the respondent as the matter now stands to argue in the alternative that the appellant is liable for damages based on the agreement having been entered into by the appellant with the authority of his co-owners I have only to say that I see no reason for disagreeing with the finding of the trial judge that as a matter of fact the appellant had no authority from his co-owners to enter into the agreement.

I would allow the appeal and dismiss the action as against the appellant.

Appeal allowed.

Solicitors for appellant: *Crease, Davey, Fowkes, Gordon & Baker.*

Solicitor for respondent: *P. J. Sinnott.*

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Practice—Judgment including order for accounting—Application for stay of accounting pending appeal—Granted by trial judge on terms—Application to Court of Appeal for stay of accounting without terms—Jurisdiction—Application granted—R.S.B.C. 1936, Cap. 57, Secs. 9 and 30.

In February, 1943, an election of officers of the Boilermakers' and Iron Shipbuilders' Union of Canada Local No. 1 took place and three former officers of the union, on behalf of themselves and other members of the union, brought action against the officers so elected and other members for a declaration that the election was illegal and void, for the return of equipment and for an accounting of union moneys collected by the defendants. It was held on the trial on the 20th of March, 1943, that the election was null and void and the plaintiffs were entitled to a return of the equipment and that there be an accounting as asked for. The defendants appealed and pending the appeal, on motion by the defendants, an order was made on the 21st of June, 1943, by the trial judge for a stay of the accounting until the hearing of the appeal upon the defendants posting a bond in the sum of $20,000. On the 29th of June, 1943, the defendants moved before the Court of Appeal for an order that the taking of accounts as ordered on the 20th of March, 1943, be postponed until the hearing of the appeal.

Held, SLOAN, J.A. dissenting, that two objections were raised that this Court lacked jurisdiction to entertain the motion: (1) That no appeal was taken from the order of the 21st of June, 1943, and (2) that what is now sought is in reality a stay of execution of a judgment which "directs the payment of money" within the meaning of section 30 (*d*) of the Court of Appeal Act and this Court is deprived of jurisdiction to stay execution because the section vests such jurisdiction exclusively in the Court appealed from. The first objection fails because the learned judge below was without jurisdiction to make the order of the 21st of June, 1943, and his order was not merely voidable, but void. There was no jurisdiction to stay proceedings in a matter pending before the Court of Appeal. On the second objection, as judgment has not been signed and cannot be signed before the accounting and as a consequence, execution cannot now issue, the present motion cannot be accepted as one for a stay of execution. It is clearly a motion to stay proceedings which cannot amount to execution. It is, therefore, a proceeding over which this Court has exclusive jurisdiction during the pendency of the appeal. The question of the postponement of the accounting is "a further proceeding in relation to the appeal" within the meaning of section 9 of the Court of Appeal Act.

Held, on the motion, that in the circumstances, this Court would not be justified in imposing any terms as a condition for postponement of the accounting pending the hearing of the appeal. The motion is granted and the accounting ordered by the judgment of March 20th, 1943, is postponed without terms, pending the hearing of the appeal therefrom.

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MOTION to the Court of Appeal for an order staying the taking of accounts by the registrar as directed by the judgment of SIDNEY SMITH, J. of the 20th of March, 1943 (reported, *ante*, p. 84), until the hearing of the appeal from said judgment. Heard by SLOAN, O'HALLORAN and FISHER, JJ.A. at Vancouver on the 29th of June, 1943.

McAlpine, K.C., and *Nemetz*, for the motion.
Paul Murphy, contra.

Cur. adv. vult.

30th June, 1943.

SLOAN, J.A.: This matter comes before us at this stage by way of a motion for an order staying the taking of accounts by the registrar as directed by the trial judge pending the hearing and determination of an appeal from (*inter alia*) that direction.

The applicant made a similar motion to the learned trial judge and succeeded in securing from him an order for a stay of the accounting pending the appeal upon the applicant posting a bond in the sum of $20,000.

The applicant dissatisfied with the terms imposed by the learned trial judge and wishing to escape therefrom was faced with the necessity of choosing between two alternative remedies. He could either appeal the order granting the stay or he could invoke (what he termed) the co-ordinate jurisdiction of this Court to grant a stay in the hope that he would secure from us an order in less onerous terms than that made below.

The applicant chose the latter course. The stay order by the learned trial judge still stands and as it was not appealed in consequence is not before us for review. The applicant rested his entire argument upon the assumption that we had a co-ordinate jurisdiction paralleling that of the trial Court to stay proceedings below pending an appeal and that on the merits we ought to exercise that jurisdiction in his favour without terms.

I find it unnecessary for me to ponder the question of our suggested co-ordinate jurisdiction because if vested in us I would not exercise it in favour of the applicant. The learned trial judge is, in my view, better informed than we are at present of all the ramifications of this involved case and I would not care

to make an order in terms different than his. With deference it is not seemly in my opinion, for this Court in the exercise of a co-ordinate jurisdiction—assuming it to exist—to make an order in conflict with the order of the learned trial judge. *In re Times Life Assurance and Guarantee Company* (1870), 5 Chy. App. 392 n.

With great respect I am unable to say with my brothers that the trial judge had no jurisdiction to make the order he did. It has always been my understanding of the law that while it is seized of the cause and until the formal entry of its judgment the jurisdiction of a Court over its own process and its own officers is unlimited and that such power is inherent and necessarily incidental to the effective administration of justice. *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28; *Henderson* v. *Muncey* (November 3rd, 1942—unreported). Whether that principle has, in its relevant aspect, suffered invasion by statute is a very debatable question.

All I wish to say upon the matter is, that as the stay order of the learned trial judge was not appealed, I must refuse to enter *ex mero* upon any discussion of its validity. That is a subject upon which I would prefer to hear argument of counsel before reaching any final conclusion.

In the result I would refuse to grant the motion.

O'HALLORAN, J.A.: A judgment of the Court below dated 20th March, 1943, declared null and void the meetings of the Boilermakers' and Iron Shipbuilders' Union of Canada Local No. 1, of the 12th, 22nd and 23rd of February, 1943, and also the nomination and election, at those meetings, of the appellants as officers of the said union. The appellants were ordered to account for all moneys of the union received during the period involved, and, subject to a direction later mentioned, to pay over to the respondents such sum as the registrar should certify upon the accounting, "to be held by them as trustees to and for the use of" the union.

An appeal has been taken from that judgment, and in ordinary course it will be heard at the next sittings of the Court, in September. Counsel for the appellants now moves this Court for

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an order that the said taking of accounts "be adjourned and postponed until after the hearing of the appeal." It is important to note, at the outset, that the motion is not one to fix security for the costs of the appeal, nor is it a motion to stay execution of judgment. Counsel for the appellants emphasized he is asking for a stay of proceedings, and not for a stay of execution.

Counsel for the respondents objected *in limine,* that this Court has no jurisdiction to entertain the motion. Two objections are advanced: First, that no appeal has been taken from an order made in the Court below on 21st June, 1943, which directed the accounting to proceed notwithstanding the appeal, unless the appellants should post a bond for $20,000. And, secondly, that what is now sought is in reality a stay of execution of a judgment which "directs the payment of money" within the meaning of section 30 (*d*) of the Court of Appeal Act. It is said this Court is deprived of jurisdiction to stay execution, because that section vests such jurisdiction exclusively in the Court appealed from.

The first objection fails, in my judgment, because the learned judge below, for reasons presently stated in considering the second objection, was wholly without jurisdiction to make the order of 21st June, 1943. Lacking jurisdiction, his order was not merely voidable, but void. In *The Queen* v. *Justices of Antrim,* [1895] 2 I.R. 603, Sir P. O'Brien, C.J. said at p. 636:

> If the case were one where the tribunal was *ex facie* wholly unauthorized, . . . , the matter would be entirely different. In such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity—not merely voidable, but void.

That passage was cited with approval by the Court of Appeal in England in *Rex* v. *Simpson* (1913), 83 L.J.K.B. 233, and also applied by this Court in *Triangle Storage Ltd.* v. *Porter* (1941), 56 B.C. 422, at p. 427.

In *In re Robert Evan Sproule* (1886), 12 S.C.R. 140, the Supreme Court of Canada quashed a writ of *habeas corpus* issued by one of its own judges in Chambers. Although the matter came before the Court by way of motion, and not by way of appeal from the learned judge in Chambers, the Court acted on the ground he was wholly without jurisdiction to do what he did in the circumstances there existing. *Vide* pp. 184, 210, and also at p. 242, where Taschereau, J. observed:

Where, as here, a judge having a limited jurisdiction exercises a jurisdiction which does not belong to him, his decision, or his acts, amount to nothing and do not create any necessity for an appeal. (*Attorney-General* v. *Hotham* [(1823)] Turn. & R. 219; [37 E.R. 1077, at p. 1081; affirmed (1827), 38 E.R. 631]. A proceeding so taken is a complete nullity, a nullity of *non esse*.

Here, as later shown, the learned judge below had no jurisdiction whatever to stay proceedings (as distinct from a stay of execution) in a matter pending before the Court of Appeal. But even if the motion could be construed as one for a stay of execution, then, as is later also shown, he was likewise without jurisdiction. His jurisdiction could exist only if the subject-matter came within one of the exceptions enumerated in section 30 of the Court of Appeal Act. The learned judge assumed a jurisdiction which he did not have. The jurisdiction given by the exceptions in section 30 to stay "execution of the judgment" pending appeal, is not a general jurisdiction, but is limited to certain cases under appeal. *Expressio unius est exclusio alterius.* It does not arise under, nor is it incidental to the original or general jurisdiction of a superior judge of the Supreme Court. It is a jurisdiction superadded by statute, and one which is not confined to a superior court judge.

It is not conferred upon him *qua* superior court judge, but *qua* judge of the Court appealed from, which, of course, may include a county judge of inferior jurisdiction. It is purely statutory, exercisable in certain cases only within the narrow limits of the exceptions which the statute defines so carefully. It is therefore a limited jurisdiction such as Taschereau, J. described the jurisdiction of the superior court judge in the *Sproule* case. In the exercise thereof, he is governed by the principle which applies, in my judgment, to any judicial tribunal when it exercises purely statutory powers, *viz.*:

Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised.

That was said by Lamont, J. (with whom Duff and Cannon, JJ. concurred) in *Samejima* v. *Regem,* [1932] S.C.R. 640, at pp. 645-6, of conditions precedent required by statute.

Nor is that inconsistent with the principle stated in *Peacock*

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v. *Bell and Kendal* (1667), 1 Wms. Saund. 73; 85 E.R. 84, at pp. 87-8, *viz.*:

> . . . , that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

That was said of a superior court exercising an original and general jurisdiction under the authority of the common law. But it does not fit itself to a limited jurisdiction which the statute may confer on a superior court judge. The limited jurisdiction conferred by section 30 is no more related to the original or general jurisdiction of a superior court judge than it is related to the jurisdiction of an inferior court judge. Section 30 cannot have a dual interpretation, one applicable when the Court appealed from is a superior court, and another when the appeal is from an inferior court.

The first objection fails accordingly. And it is unnecessary to consider it upon a premise which the foregoing reasoning excludes, *viz.*: that concurrent jurisdiction exists in the Court below.

The second objection also raises questions of general importance. It concerns the true interpretation of section 30 of the Court of Appeal Act which, although enacted in 1930, has not hitherto been considered by this Court so far as I can discover. The conclusion now reached is that the learned judge wholly lacked jurisdiction because (a) the order now sought is a "stay of proceedings," and not a "stay of execution" within section 30, *supra*; and (*b*) even if the motion could be regarded as one for a "stay of execution," nevertheless the subject-matter of the order for judgment does not fall within the classes of judgments enumerated in section 30 as exceptions to its overriding initial mandatory enactment that stay of execution occurs automatically once security for costs of appeal has been perfected.

The first aspect of this objection brings out the existence of an important distinction between "stay of proceedings" and "stay of execution." The term "proceedings" in section 9 of the Court of Appeal Act, which provides that:

> Subject to the Rules of Court and save as hereinafter provided, after notice of appeal has been given all further proceedings in relation to the appeal shall be had and taken in the Court of Appeal.

is used in a generic sense, and as such, necessarily embraces "stay of execution." But section 30 is a qualification which the statute "hereinafter provided," indicating that "execution" is a subordinate classification of the *genus* "proceedings." It provides that, upon perfecting of the security for costs of the appeal, "execution shall be stayed in the original cause." Since the subordinate term "execution" is used therein, and not the generic term "proceedings" as in section 9, section 30 strikes a dividing line between "proceedings" which amount to "execution" and "proceedings" which do not.

The Ontario decision of *Sharpe* v. *White* (1910), 20 O.L.R. 575, apparently regarded execution in its most comprehensive sense as a generic term to include any proceeding on, or for enforcing any part of an order for judgment, even though it did not amount to an execution in the sense that term is used in our Supreme Court Rules and Execution Act. But it does not appear there was a counterpart of our master section 9 in Ontario, and therefore there was no statutory context such as we have in this Province which imposed "proceedings" as a generic and "execution" as a subordinate term. It is noted also in *The Export Brewing Co.* v. *The Dominion Bank,* [1934] O.W.N. 647; Kerwin, J., as he is reported there, when considering comparable statutory language, did not seem to accept execution to include a reference before the registrar.

"Execution" may not be easy to define with precision, and *vide Thakar Singh* v. *Pram Singh* (1942), 57 B.C. 372, at p. 386. But, in my view, it cannot be extended to include an accounting or other like proceedings, without which the amount for which final judgment is ordered cannot be ascertained. Such proceedings are frequently an integral part of the judicial process essential to the making of a final adjudication upon the issues. They enable specific findings of fact to accord with the principles of law which the trial judge has found applicable. Without that final adjudication judgment cannot be "signed," *vide Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd. and Oscar Niemi Ltd.* (1942), *ib.* 346, at pp. 365-6, and also *Dresser* v. *Johns* (1859), 6 C.B. (N.S.) 429; 141 E.R. 524. In *Jellett* v. *Anderson* (1880), 8 Pr. 387, where the

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decree ordered payment forthwith after the making of the Master's report, the Court set aside an execution issued before the report had been filed.

In the present case, the essential preliminary to execution, *viz.*: "signing" of final judgment, has not taken place, and cannot take place, if at all, until after the accounting has been held. Furthermore, as later shown, there is no certainty the registrar will find any amount for which final judgment could be signed. If that should happen, no execution could issue. Whether any balance may remain in the hands of the appellants after crediting disbursements in the "ordinary course of business" as the order for judgment directs, cannot be determined until the accounting has been held. Thus regarded, the order for judgment means nothing more than an order to pay, if there is any balance left after payments made in the ordinary course of the business of the union. By way of precaution it is observed that final judgment, in the sense now used, has no relation to the question whether it is final for the purposes of appeal as discussed in *Spelman* v. *Spelman* delivered 28th April, 1943 [reported, *ante,* p. 120].

But even if the registrar, upon such an accounting, should find a specific balance payable, judgment may not be signed as of course. It would still be subject to variation or discharge by the Court below, *vide* sections 61 (2) and 61 (3) of the Supreme Court Act, Cap. 56, R.S.B.C. 1936, and rules 832 and 833. In *Horsnail* v. *Shute* (1921), 30 B.C. 189, at p. 198, MACDONALD, C.J.A. held the Court below had inherent jurisdiction to vary the report of its own registrar, and that such jurisdiction was not ousted by the particular wording of the order for judgment. As judgment has not been signed, and cannot be signed before the accounting, and as in consequence, execution cannot now issue, hence the present motion cannot in any event be accepted as one for a stay of execution. It is clearly a motion to stay proceedings which do not amount to execution.

It is, therefore, a proceeding over which this Court has exclusive jurisdiction during the pendency of the appeal, since there is nothing in the statute or in any present Rule of Court to qualify section 9, *supra,* in that respect. I entertain no doubt

the question of the postponement of the accounting is "a further proceeding in relation to the appeal" within the meaning of section 9. But whether it is or not, the fact remains the Court of Appeal has original and general jurisdiction to control any proceeding which it may regard as necessary or incidental to the hearing and determining of the appeal, and *vide* sections 6, 7, 8 and 10 of the Court of Appeal Act. In *Wilson* v. *Church (No. 2)* (1879), 12 Ch. D. 454, Cotton, L.J. said at p. 458 that, when a party appeals, the Court ought to see that the appeal, if successful, is not nugatory; and so a fund, the subject-matter of the appeal, was not allowed to be disturbed, and *vide* also *Polini* v. *Gray* (1879), *ib.* 438.

It should be mentioned perhaps that rule 19 of the Court of Appeal Rules until its repeal in 1930, was a Rule of Court within section 9 based upon concurrent or co-ordinate jurisdiction in this Court and the Court below to "stay execution or proceedings." But that rule was repealed on 17th December, 1930 (p. 429, B.C. Gazette, 1931, Vol. 1), after section 30 had come into operation on the previous first of June. It is no longer necessary to consider that rule, or the English decisions to which we were referred based upon a similar rule in England.

On the second branch of this jurisdictional aspect, even if the accounting could be construed as an execution, it does not avail the respondents. For, if it be so regarded, the accounting is stayed automatically by the opening lines of section 30, and, for reasons shortly to be given, the order for judgment does not come within exception (*d*) thereof, *viz.*: a judgment which "directs payment of money either as a debt or for damages or costs." It is obvious, I think, that none of the other exceptions could be invoked.

The enactment of section 30 in 1930, seemingly derived from Ontario (*vide* section 27, Cap. 38, R.S.O. 1877), made a radical change from the English practice which had prevailed in this Province. Before its repeal in 1930, we had a Rule of Court (rule 19, *supra*) similar to the English rule providing that:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal, may order.

In *Sharpe* v. *White* (1910), 20 O.L.R. 575, Meredith, C.J.C.P.,

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in giving judgment of the Divisional Court, pointed out that, while under the English Rules it was not the practice to stay enquiries directed by a judgment under appeal, the converse was the case in Ontario, and upon perfecting the security, the stay became statutory, save in certain enumerated cases. In my view, that truly describes the British Columbia practice in regard to stay of execution as governed by our present statute and Rules of Court. But, as already explained, our section 9 does not permit an enquiry before the registrar to be regarded as an execution.

The Ontario Court of Appeal, in *Battle Creek Toasted Corn Flake Co. Ltd.* v. *Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127, at p. 130, held that execution on a judgment differs from enforcing personal obedience to it, but also recognized that the stay, if given, was statutory. That case concerned an injunction. In *Andler* v. *Duke* (1931), 44 B.C. 201, MACDONALD, C.J.B.C., in Chambers, apparently did not consider registration of title to lands as directed by the order for judgment, was an execution within the meaning of section 30, let alone an execution of the judgment within any of its exceptions. MACDONALD, J. previously, in *Andler* v. *Duke* (1931), *ib.* 161, seems to have reached the same conclusion, for he doubted his jurisdiction as a judge of the Court appealed from, to entertain the motion for a stay. However, even if the term "execution" in section 30 could be construed in the largest sense, to include the accounting as a proceeding on or for enforcing the order for judgment, nevertheless the stay would be mandatory and automatic.

Moreover, section 30 (*d*), the exception invoked by counsel for the respondents, reads in relevant part that:

> If the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed until the appellant has given security to the satisfaction of the Court appealed from, or a judge thereof that if the judgment or any part thereof is affirmed the appellant will pay the amount thereby directed to be paid.

To come within this exception, the order for judgment must therefore not only be for a debt, but must also be one which directs a specific amount to be paid. But it is clear on the face of the order for judgment that it does not direct a specific amount to be paid. It directs that after the inquiry by the registrar has taken place and the amount of the moneys has been certified by him, the defendants appellants

do forthwith pay the said sum so certified, less such sums as the said registrar may certify has been paid in the ordinary course of business of the said union, to the plaintiffs [respondents] herein to be held by them as trustees to and for the use of the Boilermakers' and Iron Shipbuilders' Union of Canada Local No. 1.

But, in the affidavit of one of the appellants, Thomas G. Mackenzie, present secretary-treasurer of the union, sworn 18th June, 1943, it is deposed that on 17th June, 1943, the union unanimously endorsed a resolution of the union executive held on 17th May, 1943, reading in part:

2. That the moneys involved in this accounting . . . is the sole property of the union, and that all moneys collected by the defendants appellants during the recent litigation has been handed over to the union.

That affidavit has not been answered or cross-examined upon. Read with the judgment appealed from, it would seem from the material now before us (but without so deciding) that, if the accounting were held, the registrar might easily certify that all moneys having been already paid over to the union, there was, at the date of his report, no sum of money payable by the appellants under the order for judgment appealed from. In that event, there would be no "money" or "amount" to be paid over for which judgment could be signed, and nothing in respect to which execution could issue within the meaning of section 30 (*d*).

Again there is much to support the contention that the order for judgment does not direct payment of a "debt" within the meaning of section 30 (*d*). Whatever the common and enlarged meaning of "debt," section 30 (*d*) distinguishes it from "liability" or "obligation" by distinguishing it from damages and costs. The term must be read as limited by its context, *vide In re Neville* (1924), 94 L.J. Ch. 130 (a will case) and 17 C.J. 1371 *et seq.* That would seem to restrict it to something founded on the consideration or equivalent given by a creditor to a debtor. If that is so, it is confined to contract, and would exclude liabilities in tort and equitable obligations not arising from implied contract. As is commonly said, "a debt is contracted while a liability is incurred."

Moreover, there is no finding that the appellants have mishandled or converted the union funds to their own use, or that they have committed any breach of trust. All the order for judgment directs is that union funds received by *de facto* officers

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be transferred to persons the Court then regarded as *de jure* trustees. The obligation to pay which the Court imposed did not arise out of contract, nor for that matter is it disclosed to have arisen out of tort. The distinction between a debt and an obligation to pay is recognized in other corners of the law, for example in alimony, *vide Linton* v. *Linton* (1885), 15 Q.B.D. 239, and *McKay* v. *McKay* (1933), 47 B.C. 241, and also the Attachment of Debts Act, Cap. 17, R.S.B.C. 1936.

If it were not a debt before judgment, then it seems the judgment would not make it any more so, and *vide In re Wethered* (1925), 95 L.J. Ch. 127, at pp. 130-1, and *International Harvester Co.* v. *Hogan,* [1917] 1 W.W.R. 857, where Scott, J., at pp. 859-60, in giving the judgment of the Appellate Division of Alberta, adopted this passage from 23 Cyc. 1105:

> But while the debt or claim in suit becomes merged in the judgment and the judgment becomes thereafter a new liability and a fresh cause of action, yet as to the original debt the judgment neither creates, adds to nor detracts from it, its only office is to declare the existence of the debt, fix the amount and secure to the creditor the means of enforcing its payment.

In any event, however, there is no specific amount, and there cannot be until the accounting has taken place. In *Dresser* v. *Johns* (1859), 6 C.B. (N.S.) 429; 141 E.R. 524 (Crowder, Willes and Byles, JJ. sitting *in banc*), Dresser attempted to attach moneys in the hands of a company which were to become payable to Johns upon a verdict for £100 the latter had already recovered against the company in an action of contract for unliquidated damages. But, as judgment for the amount of the verdict had not been signed when the attaching order issued, it was held there was no "debt owing or accruing" from the company to Johns. There could be no debt until judgment was signed for a specific amount. Moreover, even if the registrar, on the accounting when it takes place, should find a specific amount payable, that would not constitute a debt. For under *Horsnail* v. *Shute* (1921), 30 B.C. 189, already referred to, the matter would still rest in the Court below to vary or discharge the finding of its registrar. That is to say, there can be no judgment for debt until (a) a specific amount is ascertained at the accounting, and (b) final judgment is "signed" therefor.

In so concluding, I am not unmindful of the decision of

MARTIN, J.A. in Chambers, in *Insinger* v. *Cunningham* (1923), 32 B.C. 518, while exercising a jurisdiction conferred by the Supreme Court Act (Canada). The reference as to damages had not yet taken place, but the amount of the likely damages was stated to be readily ascertainable because of what the learned trial judge had said in his reasons. In fact, surprise was expressed that a reference had been directed. That, of course, is quite a different case from the one before us, where the direction to pay is not shown to relate to "debt damages or costs," and the unchallenged material discloses that all moneys directed to be paid over to the respondents as trustees of the union, have already been paid over to that union. But, in coming to his conclusion in the *Insinger* case, the learned judge indicated that the purpose of the statute, as he conceived it, prevented him giving its language the meaning it plainly conveyed. At p. 519, the learned judge expressed the view that the practical result of giving the language its plain meaning would be that

> execution could not be stayed because it is impossible to name an exact sum for security, which would be a very unfortunate position for the appellant.

He referred again to what he describes as the purpose of the section, *viz.*,

> to relieve an appellant, . . . , from the disastrous consequence of an execution.

But, as previously explained, the expressed purpose of section 30 of our Court of Appeal Act is to stay execution automatically, except in certain enumerated cases of which this is not one. The decision in Chambers in *Insinger* v. *Cunningham*, upon another statute, cannot therefore be regarded as an obstacle to conclusions which in this case exclude the applicability of section 30 (*d*).

Finally, if accounting, assessment of damages or like proceedings had been intended to come within the terms "execution" or "execution of the judgment" as used in section 30, one would conclude the section would not have passed over in silence proceedings which are of such frequent occurrence. In view of the pointed particularity of the language employed in section 30 and its exceptions, it seems to follow reasonably that these common proceedings leading up to final adjudication and signing of judgment were not mentioned among the exceptions in the section, because the Legislature purposely declined to widen the

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meaning of "execution" to include them. The foregoing reasons have convinced me that the postponement of the accounting is a stay of proceedings, and not a stay of execution within section 30 of the Court of Appeal Act or any of its exceptions. From which it follows that this Court has exclusive jurisdiction, and the learned judge below had no jurisdiction. The preliminary objections to our jurisdiction are overruled. But it remains to be determined whether this Court should exercise that jurisdiction and grant the postponement of the accounting without terms as sought.

When giving judgment on the 20th of March, the learned trial judge, in a praiseworthy effort to end the trouble, concluded with these observations [*ante*, p. 87]:

> My duty is to find the facts and declare the law. It is no part of my task to define the policy of the union or to state what course in my opinion should now be followed. But perhaps I may be permitted to remind the members that the future of this union is in their own hands and that they must themselves work out its salvation. Another election should be held at the earliest possible moment. They should, each of them, take an immediate interest in the holding of this election and should elect officers who beyond all doubt represent the majority feeling of the union and enjoy its confidence. It is only thus that any democratic organization can successfully function.

It appears from the affidavits of William Stewart and Thomas G. Mackenzie that a regular general meeting of the union for that purpose was held on 15th April, 1943, at 8 p.m. in the Athletic Park, Vancouver, and that 3,628 members of the union attended this meeting, "the largest in the history of the union." That "only members in good standing who showed their cards at the one gate of the entrance to Athletic Park (which park is enclosed by a high-board fence) were allowed to enter."

It appears from the said affidavits that, at such meeting, the appellant Stewart was elected president, the appellant Cardwell vice-president, the appellants Simpson and Forster executive member and reporter respectively. It also appears from the said affidavits that, at a regular meeting of the union held on 17th June, 1943, the following resolution of the union executive of 17th May, 1943, was endorsed unanimously:

> 1. That this union is unalterably opposed to any accounting or transferring of funds to Robert James Rollo Stephen, Thomas Bradley and David Thompson [the respondents herein] for themselves or on behalf of any other

members who they allegedly represent. 2. That the moneys involved in this accounting is the sole property of the union and that all moneys collected by the defendants during the recent litigation has been handed over to the union. 3. That the union does not require or desire any terms to be made as a condition to the defendants' application for a stay of proceedings pending the appeal in the recent litigation. 4. That if any accounting is required to be made, that accounting should be made to the present officers of this union.

The recited facts deposed to in the said affidavits have not been answered, challenged or cross-examined upon in any material before this Court. The respondents have not seen fit to challenge the validity of the meeting of the 15th of April last or the legal *status* of the appellant officers then elected. On this motion to postpone the accounting (whatever may happen hereafter) the appellants appear now as *de jure* officers of the union. That is a factor which cannot be dismissed from consideration when a decision has to be reached upon whether terms should or should not be imposed to permit postponement of their accounting of union funds for a period during which they would now appear to have been in effect *de facto* officers of the union.

In considering whether a stay of proceedings ought or ought not to be granted pending appeal, the Court should guide itself by conditions now existing. The guiding consideration should be the protection of the funds of the union in accordance with the legally expressed wishes of the members of the union. Our duty, as Lord Parker stated in *The Zamora,* [1916] 2 A.C. 77, at p. 99,

> is to preserve the *res* for delivery to the persons who ultimately establish their title.

In the material before us, it appears the union funds in dispute are now held by the union, that the legal *status* of its present officers has not been questioned in the two and a half months interval since their election, and that the membership of the union is opposed to any accounting of its funds to the respondents in an official capacity which the union membership has refused to accord to them since 15th April last.

I am of opinion that the meeting of 15th April, 1943, has so radically changed the situation since the judgment under appeal was delivered that, so long as its validity remains unchallenged, this Court would not be justified in imposing any terms as a

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condition for postponement of the accounting pending the hearing of the appeal.

I would grant the motion. The accounting ordered by the judgment of 20th March, 1943, is postponed accordingly without terms, pending the hearing of the appeal therefrom at the next sittings of this Court.

FISHER, J.A.: I agree with my brother O'HALLORAN.

Motion granted, Sloan, J.A. dissenting.

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Sept. 14.

HENDERSON v. MUNCEY.

Marriage — Breach of promise — Action for damages — Plaintiff formerly married and left her husband—Husband moved to State of Oregon—He obtains a divorce in Oregon—Domicil—Validity of divorce in Canada.

The plaintiff and defendant first met in Vancouver in May, 1933, and in the following August defendant's proposal of marriage was accepted by the plaintiff. As defendant was living with an older sister at the time, his proposal that the marriage be postponed until after his sister's death was agreed to. On the death of the sister in April, 1939, they decided to be married on the 3rd of January, 1940. Shortly before that date, the defendant made excuses for postponement and continued to put off the marriage, resulting in an action for damages for breach of promise. Shortly after their engagement, the plaintiff told the defendant of her marriage to one Weier in Calgary, Alberta, in 1912. In 1914 Weier enlisted and went overseas. On his return in 1918, he lived with his wife until July, 1920, when she left him and went to Vancouver. Upon the engaged couple making enquiries, they found that Weier had left Calgary for Portland, Oregon, U.S.A., where he obtained a divorce from the plaintiff (she had no knowledge of this as process had been served by publication, as provided by the law of the State of Oregon). Exemplification of the proceedings in the American Court filed as an exhibit shows that the jurisdictional requirement was residence in Oregon for at least one year immediately preceding the commencement of the suit and that the ground for divorce was wilful desertion by the plaintiff for the period of one year. One Eastman, an attorney from Portland, testified that he had known Weier in Portland from 1922 until his death in 1940 and he recited his activities during that time. It was held on the trial that Weier had acquired domicil (in the English and Canadian sense) in the State of Oregon, that the divorce was valid in Canada and

she was free to enter into a contract of marriage with the defendant and entitled to damages.

Held, on appeal, affirming the decision of SIDNEY SMITH, J. that the evidence established that at the time of the institution of the divorce proceedings, Weier had acquired a domicil in the State of Oregon. It therefore follows, as the learned trial judge held, that the divorce Weier obtained from the respondent was valid in Canada and the respondent was free to enter into the contract of marriage with the appellant.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 16th of April, 1943 (reported, *ante*, p. 57) in an action for damages for breach of promise of marriage. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 11th and 14th of June, 1943, before SLOAN, O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for appellant: The plaintiff lived with her husband in Calgary. After she left him in 1921, he left Calgary and went to the State of Oregon where he arrived in 1922. He obtained a divorce there from his wife in November, 1923, and was remarried six months later. The plaintiff, on leaving her husband, went to Vancouver where she took up the hairdressing business. She did not know where her husband was and had no notification of the divorce proceedings in Oregon, but when she became engaged to the defendant in 1933, she made enquiries and obtained an exemplification of the proceedings in the Oregon Court. Process had been served by publication. It is submitted that the divorce in Oregon is a nullity. Unless domicil is established, there was no jurisdiction to grant a divorce in Oregon. The evidence of domicil is very meagre. The divorce was obtained 14 months after he entered Oregon and the Oregon law requires that he must have domicil at least one year before divorce proceedings are commenced. The *onus* is on the plaintiff: see *Winans* v. *Attorney-General*, [1904] A.C. 387; *Bell* v. *Kennedy* (1868), L.R. 1 H.L. Sc. 307; *Huntly (Marchioness)* v. *Gaskell*, [1906] A.C. 56, at pp. 66-7; *The Attorney-General* v. *The Count and Countess Blucher de Wahlstatt* (1864), 34 L.J. Ex. 29; *Ramsay* v. *Liverpool Royal Infirmary*, [1930] A.C. 588; *Wahl* v. *Attorney-General* (1932), 147 L.T. 382; *Trottier* v. *Rajotte*, [1940] 1 D.L.R. 433. Residence *per se*

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raises no inference: see *Briggs* v. *Briggs* (1880), 49 L.J. P. 38; *Green* v. *Green and Sedgwick* (1893), 62 L.J. P. 112. The wife had no notice of the proceedings and the proceedings are not valid in Canada. We say the domicil is not established in Oregon, but if it is, lack of notice is fatal to the validity of the divorce.

Lucas, for respondent: There was a deliberate breach of contract. He brought his action for divorce in Oregon, contemplating marriage there after he obtained his divorce. It is proved that when he went to Portland, it was his intention to make his permanent home there. The cases referred to for the appellant are all distinguishable on the facts: see Phipson on Evidence, 7th Ed., 144. *In re Grove. Vaucher* v. *The Solicitor to the Treasury* (1888), 40 Ch. D. 216; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 566; *Harris* v. *Harris,* [1930] 4 D.L.R. 736.

McAlpine, replied.

Cur. adv. vult.

On the 14th of September, 1943, the judgment of the Court was delivered by

FISHER, J.A.: The appellant appeals from a judgment in favour of the respondent for $1,500 damages in an action for breach of promise of marriage alleged to have been made in or about the month of August, 1933. The ground of appeal relied upon before us was that the respondent was at the time of the alleged contract a married woman and therefore could not enter into a contract of marriage with the appellant.

On October 8th, 1912, the respondent, then sixteen years old, had been married in Calgary, Alberta, to one John J. Weier, then 24 years old, and had lived with him there till 1921 after which she never saw him again. The said Weier was still alive in August, 1933, but had obtained a divorce from the respondent in Portland, Oregon, U.S.A., on the 19th of November, 1923. The contention on behalf of the appellant is that such divorce was invalid and of no effect in contemplation of Canadian law upon the ground of lack of jurisdiction of the Oregon Court due to the parties not being domiciled in Oregon when the divorce proceedings were commenced. Weier, an American citizen, had been born in Detroit, in the State of Michigan, which was there-

fore his domicil of origin. Though Weier lived in Calgary for some years the learned trial judge made no finding as to whether or not he had obtained a domicil of choice in Alberta. In the absence of any finding of the learned trial judge on this point I would not find, in view of the evidence given by the respondent as to what was said to her by Weier in Calgary as to his intention to return to Detroit, Michigan, that Weier had acquired a domicil of choice in Alberta. The question therefore is whether or not the evidence established that the domicil of origin had been displaced and a domicil of choice acquired in the State of Oregon.

Counsel for the respondent relies upon the evidence as to domicil given by E. W. Eastman, an attorney of Portland, Oregon, who acted for Weier in his divorce proceedings. He testified that he was a friend of Weier and had known him in Portland from about September, 1922, till his death there in 1940. In his evidence Mr. Eastman said in part in answer to questions as follows:

At the time of bringing this divorce, will you please state to the Court what was the extent of your acquaintance with Weier, the plaintiff? Well, I had known him for about 14 months, I presume, just prior to that—that is prior to the divorce, and I have known him ever since—up until his death in 1940.

. . . . .

Mr. Eastman, with respect to your last item of evidence, namely the purpose for which Weier was purchasing this property, will you please say to the best of your recollection at what place and about what time your conversations with Weier occurred which gave you this information? Well, this was at Portland, Oregon, about 14 months before I made application for the decree of divorce and under the circumstances he was securing a decree of divorce for the purpose of remarrying.

. . . . .

. . . Will you go on and state your knowledge of Weier's affairs, having in view what we are discussing here? I may say, my Lord, of my own personal knowledge that Mr. Weier bought a home down on 18th Street at my special instance and request because it was near me. I live on 13th and Rex and he bought this home on 18th Street between Rex and Lambert.

. . . .

Well now, those things that you have been telling about, did they take place before the divorce was granted? You mean the saving of his money?

Well the buying of the house, for instance? No, he hadn't bought it yet, but he proposed purchasing a house and he was saving his money for that purpose, and I was showing him different properties around there before his divorce.

Before the divorce. Before the divorce, but I guess I would not be allowed

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to say that—if I could—that it was in contemplation of his divorce, and I know he had a bank account there.

That was before the divorce? That is true.

And was there any change in the course of his business activity from then until he died in 1940? . . .

From 1922 to 1940. Only that he progressed in the way of promotion in his business and he saved money and acquired property. That is all I can say.

Did he ever move away from Portland? No, I don't think Mr. Weier was outside of the county to my personal knowledge except on little trips to the seaside and up in the hills. He was a home-loving man and a very hard worker and he would work on Sundays and any time he had off on his property.

There was no cross-examination of Mr. Eastman on this evidence and the learned trial judge when referring to his evidence said as follows in his reasons for judgment [*ante*, p. 60]:

The evidence he gave of Weier's activities and interests convinces me that at the institution of the divorce proceedings Weier had acquired a domicil (in the English and Canadian sense) in the State of Oregon.

It must be noted that the acquisition of a domicil of choice is a question of fact, as the two elements making up domicil of choice, namely, residence and intention, are both matters of fact, the one a physical fact and the other a mental fact. See Dicey's Conflict of Laws, 5th Ed., 66-8. See also *Inland Revenue Commissioners* v. *Lysaght*, [1928] A.C. 234, especially at p. 243, *per* Lord Sumner, and at p. 249 *per* Lord Warrington; *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483 *per* Bowen, L.J. and *Iveagh* v. *Revenue Commissioners; and Revenue Commissioners* v. *Iveagh*, [1930] I.R. 386, where Kennedy, C.J. says in part as follows at p. 437:

I begin with this: that domicil is a question of fact, and that the effective acquisition of a domicil of choice, with its correlative effective abandonment of domicil of origin, or previous domicil of choice, is also a question of fact. . . .

In the language of Lord Sumner in the *Lysaght* case it is "the conclusion of fact which the facts prove."

Counsel for the appellant relies especially upon *Trottier* v. *Rajotte*, [1940] 1 D.L.R. 433 and the cases cited therein. In the *Trottier* case Sir Lyman P. Duff, C.J., delivering the judgment of the Court said in part as follows at pp. 436-440:

The principles which ought, I think, to be kept steadily in view and rigorously applied in this case are, first, that a domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisi-

tion of a new domicile involves two factors,—the acquisition of residence in fact in a new place with the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says, "for the rest of his natural life," in the sense of making that place his principal residence indefinitely.

It will be necessary, I think, to consider rather carefully the evidence as to the change of residence in fact, but before going into that, it will be useful, I think, to discuss more fully the point of intention.

As Lord Westbury says in *Udny* v. *Udny* [(1869), L.R. 1 H.L. Sc.] (p. 457) the residence for the purpose "must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

. . . . .

Before proceeding to discuss the facts, it, perhaps, ought to be added that a domicile of origin is not lost by the fact of the domiciled person having left the country in which he was so domiciled with the intention of never returning. It is essential that he shall have acquired a new domicile, that is to say, that he shall in fact have taken up residence in some other country with the fixed, settled determination of making it his principal place of residence, not for some particular purpose, but indefinitely.

This factor is of great importance in the present case. The issue is not whether the husband had left Quebec with the intention of settling somewhere in the United States and not returning to Quebec, but whether he had taken up his residence in the State of Connecticut with a fixed, settled determination of making his permanent residence in that State.

The point is dealt with in the judgments in *Wahl* v. *Attorney-General* (1932), 147 L.T. 382. . . .

. . . the judgment of Lord Atkin, in which Lord Dunedin concurs, illustrates admirably, I think, the searching analysis to which it is the practice of the Courts to subject the facts adduced in support of an allegation that a domicile of origin has been changed and a new domicile acquired.

But my immediate purpose is to emphasize the third of Lord Dunedin's "three remarks." An intention to reside in the United Kingdom, although it may be a starting point as evidence, tells us nothing *per se* as to change of domicile. So with regard to the United States, an intention indefinite as to locality to live somewhere in the United States is in itself inconclusive where the question at issue is: Has A, the person whose domicile is in dispute, taken up residence in a given State with the intention of residing permanently in that State? Residing in Philadelphia with the intention, not of making his permanent home in Philadelphia, but of making his home in Philadelphia, Baltimore or Washington, could not be effective to displace the domicile of origin.

In the present case there can be no doubt that, when the divorce proceedings were commenced in Oregon in September, 1923, Weier had acquired residence in fact in Oregon but it may be said that there is no direct evidence of his intention at the time. There is no evidence of any definite statement by Weier that he

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had taken up residence in Oregon with the intention of residing permanently in that State. During the argument the point was raised as to whether the conduct and acts of Weier subsequently to the time when the divorce proceedings were commenced in Oregon were proper or sufficient evidence of Weier's intention at that time to settle permanently in Oregon. It was or may be suggested that we must not regard such conduct and acts in determining what the state of Weier's mind was in September, 1923. I am satisfied, however, that the law is as stated by Lopes, L.J. in the case of *In re Grove. Vaucher* v. *The Solicitor to the Treasury* (1888), 40 Ch. D. 216, at p. 242, where he says as follows:

> I have always understood the law to be, that in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency.

Applying the law as so stated I have to say that I am satisfied that the proper conclusion to be drawn from the evidence given in the Court below of Weier's conduct and acts before, during and after September, 1923, is that in September, 1923, Weier had the intention of permanently settling in Oregon. Applying also the settled principles approved by Sir Lyman P. Duff, C.J. in the passage quoted from his judgment in the *Trottier* case, *supra,* and subjecting the facts adduced to the required "searching analysis" I conclude that the evidence established that, at the time of the institution of the divorce proceedings, Weier had acquired a domicil in the State of Oregon. It therefore follows, as the learned trial judge held, that the divorce Weier obtained from the respondent was valid in Canada and therefore the respondent was free to enter into the contract of marriage with the appellant.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for respondent: *E. A. Lucas.*

WILLIAMS v. WILLIAMS.

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In Chambers
1943
Aug. 31;
Sept. 1.

Practice—Order for payment of alimony—Default—Motion for attachment—Order made—Appeal—Motion for stay pending the determination of the appeal—Affidavit not filed proving that the order for payment had been served—Order granted—Divorce Rule 77.

The appellant was ordered to pay alimony. He made default and, on motion by respondent, an order was made for his attachment for contempt. The appellant now moves for a stay pending the hearing of an appeal from said order. On the motion for the attachment order, the respondent filed a notice of motion and gave notice therein that the material to be used on the return included a copy of the original order for payment of alimony and an affidavit proving that such order had been disobeyed. The notice of motion was then served together with the material mentioned and an affidavit of such service was before the learned judge. On this application objection was taken by appellant that before the notice of motion was filed or any step taken for attachment for contempt, an affidavit should first be filed proving that the order for payment had been served. No such affidavit had been made or filed, although a copy of the order was served with the notice of motion.

Held, that although the objection is highly technical, the argument has thrown sufficient doubt to satisfy the Court that a stay of the proceedings should be granted until the appeal from the attachment order be heard.

MOTION for an order that execution on the order of the Supreme Court of the 18th of August, 1943, herein from which an appeal has been taken, be stayed pending the hearing and determination of the appeal. Heard by McDONALD, C.J.B.C. in Chambers at Vancouver on the 31st of August, 1943.

Lucas, for the motion.
Fleishman, contra.

Cur. adv. vult.

1st September, 1943.

McDONALD, C.J.B.C.: The appellant in these proceedings was ordered to pay alimony. He made default and under Divorce Rule 77 an application by way of motion was made for his attachment by reason of his contempt of Court. An order of attachment was made by SIDNEY SMITH, J. The appellant now moves before me for a stay until the validity of the order has been considered by the Court of Appeal. The question has been

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WILLIAMS
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McDonald,
C.J.B.C.

argued before me at considerable length, as it should be, considering that the liberty of the subject is in question.

The objection taken by Mr. *Lucas* is highly technical but, in such a case, no matter how technical, it must be given effect to, if it is sound.

What happened was this: The applicant filed a notice of motion and gave notice therein that the material to be used on the return of the motion included a copy of the original order for payment of alimony and an affidavit proving that such order had been disobeyed. The notice of motion was filed and thereupon was served, together with the material mentioned, and an affidavit of such services was before the learned judge. The objection taken is that before the notice of motion was filed or any step taken for attachment for contempt, an affidavit must first have been filed proving that theretofore a copy of the order for payment had been served. No such affidavit was made or filed, though, as stated above, a copy of the order was served along with the notice of motion. It is difficult to imagine any more technical objection and yet the strenuous argument made by Mr. *Lucas* has thrown a sufficient doubt in my mind to satisfy me that I ought to stay the proceedings until the matter has been argued before the Court.

The costs of this application will be costs in the appeal and the appellant will speed the hearing.

Motion granted.

IN RE QUIETING TITLES ACT AND *IN RE* APPLICATION OF THE HIRST ESTATE LAND CO. LTD.

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March 18;
July 2.

Quieting Titles Act—Foreshore—Title to lands adjoining the foreshore—Long user—Evidence—R.S.B.C. 1936, Cap. 238.

The petitioner, who is the owner of lots 13 and Hirst Block LVIII. on the official plan or survey of the town of Nanaimo, claimed to be the owner of the adjoining lands which lie between high and low-water marks bounded by projection of the boundaries of the said land lots under and by virtue of documents of title since the grant by letters patent of the 13th of January, 1849, by the Queen to the Hudson's Bay Company, and alternatively, a possessory title to the said foreshore by right of continuous, exclusive and uninterrupted possession thereof by it and its predecessors in title for more than 60 years.

Held, that the petitioner has established its claim to be the absolute owner of an estate in fee simple to the foreshore above mentioned, both by virtue of the documents of title and by right of continuous and exclusive possession by the petitioner and its predecessors in title for more than 60 years.

PETITION under the Quieting Titles Act to have petitioner's title to the foreshore adjacent to lots 13 and Hirst Block LVIII. in the town of Nanaimo judicially investigated and the validity ascertained and declared. The facts are set out in the reasons for judgment. Heard by BIRD, J. at Victoria on the 18th of March, 1943.

Cunliffe, for petitioner.
Macfarlane, K.C., for the Crown.

Cur. adv. vult.

2nd July, 1943.

BIRD, J.: The company has applied by petition under the Quieting Titles Act, presented March 18th, 1943, to have its title to the lands described by metes and bounds in paragraph 12 of the petition, being the foreshore adjacent to lots 13 and Hirst Block LVIII. on the official plan or survey of the town of Nanaimo, District of Nanaimo, Province of British Columbia, judicially investigated and the validity thereof ascertained and declared.

It appears that service was made of the petition and other documents, by which this proceeding was initiated, upon the city

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clerk of the corporation of the city of Nanaimo and upon the Honourable the Attorney-General for Canada. Appearance was made before me on the presentation of the petition by counsel for the petitioner and by counsel for His Majesty the King in right of his Dominion of Canada. The city of Nanaimo did not appear.

Counsel for the Crown Dominion declared that he was instructed to appear on this petition neither to oppose nor consent, but to assist the Court in reaching a decision after a full investigation.

The petitioner in my opinion has duly complied with the provisions of sections 5 to 8 inclusive of the Quieting Titles Act relative to the presentation of this application.

The petitioner claims: (1) To be the absolute owner of an estate in fee simple in the lands described by metes and bounds in paragraph 12 of the petition which lie between high and low-water marks bounded by projection of the boundaries of the lots before described, and to which I shall refer hereafter as the said foreshore under and by virtue of several documents of title to which I will refer; (2) alternatively a possessory title to the said foreshore by right of continuous, exclusive, uninterrupted and undisturbed possession thereof by it and its predecessors in title for more than 60 years.

By way of proof of the petitioner's claim on the first branch, reference has been made to the following documents of title:

1. A grant by letters patent dated 13th January, 1849, by Her Majesty Queen Victoria to the Governor and Company of Adventurers of England trading into Hudson's Bay (hereinafter referred to as the Hudson's Bay Company) and their successors, of

all that the said island called Vancouver Island, together with all royalties of the seas upon these coasts within the limits aforesaid.

The grant reads further,

to have, hold, possess, and enjoy the [same] . . . , with their and every of their rights, members, royalties, and appurtenances . . . , in free and common socage.

This grant is found in R.S.B.C. 1911, Vol. IV., p. 107, and particularly at pp. 110-11.

2. A grant made by Her Majesty Queen Victoria to the

Hudson's Bay Company, their successors and assigns, under date May 5th, 1855,

of all the territory or estate and lands and hereditaments situate in Vancouver Island in the District of Nanaimo, and islands called Newcastle, Cameron Island and Douglas Island,

which lands are delineated and described in the map or plan attached to the confirmatory grant numbered (3) herein and which lands include the lands the title to which is now under consideration. It was established before me that the grant of 1855 has been lost. The confirmatory grant of 1899, however, recites in part the grant of 1855 and contains the additional recitals which are set out hereafter.

3. A confirmatory grant made by letters patent of Her Majesty Queen Victoria the 18th of November, 1899, whereby Her Majesty

grants, releases, assures and confirms unto The New Vancouver Coal Mining and Land Co. Ltd., successors to the Hudson's Bay Company and Vancouver Coal Mining and Land Co. Ltd., their successors and assigns, the sole and exclusive right to mine for, raise, get and win all the coal and coal substances whatsoever lying under that portion of the sea adjacent to the said lands.

which lands include the foreshore, the subject of this application.

This confirmatory grant contains the following recitals:

Whereas by our letters patent bearing date the 13th day of January in the twelfth year of our reign, we did grant and confirm, *inter alia*, all that the Island called Vancouver, together with all royalties of the seas upon the coasts thereof unto the Governor and Company of Adventurers of England trading into Hudson's Bay, and their successors, to have, hold, possess and enjoy the same . . . with their and every of their rights, members, royalties and appurtenances whatsoever.

And further recites:

And whereas the said Governor and Company of Adventurers of England trading into Hudson's Bay, did on about the fifth day of May, 1855, purchase from us all that territory or estate, lands, tenements, hereditaments, rights, easements, privileges and appurtenances hereinafter mentioned, [*i.e.*,] said portion of the sea including the waters now generally known as Nanaimo Harbour, etc. . . . to Hudson's Bay Company, their successors or assigns free from any and all royalties or tolls to us or our successors.

And a further recital:

"And whereas the said Hudson's Bay Company, the said Vancouver Coal Mining and Land Co. Ltd. and their successors The New Vancouver Coal Mining and Land Co. Ltd., have continuously since the date of the said purchase from us exercised rights, privileges and manorial rights attached to the said territory or estate, lands and hereditaments.

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4. An indenture dated September 30th, 1862, whereby the Hudson's Bay Company and James Nicol did grant and convey to the Vancouver Coal Mining and Land Co. Ltd.

all that territory or estate and lands and hereditaments situate in Vancouver Island in the District of Nanaimo . . . delineated in the map or plan endorsed on these presents, together with . . . the rights, easements, privileges and all other things whatsoever thereto belonging or in anywise appertaining or with the same territory or estate, lands and hereditaments or any part thereof now or at any time or times heretofore demised, leased, held, used, occupied or enjoyed or accepted, reputed deemed taken or known as part, parcel or member thereof . . . and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, both at law and in equity, as well of the said Hudson's Bay Company, as also of the said James Nicol, in to, out of or upon the same premises and every part and parcel thereof, to have and to hold the said territory, estate, lands and hereditaments and all and singular other the premises hereby assured or intended so to be unto and to the use of the said Vancouver Coal Mining and Land Company Ltd., their successors and assigns forever.

The lands so described and delineated include the lands, the title to which is here under consideration, although the map referred to does not show the foreshore specifically.

5. By an indenture of release of mortgage made the 28th of August, 1863, between the Hudson's Bay Company and Vancouver Coal Mining and Land Co. Ltd. the Hudson's Bay Company granted and released to the said company, their successors and assigns,

all those two blocks of land and hereditaments situate in Vancouver Island in the District of Nanaimo, containing together 45 acres, the same more or less being part of the territory in the indenture comprised . . . which said lands . . . are described and delineated on the map or plan annexed to these presents, and are therein coloured red.

The wharf and foreshore, the subject of this application, are shown on the plan referred to and are coloured red.

6. An indenture made April 3rd, 1867, between the Hudson's Bay Company and Her Majesty Queen Victoria, a copy of which is found in R.S.B.C. 1911, Vol. 4, p. 276, whereby the Hudson's Bay Company reconveyed to Her Majesty Vancouver Island

except such portions thereof as may have been sold by the said company previous to the first day of January, 1862.

Reference is there made, p. 278, to certain excepted lands

together with the water frontages and spaces between high and low-water mark abutting on any portions of such lands.

7. An indenture made July 9th, 1874, whereby Vancouver Coal Mining and Land Co. Ltd. conveyed to John Hirst all that parcel or lot of land situate in the town of Nanaimo in the Province of British Columbia and numbered and named lots 13 and Hirst Block LVIII. on the official plan or survey of the said town, all of which land is delineated in the map drawn in the margin of these presents and is herein coloured red, together with the appurtenances to the said land belonging.

The high-water mark is shown on the plan below on which coloured red is shown the wharf property, the subject of this application.

8. On March 2nd, 1899, the administrators of the estate of the late John Hirst, deceased, conveyed the lands held by Hirst under conveyance from Vancouver Coal Mining and Land Co. Ltd., being the lands mentioned in paragraph 7 hereof to the petitioner, and the petitioner now holds the said lands.

On the second branch of the petitioner's claim evidence was adduced which in my opinion establishes the following:

1. That a wharf has been located on the said foreshore continuously since the year 1855. The land approach to that wharf extended through the land lots now held in fee simple by the petitioner. 2. That the late John Hirst, deceased, erected a stone warehouse on the lands described as Hirst Block LVIII. in the year 1875, being the warehouse now standing thereon and which building has inscribed upon it in stone the figures 1875. 3. That at the time of construction of the Hirst Block in 1875 a fill was created upon the said foreshore by the material taken from the excavation for the Hirst Block, which extended 20 to 30 feet below high-water mark. 4. That from time to time in subsequent years the fill before mentioned has been enlarged to the point where the existing fill extends from the rear wall of the Hirst Block to the existing wharf. 5. That the high-water mark adjacent to the said lands in the year 1875 was within approximately one foot of the rear wall of the Hirst Block. 6. That since the year 1875 the late John Hirst, deceased, and the petitioner have used and enjoyed the filled area continuously, and neither the filled area nor the said wharf have during that period been occupied or in the possession of anyone claiming adversely to the said Hirst and the said petitioner. 7. That for many years a gate was maintained by the said John Hirst across the roadway

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leading from the land lots before mentioned to the filled area and wharf. 8. That in the years 1874 and 1875 lot 13 and Hirst Block LVIII., being the land lots above high-water mark, were assessed as appears by assessment records of the city of Nanaimo, at $600 and $800 respectively. 9. At the time of purchase of the lands described as "lots 13 and Hirst Block LVIII. together with appurtenances to the said land belonging" by John Hirst in the year 1875, he paid therefor the sum of $3,500. 10. That for many years prior to the year 1942 the city of Nanaimo included the value of the said land lots as well as the value of the wharf then situate on the foreshore in arriving at the assessment of the said lands for taxation purposes and taxes so assessed were fully paid annually for many years by the petitioner or its predecessor in title, John Hirst.

I have no hesitation in finding upon the evidence adduced in support of the second branch of the petitioner's claim that John Hirst, the administrators of his estate and the petitioner during the period of ownership of each of them had had continuous exclusive and uninterrupted possession of the lands described by metes and bounds in paragraph 12 of the petition herein, that is to say, from the year 1875 to the date of presentation of this petition, being for a period of 68 years. No evidence was adduced before me to the contrary.

Turning now to the documents of title to which reference has been made earlier, counsel for the petitioner submits that under the documents which, for the purpose of convenience, I have numbered 1 to 8, title passes to the said foreshore, being the lands described by metes and bounds in paragraph 12 of the petition, and upon which are the present fill, approaches to the wharf and the existing wharf. In support of this submission he refers particularly to the language of the grant to the Hudson's Bay Company made January 13th, 1941, numbered 1 above. That is to say, "together with all the royalties of the seas upon these coasts."

In *The Attorney-General of Ontario* v. *Mercer* (1883), 52 L.J.P.C. 84, the Lord Chancellor, then the Earl of Selborne, in delivering the opinion of the Board said when discussing the interpretation of the word "royalties" as applied to mining grants at p. 89:

It appears, however, to their Lordships to be a fallacy to assume that because the word "royalties" in this context would not be inofficious or insensible if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated—lands, as well as mines and minerals. . . . It is a sound maxim of law that every word ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense, "royalties" is merely the English translation or equivalent of *"regalitates," "jura regalia," "jura regia"* . . . "That it is a *jus* . . . is indisputable; it must also be *'regale'*; for the Crown holds it generally through England by royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, . . . , and other analogous rights." With this statement of law their Lordships agree.

Again the confirmatory grant of November, 1899, heretofore numbered 3, recites that the predecessors in title of the petitioners have exercised "all the rights, privileges and manorial rights attached to the said lands," rights which upon the evidence before me could only have been acquired by virtue of the grant to the Hudson's Bay Company of 1849. That grant proceeds to confirm as among those rights, the right to mine coal under the bed of the sea adjacent to the lands above high-water mark expressly conveyed. However, it cannot be said that a grant of lands "together with manorial rights" necessarily carries title to the foreshore: *Beaufort* v. *Mayor of Swansea* (1849), 3 Ex. 413, wherein Pollock, C.B., says at p. 424:

There is a grant of the seigniory of Gower. . . . You cannot say that the spot which the plaintiff claims is his, as being part of the seigniory of Gower, merely from those words. But if by usage, which is of so long standing, that we may presume it to be contemporaneous with the grant itself, the sea-shore in question has always been considered to be part of the seigniory of Gower, then you will take the grant and the usage together.

Again it was held in *Attorney-General* v. *Emerson*, [1891] A.C. 649 that although *prima facie* the Crown is entitled to every part of the foreshore of the sea between high and low-water mark, yet proof of the ownership of a several fishery over part of the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore is in the owner of the fishery.

Counsel for the Crown Dominion questions the right to refer

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to the plan attached to the conveyance of July 9th, 1874, from Vancouver Coal Mining and Land Co. Ltd. to John Hirst, since he submits that the description in the conveyance of lands conveyed is a sufficient description of those lands. He refers to the rule of construction laid down in *Mellor* v. *Walmesley,* [1905] 2 Ch.164 , that where there is a clear description in the words of a deed, such description prevails over any attached plan. The phraseology of the 1874 conveyance is inartistic, but if the phrase "together with the appurtenances to the said land belonging" is read as "referring to" and following immediately after the words "lots 13 and Hirst Block LVIII." then the word description is not in my view at variance with the lands conveyed as shown in red on the plan.

A further question was raised in the argument as to whether at the time of the grant to Hirst in 1874 the road which is now Wharf Street was or was not a public road. This question appears to me to be determined by the plan attached to the grant of 1874 to Hirst, which shows the wharf approach as extending above high-water mark. The evidence, in my view of it, shows the street to have been closed by Hirst or his predecessors in title at a point above high-water mark prior to the time when any street existed. It appears to me, therefore, that if in 1874 the road which is now Wharf Street did exist as a public road, it extended only to the point where the road was closed, namely, above high-water mark.

Here it has been shown that the petitioner and its successors have had continuous exclusive possession of the foreshore upon which the fill and wharf are now situate over a period in excess of 60 years, and have exercised acts of ownership continuously during that period to the exclusion of all others including the representatives of the Crown. No one has been heard to assert any adverse claim to the foreshore. In fact, the corporation of the city of Nanaimo for many years assumed to assess the petitioner and its predecessors for taxes in respect of the foreshore lands and improvements thereon. The Crown in right of the Dominion of Canada, though served with these proceedings and represented before me by counsel, is content to adopt the position of *amicus curiæ*. It does not contest the petitioner's claim.

Having in mind the language of the original grant from the Crown to the Hudson's Bay Company, that is to say, "together with all the royalties of the seas upon these coasts" and the opinion of the Privy Council in the *Mercer* case upon the interpretation of the word "royalties," it is my view that not only did the grant of 1849 pass title to the lands lying between high and low-water mark adjacent to Vancouver Island, but that it was the express intention that the document should pass title thereto.

In my opinion each of the subsequent grants and conveyances in turn passed to the grantee named therein all the right, title and interest acquired by the Hudson's Bay Company under the grant of 1849 as applied to the particular lands and appurtenances sought to be conveyed by each of the documents before enumerated, including the title to the foreshore.

If there were doubt as to the interpretation of the 1849 grant, then the fact of usage of the said foreshore by the petitioner and its predecessors over so long a period should resolve that doubt. See *Attorney-General for Ireland* v. *Vandeleur* (1907), 76 L.J.P.C. 89, wherein Lord Loreburn, L.C. said:

> So the doubt whether it does or does not include it may legitimately be solved by reference to the actual user, . . . User so continuous, so notorious, and for so long a time . . . , surely forms an immensely strong foundation for the view that this charter did in fact include this foreshore.

Consequently I am disposed to hold that the plaintiff has established its claim to be the absolute owner of an estate in fee simple in the lands described by metes and bounds in paragraph 12 of the petition herein which lie between high and low-water marks bounded by projection of the boundaries of the land lots described as lots 13 and Hirst Block LVIII. on the official plan or survey of the city of Nanaimo, both by virtue of the documents of title and by right of continuous and exclusive possession by the petitioner and its predecessors in title for more than 60 years.

A question was raised in argument as to the plaintiff's right to proceed for such a declaration under the provisions of the Quieting Titles Act, R.S.B.C. 1936, Cap. 238. I would not have had any doubt in regard thereto in view of sections 2 and 3 of the Act, but authority, if required, is to be found therefor in *Re Loewen & Erb* (1892), 2 B.C. 135, in Ontario under the pro-

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visions of a similar statute *Re Raycraft* (1910), 20 O.L.R. 437, and in Alberta *Majestic Mines Ltd.* v. *Attorney-General for Alberta,* [1941] 2 W.W.R. 353.

I therefore direct that the validity of the petitioner's title to the lands described in paragraph 12 of the petition be declared accordingly.

Petition granted.

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June 29;
July 17.

SECRETARY OF STATE v. QUON HON.

Landlord and tenant—Default in observing condition of tenancy—Conviction—Application for possession—Admissibility of document purporting to prove conviction—R.S.B.C. 1936, Cap. 143, Sec. 29.

The registered owner of the premises in question was one Tsawaki, a Japanese and alien enemy, and the title thereto, by operation of certain orders in council and a vesting certificate made pursuant thereto, devolved to the Secretary of State, who made application under section 29 of the Landlord and Tenant Act for possession of the premises, alleging that the tenant has, as provided in subsection (*b*) thereof "[made] default in observing [a] covenant, term, or condition of his tenancy, such default being of such a character as to [permit] the landlord to re-enter or to determine the tenancy." It is alleged that the tenant Quon Hon did maintain on the premises a disorderly house. In proof of this allegation is filed a certificate from the Vancouver police court proving that the tenant was on March 22nd, 1943, convicted under the Criminal Code of keeping a disorderly house, to wit, a common bawdy-house, on the premises in question.

Held, that the certificate of conviction cannot be accepted as proof against the tenant for the purposes of these proceedings that he did maintain a disorderly house and the application is dismissed.

La Fonciere Compagnie d'Assurance de France v. *Perras et al. and Daoust*, [1943] S.C.R. 165 and *Caine* v. *Palace Steam Shipping Company*, [1907] 1 K.B. 670, followed.

In the Estate of Crippen, [1911] P. 108, not followed.

APPLICATION under section 29 of the Landlord and Tenant Act for possession of certain premises in the city of Vancouver on the ground that the tenant

[made] default in observing [a] covenant, term, or condition of his tenancy, such default being of such a character as to [permit] the landlord to re-enter or to determine the tenancy.

The facts are set out in the reasons for judgment. Heard by WILSON, Co. J. at Vancouver on the 29th of June, 1943.

Des Brisay, for plaintiff.
McAlpine, K.C., for defendant.

Cur. adv. vult.

17th July, 1943.

WILSON, Co. J.: This is an application under section 29 of the Landlord and Tenant Act, R.S.B.C. 1936, Cap. 143, for possession of certain premises in the city of Vancouver. It is alleged that the tenant has, as provided in subsection (*b*) of section 29,

> [made] default in observing a covenant, term, or condition of his tenancy, such default being of such a character as to [permit] the landlord to re-enter or to determine the tenancy.

The lease contains the usual lessee's covenant not to maintain or permit a nuisance on the premises. The penalty for breach of this covenant is determination of the tenancy.

The landlord, The Secretary of State for Canada, acquires his *status* as follows: The registered owner of the property is one Tsawaki, whom I find to be a Japanese, an enemy alien, formerly living in a protected area and duly evacuated therefrom. The title to the property in question has, I find, by the operation of various orders in council and by a vesting certificate made pursuant thereto, devolved to the Secretary of State, who is therefore a competent person to maintain these proceedings.

The nuisance complained of, and by virtue of which the landlord seeks to determine the lease, is as follows: It is alleged that the tenant, Quon Hon, did maintain on the premises a disorderly house. In proof of this allegation is filed a certificate from the Vancouver police court proving that the tenant was, on March 22nd, 1943, convicted under the Criminal Code of keeping a disorderly house, to wit, a common bawdy-house, on the premises in question.

The tenant does not deny the conviction, but says the certificate cannot be accepted in evidence as proving that the tenant broke the covenant in the lease. He does not deny that maintaining a disorderly house, if proved, would constitute a breach of the covenant against nuisance, and he does deny that the certificate

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Wilson, Co. J.

of conviction is, as against him, proof, for the purposes of these proceedings that he did maintain a disorderly house.

He relies principally on the recently decided case of *La Fonciere Compagnie d'Assurance de France* v. *Perras et al. and Daoust,* [1943] S.C.R. 165, also on *Continental Casualty Co.* v. *Yorke,* [1930] S.C.R. 180. In the reports of these cases reference is made to the English authorities of *Caine* v. *Palace Steam Shipping Company,* [1907] 1 K.B. 670 and *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414.

As against this I am referred by counsel for the landlord to numerous recent authorities, the leading one being *In the Estate of Crippen,* [1911] P. 108. Phipson on Evidence, 8th Ed., 407, gives a very succinct statement of the English law as affected by the *Crippen* case:

> A judgment in a civil action is in general no evidence of the truth of the matter decided against the same person in a criminal trial, nor *vice versa,* since the parties are necessarily different; moreover, the burden of proof is not the same, the defendant in the criminal trial cannot avail himself of the admissions of the plaintiff in the civil one, and the jury in the latter may decide upon a mere preponderance of evidence. . . . This rule, which certainly savours of technicality, has, however, lately undergone modification, it being held that a conviction is admissible against the convict or his representatives in civil proceedings, not merely as proof of the conviction, but also as presumptive evidence of guilt, at all events where such proceedings are brought to enforce a claim to the fruits of the crime, and perhaps generally. . . .

In the *Crippen* case Dr. Crippen had been convicted and hanged for killing his wife. The Probate Division (Sir Samuel Evans) held that Crippen's personal representative could not take the deceased wife's estate, being the fruits of Crippen's crime. It was further held that the filing of a record of the conviction of Crippen was presumptive proof that he had committed the crime. Counsel for the landlord has, with commendable diligence, referred me to numerous other authorities supporting this proposition. I do not specifically refer to these authorities because the Crippen case contains such a clear and authoritative statement of the principle followed in the other cases that citations from them would be supererogatory. I would, however, like to point out that all the authorities cited are English save one—*In re Noble Estate,* [1927] 1 W.W.R. 938, the

decision of a county court judge following in almost exactly similar circumstances the *Crippen* case.

In the *Daoust* case, *supra,* the facts were as follow: Daoust had been involved in an automobile accident. He was convicted of driving while drunk. Subsequent civil litigation arising out of the accident resulted in a judgment for damages against him. He carried public-liability insurance. The judgment creditor sought to collect from the insurance company the amount of his judgment against Daoust. The insurance company defended, alleging that the accident resulted from and while Daoust was committing a criminal offence, and it would be against public policy to indemnify him. In proof of the allegation that he was committing a criminal offence, there was filed a record of his conviction for drunken driving. The Supreme Court of Canada held that this record was not proof that the offence had been committed and therefore not admissible in evidence.

Davis, J. at p. 176 of the report of the *Daoust* case indicates that he thinks the *Crippen* case can be distinguished from the *Daoust* case. However, his qualifying "if" clearly indicates that he does not commit himself to adopting or approving the judgment in the *Crippen* case. Under these circumstances I cannot use his remarks as a guide, particularly since the other judges do not cite the *Crippen* case.

It is true that the *Daoust* case arose under the provisions of the Quebec Civil Code. However, the principle of *res judicata,* as stated in that code, is almost identical with the best English definitions. Furthermore, the Supreme Court, in the *Daoust* case, refer to English authorities, notably to *Castrique* v. *Imrie, supra,* as applying to the case before them. They refer, with approval, to the judgment of the English Court of Appeal in *Caine* v. *Palace Steam Shipping Company,* [1907] 1 K.B. 670. I do not see how the judgment in the *Crippen* case can be reconciled with that in the *Caine* case, which was decided by higher authority, unless its application is to be restricted to cases in which a person seeks to recover the fruits of a crime. In the *Caine* case some seamen in a British ship left it at Hong Kong, refusing to proceed in it to Japan, which was at the time a theatre of war.

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They contended that the articles under which they served did not compel them to serve in a theatre of war. They were convicted by a competent tribunal at Hong Kong of desertion and sent to gaol. On their return to England they sued the shipping company for wages. By way of defence the shipping company argued that the conviction at Hong Kong estopped the seamen from denying that they had wrongfully left the ship there—a circumstance which would deprive them of their right to wages. The Court of Appeal refused to entertain this argument, and it was indeed abandoned by counsel for the defendant. Cozens-Hardy, L.J., says at p. 677:

> It was argued that the proceedings at Hong Kong, . . . , operated as an estoppel and precluded the sailors from now contending that their conduct at Hong Kong was lawful. But it was pointed out that there could be no estoppel, the criminal proceedings at Hong Kong not being between the same parties as the present civil proceedings in this country, and the contention was abandoned.

Farwell, L.J., says (p. 683):

> It is well settled that a conviction is no estoppel in a civil action: see *Castrique* v. *Imrie* [*supra*]; *Petrie* v. *Nuttall*, [(1856)] 11 Ex. 569; Taylor on Evidence, 10th Ed., s. 1693. Estoppels must be mutual, but the litigation here is between shipowners and seamen, in the criminal proceedings at Hong Kong it was between the King and the prisoners.

An interesting feature of the report of this case is that the counsel for the successful plaintiffs was Samuel T. Evans, presumably the same gentleman who later, as Sir Samuel Evans, President of the Probate Court, was to lay down a different doctrine in the *Crippen* case.

I feel that the case before me is very much on all fours with the *Caine* case. The landlord's contention is, in effect, that the conviction in the police court estops the tenant from denying that he was guilty of creating a nuisance on the leased premises. The parties before the police court were the King and the tenant. The parties before me are the tenant and the successor in title of the landlord. The *Caine* case has been approved by our highest Canadian Court in the *Daoust* case. I feel that I am therefore bound by these decisions, rather than that in the *Crippen* case. If the view expressed in the *Crippen* case is to be adopted in Canada it is for a higher Court than this to say so. It would appear from the latest editions of both Taylor and Phipson that the *Crippen* case is considered as having modified the law of

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England on this particular subject. There is nothing in the report of the *Daoust* case to lead me to believe that this modification has been accepted by our Canadian Court of last resort. Furthermore, despite the extended application given to the *Crippen* judgment by the text-books, it may still be construed as only applying to a case where a criminal or his successor in title, seeks to recover the fruits of a crime.

It was also argued before me that the landlord had, by accepting rent after the date of the alleged conviction, waived his right to determine the lease. To clear the record, I reject this contention on the ground that there is no proof that the landlord knew of the alleged nuisance prior to the date of this application.

However, as I have found for the tenant on the other grounds, the landlord's application is dismissed with costs.

Application dismissed.

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May 20, 21; *Aug.* 6.

Sale of land—Agreement for—Default in monthly payments—Action by vendor under agreement—Order nisi and order for taking accounts—Registrar's report—Including moneys that fell due after order nisi—Final order for foreclosure—Motion to set aside final order and order nisi—Jurisdiction—Granted on appeal.

By agreement of October 15th, 1941, the plaintiff sold the defendant Ross MacKinnon certain lands in Vancouver for $3,800 payable $600 cash, $2,200 by assumption of a mortgage and the balance by monthly instalments until the 16th of November, 1942, when the whole balance fell due. On November 17th, 1941, Ross MacKinnon assigned his right to purchase to his wife. The defendants having made default as to two monthly instalments, a writ was issued on February 28th, 1942, setting up such default. No appearance was entered and the statement of claim was delivered on 9th of May, 1942, when further instalments fell due and the amount claimed was $103.20. In the alternative, a claim was made against both defendants for: (1) An accounting of what was due under the agreement; (2) an order that the agreement be cancelled; (3) foreclosure of said agreement; (4) an order for possession; (5) an order for cancellation of registration of the agreement, and (6) an order that all moneys paid under the agreement be forfeited. No

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defence having been delivered, on June 9th, 1942, SIDNEY SMITH, J. ordered an accounting "of what is due to the plaintiff under said agreement and costs to be taxed." Judgment was given against Ross MacKinnon for the amount so found due and it was further adjudged that upon the defendants paying into Court the amount certified to be due within three months of the date of the registrar's certificate, the agreement should remain in full force, and it was further adjudged that in default of such payment, the defendants should stand debarred and foreclosed of the right to purchase the lands and that the said agreement be cancelled. On June 26th, 1942, the registrar made his report finding $378.80 due, that in three months from the date of the report a further sum of $80.71 would fall due and with the taxed costs the whole sum due would be $592.31. The registrar appointed the 26th of September, 1942, as the last day for payment. On October 14th, 1942, the defendants paid $100 on account. On December 21st, 1942, the Chief Justice of the Supreme Court made an order, after notice to but in the absence of the defendants, extending the time for payment until January 21st 1943, but fixing the amount to be paid at $1,022.31, being the above mentioned $592.31 (less $100 paid) plus the further sum of $530 which had fallen due under the agreement for sale. On February 11th, 1943, on motion before BIRD, J. on notice to, but in the absence of the defendants, no further payments being made, a final order for foreclosure was made, including an order cancelling the agreement, that all moneys paid be forfeited and that the plaintiff recover possession of the lands. A motion made on the 21st of April, 1943, before SIDNEY SMITH, J. for an order setting aside the writ of possession, the judgment of BIRD, J., the order of the Chief Justice and the order of SIDNEY SMITH, J. was dismissed on the ground that he had no jurisdiction to make the order.

Held, on appeal, reversing the order of SIDNEY SMITH, J., that he had jurisdiction to make the order which was sought.

Held, further, that this was an action for cancellation on default in payment of the amount which was due and payable at the date of the order *nisi*, there was error in the registrar's report in taking into account moneys which fell due after the date of the order *nisi*. It follows that the appeal be allowed with costs and the registrar's report and all proceedings founded thereon be set aside.

Milos v. *Schmidt*, [1923] 1 W.W.R. 1444, followed.

APPEAL by defendants from final order of foreclosure of BIRD, J. of the 11th of February, 1943, whereby the defendants were debarred and foreclosed from the right to purchase certain lands in Vancouver under agreement for sale of the 16th of October, 1941, for cancellation of said agreement and that the plaintiff recover possession of said lands, and appeal from the order of SIDNEY SMITH, J. of the 21st of April, 1943, dismissing an application to set aside the writ of possession of the 6th of

April, 1943, and the said final order for foreclosure. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 20th and 21st of May, 1943, before McDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for appellants: Certain payments were in default and action was brought for foreclosure. When the writ was issued in February, 1942, there was a balance due of $532. Certain amounts were added on after the order *nisi*. You cannot increase the debt. Under rule 304 the learned judge can set aside a judgment by default: see *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764; *Hughes* v. *Justin*, [1894] 1 Q.B. 667; *Milos* v. *Schmidt*, [1923] 1 W.W.R. 1444, at pp. 1452-3; Halsbury's Laws of England, 2nd Ed., Vol. 26, p. 55 (note (f)); *Evans* v. *Bagshaw* (1870), 5 Chy. App. 340. The order absolute and writ of possession should be set aside.

Mayall, for respondent: As to the appeal from the judgment of SIDNEY SMITH, J. in which he concluded there was want of jurisdiction, the order *nisi* and the final order for foreclosure are not default judgments so that rule 304 does not apply and SIDNEY SMITH, J. had no jurisdiction to set aside said judgments: see *Spira* v. *Spira*, [1939] 3 All E.R. 924. Once you go before the Court for judgment, it is not a judgment by default. As to the form of the order see *Orders for Specific Performance* (1915), 7 W.W.R. 1191, at p. 1192; *Lee* v. *Sheer* (1914), *ib.* 927. As to adding on future instalments see *Hill* v. *Spraid* (1909), 11 W.L.R. 680, at p. 686; *Canada North-West Land Co.* v. *Cheavins*, [1925] 2 W.W.R. 279, at p. 291.

McAlpine, replied.

Cur. adv. vult.

6th August, 1943.

McDONALD, C.J.B.C.: By agreement bearing date 16th October, 1941, the respondent sold to the appellant Ross MacKinnon certain lands for the price of $3,800, payable $600 cash, $2,200 by the assumption of a mortgage, and the balance of $1,000 in monthly instalments of $20 from 16th November, 1941, to 16th May, 1942, $250 on 16th June, 1942, and $20 per month there-

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after until 16th November, 1942, when the whole balance fell due. The rate of interest on deferred payments was 6 per cent. per annum, payable monthly. On 17th November, 1941, the appellant Ross MacKinnon assigned his right to purchase, to his wife, the appellant, Florence V. MacKinnon. The appellants having made default as to two monthly instalments and interest, a writ was issued on 28th February, 1942, setting up such default. No appearance was entered and the statement of claim was delivered on 9th May, 1942. By that time further instalments had accrued due and the amount claimed in the statement of claim against the appellant Ross MacKinnon was $103.20. In the alternative, a claim was made against both appellants for: (1) An accounting of what was due to the plaintiff under the said agreement; (2) an order that the said agreement be cancelled and be declared null and void and of no effect; (3) foreclosure of the said agreement; (4) an order for possession; (5) an order that the registration of the agreement be cancelled, and (6) an order that all moneys paid under the agreement be forfeited.

No statement of defence having been delivered, an order was made by SIDNEY SMITH, J. on 9th June, 1942, ordering an account "of what is due to the plaintiff under and by virtue of the said agreement, and for costs to be taxed." Judgment was given against the defendant Ross MacKinnon for the amount so found due. It was further adjudged that upon the appellants paying into Court the amount certified to be due, within three months of the date of the registrar's certificate, the agreement should remain in full force. It was further adjudged that in default of such payment the appellants should stand absolutely debarred and foreclosed of and from the right to purchase the said lands, and that in case of such default the agreement should be deemed to be cancelled and to be thereafter null and void and of no effect.

On 26th June, 1942, the registrar made his report, finding that on the date of the report there was due for principal and interest the sum of $378, and that in three months from the date of the report a further sum of $80.71 would fall due, making a total of $459.51. The costs were taxed at $132.80, making in all the total sum of $592.31.

The registrar appointed the 26th of September, 1942, as the last day for payment. On 30th June, 1942, an order was made appointing a receiver, but it appears that nothing depends on that.

On 14th October, 1942, the appellants paid the respondent's solicitor $100 on account. On 21st December, 1942, the Chief Justice of the Supreme Court, on an application made to him upon notice to, but in the absence of the appellants, made an order extending the time for payment until 21st January, 1943, but fixing the amount to be paid at $1,022.31, being the above-mentioned sum of $592.31 less $100 paid, plus a further sum of $530, which had fallen due under the agreement for sale after the 26th of September, 1942.

On 11th February, 1943, on motion before BIRD, J. on notice to, but in the absence of, the appellants, it appearing that nothing had been paid on account of the said sum of $1,022.31, a final order of foreclosure (as it is called) was made. This judgment contains a clause to the effect that the agreement

> shall be deemed to be cancelled, and the same is hereby cancelled, and shall henceforth be null and void and of no effect,

and all moneys paid under the agreement were declared to be forfeited. Further, it was adjudged that the respondent forthwith recover possession of the lands.

Thereafter certain negotiations took place during which the appellants tendered payment of the full amount of $1,022.31, but it appearing that the land meanwhile had advanced considerably in value, respondent stood upon his rights and sought possession of the lands. Under these circumstances the respondent cannot well complain if he is held to his strict legal rights.

On 21st April, 1943, a motion was made before SIDNEY SMITH, J. for an order setting aside the writ of possession, setting aside the judgment of BIRD, J., the order of the Chief Justice and the order of SIDNEY SMITH, J. In the alternative an order was sought for leave to bring into Court all moneys which had accrued due for principal and interest and costs, and upon such payment, for an order that the respondent convey the lands. On 21st April, 1943, SIDNEY SMITH, J. dismissed that application, being of opinion that he had no jurisdiction.

The matter now comes before us by way of appeal from the last-mentioned order of SIDNEY SMITH, J., and as a consequence,

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for an order setting aside all previous orders made. As to the last-mentioned order made by SIDNEY SMITH, J., it is said that that learned judge erred in holding that he was without jurisdiction, and reliance is placed upon Order XXVII., r. 15, it being argued that all of the judgments in question were default judgments, which could in a proper case be set aside by a judge of the Supreme Court. The only answer made is that the Court of Appeal in England in *Spira* v. *Spira,* [1939] 3 All E.R. 924 decided that that rule did not apply to judgments or orders such as we have here. In my opinion that case did not so decide, and with respect, I think SIDNEY SMITH, J. had jurisdiction to make the order which was sought.

I now come to consider whether, having such jurisdiction, the learned judge, in the circumstances of this case, ought to have exercised it. The answer I think depends upon whether we are to follow the unanimous decision of the Court of Appeal in Saskatchewan in *Milos* v. *Schmidt,* [1923] 1 W.W.R. 1444.

The simple point is whether the registrar's report was right in taking into account moneys which fell due after the date of the order *nisi.* While there is no doubt that in several of the Provinces this practice has been followed, I think that the present case falls within the Saskatchewan decision, that this was not an action for specific performance, but an action for cancellation on default in payment of the amount which was due and payable at the date of the order *nisi.* It follows that in my opinion the appeal ought to be allowed with costs and the registrar's report and all proceedings founded thereon set aside with costs in the Court below; the respondent to have all costs necessarily incurred and not thrown away in the reference before the registrar.

O'HALLORAN, J.A.: I would allow the appeal for the reasons given by the Chief Justice.

FISHER, J.A.: I agree with the Chief Justice.

Appeal allowed.

Solicitor for appellants: *Stuart H. Gilmour.*
Solicitor for respondent: *Granville Mayall.*

McCALLUM AND McCALLUM v. CORPORATION OF THE DISTRICT OF KENT.

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June 22, 23, 24; *Sept.* 14.

Ditches and watercourses—Flooding of plaintiffs' land—Nuisance—Damages —Improper construction and repair of ditches—R.S.B.C. 1911, Caps. 66, Secs. 5, 18, 42 and 43, and 69.

In the municipality of Kent a ditch known as the Agassiz ditch was constructed in 1896 by a board of commissioners appointed under the Drainage, Dyking, and Irrigation Act. It crossed the Harrison Hot Springs Road and drained into Harrison Lake to the north. To the south of the crossing and adjoining the Harrison Hot Springs Road on its west side was a ditch known as the Harrison Hot Springs ditch which drained into the Agassiz ditch. In 1918 the plaintiff and other owners of properties west of the Harrison Hot Springs Road, the drainage area of which was divided from that of the Agassiz ditch area by a slight ridge or elevation, requiring the construction of a ditch for drainage purposes, proceeded under the Ditches and Watercourses Act and the municipality appointed one McGugan their engineer to make an award under section 18 of the Act and fixed the course of the ditch (called the McCallum ditch) running from a point about 750 feet west of the Harrison Hot Springs ditch westerly about three miles to what is known as the Hammersley slough into which the water from the McCallum ditch was to flow. At this time the commissioners of the Agassiz ditch decided that their ditch had to be cleaned out and McGugan, who was also their engineer, decided to let a contract for both undertakings. The contract was let to one Hendrickson for both ditches. He constructed his dredge in Hammersley slough at the west end of the proposed McCallum ditch, completed the ditch to its east end and then in order to get the dredge to the Harrison Hot Springs ditch, he dredged through the slight ridge dividing the two drainage areas to the Harrison Hot Springs ditch (called the cross-ditch, about 750 feet) and from there he proceeded north to the Agassiz ditch. The McCallum ditch was satisfactory until 1928 when, owing to debris and growth accumulating in the Agassiz and Harrison Hot Springs ditches, the water backed up through the cross-ditch into the McCallum ditch causing it to overflow and the lands of McCallum and others in that area were damaged. In an action by the McCallums for damages, it was held on the trial that the municipality never authorized the construction of the cross-ditch where it was ultimately placed and on this ground the action failed and it was further held that McCallum knew and agreed to the cross-ditch being constructed where it was and approved of it and on this ground the action failed.

Held, on appeal, that the contractor constructed the cross-ditch where he did on instructions from McGugan, the respondent's engineer, and the respondent, having entered into such a contract and having appointed the engineer, must be deemed to have authorized what he authorized,

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but it was held further, affirming the decision of ROBERTSON, J., in the result, that the appellants sanctioned both the construction and location of the cross-ditch and it would not have been constructed or located where it was without such sanction. The appellants cannot complain of the consequences of an act, the doing of which was sanctioned by them and successfully base an action for nuisance thereon.

APPEAL by plaintiffs from the decision of ROBERTSON, J. of the 13th of October, 1942, in an action for damages resulting to the plaintiffs' farm lands near Agassiz in the municipality of Kent from flooding caused by the alleged negligent and improper construction and maintenance of ditches by the defendant whereby water has been and is wrongfully brought upon the plaintiffs' land. For a mandatory order directing the defendant to prevent water from being carried from what is known as the "Agassiz ditch" to the McCallum ditch and that said Agassiz ditch be cleaned out and properly maintained by the defendant and in the alternative for an injunction restraining the defendant from permitting further waters to flow through the ditches constructed by it so as to cause damage to the plaintiffs' land by flooding. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 22nd, 23rd and 24th of June, 1943, before SLOAN, O'HALLORAN and FISHER, JJ.A.

J. A. MacInnes (*F. K. Grimmett,* with him), for appellants: The Agassiz ditch was constructed by the municipality in 1896 and owing to a ridge between it and the plaintiffs' property, they were in separate drainage areas. In 1918 the plaintiffs, desiring to procure drainage, invoked the provisions of the Ditches and Watercourses Act and the municipality appointed its engineer, one McGugan, who made an award fixing the course of the ditch (named the McCallum ditch) and apportioned the work and furnishing of material among the lands affected, as well as the respective liabilities for maintenance. In the meantime, the Agassiz ditch became filled and clogged with debris and the commissioners of the Agassiz ditching scheme decided to let a contract for the cleaning and repair of that ditch. McGugan then let a contract for the construction of the McCallum ditch and cleaning out of the Agassiz ditch. The contractor con-

structed his dredge where the lower end of the McCallum ditch empties into a natural watercourse and from there he constructed the McCallum ditch in the course fixed by McGugan. On reaching the upper and eastern end of that ditch, in order to get to the Agassiz ditch, the contractor continued cutting his way easterly to the Harrison Hot Springs Road and through the ridge dividing the two water-basins, thence northerly on the west side of the Harrison Hot Springs Road to the Agassiz ditch. On cleaning out the Agassiz ditch both ditches carried the water away satisfactorily until 1928 when the Agassiz ditch again got into disrepair and failed to carry away the water flowing into it and the result was that the water backed up and flowed through the connecting ditch into the McCallum ditch which overflowed, flooding the farm lands in the McCallum basin. The municipality is responsible for taking the dredge from the McCallum ditch to the Agassiz ditch and had no authority to dig the connecting ditch between the two main ditches: see *Warren* v. *Deslippes* (1872), 33 U.C.Q.B. 59, at p. 68; *Kelly* v. *O'Grady* (1873), 34 U.C.Q.B. 562, at p. 574; *York* v. *Township of Osgoode* (1894), 21 A.R. 168; *Seymour* v. *Township of Maidstone* (1897), 24 A.R. 370; *Township of Colchester* v. *Township of Gosfield* (1900), 27 A.R. 281; *Lamphier* v. *Stafford* (1902), 1 O.W.R. 329; *Healy* v. *Ross* (1915), 33 O.L.R. 368. The connecting ditch was an addition to the works contemplated by the award and liability for damage resulting must follow: see *Hemphill* v. *McKinney* (1915), 21 B.C. 561; *Stalker* v. *Township of Dunwich* (1888), 15 Ont. 342, at p. 344; *The Township of Ellice* v. *Crooks* (1894), 23 S.C.R. 429; *Young* v. *Tucker* (1899), 26 A.R. 162, at p. 169; *McCrimmon* v. *Township of Yarmouth* (1900), 27 A.R. 636. There was error in the finding that the defendant did not authorize the construction of the cross-ditch where it was ultimately placed: see *Simm* v. *City of Hamilton* (1919), 16 O.W.N. 1, at p. 2; *Treguno v. Township of Barton* (1921), 20 O.W.N. 1, at p. 2; *Rudd* v. *Town of Arnprior* (1921), *ib.* 261. As to the findings of the trial judge that the plaintiffs knew of the location of the connecting ditch and consented to its construction, it is submitted there was no evidence of any factual consent to the drainage of any Agassiz

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water through the McCallum ditch and there is no estoppel: see *The Township of McKillop* v. *The Township of Logan* (1899), 29 S.C.R. 702; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414; *Willmott* v. *Barber* (1880), 15 Ch. D. 96, at pp. 105-6.

Locke, K.C. (*Gibson,* with him), for respondent: The respondent did not authorize the construction of the cross-ditch where it was ultimately placed or at all. The municipality and the engineer carried out their duty under the Act and nothing else. It was found that the municipality did not authorize the construction of the ditch, and it would have been *ultra vires* for them to do so: see *Atcheson* v. *Portage la Prairie* (1894), 10 Man. L.R. 39; *Corporation of Raleigh* v. *Williams,* [1893] A.C. 540; *Mill* v. *Hawker* (1874), L.R. 9 Ex. 309, at p. 317; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 96, par. 159. The cross-ditch could not be done by the municipality under the Ditches and Watercourses Act. It would have to be done under the Municipal Act: see *Cairncross* v. *Lorimer* (1860), 3 Macq. H.L. 827; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 400, par. 452, and p. 495, par. 566. In this case there was an express consent: see Broom's Legal Maxims, 10th Ed., 135. The plaintiffs are estopped from alleging that the defendant wrongfully constructed the cross-ditch. The alleged damage was not caused by any act or default of the respondent. He stated the basis of his claim is a nuisance, but the respondent is not responsible for maintaining the Agassiz ditch and road ditch in a proper state of repair: see *Sedleigh-Denfield* v. *St. Joseph's Mission Society* (1940), 109 L.J.K.B. 893. Any defect in the road ditch had been determined by proceedings under the statute: see *Corporation of Raleigh* v. *Williams,* [1893] A.C. 540; *Hepburn* v. *Township of Orford* (1890), 19 Ont. 585; *Murray* v. *Dawson* (1867), 17 U.C.C.P. 588; *Dalton* v. *Township of Ashfield* (1899), 26 A.R. 363. A dam was constructed in the cross-ditch that did not hold the water and gave way, but it was not constructed by the respondent and the respondent is under no liability to maintain it. The appellants' claim is barred by the Statute of Limitations, the work was completed in 1920 and the action must be brought within 12 months after completion of the work. Further, the claim is barred by section 316

of the Municipal Act. There was no complaint for eight years: see Lightwood on The Time Limit on Actions, pp. 204-5 and 398-9. There is no evidence that the appellant suffered any damage: see *Law* v. *Corporation of Niagara Falls* (1884), 6 Ont. 467. Arbitration is the only remedy: see *Murray* v. *District of West Vancouver* (1937), 52 B.C. 237.

MacInnes, in reply, referred to *Lawrence* v. *Corporation of Owen Sound* (1903), 5 O.L.R. 369.

Cur. adv. vult.

14th September, 1943.

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

O'HALLORAN, J.A.: I would dismiss the appeal on the record before us as argued at Bar. I am not convinced that the learned trial judge could have properly arrived at a different result.

FISHER, J.A.: After a careful consideration of the pleadings and the evidence adduced at the trial I am of the opinion that no relevant principles of the law of negligence or nuisance can be applied herein which will fasten the respondent with liability for damage suffered by the appellants.

As the case for the appellants was put before us the action, though not obviously so from the pleadings, is an action to abate a nuisance and to recover damages for the consequential loss already sustained. It is contended that the respondent municipality wrongfully made and carried out certain work under a contract for the construction of what has been and is hereinafter called the McCallum ditch, which wrongful act the appellants say was the cutting through a natural watershed, which separated the waters of the Agassiz basin from the McCallum basin, thus permitting Agassiz water to invade, overload and overflow the McCallum ditch and create a continuing nuisance to the damage of the appellants. Undoubtedly the respondent purported to act under the Ditches and Watercourses Act, R.S.B.C. 1911, Cap. 66 (now R.S.B.C. 1936, Cap. 75) but it seems to be common ground that under such Act the respondent had no other duty or power than to appoint the engineer, pay the cost and levy the opportioned share on each landowner. It also seems to be common

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ground that the respondent did appoint one D. J. McGugan as the engineer to carry out the provisions of the Act, paid the cost and levied the apportioned share on each landowner. The parties disagree however as to what else the respondent did and in any event they disagree as to the real cause of the damage and as to the legal responsibility of the respondent for any damage. Under the circumstances the evidence and findings of the learned trial judge must be carefully considered.

The learned trial judge found, *inter alia*: (1) That the [respondent] entered into a contract with Hendrickson, the contractor, on the form set out in Exhibit 26. (2) That at and for some months before the time when the contract was entered into, which was in or about the year 1920, the appellants and other parties concerned knew that the McCallum ditch and the Agassiz ditch would be ultimately connected by a cross-ditch. (3) That the contract which did not define the position of the cross-ditch, as it had not then been determined where it would be located, provided for payment to Hendrickson of "the sum of eleven cents per cubic yard for the excavation necessary to bring the dredge, in the manner and course as directed by the engineer, from the Agassiz ditch to the Malcolm McCallum ditch." (4) That later on Malcolm McCallum, who was then the sole owner of the appellants' lands and one of the plaintiffs in the action as originally constituted, knew and approved of the location of the cross-ditch. (5) That in and from the year 1928 the appellants' lands were damaged by water flowing from an overflow of the Agassiz ditch through the cross-ditch into and overflowing the McCallum ditch.

I accept these findings but with deference have to say that I cannot accept the conclusion of the learned trial judge that the respondent at no time authorized the construction of the cross-ditch where it was ultimately placed. In view of the clause in the contract as hereinbefore set out I do not think that the contractor Hendrickson would have constructed the cross-ditch where he did without the directions of the engineer McGugan and the evidence of McGugan is clear that he gave the final instructions to Hendrickson as to the course to be taken by the dredge after he had seen Malcolm McCallum and was assured that he was agreeable to the proposed course. In my view the

issue raised on this phase of the matter is a difficult one but my conclusion is that the respondent, having itself entered into such a contract and having appointed the engineer as aforesaid, must be deemed to have authorized what he authorized. It is apparent, however, that no damage was suffered until about eight years after the act which, as I have said, must be deemed to have been authorized by the respondent. The important question to be decided therefore is whether or not the respondent can be made responsible in such an action as this and under the existing circumstances for an alleged nuisance and damages arising in 1928. For the reasons hereinafter given I agree in the result reached by the trial judge when he dismissed the action.

In addition to making the submission as hereinafter stated counsel for the appellants contends that in 1928 and thereafter the respondent made use of a ditch, constructed under the contract, for the purpose of getting rid of Agassiz water and then goes on to argue that the respondent as an owner within the meaning of the said Ditches and Watercourses Act thus made use of the ditch after construction, contrary to the provisions of section 47 of the said Act. I am satisfied, as I think the learned trial judge was, that the water from the Agassiz ditch would not have reached the McCallum ditch if the connecting ditch had not been there and I agree that in one sense it may be said that the cross-ditch was used in 1928 as a conduit-pipe for water from the Agassiz ditch to the McCallum ditch but certainly the engineer McGugan never thought it could ever be so used and the respondent never intended to so use it. The Agassiz ditch was administered not by the respondent at all but by the commissioners appointed under the Drainage, Dyking, and Irrigation Act (now Drainage, Dyking, and Development Act) and under the circumstances disclosed by the evidence I do not think with deference that it can be fairly or accurately said that the respondent made use of either the McCallum ditch or the cross-ditch for the purpose of getting rid of Agassiz water or that the argument is sound that the said section applies to a case such as this.

Counsel for the appellants, however, further submits that in any event the respondent is liable for the nuisance created by

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water from the Agassiz ditch flowing into the McCallum ditch in 1928 because it resulted from the act of the respondent in constructing the cross-ditch and thereby wrongfully removing the natural barrier or watershed as aforesaid. The liability of the respondent for the nuisance is thus clearly based upon the contention that the act of the respondent in 1920 was an unauthorized interference with the natural physical features of the locality and until the original condition is restored by the respondent, the appellants contend, that the respondent is liable for the continuing consequences of its act. The issue of liability must therefore depend upon the facts at the time the ditch was constructed in or about the year 1920 and not upon the so-called use or effect of it in 1928 as aforesaid, as the principle of law to be applied must be determined by such facts.

I come therefore to consider the second ground on which the trial judge dismissed the action, *viz.*, that of estoppel. On this phase of the matter I have first to say that it must have been apparent in 1920 to everyone concerned that the arrangement made for the transfer of the dredge meant that the dredge should dig its own way from one ditch to the other as it actually did. It is submitted by counsel on behalf of the appellants that the transfer of the dredge in this way was wholly outside the award under the Act and was in no wise contemplated by it. It must be noted, however, that the submission of counsel on behalf of the appellants is not only that there was no authority given under the said Ditches and Watercourses Act to the respondent to make that part of the contract pursuant to which the dredge was brought from one ditch to the other, but that there was no authority thereby given to the respondent to make any such contract at all. Counsel for the appellants submits that the making of the said contract was a gratuitous intervention by the respondent in a matter in which it had no business to interfere and having so intervened the respondent must accept responsibility for any consequences resulting from the ditch constructed under its contract. There is not and cannot be any real complaint, however, with regard to any portion of the work done under the contract except with regard to the construction of the cross-ditch. Undoubtedly the appellants initiated the proceed-

ings required under the Act and were greatly benefited by the construction of the McCallum ditch and suffered no damage through the cross-ditch prior to 1928. Surely then one must seriously consider the circumstances under which the cross-ditch was constructed before placing responsibility on the respondent for any damage suffered eight years later from the construction of the cross-ditch.

The said Malcolm McCallum (now deceased) was active on the committee of landowners from the start. It may first be noted that, at the time the said contract was made it was anticipated that the dredge would be brought from the Agassiz ditch to the Malcolm McCallum ditch, but as a matter of fact the latter ditch was constructed and the dredge was then brought from the McCallum ditch to the Agassiz ditch. Apparently it had been the intention at first to take the dredge from the McCallum ditch to the Agassiz ditch through Peter Wilson's place, legal subdivisions 5 and 6 of section 36, where the McCallum ditch and the Agassiz ditch were comparatively close to each other. The engineer however suggested that the cross-ditch should go through legal subdivision 14 which was the property of Duncan McRae. On November 12th, 1920, there was a meeting of those interested in the McCallum and Agassiz ditches. McGugan did not attend this meeting but in his evidence at the trial he said that he was informed of it in the course of his duty and he spoke to Malcolm McCallum, who took an active interest in the matter all the time, regarding the suggested course to be followed in taking the dredge to the Agassiz ditch and Malcolm McCallum said it was all right with him or words to that effect. McGugan also said that it was an advantage to those interested in the McCallum ditch scheme that the dredge should be taken along the course followed since the work was in consequence done more cheaply than it could have been done any other way. The appellant James McCallum in his evidence stated that it was agreed at the meeting of the owners on November 12th, 1920, that Hendrickson should be paid to move his dredge from the McCallum ditch to the Agassiz ditch and thereafter he and his father said they would not raise any legal objection to the dredge being taken through Duncan McRae's property (as it was). I

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think it is a fair inference from his evidence that James McCallum as well as Malcolm McCallum knew and approved of the location of the cross-ditch. Malcolm McCallum was unable to give evidence at the trial but he had been examined for discovery and it should be noted that he admitted that Hendrickson had taken the contract on condition that he should also get the contract for the Agassiz ditch and that he was to take the dredge from one ditch to the other and be paid for it.

Having carefully considered the evidence I have to say that I do not find it necessary to reach a definite conclusion as to whether the construction of the cross-ditch may properly be said to have been within the contemplation of the McCallum ditch award under the said Ditches and Watercourses Act as incidental to the construction of the McCallum ditch thereunder as in any event I have reached the conclusion and have to say with deference that the submission of counsel for the appellants cannot be supported. Whether the principle to be applied is properly called estoppel or by some other name, I agree in the result with the learned trial judge that the appellants must fail on the ground that they sanctioned both the construction and the location of the cross-ditch and that it would not have been constructed or located where it was without such sanction. I do not disagree with the proposition that the consent of the appellants would not enable the respondent to rely upon the said statute as authorizing an act which it did not authorize. Nevertheless, the consent of the appellants to the act is a primary factor to be considered in an action seeking to make the respondent liable for a nuisance and damages alleged to be the consequences of the act consented to and I think it is contrary to common sense and common justice that the appellants should now be able to complain of the consequences of an act, the doing of which they sanctioned, and successfully base an action for nuisance thereupon, to the prejudice of those who have acted upon their sanction.

Counsel for the appellants relies especially upon *The Township of McKillop* v. *The Township of Logan* (1899), 29 S.C.R. 702; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414; 61 R.R. 97; *Willmott* v. *Barber* (1880), 15 Ch. D. 96, at pp. 105-6, and *Anderson* v. *Municipality of South Vancouver* (1911), 45

S.C.R. 425. None of these cases, however, was a case where the plaintiff had given his consent to the doing of the very act for the consequences of which he asked damages and no principle can be extracted from them applicable to such a case. On the other hand the principle underlying the judgment of Lord Campbell, L.C. in *Cairncross* v. *Lorimer* (1860), 3 Macq. H.L. 827, at p. 829, referred to by the learned trial judge, while expressed in language applicable to the special facts of that case, may, I think, be applied in its general sense to the facts of the present case. In the *Cairncross* case the Lord Chancellor said:

> . . . , the doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained,—he cannot question the legality of the act he had so sanctioned,—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *F. K. Grimmett.*

Solicitors for respondent: *Reid, Wallbridge, Gibson & Sutton.*

ADAMS v. FRIESEN.

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1943
Sept. 9, 14.

Negligence—Motor-vehicles—Collision at intersection of highway and road—Right of way—Speed—Stop sign on road—Drivers of both vehicles guilty of negligence—Division of liability.

On the 16th of October, 1941, at about 2 o'clock in the afternoon when the weather was clear and the road surfaces dry, the plaintiff was driving his Cord motor-car northerly on the Mission-Abbotsford highway and the defendant was proceeding east on Clayburn Road. There was some brush and trees on the west side of the highway just south of Clayburn Road which obstructed the view of both drivers. When the plaintiff was about 240 yards from the intersection of the two streets, he saw the defendant's car starting forward in an easterly direction about 100 feet from the intersection and he reduced his speed from 60 to 45 or 50 miles per hour and when about 150 feet from the intersection, the defendant's car again came into view at a point within 20 feet from the inter-

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section. The plaintiff sounded his horn and reduced his speed, assuming the defendant would stop. Immediately afterwards he realized the defendant did not intend to stop, so he swerved to the east and accelerated his speed. The plaintiff said the defendant was proceeding at about 15 miles per hour, but the defendant says he was going at only seven miles per hour and slowed down on entering the intersection, but he continued past the stop sign on the road and said he did not see the plaintiff until he reached the centre of the intersection. He ran into the left centre of the plaintiff's car about six feet past the middle line of the highway. In an action for damages for negligence:—

Held, that the defendant was guilty of negligence, which largely contributed to the accident, in ignoring the stop sign and failing to come to a full stop before crossing the highway and in failing to maintain a proper look-out for traffic on the highway when approaching it. When the plaintiff saw the defendant the second time, he should have brought his car under control by reducing speed and his failure to do so constituted negligence which contributed to the accident. The negligence of the defendant contributed to a substantially greater degree than that of the plaintiff and the plaintiff is found liable to the extent of 25 per cent. and the defendant 75 per cent.

ACTION for damages resulting from a collision between the plaintiff's Cord motor-car and the defendant's Chevrolet sedan at the intersection of the Mission-Abbotsford Highway and Clayburn Road. The facts are set out in the head-note and reasons for judgment. Tried by BIRD, J. at Vancouver on the 9th of September, 1943.

A. Hugo Ray, for plaintiff.
Tysoe, for defendant.

Cur. adv. vult.

14th September, 1943.

BIRD, J.: This action arises out of a motor accident which occurred at about 2 o'clock on the afternoon of October 16th, 1941, on the Mission-Abbotsford Highway at a point where the Clayburn Road crosses the highway. The Clayburn Road is a side road with gravel surface approximately 30 feet wide in the approach to the highway. The Mission-Abbotsford Highway is an arterial highway with tarvia paved surface 22 feet wide and gravel shoulders on each side seven feet wide. The section of the highway from a point 500 to 600 feet south of the Clayburn Road and extending for several miles west of that road is straight and level.

It is common ground that at the time of the accident the weather was clear and the road surfaces dry. The plaintiff's Cord motor-car proceeding north on the highway and the defendant's Chevrolet sedan proceeding east on the Clayburn Road (for the purpose of crossing the highway and continuing east) collided at a point approximately six feet east of the middle line of the highway, the front of the defendant's car having struck the left centre of the plaintiff's car. The plaintiff says that when about 240 yards from the Clayburn Road he saw the defendant's car at a point approximately 100 feet west of the highway and starting forward in an easterly direction towards the highway. The plaintiff then reduced his speed from 60 to 45 or 50 miles per hour. When about 150 feet from the crossing defendant's car again came into view at a point within 20 feet of the crossing when the plaintiff sounded his horn and proceeded forward without reducing speed, assuming that the defendant would stop before attempting to cross the highway. Immediately afterwards the plaintiff realized that the defendant did not intend to stop, so swerved to the east and accelerated his speed. He estimated the speed of defendant's car at 15 miles per hour when approaching the highway.

The defendant acknowledged that he had failed to stop either at the stop sign 24 feet west of the highway pavement or at any time before the impact occurred. He says that he looked north and south when his car was about ten feet east of the stop sign (that is to say, when within approximately 15 feet from the pavement) but saw nothing on the highway. He was not aware of the presence of the plaintiff's car until his attention was directed to it by a shout from defendant's passenger at a time when defendant's car was close to the middle of the highway. The defendant says that he did not exceed seven miles per hour when approaching the highway, and that on entering the highway his speed was reduced to one to two miles per hour.

It appears that brush and trees on the west side of the highway south of the Clayburn Road obstructed the view of both drivers until the defendant's car reached a point 20 feet from the west side of the pavement, though it was possible for the plaintiff when at a point 500 to 600 feet south of the Clayburn Road to

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see traffic on that road near the general store, being about 100 feet west of the highway.

Upon consideration of the evidence I have no hesitation in finding that the defendant was guilty of negligence, which if not the sole cause of, then largely contributed to the accident, first, in ignoring the stop sign and failing to come to a full stop before crossing the highway; secondly, in failing to maintain a proper look-out for traffic on the highway when approaching it. His view of the highway to the south was unobstructed for a distance of over 500 feet from the time he reached a point 20 feet west of the highway pavement. I am satisfied that when he reached that point he could or should have seen the plaintiff in ample time to stop and avoid a collision, even though his speed was as great as the 15 miles per hour estimate made by the plaintiff, *a fortiori* if his speed was so low as the defendant's estimate. I do not accept the defendant's evidence as to look-out. If he did look out he was singularly unobservant. Nor do I accept the evidence of the witness Little that the defendant stopped before entering the highway. The defendant admits that he did not stop.

On the other hand the plaintiff acknowledges that he was aware that the defendant was approaching the highway, having seen defendant start up from the store. He then proceeded at a speed of 45 to 50 miles per hour until he saw the defendant approach the highway. It is common ground that visibility was obstructed until defendant's car came within 20 feet of the highway pavement. The plaintiff's estimate of the distance between the cars at this time is 150 feet. The plaintiff did not then reduce his speed but was content to sound his horn and rely upon the defendant stopping as it was his duty to do prior to entering the highway. I expressed the view on the trial, to which I adhere, that regardless of the location of the stop sign it was the defendant's duty to stop at some point where he had a clear view of the highway before attempting to cross.

I consider that the plaintiff, when he saw the defendant the second time, should have brought his car under control by reducing speed, and that his failure to do so constituted negligence which contributed to the accident.

In the course of argument counsel for defendant relied strongly upon a recent decision of the Court of Appeal in *Alonzo* v. *Bell et al.* (1942), 58 B.C. 220, and basing his argument upon the reasons of FISHER, J.A., contended that the plaintiff alone was at fault. This submission does not take into account the defendant's failure to see the plaintiff's car approaching, nor his failure to observe the statutory provision relating to stop signs. The cases do not appear to me to be parallel. In my opinion the judgments in *Henderson* v. *Dosse* (1932), 46 B.C. 407; *Howell* v. *Wallace and Green,* [1939] 1 W.W.R. 177; and particularly in the Ontario case, *Anderson* v. *Parney* (1930), 66 O.L.R. 112, relate to circumstances which are more closely parallel to the case at Bar.

I prefer to adopt part of the language of FISHER, J.A., in the *Alonzo* case, and to base my judgment upon the facts of this particular case. In my opinion both the parties were guilty of negligence, but the negligence of the defendant contributed to a substantially greater degree than that of the plaintiff. I find the plaintiff liable to the extent of 25 per cent. and the defendant 75 per cent.

The plaintiff incurred expense for repairs to his car in the sum of $1,152 and sustained minor personal injuries in respect of which he incurred expense for medical attention in the sum of $7. The defendant incurred expense for repairs to his car and for towing, in the total sum of $594.24, and incurred expense for chiropractic treatment for personal injuries in the sum of $48. Personal injuries suffered by both parties, fortunately, were slight. I assess the plaintiff's damages for injuries at the sum of $50 and special damages at $1,159. I assess the defendant's damages at $75 for injuries, and special damages at $642.24. There will be judgment accordingly on the basis of the Contributory Negligence Act.

Judgment accordingly.

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MITCHELL v. TIMES PRINTING AND PUBLISHING COMPANY LIMITED.

Sept. 17, 23.

Practice—Action for libel—Plaintiff charged with murder—Application by defendant to extend time for delivery of statement of defence until disposal of murder charge—Application for better particulars refused.

The plaintiff brought an action that on the 19th of June, 1943, the defendant published in its daily newspaper a certain statement which he alleges was libellous. Since the date of the alleged publication, the plaintiff has been committed for trial on the charge of murder which was referred to in the publication. An application of the defendant for an order to extend the time for delivery of a statement of defence until the charge of murder against the plaintiff be tried was dismissed.

APPLICATION by the defendant in an action for libel for an order to extend the time for delivery of a statement of defence until a charge of murder against the plaintiff has been tried. The facts are set out in the reasons for judgment. Heard by COADY, J. in Chambers at Victoria on the 17th of September, 1943.

D. M. Gordon, for the application.
Sinnott, contra.

Cur. adv. vult.

23rd September, 1943.

COADY, J.: The statement of claim filed in this action alleges that the defendant did on the 19th of June, A.D. 1943, publish in its daily newspaper, the "Victoria Daily Times" the following statement which the plaintiff alleges was libellous:

At last the fish the police have been baiting their hooks for in the Molly Justice dimout murder surfaced and, they say, have solved the five-month-old mystery. William Mitchell, 50, grey-haired logger, is brought into Court before magistrate Hall and charged with the murder after he is arrested in a downtown hotel by Sgt. Elwell and detective Dave Donaldson. Police had been seeking Mitchell for weeks in Vancouver and in logging camps up-island. He was booked here first on a boy sex charge and police say this led to uncovering Justice murder facts.

Since the date of the alleged publication the plaintiff has been committed for trial on the charge of murder therein referred to.

The defendant now applies, *inter alia,* for an order to extend the time for delivery of a statement of defence until the charge

of murder against the plaintiff has been tried. Counsel have been unable to find any case in point. Counsel for the defendant relies, however, on *Illingworth* v. *Coyle* (1933), 48 B.C. 81; *Moorehouse* v. *Connell* (1920), 17 O.W.N. 351. These cases decide that if a criminal charge is pending, and a civil action brought against the accused, where the identical facts are involved in both proceedings and where the defendant has done nothing to delay or frustrate the criminal proceedings, a stay in the civil proceedings will be granted until the criminal charge against him has been disposed of. The reason clearly is to provide a protection to the accused in the criminal proceedings. The accused here is asking for no such protection. He has commenced his proceedings, filed his statement of claim, and now asks that the defendant file its defence.

The cases cited afford little assistance therefore. The defendant here can have no interest in the outcome of the criminal proceedings unless it can be suggested that this would assist in determining the form and substance of its defence and the delay sought would be a matter of accommodation to the defendant.

Counsel for the defendant further submits that the action should not be allowed to proceed when it is apparent that the defendant will not be able to get discovery or answers to interrogatories, as the plaintiff will not be compelled to answer, and cites *Staples* v. *Isaacs and Harris* (1940), 55 B.C. 189. But is this a ground for granting a stay at this stage? I feel it is not.

What the defendant asks in effect is that it be permitted to postpone the filing of its defence until the guilt or innocence of the plaintiff has been determined by another tribunal. That may be a proper ground for delaying the trial, but in the absence of any authority I can see no good reason why it should be a ground for delay in filing a defence. On this branch of the application, therefore, the defendant must fail. As requested by counsel, I will fix a time of ten days from this date for filing the defence.

On the second branch of the application the defendant asks that the plaintiff furnish better particulars of the "words" (alleged in paragraph 4 of the statement of claim)

which were calculated to and exposed the plaintiff to the hatred, contempt and ridicule of the persons reading them.

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Coady, J.

The whole of the alleged libellous statement on which the plaintiff relies is set out in paragraph 6 of the statement of claim. The "words" referred to in paragraph 4 are all there. I do not think the plaintiff should be called upon or required to indicate the particular words therein that he has reference to or relies upon as constituting the libel. It may be that it is only in association with the other words and as forming part of the context that the words complained of are alleged to be libellous and it may be impossible to segregate them. The defendant has all the words before it as set out in paragraph 6, and will not be taken by surprise.

The defendant also asks that the plaintiff furnsh better particulars of paragraph 9 of the statement of claim as to the "further" damage alleged therein. I am of the opinion that no further particulars are necessary. There is no claim here for special damages which would require to be pleaded specifically. The claim is for general damages only. The allegation is that the plaintiff has

> further sustained damage as a result of the said false and malicious statements of the defendant and of the contempt and ridicule directed against the plaintiff in the said article.

I would not order further particulars of that pleading.

The defendant also asks that certain part of the pleadings be struck out as irrelevant, unnecessary and intending to prejudice and embarrass the fair trial of the action. It is unnecessary to refer to these in detail. I am of the opinion that these parts ought not to be struck out. See *Knowles* v. *Roberts* (1888), 38 Ch. D. 263; *Millington* v. *Loring* (1880), 6 Q.B.D. 190, at p. 195. The application is dismissed with costs.

Application dismissed.

WILLIAMS v. WILLIAMS.

C. A.
1943
Sept. 21.

Practice—Divorce—Order for interim alimony—Default in payments—Motion to commit—Proof of service of order with endorsement of warning—Service of affidavit of service with notice of motion—Rules 573 and 699.

In an action for dissolution of marriage, an order was made providing for *interim* alimony. The defendant, being in default, on motion to commit, copies of the notice of motion, the affidavit in support and the order for *interim* alimony, being served on the defendant, an order for commitment was made.

Held, on appeal, reversing the decision of SIDNEY SMITH, J., that the appeal be allowed and the order be set aside.

Per MCDONALD, C.J.B.C., SLOAN and FISHER, JJ.A.: That the service was irregular as the affidavit of service does not show that the order for *interim* alimony served on the defendant had the memorandum endorsed upon it as required by rule 573.

Stockton Football Company v. *Gaston*, [1895] 1 Q.B. 453, followed.

Per O'HALLORAN, J.A.: The appeal should be allowed on two grounds. No affidavit of service of the order was served as required by rule 699 and the affidavit of service produced does not show that the necessary warning was endorsed on the order served on the defendant.

Per ROBERTSON, J.A.: There must be an affidavit showing service of the order. That affidavit was produced in Court upon the hearing of the motion, but was not served with the notice of motion, as required by rule 699.

APPEAL by defendant from the order of SIDNEY SMITH, J. of the 18th of August, 1943, whereby the defendant was adjudged guilty of contempt of Court and adjudged to be imprisoned therefor. On the 19th of April, 1943, a petition was issued by the petitioner for dissolution of marriage on the grounds of adultery. On the 11th of May, 1943, the deputy district registrar held a reference with respect to *interim* alimony and recommended that $12.50 per week be paid to the petitioner from the 19th of April, 1943, and a further sum of $200 for *interim* costs on or before the 18th of May, 1943, and deposit into Court a further sum of $225 five days before the trial. The recommendation of the deputy district registrar was confirmed by order of SIDNEY SMITH, J. of the 17th of May, 1943. On the 13th of August, 1943, the defendant having in the meantime paid the petitioner only $25, the petitioner moved for an order to commit the defend-

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ant for contempt of Court for disobedience of the order of the 17th of May, 1943. The notice of motion, a copy of the affidavit in support and a copy of the order of the 17th of May were served on the defendant on the 14th of August, 1943, but a copy of the affidavit of service of said order was not served, nor did the affidavit in support of the motion nor the affidavit of service show that the order of August 14th served on the defendant had the memorandum required by rule 573 endorsed upon it.

The appeal was argued at Victoria on the 21st of September, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

Lucas, for appellant: The evidence in support of the motion for contempt is insufficient as there was no proof of personal service on the appellant of the order of the 17th of May, 1943. Secondly, the affidavit in support of this motion must state that the copy of the order of the 17th of May, 1943, which was served on the appellant was endorsed with the warning required by rule 573. Rule 699 requires that the affidavits in support of the motion to commit be served with the notice of motion and we say that includes the affidavit of service and it should be served with the notice of motion on the other side: see Annual Practice, 1943, p. 832. That the affidavit in support of the motion must state that the order is endorsed with the warning as set out in rule 573 see *Stockton Football Company* v. *Gaston,* [1895] 1 Q.B. 453; *Hampden* v. *Wallis* (1884), 26 Ch. D. 746; *In re Holt (an Infant)* (1879), 11 Ch. D. 168; *Evans* v. *Noton* (1892), 9 T.L.R. 108.

Fleishman, for respondent: The point raised as to the endorsement of warning on the copy of the order served was not raised in the notice of appeal. The appellant knew the order was made and the Court will not assist him: see *Mackell* v. *Ottawa Separate School Trustees* (1917), 12 O.W.N. 265. He was served with the order. On the motion, I did not have to serve the affidavit of service: see *Turnbull Real Estate Company* v. *Segee et al.* (1914), 42 N.B.R. 625; *Re Bolton and County of Wentworth* (1911), 23 O.L.R. 390, at p. 394; *Irvine* v. *Hervey et al.*

(1908), 47 N.S.R. 289; *Fitzpatrick* v. *Fitzpatrick,* [1934] 3 W.W.R. 734; *Jones* v. *Jones,* [1912] P. 295.

Lucas, replied.

MCDONALD, C.J.B.C.: The majority of the Court is hopelessly against you, Mr. *Fleishman.*

We want to know from you, Mr. *Lucas,* do you want an amendment, or are you satisfied to rely on the grounds on which you now hope to win.

Lucas: Well, as far as I am aware, my Lord, I don't know just what your Lordship has in mind.

MCDONALD, C.J.B.C.: It seems that you did not raise definitely this point about serving the order with the warning endorsed on it. If you want an amendment, we would be disposed, as I understand, to grant it, but if so it would be on terms as to costs.

Lucas: My Lord, these sets-off of costs are not going to concern me at all, and therefore I ask for the amendment, notwithstanding what the result may be with regard to the costs of this appeal.

MCDONALD, C.J.B.C.: Well, as far as I am concerned, the appeal is allowed, and my brother SLOAN will give you the reasons upon which he and I go.

SLOAN, J.A.: My brother the Chief Justice and I would grant the amendment, and we would allow the appeal on the principle of *Stockton Football Company* v. *Gaston,* [1895] 1 Q.B. 453. We think the service was clearly irregular, for the reason that the affidavit of service does not show the order served upon the defendant had the memorandum endorsed upon it as required by the rule. Costs of the motion to amend will be costs to Mr. *Fleishman,* costs of the appeal to the appellant.

O'HALLORAN, J.A.: I would allow the appeal with costs, on two grounds: First, admittedly no affidavit of service of the order was served as rule 699 requires; and secondly, the affidavit of service produced to us does not show that the necessary warning was endorsed on the order served on the defendant as laid down in *Stockton Football Company v. Gaston.* I may add

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that, as I read the notice of appeal, it does not require amendment to enable disposition of the appeal on this second ground.

FISHER, J.A.: I agree with the Chief Justice and my brother SLOAN. I understand that the Court is granting the amendment.

ROBERTSON, J.A.: I think that paragraph 1 of the notice of appeal sets out the proper ground, namely, that no affidavit was filed in support of the motion proving service of the order, nor was it served with the notice of motion. Rule 699 says:

> Every notice of motion to set aside, remit, or enforce an award, or for attachment, shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.

Now I take it that there must be an affidavit showing service of the order. That affidavit was produced in Court upon the hearing of the motion, but had not been served with the notice of motion as required by rule 699.

For that reason, I think the procedure was irregular and the appeal should be allowed with costs.

Appeal allowed.

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

Solicitors for respondent: *Fleishman & Hansford.*

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Sept. 22; *Oct.* 1.

REX v. HOBER.

Criminal law—Indecent assault upon child — Corroboration — Lack of— Criminal Code, Sec. 1003, Subsec. 2.

The accused, a janitor in a school, after cleaning up the school, went to the basement where he burnt the refuse in the furnace. When there the complainant, a girl six years of age, went into the basement. The accused took her on his knee and, according to her evidence, pulled down her panties and put his hand on her private parts. The accused admitted taking her on his knee, but denied any impropriety. He was convicted of indecent assault.

Held, on appeal, reversing the decision of stipendiary magistrate Powell, of Powell River (O'HALLORAN, J.A. dissenting), that there was no evidence to supply the corroboration required under section 1003, subsection 2 of the Criminal Code.

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APPEAL by the accused from his conviction by A. T. Powell, Esquire, stipendiary magistrate at Powell River, B.C., on the 23rd of June, 1943, on a charge that he did on the 13th of June, 1943, at Cranberry Lake, B.C., indecently assault Sharon Brooks, a girl six years of age. The accused was janitor at the Cranberry school and on the 13th of June was cleaning up garbage and burning refuse in the furnace in the basement. When there, the little girl Sharon Brooks came into the basement and, according to her evidence, he sat her on his lap, pulled down her panties and touched her private parts. She ran home and told her mother what happened and stated that when running home she tripped on her heel and she was crying. Her mother told her not to say anything about tripping on her heel. The mother gave evidence as to the child's statement. Accused gave evidence and stated that he asked the child if she wanted to sit on his knee, that she sat on his knee and he put his arm around her and that was all. He denied the girl's story as to indecency.

The appeal was argued at Victoria on the 22nd of September, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

Castillou, K.C., for appellant: There cannot be a conviction on the child's evidence alone. Her evidence must be corroborated by some other material evidence in support thereof implicating the accused. There was no corroboration in law: see section 1003, subsection 2 of the Criminal Code. The girl says she was sitting on his lap and he put his hand on her private parts and that was all. The statement to the police officer should not have been allowed; accused was not warned: see *Gach* v. *Regem* (1943), 79 Can. C.C. 221, at p. 225; *The Queen* v. *Thompson*, [1893] 2 Q.B. 12; *Rex* v. *Evans* (1924), 18 Cr. App. R. 123; *Canning* v. *Regem*, [1937] S.C.R. 421.

Martin, K.C., for the Crown, relied on *Rex* v. *Steele* (1923), 33 B.C. 197; 42 Can. C.C. 375; affirmed by the Supreme Court of Canada, [1924] 4 D.L.R. 175. It is submitted there is sufficient corroboration to support the conviction.

Castillou, replied.

Cur. adv. vult.

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McDONALD, C.J.B.C.: I think this case is very close to the line, and, while I recognize that there may well be differing opinions on the questions involved, I prefer to give the appellant the benefit of the doubt. The evidence of the complainant is certainly not very satisfactory, and in my opinion there is no evidence to supply the corroboration required under section 1003, subsection 2 of the Criminal Code.

I would allow the appeal and quash the conviction.

SLOAN, J.A.: After a careful consideration of all the relevant facts and circumstances herein, I have reached the conclusion that the corroborative evidence required by section 1003, subsection 2 of the Code is lacking and in consequence the appeal must be allowed and the conviction quashed.

O'HALLORAN, J.A.: This appeal raises an important question, *viz.*, what is corroborative evidence within section 1003, subsection 2 of the Code? It involves the true meaning of the language in that section forbidding a conviction for indecent assault upon a girl of tender years

> . . . unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

The testimony of the six-year-old girl was corroborated by the convicted appellant as to (1) the time—Sunday morning; (2) the place—the school-house basement; (3) taking her on his knee; and (4) placing his arm around her. But he denied the culminating circumstance of the indecent assault, that he then placed his hand indecently upon her person as she had testified. The appellant was the janitor at the school where it happened. He also testified she was the only little girl he had taken upon his knee during his employment at the school. Counsel for the appellant contended the magistrate erred in finding there was sufficient corroboration of her testimony within section 1003, subsection 2, and submitted that taking the child on his knee was not evidence of indecent assault by the appellant, and that in any event it was equally consistent with his innocence.

In my judgment with respect the fallacy in that submission lies in its failure to appreciate that the appellant's evidence in

that respect was put forward by the prosecution, not as proof in itself of the indecent act, but to fortify the credibility of the little girl, and to justify the acceptance of her story by the magistrate. The fact that the principal witness was corroborated in four circumstances material to the proof of this case leading up to the next and culminating circumstance, induces reasoned belief in her evidence of the culminating circumstance. The magistrate could reasonably believe her. As he did believe her, and in doing so did not believe the appellant, then in the absence of other evidence supporting the appellant's testimony, it is plainly a case in which an appellate Court ought not to disturb the magistrate's finding based on credibility.

In *Rex* v. *Baskerville* (1916), 86 L.J.K.B. 28, Viscount Reading, C.J. speaking for a specially-constituted Court of Criminal Appeal, warned of the danger of attempting to formulate the kind of evidence which amounts to corroboration and said at p. 34:

> The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged.

That flows from what I understand to be the principle that the kind of independent testimony which may be regarded as corroborative (as indeed the word itself indicates), is not confined to the actual performance of the guilty act, but includes any circumstances affecting the accused which may confirm the jury or other judge of fact, in the belief that the principal witness is telling the truth. That is made clear in many cases. In *Rex* v. *Baskerville, supra,* at p. 33 it is said:

> What is required is some additional evidence rendering it probable that the story of the accomplice [substitute here the principal witness] is true, and that it is reasonably safe to act upon it.

In *Rex* v. *Daun* (1906), 12 O.L.R. 227, Maclaren, J.A. (with whom Moss, C.J.O. and Garrow, J.A. concurred) said at p. 233:

> What is required is corroboration in some material respect, that will fortify and strengthen the credibility of the main witness, and justify the evidence being accepted and acted upon, if it is believed and is sufficient.

That was acted on in *Magdall* v. *Regem* (1920), 61 S.C.R. 88, affirming the decision of the Alberta Court in [1920] 2 W.W.R. 251 and *vide* Beck, J.A. at p. 260. In *The Queen* v. *Tower* (1880), 20 N.B.R. 168, Duff, J. (with whom Allen, C.J. con-

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curred) p. 207, approved the charge of the trial judge when the latter told the jury:

> " . . . it was not necessary that Thomas should be corroborated as to the very act of boring the holes in the vessel; if the other evidence and circumstances of the case satisfied them that he was telling the truth, in the account which he gave of the destruction of the vessel, that would be sufficient."

Both *Rex* v. *Daun* and *The Queen* v. *Tower* were founded on *The Queen* v. *Boyes* (1861), 1 B. & S. 311; 121 E.R. 730, in which Wightman, J. said at p. 734:

> It is not necessary that there should be corroborative evidence as to the very fact; it is enough that there be such as shall confirm the jury in the belief that the accomplice [in this case the principal witness] is speaking the truth.

Observations to the same effect are found in *Rex* v. *Iman Din* (1910), 15 B.C. 476, IRVING, J.A. at p. 483, and MARTIN, J.A. at p. 487, and also in *Rex* v. *McGivney* (1914), 19 B.C. 22, MARTIN, J.A. at p. 30 and GALLIHER, J.A. at p. 32. In the latter case, GALLIHER, J.A. cited the following apt passage from the judgment of Moss, C.J.O. in *Rex* v. *Burr* (1906), 13 O.L.R. 485, at p. 486:

> This does not necessarily make it incumbent on the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be to virtually render a conviction impossible in the majority of cases like the present. It is enough if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.

I am satisfied that the evidence of the appellant confirming the little girl's story of the time, place and circumstances as detailed, was properly admitted as evidence fortifying and strengthening her credibility, and justified acceptance of her story by the magistrate. In *Rex* v. *Daun, supra,* the fact that the accused and the girl had their photograph taken together one month before the seduction, was accepted as corroborative of her evidence that he had promised to marry her. In *Rex* v. *Baskerville, supra,* the admission of the accused that the accomplice witnesses did come to his flat and that "we used to sit and talk together" was accepted as corroborative: see pp. 29 and 32. The same objection was taken by counsel in the *Baskerville* case as here but unsuccessfully, *viz.*, that the circumstance just noted

as well as other circumstances in that case were equally consistent with innocence.

It appears in the *Baskerville* case that the learned Recorder in charging the jury, used the word "affecting" the accused, instead of "implicating" the accused. But the Court of Criminal Appeal held (p. 32) that direction gave no cause of complaint to the appellant. That finding supports the view that the *ratio decidendi* of this aspect of the *Baskerville* decision was that the purpose of corroborative evidence is to fortify the credibility of the principal witness, and is not in itself to prove the guilty act, even though it may do so. Strengthening the credibility of the principal witness may be accomplished (to quote the *Baskerville* case), by evidence "rendering it probable" that the story of the principal witness is true. This is explained by the observation also at p. 33, that corroboration does not mean that there should be independent evidence of every detail of the crime, because if it did the testimony of the principal witness would not be essential to the case.

We were referred to the carnal knowledge case of *Rex* v. *Steele* (1923), 33 B.C. 197; affirmed by the Supreme Court of Canada, [1924] 4 D.L.R. 175. Evidence was accepted in corroboration of the girl's story, of a witness who saw the girl and accused dance together at a dance hall, leave the hall separately, meet outside and walk away together towards a public park. This witness did not see them enter the park where the girl testified the assault took place. He also testified that a week later the accused had threatened something might happen to him if he did not keep his mouth shut. He explained this by saying "he guessed" the accused had been told of what he had seen as above detailed. In this Court MACDONALD, C.J.A. considered there was corroboration quite apart from the threat which he regarded as "too vague and indefinite" (p. 199). MARTIN, J.A. was of the "like opinion" (p. 200), GALLIHER, J.A. held simply there was sufficient corroboration, and MCPHILLIPS, J.A. in dissenting made no reference to the evidence of the threat. Nor is the threat mentioned in the head-note, statement of the case or in the argument as reported in 33 B.C., *supra*, at pp. 197-8.

In the Supreme Court of Canada Idington, J. thought the

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evidence of this witness even without the threat was sufficient corroboration, although he regarded the threat as cogent additional corroborative evidence. Malouin, J. simply dismissed the appeal. Mignault, J. with whom Maclean, J. (*ad hoc*) concurred, held the witness's evidence as a whole to be corroborative. As I read the *Steele* decision, the majority in this Court accepted the witness's evidence without the threat as sufficient corroboration. If that is correct, then a majority in the Supreme Court of Canada did not take a contrary view. I think also that this construction of the *Steele* case is confirmed by the manner in which it was applied by this Court in *Rex* v. *Canning, infra,* affirmed as well in the Supreme Court of Canada.

The appellant's corroboration of the time, place and circumstances fortifying the credibility of her story, receives material assistance also from his testimony that she was the only little girl he had taken on his knee during his time as a janitor at the school. It is a circumstance which forces itself into the consideration of anyone whose duty it may be to weigh the truth of the little girl's story and the truth of the appellant's own evidence. Realistically viewed, it pointed to some fondness or physical attraction for this particular little girl, which in the ordinary judgment of mankind could "render it probable," to use the language of the *Baskerville* case again, that the little girl's story was true.

It was also urged that there was no corroboration of the fact that an indecent act had taken place. No one saw it, and the indecent assault was of such a kind that no trace of it would remain as in a carnal knowledge case. That vital distinction was not considered in *Rex* v. *Gee Poy,* [1922] 3 W.W.R. 1183, which cited no authority in support. That decision if followed in a case like the present, would necessarily demand independent direct testimony of the indecent act. But with respect that is contrary to the *Baskerville* decision where Viscount Reading said at p. 34:

> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

And added that if it were not so, many crimes like the present could never be brought to justice.

That passage is preceded by the observation also at p. 34:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him—that is, which confirms in some material particular not only the evidence that the crime has been committed, but that the prisoner committed it.

I read the concluding phrase "but also that the prisoner committed it" to be an abbreviated form of "which confirms in some material particular also the evidence that the prisoner committed it." So read, in what I think is the proper grammatical construction of the text, it means that evidence may be regarded as corroboration, which confirms evidence of the principal witness in some circumstance affecting the accused and material to the proof of the charge. Moreover that construction accords with the particular language employed in section 1003, subsection 2. It is also noted that the word used in our section is "implicate" and not "incriminate." As pointed out before, "implicate" in the *Baskerville* decision is read in the sense of "affect" and not "incriminate."

That construction is borne out by other observations in the *Baskerville* case, some of which have been mentioned. I add one more at p. 33:

> Indeed, if it were required that the accomplice [substitute principal witness] should be confirmed in every detail of the crime, his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony.

In *Rex* v. *Schiff* (1920), 15 Cr. App. R. 63, Viscount Reading, C.J. gave strong support to that construction of his own language in the *Baskerville* case. The objection was taken there that while there was evidence corroborating the eight-year-old child's story generally, nevertheless it did not implicate the accused. That is the nub of this case. But the Court rejected that submission on the authority of the *Baskerville* decision. Viscount Reading's observations at p. 64, in my view are as applicable to the present facts as if specifically directed thereto:

> . . . , it is difficult to see how the evidence in the present case, if it was believed by the jury, [the magistrate here] does not tend to implicate the accused man. It is hardly possible that the child could have invented the details of the story which she told in the witness box, and the Court considers that there was sufficient corroborative evidence in the case.

In *Rex* v. *Canning* (1937), 52 B.C. 93, the police agent Fisher

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testified he saw the appellant and the accomplice Furumoto together in a conversation which he did not overhear. This Court, MARTIN, J.A. dissenting, held that was sufficient corroboration of the evidence of Furumoto as to what was said during that conversation, to support a conviction for conspiracy to distribute morphine. MACDONALD, C.J.B.C. who gave the leading judgment cited *Rex* v. *Steele, supra,* in support. The view of the majority was upheld in the Supreme Court of Canada, [1937] 3 D.L.R. 375. Kerwin, J. dissented citing Lord Reading's observation in *Burbury* v. *Jackson,* [1917] 1 K.B. 16 that opportunity by itself is not sufficient.

In the case at Bar, however, as in the *Steele* and *Canning* cases, there is with respect something more than corroboration of mere opportunity. We have here corroborative evidence of circumstances affecting the appellant and material to the proof of the charge against him, which could induce reasoned belief in the child's story as a whole, or to put it in the words of the *Baskerville* case, could "render it probable" that her story was true. In view of the nature of the offence and the particular circumstances under which the principal witness testified it occurred, I am of opinion that the evidence of the convicted appellant to which I have referred, tended to show that the story of the little girl was true. That evidence was therefore corroboration of her testimony within the meaning of section 1003, subsection 2.

Some point was made also of a discrepancy in the evidence of the child and her mother. But as I regard it, that related to another test of the credibility of the child. The magistrate did not believe that the truth of the child's story taken as a whole was materially affected by that discrepancy. I find nothing in the mother's testimony which substantially weakens the corroboration furnished by the appellant as to the time, place, and other circumstances, material to the proof of the crime. I have not overlooked *Hubin* v. *Regem,* [1927] 4 D.L.R. 760. In that carnal knowledge case, there was no independent corroboration such as exists here as to circumstances of time, place, identity of accused, and placing his arm around the girl.

I would dismiss the appeal.

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

ROBERTSON, J.A.: The accused appeals from conviction for indecently assaulting a little girl who was nearly seven years of age. She was not sworn. Her evidence was taken pursuant to section 16 of the Canada Evidence Act. Accordingly, as provided by that section, there could be no conviction upon her evidence alone, and her evidence had to be "corroborated by some other material evidence." The little girl was the only witness as to the alleged commission of the offence. The facts are: The accused was a janitor at a school. One Sunday morning he was busy doing his work. The little girl went to the basement of the school and says that the accused took her on his knee, put his arm around her and then did the act complained of. The accused admits taking her on his knee but denies any impropriety. The Crown submitted that the admission by the accused was sufficient corroboration. As laid down in the often-cited case of *Rex* v. *Baskerville*, [1916] 2 K.B. 658, at p. 667:

> . . . evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

In my opinion mere opportunity is not corroboration.

In my opinion the girl's evidence as to the crime having been committed is not corroborated by the above admission. While I base my judgment on this, I may say that I feel doubtful about the little girl's evidence because she said that she had forgotten half of what the accused said to her and that her mother refreshed her memory as to this; and further that her mother told her not to tell about her tripping on her heel which might have been the cause of her crying when she first spoke to her mother.

I think the appeal should be allowed.

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

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Sept. 15, 16, 17, 20, 21, 22. *Nov.* 2.

COLE v. COLE.

Timber licences—Purchase by husband in wife's name—Whether advancement or resulting trust—Presumption—Evidence—Admissions by wife—Presumption of intent to defraud creditors—When cross-appeal necessary.

The plaintiff and defendant were married in 1935 and lived together until February, 1940. Prior to 1929, the plaintiff was rated a wealthy man, but owing to the financial slump in that year, his debts amounted to about $800,000. At the time of his marriage he had reduced his indebtedness to $200,000. On the 4th of March, 1937, he purchased 14 timber licences for timber on the west coast of Vancouver Island for $17,500 and on his instructions the assignments were made out in the name of his wife. In May, 1937, he sent the licences and assignments to *J. H. Lawson*, his solicitor in Vancouver, for registration and after registration to hold the licences subject to instructions from him. He told his wife that the licences were in her name as his agent, that they were left with Mr. *Lawson*, pending a sale and he handed over an assignment of the licences in blank to her which she executed and delivered to him. In October, 1938, Mrs. Cole telephoned Mr. *Lawson* from New York saying Mr. Cole was ill and wished him to send the licences to her. Mr. *Lawson* then sent her the licences. Mr. Cole later discovered that Mrs. Cole had removed from his files the assignment in blank which she had executed and on going to Mr. *Lawson's* office in Vancouver in November, 1939, he first discovered that Mr. *Lawson* had sent the licences to her. He then demanded delivery of the licences and the assignment in blank from Mrs. Cole but she refused delivery. On the 31st of January, 1940, Mrs. Cole assigned her interest in the timber licences to Mr. *Lawson*. Mr. Cole then demanded delivery of the licences from Mr. *Lawson* but he refused delivery. Mr. Cole recovered judgment in an action for a declaration that he is the owner of the 14 timber licences and for delivery of them.

Held, on appeal, affirming the decision of SIDNEY SMITH, J., that although the burden rests upon the respondent to rebut the presumption of advancement, the evidence, considered in the light of all the surrounding circumstances, is sufficient to discharge that *onus* and the appeal is dismissed.

Per MCDONALD, C.J.B.C.: In cases where findings are fully supported by evidence which the judge believes, the question of presumption and *onus* have little bearing. They are only of importance where evidence is lacking or where it is so indirect that conclusions must rest on inference. The general rule is that a respondent can hold a judgment on any grounds available below, even though it was not based on them and that he need not cross-appeal against the judge's reasoning merely because it is untenable, so long as respondent is satisfied with the result. Appeals are taken against the effect of judgments, not against reasons given for them.

Per SLOAN, J.A.: A very heavy burden rests upon the respondent to rebut the presumption of advancement and to show that the transfer to the wife, although absolute in form, was never intended to operate as a gift to her. The evidence, when evaluated in the light of all the surrounding and special circumstances of this case, is sufficient to discharge that *onus*.

Per FISHER, J.A.: Presumption may be rebutted by subsequent acts and declarations of the wife where there is evidence by the husband showing that she had been informed at the time of the purchase that the property had been put in her name for convenience.

Per ROBERTSON, J.A.: In order to succeed in this case, the respondent had only to prove the resulting trust, and was not bound to disclose the alleged fraud.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 28th of June, 1943, in an action

for a declaration that he is the owner of [14] timber licences issued by the Government of the Province of British Columbia . . . , and that the defendant *James H. Lawson* holds the same in trust for the plaintiff and that the defendants, Amylita G. Cole, Arthur O'Brien, Donald G. Graham and James B. Howe, have no interest in the same. And for an order that the defendant, *James H. Lawson*, transfer the same to the plaintiff. And for an injunction restraining the defendants from dealing with the said licences pending the trial of this action.

The plaintiff and defendant were husband and wife. On April 29th, 1937, the plaintiff purchased the 14 licences in question, being for timber situate on the west coast of Vancouver Island for $17,500. The assignments were prepared in blank and later the plaintiff decided to insert his wife's name as assignee and he advised his wife later that he had done so for convenience. He then sent the licences to Messrs. *Lawson, Clark & Lundell*, his solicitors in Vancouver, for registration and the licences remained with that firm until October, 1938, when the defendant requested the firm to forward the licences to her in New York. In the winter of 1938-39, the plaintiff came to the west coast of the United States and Canada with his wife when he was endeavouring to sell said licences and in November, 1939, he saw his solicitors in Vancouver when he first learned that said solicitors had sent the licences to his wife. He thereupon demanded them of her and she stated she would obtain them from her bank in New York, but later she definitely refused to give them to him. The plaintiff then brought action in the United States for divorce and brought this action for recovery of the licences. The wife's sole defence was that the licences were given to her by her

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husband. She stated in evidence that on completion of the purchase in 1937, her husband told her that "You are now a timber baroness." The husband's evidence was that he made the purchase with his own funds and paid the licence fees to the end of the year 1939. Further, that in November, 1937, his wife executed an assignment of the licences to himself and he asked his wife to keep the assignment for him in her safety-deposit box as he did not have one. A few months later he asked her for the assignment and she stated she did not remember him giving it to her and she knew nothing about it. Prior to 1929 the plaintiff was a wealthy man, but due to the slump in that year, he lost everything and was in debt to the extent of about $800,000, but he subsequently paid off a large portion of this debt and when he married the defendant he only owed about $200,000. During his married life with the defendant, the plaintiff had several times taken property in his wife's name. His wife never claimed any interest in his other deals.

The appeal was argued at Victoria on the 15th to the 17th and the 20th to the 22nd of September, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

Bull, K.C. (*G. E. Housser,* with him), for appellant: The respondent claims that appellant is a trustee for him, but does not allege, nor has he proved an express trust. His claim must therefore rest on a resulting trust arising from the fact that he paid the purchase-money: see Halsbury's Laws of England, 2nd Ed., Vol. 15, pp. 715-18, par. 1246. The presumption of advancement may be rebutted by showing that there was no present intention to benefit: see *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328. The respondent, to succeed, must negative the presumption of advancement: see *McEvoy* v. *The Belfast Banking Co.,* [1935] A.C. 24, at p. 42; *Dyer* v. *Dyer* (1788), 2 Cox 92; 2 White & Tud. L.C., 9th Ed., 749, at p. 755; Lewin on Trusts, 14th Ed., 157; *Finch* v. *Finch* (1808), 15 Ves. 43; *In re Jones, Deceased. Royal Trust Co.* v. *Jones* (1934), 49 B.C. 179, at p. 186; *Grey* v. *Grey* (1677), 2 Swanst. 594; *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; *Christy* v. *Courtenay* (1849), 13 Beav. 96. The only evidence in rebuttal is that of the plaint-

iff: see *Devoy* v. *Devoy* (1857), 3 Sm. & G. 403. The learned judge should have found that the respondent utterly failed to discharge the *onus* of negativing the presumption of advancement: see *Hyman* v. *Hyman,* [1934] 4 D.L.R. 532; *McManus* v. *McManus* (1876), 24 Gr. 118; *Fricke* v. *Fricke,* [1940] 1 W.W.R. 87; *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625. Declarations supporting an advancement are much stronger in the case at Bar than in *Eldridge* v. *Royal Trust Co. (Eldridge Estate),* [1923] 2 W.W.R. 67. Subsequent acts and declarations by the husband may be used against him, but not in his favour: see *Stock* v. *McAvoy* (1872), L.R. 15 Eq. 59; *Crabb* v. *Crabb* (1834), 1 Myl. & K. 511, at p. 519. In *In re Jones, Deceased. Royal Trust Co.* v. *Jones* (1934), 49 B.C. 179, at p. 189, the *Eldridge* case is referred to as stating "the fact is that the transfer was made to the son and the law presumes the gift and such presumption upon the authorities is not to be lightly displaced"; see also *Commissioner of Stamp Duties* v. *Byrnes,* [1911] A.C. 386; *Harrington* v. *Harrington,* [1925] 2 D.L.R. 849. Even if appellant had executed the assignment, it would not be evidence rebutting the presumption: see Lewin on Trusts, 14th Ed., 157; *McLeod* v. *Curry,* [1923] 4 D.L.R. 100. In the alternative the appellant submits that the evidence discloses that respondent at the time of the purchase was insolvent. He had fought bankruptcy for years. The result is the respondent's action should have been dismissed on the ground that a Court of Equity will not grant relief to a husband against the consequences of his unlawful attempt to delay and hinder his creditors: see *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625; *Trumbell* v. *Trumbell* (1919), 27 B.C. 161. This does not detract from his intention to make a gift: see *Fricke* v. *Fricke,* [1940] 1 W.W.R. 87, at p. 91; *McEvoy* v. *The Belfast Banking Co.,* [1935] A.C. 24, at p. 41. Presumption of advancement is not only not negatived by the facts, but is in fact enhanced. Actual fraudulent intent need not be shown: *Gardner* v. *Gardner,* [1937] O.W.N. 500.

McAlpine, K.C. (*Walkem, K.C.,* with him), for respondent: Where a husband invests in his wife's name, a gift is presumed in the absence of evidence of a contrary intention. The question

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is with what intention the transaction took place: see Lush on Husband and Wife, 4th Ed., 145. The surrounding circumstances should be considered to determine whether there is a gift or whether a resulting trust was intended: see *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328, at p. 329; *In re Young. Tyre* v. *Sullivan* (1885), 28 Ch. D. 705. The evidence led to rebut the presumption was conclusive. In the transfer of the licences in question he inserted his wife's name for convenience only. In 1937 he instructed his attorney to draw an assignment of the licences from his wife to himself. Mrs. Cole executed the assignment and he gave the assignment to his wife to keep for him in her safety-deposit box, but subsequently she denied that she had it and he never saw it again. The licences were in the hands of *Lawson, Clark & Lundell,* Barristers, Vancouver, who were the respondent's solicitors. At the request of the appellant the solicitors sent the licences to her when she was in New York. The learned judge properly regarded the sworn testimony and all the circumstances surrounding the transaction which conclusively rebut the presumption of advancement, namely: (1) She was the beneficiary of a trust fund of $416 per month for life; (2) Cole told her he put the licences in her name for convenience; (3) she executed an assignment back to Cole; (4) she obtained the licences secretly and kept that fact hidden; (5) Cole had never carried property in his own name and he had put several properties in her name to which she made no claim; (6) she admitted to Cheney that the licences were her husband's; (7) the licences were purchased for resale to her knowledge and Cole was offering the licences for sale with her knowledge and without protest from her. He had been a wealthy man, but owing to the depression, he incurred obligations in the sum of about $800,000. He succeeded in reducing his liabilities by about $600,000 and owed about $200,000 at the date of the trial. The learned judge was right in holding that there was no proof of fraud and that the plaintiff was not *in pari delicto.* There is no evidence that the remaining creditors were in fact hindered, delayed or defrauded and the plaintiff is not barred from recovering what is rightly his: see *Taylor* v. *Bowers* (1876), 1 Q.B.D.

291; *Symes* v. *Hughes* (1870), L.R. 9 Eq. 475; *Petherpermal Chetty* v. *Muniandy Servai* (1908), 24 T.L.R. 462.

Bull, replied.

Cur. adv. vult.

2nd November, 1943.

McDONALD, C.J.B.C.: This is a contest between a former husband and wife over the beneficial ownership of timber licences, which he bought in her name and she afterwards transferred to a trustee. The judgment appealed from awards the licences to the ex-husband, plaintiff below and respondent here.

In order to rebut the presumption of gift that arises where a husband buys property in his wife's name, the respondent gave evidence that he had never intended to make her a gift, but had merely put the property in her name as his agent and "for convenience," and that he had told her so at the time. This was flatly denied by her; but the trial judge believed the respondent.

I have reached the conclusion that this case turns entirely on questions of fact, and that the judgment below should stand. Not only is there ample evidence to justify it, but if I were to make a finding *de novo* I should reach the same conclusion as the trial judge. The respondent's evidence was corroborated on important points by several witnesses; the appellant had no corroboration except that supplied by respondent's communications with third parties, which several times referred to the licences as the appellant's. Though these references were undoubtedly evidence against the respondent I think the trial judge took the right view of their weight. They were made in communications to parties who were interested in the legal title only, and were quite reconcilable with the respondent's regarding himself as the beneficial owner. One would hardly expect him to keep explaining to third parties that although the licences were in his wife's name, she only held as his trustee, at least when this did not concern these parties.

As I find that the weight of evidence supports the judgment, it only remains to consider the various points raised for the appellant, to show that this case involves more than questions of fact.

First it is said that the presumption in the wife's favour is

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decisive. This undoubtedly put the *onus* on the respondent. But in cases where findings are fully supported by evidence which the judge believes, the questions of presumption and *onus* have little bearing. They are only of importance where evidence is lacking or where it is so indirect that conclusions must rest on inference. This case presents no such situations.

Next it is said that we ought to conclude that the respondent put the property in his wife's name so as to defraud his creditors, and such decisions as *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625 and *Elford* v. *Elford* (1922), 64 S.C.R. 125 are invoked to show that he should receive no help from the Courts. On this point appellant's counsel relied on admissions by the respondent that for many years past he had been under heavy liabilities and even "fighting off bankruptcy." I think, however, that it is impossible for us to lay down as a principle of law that under such circumstances every transfer of property taken in another's name must be presumed to be fraudulent. This must be a question of fact in each case. It is noteworthy that no issue of fraud was raised in the pleadings, and especially in view of that we cannot act on what are at most suspicious circumstances. It is true that if it were an admitted fact, as in the two cases cited, that the purpose of using the wife's name was fraud, we should have to take notice of it, although the point was not pleaded. Here, however, respondent, far from admitting any such purpose, denied it strenuously. The learned trial judge accepted his denial; he could hardly do otherwise when there was no issue on the point; and we certainly cannot take a different view. The want of conclusive evidence makes *Scheuerman* v. *Scheuerman, supra,* and *Elford* v. *Elford, supra,* inapplicable, and makes it unnecessary to decide whether those decisions can be reconciled with the Privy Council's decision in *Petherpermal Chetty* v. *Muniandy Servai* (1908), 24 T.L.R. 462, and if not which decision we ought to follow.

Next the appellant argues that, even if this case turns on the facts, the trial judge erred in admitting evidence of appellant's admissions, made subsequent to her acquisition of title, to the effect that the respondent was the real owner of the licences. On this point appellant relies chiefly on a passage from Lewin

on Trusts, 14th Ed., 157, where the author, in discussing the presumption of advancement where a father puts property in his son's name, seems to suggest that subsequent admissions by the son of the father's ownership are not evidence against him. The passage is rather cryptic, and after studying the context and the authorities cited, I am satisfied that Lewin means nothing more than that admissions by a grantee as to the grantor's intentions, though against the grantee's interest, are entitled to no weight where he cannot possibly know the grantor's intentions, *e.g.*, where the grantor never disclosed them. I am satisfied that admissions against interest, whenever made, are always evidence against the maker, even though their weight will vary, and may even dwindle to the vanishing point. That is the view taken in 2 White & Tud. L.C., 9th Ed., 776 and elsewhere.

Here, if respondent's evidence is accepted, as it was below, there can be no question of appellant's not knowing his intent when he put the licences in her name.

The case of *McLeod* v. *Curry,* [1923] 4 D.L.R. 100, also cited on the same point as Lewin, does not help the appellant at all. That case did not decide that the wife's acknowledgment of her husband's title was inadmissible; it decided that the admission had no value, first because she did not even know he had put the property in her name, secondly because she did not know she was making the admission, not having read what she signed.

I hold therefore that there was no error made in receiving appellant's admissions of respondent's title.

It only remains to consider the respondent's claim that, if necessary to support the judgment, he should be allowed to rely on certain evidence that the trial judge ruled out as privileged. Against this, appellant objected that no notice of cross-appeal had been given. In another case this situation might raise some nice points of practice. The general rule is that a respondent can hold a judgment on any grounds available below, even though it was not based on them, and that he need not cross-appeal against the judge's reasoning, merely because it is untenable, so long as respondent is satisfied with the result. Appeals are taken against the effect of judgments, not against the reasons given for them. Here, however, the respondent wishes to com-

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plain, if occasion arises, that he was actually deprived of something he was entitled to in addition to his judgment, *viz.*, the right to put his evidence on record, and my impression is that in order to complain of this, he should have cross-appealed. Actually, however, he gave the appellant ample warning in his factum of his intentions, and so, if it were necessary, I would extend the time for giving notice of cross-appeal. However, as I would dismiss the appeal, cross-appeal becomes unnecessary to sustain the judgment, and we need not decide whether the evidence was rightly excluded.

SLOAN, J.A.: By reason of the marital relationship existing between the respondent and appellant, at the time the licences herein were assigned by the husband to the wife, a very heavy burden rests upon the respondent to rebut the presumption of advancement, and to show that the transfer to the wife, although absolute in form, was never intended to operate as a gift to her. In my view the evidence, when evaluated in the light of all the surrounding and special circumstances of this case, is sufficient to discharge that *onus*.

The relevant documents in the case are as equally consistent with the evidence of the respondent as with the testimony of the appellant and thus tend to corroborate neither.

I would, therefore, dismiss the appeal.

O'HALLORAN, J.A.: Perusal of the evidence in the light of the argument at Bar, satisfies me the learned trial judge did not fail to reach the right conclusion. My brother ROBERTSON has stated the essential facts, and I agree with his reasons for dismissing the appeal.

The presumption of law which favours a gift to the appellant wife, is a rebuttable presumption. Her statements and conduct which point to a denial of the gift to her of the timber licences, constitute evidence in rebuttal of that legal presumption. Testimony of that nature is a convincing answer to a presumption of gift, and as such is essentially admissible evidence.

Study of that branch of the testimony, and in particular the evidence of the witness Cheney, and the circumstances surrounding it, satisfies me that it displaces the legal presumption of gift.

Upon that principal issue as well as upon the other points upon which the judgment was attacked, I am unable to find that the learned judge came to an unwarranted conclusion.

I would dismiss the appeal.

FISHER, J.A.: This is an appeal from the judgment of SIDNEY SMITH, J. deciding that the 14 British Columbia timber licences in question are the property of the respondent and that the defendant *Lawson* holds them as trustee for him.

The respondent gave evidence which was not contradicted that he completed the purchase of the said timber licences with his own funds in an attorney's office at Savannah, Georgia, on April 29th, 1937, and paid all fees payable on the licences from that date to the end of the year 1939. The appellant (then the wife of the respondent but subsequently divorced) was named in the assignment of the said timber licences as the assignee thereof. The respondent says that he inserted the name of the appellant in the assignment for convenience and shortly thereafter on the same day advised the appellant, who was also in Savannah, that he had inserted her name in the assignment for convenience.

It is or must be common ground between counsel that, where a husband purchases property in his wife's name, there is a presumption of law that the purchase was an advancement to the wife but that the presumption of an advancement may be rebutted. Counsel for the respondent submits that the evidence led to rebut the presumption was conclusive in the respondent's favour and that the learned trial judge was right in so finding. Counsel for the respondent relies especially upon the evidence of the respondent himself and the evidence of the witnesses Mrs. Money (formerly Gertrude Peterson), Mrs. Randolph and Mr. Cheney. On the other hand, counsel for the appellant submits that the Supreme Court of Canada has in recent years laid down in clear terms the nature of the evidence required to rebut the presumption in favour of a wife and that, if the learned trial judge had properly directed himself to the real issue, he must have found that the respondent failed to discharge the *onus* of rebutting such presumption.

Counsel for the appellant relies especially upon the judgments

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of the Supreme Court of Canada in *Hyman* v. *Hyman*, [1934] 4 D.L.R. 532 and *Eldridge* v. *Royal Trust Co. (Eldridge Estate)*, [1923] 2 W.W.R. 67. In the *Hyman* case Hughes, J., delivering the judgment of the Court, said in part as follows at pp. 538-9:

Now in the case at Bar, there is not only the presumption of an advancement, but there is the affidavit of the appellant, prepared by his own solicitor and sworn before Nina Hattin, a witness of the appellant, that the conveyance was a gift to the grantee. In *McManus* v. *McManus* (1876), 24 Gr. 118, Moss, J., said at p. 124:—

"No one who has watched the administration of justice in our Courts will doubt the wisdom of a rule declaring that, if under certain circumstances a plaintiff is, notwithstanding the statute, to be exempt from the necessity of producing written evidence of a trust in his favour, he shall at least establish its existence by verbal testimony of a clear, satisfactory and convincing character. The perils which encompass relaxations of the statute are great enough to justify a Court in exacting an amount of verbal testimony which shall produce a strong degree of conviction. If a trust is to be established by parol despite the statute, sound policy requires that its existence should be brought within the range of reasonable certainty, and not left within the shadowy region of conjecture.

"If, in consideration of special circumstances, and for the vindication of justice, a man receives the indulgence of submitting evidence apparently excluded by the statute, he may well be required to justify the action of the Court in his favour by bringing forward clear, distinct and precise testimony by presenting a case not resting upon a very nice balance of conflicting statements, by producing in short proofs little, if at all, inferior to a written document in their efficacy."

. . . The appellant fails to give any valid explanation for delivering to the respondent a deed absolute in form or for swearing an affidavit of "gift" if there was not in fact an advancement. Considering the whole case, we are of opinion that the appellant has failed to bring forward, in the words of Moss, J., in *McManus* v. *McManus*, *supra*, "clear, distinct and precise testimony" of any definite trust in his favour.

In *In re Jones, Deceased. The Royal Trust Co.* v. *Jones* (1934), 49 B.C. 179 my brother ROBERTSON referred to the *Eldridge* case at pp. 190-1 as follows:

A very strong case is that of *Eldridge* v. *Royal Trust Co.*, [1922] 2 W.W.R. 1068, wherein the facts were that the plaintiff's father purchased land under an agreement for sale to himself, but on getting the transfer caused it to be made out to the plaintiff. He explained to the vendor that his son was "coming up from the States." The father retained the duplicate certificate of title and the transfer (unregistered) and they were found among his papers after his death, in a locked trunk. He never told the plaintiff (who did not come to Alberta) anything about this land and during the seven years between the purchase and his father's death the latter leased the land "on shares," took the profits, paid for the seed grain, paid for the breaking

of the land and paid the taxes. Two tenants testified as to conversations in regard to selling the land in which the father said he had given the land to the plaintiff. The majority of the Court of Appeal held that there was a completed gift of the land to the plaintiff; there was a presumption that the gift was intended from the father to the son and this could not be said to be rebutted; and the plaintiff's interest arose on delivery of the transfer by the vendor and the plaintiff's right was to claim possession of the document in order to make himself the registered owner. The judgment of the majority of the Court was upheld by the Supreme Court of Canada—see [1923], 2 W.W.R. 67. Sir Lyman Duff, Chief Justice of Canada, who was then Duff, J., held that there was a legal presumption of advancement in which case the *onus* was upon the estate to show that a trusteeship had been intended and he held that the presumption had not been rebutted.

In the *Eldridge* case Duff, J. had said in part as follows at p. 68:

> . . . The father nominated the son as vendee; and the only question is whether he did so with the intention of vesting the beneficial ownership in the son in the fullest sense or merely as trustee for himself? The question is no doubt on the facts a debatable one but the *onus* is on the estate because there is a legal presumption of advancement and I have no hesitation in holding that this presumption has not been rebutted.
>
> True the declarations of the father at the time of the purchase point to an expectation entertained by him that the son would come and live with him, and might perhaps bear the construction that this expectation supplies the primary motive for making the gift. The subsequent conversations are however not only admissible but valuable as tending to throw light upon the earlier conversation and these point very directly and decisively to the existence of an intention to make an absolute gift. . . .

Anglin, J., as he then was, agreed with Clarke, J.A. in the Appellate Division ([1922] 2 W.W.R. 1068). Clarke, J.A. at p. 1078 had referred to the evidence of certain witnesses as to subsequent declarations of the father as supporting the gift, as had also the trial judge, Walsh, J. ([1922] 1 W.W.R. 792, at p. 794).

Counsel for the appellant submits that the respondent in the present case, like the appellant in the *Hyman* case, has failed to bring forward "clear, distinct and precise testimony" of any definite trust in his favour and that the declarations of the respondent in his correspondence with Mr. *Lawson,* which correspondence is hereinafter more particularly referred to, were much stronger than the contemporaneous affidavit under the Land Transfer Tax Act, R.S.O. 1927, Cap. 31 in *Hyman* v. *Hyman, supra,* and the verbal statements of the donor to disinterested parties in *Eldridge* v. *Royal Trust Co., supra.* It must

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be noted, however, that in the *Hyman* case Hughes, J., delivering the judgment of the Court, said in part as follows at pp. 538-9:

> . . . The judgment is not in substantial accord with the evidence of the appellant and Nina Hattin, and the appellant is, therefore, not in a position to take advantage of the fact that the learned trial judge believed the evidence of the appellant and certain of his witnesses.

In the present case I think the respondent is in a better position than the appellant in the *Hyman* case. During argument by counsel for the appellant and in what may be called his reasons for judgment the learned trial judge referred several times to the question of credibility and said *inter alia*:

> I agree with you when you say there are two versions and that I must accept one of the two. I cannot weave the evidence together. I must accept one or the other. They cannot live together.

Judgment was given in substantial accord with the evidence of the respondent and some of his witnesses and I have no doubt that the learned trial judge believed the evidence of the respondent and certain of his witnesses and disbelieved the evidence of the appellant. The respondent is therefore in a position to take advantage of such fact. With regard to the declarations it must moreover be observed that in the *Hyman* case the affidavit of the appellant stated that the transfer was a "gift to the grantee" and thus was cogent evidence as to his real intention and obviously inconsistent with the evidence of himself and Nina Hattin, a witness called by him at the trial. In the *Eldridge* case also there was evidence of statements by the father that he had "given" the property to his son. In the present case the declarations relied upon by counsel for the appellant were contained in certain correspondence passing between the respondent and Mr. *Lawson's* firm, acting as solicitors on behalf of the Malahat Logging Co. Ltd., though at times also acting for the respondent. This correspondence must therefore be carefully considered and I propose to set out here certain parts of it as follows: [His Lordship after setting out the correspondence continued].

Although I have set out only part of the correspondence I pause to say here that I have carefully considered all of it. I think it is quite obvious that the correspondence was begun to settle the question that had arisen as to whether or not Mrs. Trosdal had executed an assignment of the licences to Mrs. Cole,

in order that the solicitors might pay to Mrs. Trosdal the stumpage payments under the right-of-way agreement made by her or to her assignee if she had executed an assignment. When it appeared that there was an assignment from Mrs. Trosdal to Mrs. Cole, the solicitors then suggested it would be good policy for such assignment to be registered and the later letters show that the solicitors finally received the assignment from Mrs. Trosdal to Mrs. Cole and instructions to have same properly recorded as suggested by the solicitors and to hold all papers in question for Mrs. Cole's account. I am satisfied that throughout the entire correspondence the parties were concerned only with the matters mentioned. In other words, it may be said that the solicitors in the course of their duty were concerned to know whether Mrs. Trosdal had assigned the licences to Mrs. Cole but, if she had, they did not require to ascertain why or with what intention they were put in the name of Mrs. Cole. It may well be, as the learned trial judge says, that Mr. Cole was not very frank in his business dealings with Mr. *Lawson* and that, if he had said what the true situation was, Mr. *Lawson* would not be in the position he is now, but nevertheless in none of the documents making up the correspondence did the respondent state that the assignment was a gift to the appellant or that he had given the licences to her. In this respect the declarations in the *Hyman* and *Eldridge* cases, *supra,* are distinguishable from those relied upon in the present case. The learned trial judge, who had all the parties directly interested before him and heard their testimony, held that the documents were not inconsistent with the evidence and I agree. The documents do not disclose what the real intention of the respondent was at the time of the purchase or assignment.

I still have to deal with the question as to whether the presumption of advancement may be rebutted by such evidence as was given by the said witnesses Mrs. Money, Mrs. Randolph and Mr. Cheney, who gave evidence of subsequent acts and declarations of the appellant which were in the nature of admissions by her that the timber licences, though in her name, were the property of the respondent. It is apparently argued by counsel for the appellant that such evidence was not evidence to rebut the

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presumption. Lewin on Trusts, 14th Ed., 157 and *McLeod* v. *Curry*, [1923] 4 D.L.R. 100 are especially relied upon. Lewin says:

> . . . , and so the subsequent acts or declarations of the son may be used against him by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father; but not otherwise, for the question is, not what did the son, but what did the father, mean by the purchase.

I have to say that I find it difficult to understand just what the learned writer means to say in this passage but I do not think that he means that the presumption may not be rebutted by subsequent acts and declarations of the son if he had actual knowledge at the time that the property in question had been put in his name. If, however, he does mean that, then I have to say with great respect that I am unable to agree. In this connection reference might be made to what is said in 2 White & Tud. L.C., 9th Ed., at pp. 775-6, *viz.*:

> The acts and declarations of the father subsequent to the purchase may be used in evidence against him by the son, although they could not be used by the father against the son; and it seems that the subsequent acts and declarations of the son, as being in the nature of admissions, can be used against him by the father.

In *McLeod* v. *Curry* the Court of Appeal of Ontario, affirming on this point Mulock, C.J. Ex. (1921), 51 O.L.R. 68, held that the presumption of advancement was not rebutted by an affidavit made by the wife in connection with the probate of the estate declaring the lands in question as being part of the estate of which the testator died possessed. It is quite apparent, however, from the report of the case that the wife was not found to have had actual knowledge that the said lands had been vested in her but that Mulock, C.J. Ex. had held that she was deemed by the Registry Act to have notice of the deed on which point it may be noted the Court of Appeal disagreed with him.

After careful consideration of the arguments of counsel I am satisfied that the presumption may be rebutted by subsequent acts and declarations of the wife where there is evidence by the husband as here showing that she had been informed at the time of the purchase that the property had been put in her name for convenience. Assuming that the presumption may be so rebutted then it would appear that the respondent had brought forward "clear, distinct and precise testimony" of a definite trust in his

favour in the words of Moss, J. in *McManus* v. *McManus, supra*. The case then becomes one in which the learned trial judge accepted such testimony, as I have already intimated, and found that the respondent did not intend an advancement but a trusteeship. Before dealing with the rule applicable on an appeal in such a case I will deal with the alternative submission made on behalf of the appellant.

Counsel for the appellant submits in the alternative that, even if the learned trial judge found that the respondent did not intend an advancement, nevertheless he should have drawn the inference that the respondent was endeavouring to protect the property from his creditors and therefore should have dismissed the action on the ground that a Court of Equity will not grant relief to a husband against the consequence of his unlawful attempt to delay and hinder his creditors. See *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625 and *Trumbell* v. *Trumbell* (1919), 27 B.C. 161, at p. 163. In his reasons for judgment the learned trial judge said:

> . . . I may say with respect to the second point of fraud, I do not think I should draw any inference of fraud. It was denied. Fraud should be proved up to the hilt. I am not prepared to hold now that there was anything fraudulent in this action with reference to these limits. . . .

Counsel for the appellant relies upon *Gardner* v. *Gardner*, [1937] O.W.N. 500 as showing that actual fraudulent intent need not be shown. I am not satisfied however that the learned trial judge misdirected himself or came to a wrong conclusion on the issue raised on this phase of the matter. I do not propose to canvass the evidence but I would say that there was no direct evidence given by the wife herself, as there was in the *Gardner* case, or by any other witness to the effect that the respondent had put the property in her name as a protection against creditors, and I do not agree that from the evidence there is an irresistible inference that the assignment was intended to defeat, delay or defraud creditors of the respondent.

Before indicating my conclusion on the whole matter I pause here to say that I have not overlooked the fact that the learned trial judge apparently did not have the opportunity of seeing and hearing two of the said witnesses, *viz.*, Mrs. Money and Mrs. Randolph whose evidence was taken on commission. I am satis-

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fied, however, that he accepted their evidence in preference to that of the appellant where she gave contradictory evidence. The trial judge saw and heard the appellant, the respondent, Cheney and other witnesses while they were giving their evidence. Under the circumstances I think I must apply the rule stated by Lord Wright in the House of Lords in *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243, at pp. 265-66:

> . . . the Court of Appeal "must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong"; (*The Julia* (1860), 14 Moore, P.C. 210, 235), *per* Lord Kingsdown, cited with approval by Lord Sumner [*Hontestroom (Owners)* v. *Sagaporack (Owners)*], [1927] A.C. 47). . . .

In the present case I am not convinced that the learned trial judge was wrong in deciding that the said timber licences are the property of the respondent and that the defendant *Lawson* holds them as trustee for him. Applying then the rule as stated I conclude that I should not reverse the judgment of the Court below and I would therefore dismiss the appeal.

ROBERTSON, J.A.: On the 4th of March, 1937, the respondent agreed to purchase 14 British Columbia timber licences, belonging to the Trosdal estate, for $17,500, payable as to $2,500 on or before March 9th, 1937, and as to the balance on or before June 1st, 1937. The agreement provided that these payments should be made to A. P. Adams "Attorney for Mrs. Trosdal at Savannah in New York Funds." On the 29th of April, 1937, the respondent drove to Savannah to complete the purchase. The appellant (his wife) was with him. The respondent went in to see Adams and the appellant remained in the motor-car. After the conclusion of his interview with Adams he rejoined the appellant in the motor-car and they proceeded on their way to New York. The transaction was not actually completed until two or three days after the 29th of April as the appellant did not have there the New York funds which Adams required. The respondent says he told her in the motor-car that he had finished the transaction with Adams; that he had been undecided how to take title; that the assignment was in blank and he had decided at the last moment, as had been his custom in other matters, to insert her name in the assignment, for convenience; that the appellant did not say anything nor appear to take any

interest in the matter and that he cannot remember that the matter was discussed any further on the way to New York.

It is not suggested by the appellant that before the 29th of April, 1937, the respondent said anything to her about giving her these timber licences or putting them in her name. She says that she had a vague idea, previously, of the business being transacted; that after the respondent rejoined her in the motor-car he said "You are a timber baroness now" and on appellant asking why, he said "I have had Mr. Adams put these timber licences in your name" and appellant said "that is nice," and respondent said later in the day or during the journey to New York "I have done this to make you secure from Hattie D. [a former wife] and James Howard" (respondent's son) and later he said he had no life insurance so "it would protect her."

In July, 1938, the respondent sent the licences and the transfer to the appellant to British Columbia for registration and they were duly registered in August, 1938, in the appellant's name. Early in 1940 marital difficulties occurred between these parties. The respondent commenced this action, on the 20th of September, 1940, for a declaration that he was the owner of the timber licences, because of the resulting trust arising out of the circumstances above described by him. The learned trial judge held that the licences belonged to the respondent. The appellant submits that the learned trial judge did not give effect to the presumption of law that the purchase of the timber licences in the name of the appellant was an advancement; that he was wrong in not finding on the evidence that the respondent had failed to discharge the *onus* of rebutting the presumption of an advancement; that he misdirected himself on the issue of advancement in that he held (1) that there was no corroboration of the appellant's evidence that the respondent intended to make a gift of the said licences to her; that he attached too much importance to this fact, whereas, as a matter of fact the correspondence between the respondent and his solicitor *Lawson* strongly corroborated the appellant's evidence, and that evidence of declaration and actions on the part of the appellant after the 29th of September, 1937, were not relevant to the issue of advancement. As to corroboration, the learned judge clearly

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had in mind the correspondence as is shown by what he said to Mr. *Bull* at the conclusion of his argument after the evidence had been given, *viz.*: "I know the strength of your case is in the documents," and again, "Apart from the documents there is no point where the defendant Mrs. Cole's evidence is corroborated by anyone." This statement seems to be entirely correct.

I now turn to a consideration of the other grounds of appeal. *Prima facie*, the purchase of the timber lands by the respondent in the name of his wife the appellant raises the presumption that it was intended as an advancement by him and the presumption is that there was not a resulting trust as between them. See *Hyman* v. *Hyman*, [1934] 4 D.L.R. 532, at p. 538. The question to be determined is what was the respondent's intention at the time of the transfer, *i.e.*, 29th April, 1937? To ascertain this, evidence may be led of facts antecedent to, or contemporaneous with, the purchase or so immediately after it as to constitute part of the same transaction—Lewin on Trusts, 14th Ed., 156 and cases cited there. The evidence of both parties as to what took place on the 29th of April, 1937, was clearly admissible. After the transaction had been completed, and, "at a time not so immediately after it as to constitute part of the transaction," I am of the opinion that, in the circumstances of this case, statements or declarations by the appellant against, but not in her favour, were admissible evidence to show the respondent's intention at the time of the transfer. Lewin on Trusts, 14th Ed., 157 and cases there cited. Counsel for the appellant submitted that this was not so. He relied upon *McLeod* v. *Curry*, [1923] 4 D.L.R. 100 and *Hyman* v. *Hyman*, [1934] 4 D.L.R. 532. In *McLeod* v. *Curry* the facts were a testator had without his wife's knowledge put certain lands in her name. To obtain probate she swore a joint affidavit that several hundred parcels of land, "the enumeration of them, [occupying] nearly six foolscap pages," belonged to the testator. The widow knew nothing about the purchase until after her husband's death. Obviously she could know nothing of the intention of her husband at the time of the purchase which was the question to be determined. It was held that the presumption of advancement had not been rebutted because of the widow not knowing she was making any admission.

In *Hyman* v. *Hyman* the facts were the husband transferred certain lands to his wife by a deed absolute in form. The husband "swore the affidavit required by the Land Transfer Tax Act" in which he said (p. 534):

> The only consideration for the within transfer is natural love and affection and the same is a gift to the grantee. The relationship between the grantor and grantee is that of husband and wife."

The husband brought an action for a declaration that the respondent held these lands in trust. Both parties gave evidence as to what had occurred prior to and at the time the conveyance was signed. The plaintiff called his secretary who was present at the time the conveyance was given, who related circumstances to show the husband's intention that the wife should hold in trust. He also called other witnesses who deposed to conversations with the wife after the transaction in which she stated the property in question belonged to her husband. Notwithstanding this the Court said at p. 539:

> The appellant fails to give any valid explanation for delivering to the respondent a deed absolute in form or for swearing an affidavit of "gift" if there was not in fact an advancement.

and held:

> Considering the whole case, we are of opinion that the appellant has failed to bring forward, in the words of Moss, J., in *McManus* v. *McManus*, *supra*, "clear, distinct and precise testimony" of any definite trust in his favour.

Now it is to be noted that in the *Hyman* case no objection was suggested to the admissibility of the statements made by the wife sometime after the transaction had been completed. Then it is submitted in the case at Bar that the evidence is not clear, distinct and precise testimony establishing a resulting trust in favour of the respondent.

I have carefully considered the whole evidence. The fact that the respondent in July, 1938, sent the timber licences to *Lawson* with the transfer, to have them registered in the name of the appellant and the fact that they were registered is I think "cogent" evidence confirming the appellant's evidence, in view of the respondent's evidence that in September, 1937, the appellant had given him a transfer of the licences which he then handed to her for safe keeping; that in March, 1938, when he asked for the transfer she could not remember having received

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it and denied ever having signed it and the respondent then said that when they went to Vancouver they would have them transferred while there; instead of which he forwarded the licences to Vancouver to be registered in her name some three or four months after. In *Harrington* v. *Harrington,* [1925] 2 D.L.R. 849, the husband took a conveyance of property in his wife's name. He said at the time that he wanted the property to be in his wife's name temporarily. The conveyance dated April 9th, 1920, was not registered until December 1st following. The wife knew nothing of these matters. Riddell, J., delivering the judgment of the Appellate Division said at p. 854:

> It seems to me that the fact that the plaintiff in April directed his solicitor not to register the deed to the defendant for a time, and then, some 7 or 8 months thereafter, directed him to register it, is cogent evidence of his having ultimately made up his mind that his wife should have the property, the deed being registered to make her paper-title complete.

The respondent had learned in November, 1939, that the appellant had the timber licences. In the first week in January, 1940, the parties were at arm's length. The appellant had commenced proceedings for maintenance. About that time F. I. Cheney, an attorney-at-law, said that he had two conversations with her about the licences in question; that he said to her:

> About these Canadian licences [referring to the 14 licences] just whose timber is this? She replied "This is Howard's timber. . . . I have them in my name.

(Howard is the appellant's Christian name.)

He then said:

> "Can you explain this? I always understood it was Mr. Cole's timber and we always negotiated with Mr. Cole and still are negotiating with Mr. Cole . . . on this. She said, "He was very sick a few years ago and put them in my name. . . . Poor Howard, he was very sick and felt so sorry, he did not expect to recover, and put them in my name to take care of me in case anything happened if he passed away."

The appellant was not called to contradict this evidence. The learned judge was impressed by the fact that the appellant's evidence was contradicted by several witnesses—Peterson, Striker, and Randolf. Now, shortly, when the parties were at arm's length and the appellant had taken the proceedings which I have mentioned, an admission by her then, when she was trying to get all she could out of her husband, that the timber licences belong to the respondent is cogent evidence, is in my opinion of

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the same importance, as evidence, as the affidavit was held to be in the *Hyman* case.

The learned judge had before him the class of evidence which the *Hyman* case lays down as essential to rebut the presumption of advancement. He believed the respondent's "version." I am quite unable to say he was wrong in coming to this conclusion. The appellant also submitted alternatively that the respondent's intention was to place the licences beyond the reach of his creditors and that the respondent being *in pari delicto* the learned judge should have refused him any relief. There is no evidence of any express agreement as to defrauding creditors. In order to succeed in this case the respondent had only to prove the resulting trust and was not bound to disclose the alleged fraud—see *Elford* v. *Elford* (1922), 64 S.C.R. 125 and *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625. This defence fails, accordingly.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

Solicitors for respondent: *Walkem & Thomson.*

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Criminal law—Possession of house-breaking instruments by day—Intent to commit indictable offence — Evidence of intent — Criminal Code, Sec. 464 (b).

At about 7 o'clock on the morning of April 4th, 1943, a police officer saw the accused and one Murphy enter the Cadillac Hotel in Vancouver. Five minutes later the policeman entered the hotel and saw accused and Murphy coming down the stairs. He asked accused for his registration card and then searched him. He found two keys, one a skeleton key for Yale locks, a penknife and a pair of gloves, then on further search, he found two pieces of celluloid concealed in a sock on one of his feet. He asked accused what the purpose of the celluloid was and the reply was "Don't be so dumb, copper." The policeman then put the

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articles in a wallet which was found on accused and put it on the banister-rail in the hotel and proceeded to search Murphy. Accused then grabbed the wallet and ran out the door. He was convicted on a charge that he unlawfully did have in his possession by day instruments of house-breaking, to wit, two pieces of celluloid, two pass-keys and one pair of gloves.

Held, on appeal, affirming the conviction by LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that the Crown must show: (1) That the accused was found having in his possession by day a house-breaking instrument and (2) with intent to commit an indictable offence. There is ample proof of the first. As to the second, the mere finding of a person having in his possession by day an instrument which may be used for house-breaking is not sufficient to show intent. There must be something else. This is to be found in the present case in the extraordinary concealment of the pieces of celluloid. The learned trial judge was justified in the inference he drew from the circumstances as to the accused's intent.

APPEAL by accused from his conviction by LENNOX, Co. J. on the 19th of July, 1943, on a charge of having in his possession by day instruments of house-breaking, to wit, two pieces of celluloid, two pass-keys and one pair of gloves, with intent to commit an indictable offence. The facts are set out in the headnote and reasons for judgment.

The appeal was argued at Victoria on the 14th and 15th of September, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, J.J.A.

McAlpine, K.C., for appellant: The accused had in his possession in the day-time instruments of house-breaking, namely, two pieces of celluloid, two pass-keys and a pair of gloves, and was charged under section 464 (*b*) of the Code. The learned judge misdirected himself, as there was no evidence to prove the charge as laid and, secondly, the learned judge said the burden was on accused to prove his innocence. On April 4th, 1943, when accused was in the Cadillac Hotel, a police officer found these tools on him and while the police were searching another man, accused ran away, but he was picked up later. The learned judge made the error of treating the case as though it happened at night and applied subsection (*a*) of said section 464 of the Code. There was no evidence to infer intent to commit an indictable offence. On the definition of "intent" see sections 457, subsec-

tion 3 and 459, subsection 2 of the Code. There must be evidence of an "intent" to commit an indictable offence and the circumstances do not warrant it. Having these instruments is not of itself evidence of an intent to commit an offence. That he was not employed at the time has nothing to do with it and his saying "Don't be so dumb, copper" is not evidence of intention: see *Rex* v. *Davies* (1913), 8 Cr. App. R. 211; *Clark* v. *Reginam* (1884), 14 Q.B.D. 92.

Remnant, for the Crown: In the circumstances there is ample evidence. The celluloid was found in his sock. He did not go into the box: see *Rex* v. *Schwartzenhauer* (1935), 50 B.C. 1, at p. 10. These were acts indicative of a guilty intention: see Wills on Circumstantial Evidence, 7th Ed., 75; *Fuller's Case* (1816), R. & R. 308; *Oldham's Case* (1852), 2 Den. C.C. 472; *Rex* v. *Ward,* [1915] 3 K.B. 696; *Rex* v. *Mitchell and McLean,* [1932] 1 W.W.R. 657. He grabbed his tools and ran away: see *Rex* v. *Picken* (1937), 52 B.C. 264, at p. 274. A judge has the right to draw an inference from fleeing. With this evidence, the *onus* is shifted. There is evidence on which the learned trial judge can draw the inference of guilty intent: see *Rex* v. *Smith* (1926), 37 B.C. 248; *Rex* v. *Charles McDonald,* [1940] O.R. 7; *Rex* v. *Jasey* (1940), 73 Can. C.C. 260.

McAlpine, in reply, referred to Wills on Circumstantial Evidence, 7th Ed., 138 and *Rex* v. *Hampson* (1915), 11 Cr. App. R. 75.

Cur. adv. vult.

1st October, 1943.

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

SLOAN, J.A.: In my opinion the facts and surrounding circumstances warrant the inference of intent to commit an indictable offence and in consequence I would dismiss the appeal.

O'HALLORAN, J.A.: Mere possession by day of what are called house-breaking instruments, does not supply that intent which section 464 (*b*) clearly declares to be the other distinctive ingredient of the offence thereby constituted. That subsection does not incriminate a person "suspected" of an intent to com-

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mit an indictable offence, as it would have to be phrased, if I were to justify the present conviction.

Possession of house-breaking instruments by day, undoubtedly gives rise to suspicion of the existence of a subjective purpose in the mind of the suspect. But as this case unfolds itself, possession by the suspect of skeleton keys and things of that kind, whether in his pockets or more secretively hidden in his clothes, even when coupled with his flight from an enquiring police officer, and his oblique answers to the officer, does no more than enlarge that suspicion. Such conduct in my opinion, is not evidence of intent within the meaning of section 464 (*b*) to commit an indictable offence, unless accompanied by some circumstance which advances that suspicion beyond the subjective stage into evidence of an active objective purpose to commit a crime. *Rex* v. *McMyn* (1941), 56 B.C. 475, at pp. 479-80 is a good illustration of this reasoning.

Were it otherwise, mere possession of such skeleton keys and things of that kind, would in itself be evidence of an intent to commit a crime and the latter part of section 464 (*b*) would then be superfluous. I do not think the testimony in this case when viewed objectively, extends beyond the suspicion that because of his possession of the skeleton keys and things of that kind in the circumstances disclosed, the suspect might possibly use them unlawfully at some time or other in the future. In view of what I have just said I must reach the conclusion that the record discloses no objective evidence express or capable of implication, that the suspect was planning to engage in any course of conduct—let alone planning to commit some particular "indictable offence"—during which the skeleton keys, etc., would likely be used unlawfully. The language of section 464 (*a*) lends point to what has just been said of section 464 (*b*).

I would allow the appeal and quash the conviction.

FISHER, J.A.: I agree with my brother ROBERTSON.

ROBERTSON, J.A.: The accused appeals from his conviction under section 464 (*b*) of having been found having in his possession by day instruments of house-breaking with intent to commit an indictable offence. The facts are as follow:

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On the 4th of April, 1943, about 7 a.m. a police officer Shretland having seen the accused and a man named Murphy enter an hotel went into the hotel a little later and met the two men coming out. After some questions Shretland asked the accused if he objected to him searching him. The accused did not reply. Shretland then searched him and found, *inter alia,* a skeleton key, and concealed "just below the sock level on the inside" two pieces of celluloid, measuring "about 3½ to 4 inches by 6 to 8 inches." He put these and other things taken from the accused in the accused's wallet and placed it on a "banister." He then proceeded to search Murphy. While doing so the accused seized the wallet and ran away. When Shretland found the celluloid he asked the accused what was its purpose and his reply was "Don't be so dumb, copper."

The evidence shows the celluloid is an instrument which may be used for house-breaking.

It was necessary for the Crown to show two things: (1) That the accused was found having in his possession by day such an instrument, and (2) with intent to commit an indictable offence. There was ample proof of the first. As to the second I am of the opinion that the mere finding of a person having in his possession by day an instrument which may be used for house-breaking is not sufficient to show intent for there are many instruments which are constantly carried by honest men on the public streets which could be used for house-breaking such as a hammer, file, screwdriver, wrench, etc. There must be something else. I think this is to be found in the extraordinary concealment of the pieces of celluloid. The evidence shows they were instruments "eminently suitable" for house-breaking.

To use the language to be found in *People* v. *Edwards* (1892), 53 N.W. 778, at p. 779, the accused intended to employ them for that purpose when an opportunity satisfactory to him presented itself or when he found a place or places sufficiently unguarded to permit him to take the risk of an attempt.

In *Fuller's Case* (1816), R. & R. 308, the charge was procuring counterfeit coins with intent to utter the same. The only evidence against Robinson was that he was found in possession of counterfeit coins. The jury found him guilty. The learned

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trial judge respited the sentence to take the opinion of the judges whether these facts amounted to the commission of a crime. All the judges met and were of the opinion that the conviction was right, that is the intent to utter could be inferred from the possession of the counterfeit coins. I think the learned trial judge was justified in the inference he drew from the circumstances as to the accused's intent.

The appeal should be dismissed.

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

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Nov. 22, 23.

MARTIN v. LARSEN.

Landlord and tenant—Premises allowed to become infested with bedbugs—Action for damages—Liability of tenant.

In an action for damages by a landlord against a tenant for alleged infestation by the tenant of the leased premises with bedbugs, it was found that there were no bugs on the premises when the tenant took possession, that there were bugs there when she vacated and that the bugs must therefore have been introduced into the premises during her tenancy.

Held, that the importation of bedbugs into the premises by a tenant is untenantlike user and a breach of her implied obligation in the taking of the premises and she is liable for damages suffered by the plaintiff.

ACTION for damages by a landlord against a tenant caused by the house being allowed to become infested with bugs. Tried by WILSON, Co. J. at Vancouver on the 22nd of November, 1943.

A. M. Whiteside, K.C., for plaintiff: The tenant is under an implied covenant to use the premises in a tenantlike manner. Permitting the house to become infested with insects is a breach of this obligation: *Shaw* v. *Anthony* (1939), Estates Gazette, Vol. 133, p. 342 cited in Woodfall on Landlord and Tenant, 24th Ed., 720; *Jones* v. *Joseph* (1918), 87 L.J.K.B. 510; *Ferguson* v. ——— (1797), 2 Esp. 590.

Graham B. Ladner, for defendant: The defendant's husband was tenant of the premises and not the defendant. The *onus* of

proving that the wife acted otherwise than as agent is on the plaintiff: see *Scoble* v. *Woodward,* [1924] 1 W.W.R. 1040; *Paquin, Limited* v. *Beauclerk,* [1906] A.C. 148.

Cur. adv. vult.

23rd November, 1943.

WILSON, Co. J.: The plaintiff claims from the defendant his former tenant, damages for the alleged infestation by the tenant of the leased premises with bedbugs.

The defendant occupied the house, 4808 Francis Street, from July 28th, 1942, to April 27th, 1943, under a verbal tenancy from month to month. I find as a fact that she, not her husband, was the tenant.

The plaintiff and his wife swear that the house was free from vermin when they moved out on July 14th, 1942. Mr. and Mrs. Farrold, who were in the house from July 14th to July 28th, 1942, state that there were no bugs on the premises during their occupancy. The defendant and her family occupied the premises from July 28th, 1942, to April 27th, 1943.

Mr. and Mrs. Shillibee, who moved in April 28th, 1943, assert that they found bedbugs on the premises in such quantity that they had to employ an insect exterminating firm to destroy them.

It is conceded by the defendant that the insects found on the premises were bedbugs. However, the defendant and her daughter denied with some vehemence not only that they had imported the bugs on to the premises but that there were in fact any bugs there during the period of their occupation.

While no entomological experts were called by either party I take it that the presence of bedbugs in the house, though it might be a latent defect which would not be apparent to a tenant in a cursory examination of the premises, is nevertheless a circumstance of such a nature that it is likely to become known to the tenant after a reasonable period of occupancy. The defendants did not notice any bedbugs during their tenancy. The Shillibees noticed them at once. Plaintiff's counsel hints rather than suggests to me that the inference to be drawn from this is that the defendants were so habituated to the presence of these

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vermin that they were not incommoded. I reject this rather uncharitable supposition.

It is a tribute to the general cleanliness of the Canadian public that there are no reported Canadian decisions dealing with the infestation of premises by vermin. Indeed the long annals of British jurisprudence reveal only two judgments on the subject.

In *Jones* v. *Joseph* (1918), 87 L.J.K.B. 510, the Court of King's Bench held that the infestation of premises by bugs was a breach by a tenant of an express covenant to keep the premises in as good condition as when they were let. Since no express covenant existed here this decision is not applicable. However, in *Shaw* v. *Anthony* (1939), Estates Gazette, Vol. 133, p. 342, cited in Woodfall on Landlord and Tenant, 24th Ed., at p. 720, a county court judge held that the importation of bugs and fleas into the premises in large quantities by a tenant is untenantlike user and a breach of an implied obligation in the taking of furnished lodgings.

I must find that there were no bugs on the premises when the defendant took possession and that there were bugs there when she vacated. I do not think I am overstraining the doctrine of *res ipsa loquitur* when I further hold that the bugs must have been introduced into the premises during her tenancy by the defendant or some one of the four persons who inhabited the house with her. Following *Shaw* v. *Anthony, supra,* I hold that this is a breach of her implied obligation and that she is liable for damages suffered by the plaintiff. Since there is no suggestion that the pests were introduced *malo animo* the damages will be limited to the $40 charged by the insect exterminating firm for destroying the bugs. Judgment for the plaintiff for $40 and costs.

Judgment for plaintiff.

REX v. McCLELLAN.

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Sept. 14;
Oct. 1.

Criminal law—Retaining stolen goods—Common purpose—Criminal Code, Secs. 5 and 69, Subsec. 2.

Late in the afternoon of May 27th, 1943, the appellant McClellan met two men McLean and Christensen at the corner of Smythe and Granville Streets in Vancouver and from there they walked to Campbell's Storage on Homer Street where one Horne was in charge. McLean and Christensen went into the office and the appellant remained outside. In three or four minutes the three men came out and walked towards Horne's car which was close by and were followed by the appellant. All four got into the car and, Horne driving, they drove to Stanley Park and then at McLean's direction they went up the road towards the first Narrows Bridge about a mile when McLean told him to stop. Horne stated that McLean and Christensen got out, went into the woods and returned with two automobile tyres and two automobile wheels. The appellant did not get out of the car. He was sitting in the back seat and they put the tyres and wheels on the floor in front of appellant's feet. They then drove back and at McLean's direction went to the garage at the corner of Keefer Street by the Mandarin Gardens where a Chinaman was in charge. McLean and Christensen got out and talked to the Chinaman. Then the police came and arrested the four men. On a charge of retaining in their possession stolen goods knowing them to have been stolen, McLean, Christensen and McClellan were found guilty and Horne was acquitted. On appeal by McClellan:—

Held, affirming the conviction by police magistrate Wood, that there was sufficient evidence from which the magistrate could reasonably find that Christensen, McLean and McClellan met at the corner of Smythe and Granville Streets and left there with the common purpose to get the tyres in question and went with that purpose in view to the Campbell Cartage Co. and from there to Stanley Park. There was also evidence on which it could be found that they got the tyres in Stanley Park and took them to the gas station on Keefer Street. The facts disclose that the appellant had an equal measure of possession as the other two and was guilty of retaining stolen goods.

APPEAL by accused from his conviction before police magistrate Wood at Vancouver on the 6th of July, 1943, on a charge of being in possession of stolen goods knowing them to have been stolen. The facts are set out in the head-note and reasons for judgment.

The appeal was argued at Victoria on the 14th of September, 1943, before McDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

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Denis Murphy, Jr., for appellant: On the 26th of May, 1943, between 4 and 5 o'clock in the afternoon McClellan met Christensen and McLean at the corner of Smythe and Granville Streets in Vancouver and they went to the Campbell Storage where McClellan waited outside while the other two went in and talked to Horne who was in charge there. Then the three came out and went to Horne's car, McClellan going with them. They all got in and Horne drove the car to Stanley Park where they drove up the first Narrows Bridge road and when near the bridge, McLean and Christensen got out, went into the woods and brought back two tyres, tubes and wheels and put them on the floor adjoining the back seat, where McClellan was sitting. Horne then drove the car to the gas station on Keefer Street where a Chinaman Dick Chan was in charge. McLean and Christensen then got out and conferred with the Chinaman as to the value of the tyres, then suddenly the detectives appeared on the scene. McClellan never got out of the car either when they brought the tyres from the woods or when they reached the Chinaman's gas station. The whole story shows that McClellan had nothing to do with the tyres. He never touched them and the other two told the police that McClellan had nothing to do with them. There must be a measure of control of the property established before conviction: see *Reg.* v. *Dring* (1857), 7 Cox, C.C. 382; *Rex* v. *Berger* (1915), 84 L.J.K.B. 541; *Rex* v. *Freedman* (1930), 22 Cr. App. R. 133; *Rex* v. *Parker* (1941), 57 B.C. 117; *Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204. Common purpose cannot be inferred from the meeting of the three men at the corner of Smythe and Granville Streets: see *Rex* v. *Shaw*, [1942] 2 All E.R. 342.

G. A. Cameron, for the Crown: The tyres were in the car under McClellan's feet and McClellan remained in the back seat of the car until they arrived at the Chinaman's gas station. From the whole evidence inferences may be drawn by the learned magistrate as to his connexion with the stolen goods: see *Rex* v. *Parker* (1941), 57 B.C. 117.

Murphy, replied.

Cur. adv. vult.

1st October, 1943.

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McDONALD, C.J.B.C.: I would dismiss the appeal for the reasons given by my brother ROBERTSON.

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

O'HALLORAN, J.A.: The offence of retaining in possession under section 399 of the Code although distinct from the offence of "receiving" in the same section, *vide Rex* v. *Yeaman* (1924), 33 B.C. 390, nonetheless implies prior possession of the thing retained. As was said in *Rex* v. *Parker* (1941), 57 B.C. 117, at p. 119, retaining in one's possession, of its very nature necessarily imports a measure of control over the subject-matter: *vide* also *Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204, at pp. 208-210; *Rex* v. *Freedman* (1930), 22 Cr. App. R. 133 and *Rex* v. *Shaw, Rex* v. *Agard,* [1942] 2 All E.R. 342.

In this case the learned magistrate held, and I think correctly, that the conduct of the three men (of whom the appellant was one) in respect to the two stolen automobile wheels and tyres, betrayed a common purpose which amounted to the exercise of a measure of control over the wheels and tyres sufficient at least to constitute the possession necessary to justify a conviction for retaining. A fourth man, the driver of the motor-car was acquitted because the learned magistrate believed his explanation of innocent association with the other three.

There are objective facts to support a legitimate inference that the three men had a common purpose and were engaged in effectuating it. They went to Stanley Park together and got the stolen tyres from a hidden place in the bush. They then went together to try to sell them to a Chinese gasoline service-station dealer. The evidence of their acts in association compels practical certainty of guilt as charged—*vide Rex* v. *McKinnon* (1941), 56 B.C. 186, at p. 192.

The appellant's explanation of his association with the other two men, *viz.*, that he went along for the ride and to try to get a job from the fourth man who was induced to drive the motor-car, receives no support in the testimony of what occurred while the four men were together. It is not surprising the learned

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magistrate disbelieved it. With it fell any reasonable hypothesis of innocence.

I would dismiss the appeal.

FISHER, J.A.: In my view there was sufficient evidence from which the magistrate could reasonably infer and find, as he did, that Christensen, McLean and the appellant McClellan met at the corner of Smythe and Granville Streets in the city of Vancouver, left there with a common purpose to get the tyres in question, and went with that purpose in view to the Campbell Cartage Company and from there in the car of a fourth man named Horne to Stanley Park. In my view there was also evidence from which the magistrate could find, as he did, that Christensen, McLean and McClellan got the tyres in Stanley Park, put them in the car and took them to the gas station.

The facts found by the magistrate as aforesaid disclose that the appellant had an equal measure of possession of the tires with the other two and was therefore guilty of retaining.

As sections 5 and 69, subsection 2 of the Criminal Code were referred to on the argument herein, I think I should add that my view is not based upon either of said sections nor upon decisions founded thereon.

I would dismiss the appeal from conviction and I also agree that we should not interfere with the sentence.

ROBERTSON, J.A.: The appellant McClellan and Horne, McLean and Christensen were charged under section 399 of the Code, with retaining in their possession stolen property, *viz.*, two automobile wheels and two automobile tyres, knowing the same to have been stolen. The learned magistrate acquitted Horne and convicted the other three. McClellan's counsel submits that the evidence does not disclose that he had any measure of control over the tyres and wheels.

I am of the opinion there was ample evidence to support the decision of the magistrate and therefore it is not necessary to consider the cases relied upon by the appellant.

McClellan said that late on the afternoon of the 27th of May, 1943, he met McLean and Christensen at a point in the city of Vancouver near Campbell's Storage where Horne was employed.

The three determined to see Horne to ascertain if he would give McClellan a job. When they arrived at Campbell's, McClellan remained outside and Christensen and McLean went in. Two or three minutes later the three of them came out and went across the street to Horne's car. McClellan followed them there and got into Horne's car. He said nothing whatever was said about where they were going and that he did not know anything about the wheels and tyres later picked up in Stanley Park. Horne said that on the day in question McLean came into the inside office, asked him if he had "anything going to the Park" and he said "No"; McLean then said he was going to join the Navy the next day and it would only take him a few minutes to drive him out to the Park. Horne thought there was a naval barracks there. He agreed to do this. Then they walked into the front office where Christensen was and the three of them walked to Horne's car and as he got in he looked around and saw McClellan had joined Christensen and McLean. The four of them then got into the car. Horne was driving, McLean to his right; McClellan behind Horne and Christensen to McClellan's right. Horne said he drove to a point in the Park to which McLean had directed him. McLean said when he went into Horne's office the latter asked him if he wanted to go for a drive, that he didn't know anything about the wheels or tyres. Christensen said he thought they were going for a drive. There was no mention made of the job, at any time, by any of the accused, to Horne. The evidence of the accused differed as to who got out of and who remained in the car. McClellan said that he and Christensen sat in the car and he thought someone in front got out but he was not sure. Then the wheels and tyres were put in the back of the car. He had to move his feet so that they could be put in but he says he did not know who put them in the car. McClellan said that he put a blanket over the tires to keep them from dirtying his trousers and the seat.

Christensen said he got out "for personal reasons" and went into the bush and that McLean and Horne got out at the same time and that when he returned the wheels and tyres were in the car. McLean said he and Christensen got out at the same time "for personal reasons" and walked into the bush and when he got back he saw Horne and McClellan with the tyres.

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Horne said that McLean and Christensen retrieved the tyres. The magistrate did not believe McClellan's story. McClellan's story that he did not know who put the tyres in the car; that he did not know who got out in the front seat; Christensen's contradiction of McClellan's evidence that Christensen sat in the back seat with him; the direct evidence of McLean that Horne and McClellan had the wheels and tyres; the fact that the tyres were actually against McClellan's knees, and that no mention of a job for McClellan was made to Horne, afforded more than sufficient evidence from which the magistrate could draw the conclusion that the three accused went to Horne's with a common purpose, *viz.*, to get him to take them out in his car to the park to get the wheels and tyres and that McClellan had at least an equal measure of control over the wheels and tyres, with the other two, McLean and Christensen.

The appeal should be dismissed.

Appeal dismissed.

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IN RE LAND REGISTRY ACT. *IN RE* APPLICATION OF R. D. J. GUY. *IN RE* APPEAL FROM THE DECISION OF THE REGISTRAR OF THE VANCOUVER LAND REGISTRATION DISTRICT.

Land titles—Registration of conveyance of part of lot—Deposit of subdivision plan—Frontage of lot—Land Registry Act, R.S.B.C. 1936, Cap. 140, Secs. 105 (a) and (e) and 232.

Section 105 of the Land Registry Act recites: "The Registrar, in his discretion, may accept a full metes and bounds description or abbreviated description, with or without a reference plan or an explanatory plan, in any of the following cases:—

(*a*) Where a subdivision plan creating blocks of lots has been duly registered and the new parcel is created by dividing the frontage of a lot."

A vendor owned a property situate on the north-west corner of Columbia Street and 4th Avenue in Vancouver, 121.93 feet fronting on Columbia Street and 107.55 feet on 4th Avenue. He had previously built thereon four frame dwellings facing Columbia Street. He sold to K. the northerly 30.48 feet fronting on Columbia Street and extending back 107.55

feet on 4th Avenue (including the northerly frame building). K. made application to register her conveyance and was opposed by the city of Vancouver and its approving officer. The registrar, exercising his discretion under section 105 of the Land Registry Act, granted leave to register the conveyance without the deposit of a subdivision plan required by sections 82 to 108 of said Act.

Held, on appeal, that the question narrows down to whether the property fronts on 4th Avenue or Columbia Street. In deciding this, regard must be had to the entire block by consideration of the subdivision plan on file in the Land Registry office from which it is clear that these lots and the other northerly lots in the block front on 4th Avenue and not on Columbia Street. The vendor sought to create a new frontage on Columbia Street. This he cannot do without filing a subdivision plan. The new parcel sought to be registered has not been created by dividing frontage and the registrar had no jurisdiction to make the order. The appeal is allowed.

APPEAL by the city of Vancouver and Charles Brakenridge, city engineer and approving officer for said city, pursuant to the Land Registry Act, from the order of the registrar of the Vancouver Land Registration District granting leave to Mrs. Josephine Kuryluk to register a conveyance from Mr. Percival Nye to herself of the northerly 38.48 feet fronting on Columbia Street, being part of a property owned by Nye at the north-west corner of 4th Avenue and Columbia Street with a length of 121.93 feet on Columbia Street and 107.55 feet on 4th Avenue, without the deposit of a subdivision plan, as required by sections 82 to 108 of the Land Registry Act. The facts are set out in the reasons for judgment. Argued before SIDNEY SMITH, J. in Chambers at Vancouver on the 8th and 14th of October, 1943.

Lord, for appellants.

A. E. Bull, for respondent.

Cur. adv. vult.

27th October, 1943.

SIDNEY SMITH, J.: This appeal from an order of the learned registrar of the Vancouver Land Registration District arises in this way:

Mr. Percival Nye has been the registered owner for some 40 years of that part of block 10 (formerly lots 4 and 5) in district lot 302, plan 5832, in the city of Vancouver. The property is situate on the north-west corner of Columbia Street and 4th

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Avenue. It has a length of 121.93 feet on Columbia Street and of 107.55 feet on 4th Avenue. Between 1908 and 1909 Nye built and fenced thereon four frame dwellings facing Columbia Street.

I think it is common ground that Nye now wishes to subdivide his land in conformity with the position of these houses, so that the portions may be sold piecemeal to his greater benefit. With this end in view Nye sold the northerly 30.48 feet of the property to Mrs. Josephine Kuryluk and she made application to register her conveyance. The city of Vancouver and its approving officer opposed this application. By so doing the city sought to prevent a subdivision into portions smaller than permissible under city regulations.

The northerly 30.48 feet comprises the most northerly of these houses and covers a portion of land extending 107.55 feet on 4th Avenue and 30.48 feet on Columbia Street. The learned registrar exercising the discretion given to him by section 105 of the Land Registry Act, and after hearing all parties concerned, granted leave to register the conveyance of the said portion without the deposit of a subdivision plan as required by sections 82 to 108 of the Land Registry Act.

This appeal from his ruling is now brought upon the ground of lack of jurisdiction to make the order. It is brought by the city of Vancouver and by Charles Brakenridge who is the city engineer and, as such, the approving officer for the said city pursuant to the Land Registry Act.

The right of appeal in these circumstances is given by section 232 to "any person [who] is dissatisfied with any decision of the Registrar." Counsel for Mrs. Kuryluk takes the preliminary objection that neither the city of Vancouver nor its approving officer is such a person because neither has any legal ground for dissatisfaction in that neither has any interest in the property; that accordingly neither has any right of appeal.

I do not think this submission is sound, for the following if for no other reason: By order in council of 27th May, 1926, the registrar, before exercising the discretion given to him by section 105 in respect of clauses (*a*) (*b*) or (*e*) (under one of which this application comes), shall be furnished by the appli-

cant with the consent of the appropriate approving officer or with evidence that he has been given reasonable notice of the application. This provision would seem to leave no room for doubt that such approving officer is an interested party. I think, therefore, that the appeal has been properly brought.

Turning to the merits, it would appear that the learned registrar granted the application upon the grounds set out in section 105 (*e*) of the Land Registry Act. But however this may be, such grounds were abandoned upon the appeal before me, and counsel for Mrs. Kuryluk stood squarely and solely upon the terms of section 105 (*a*), which reads as follows:

> 105. The Registrar, in his discretion, may accept a full metes and bounds description or abbreviated description, with or without a reference plan or an explanatory plan, in any of the following cases:—
>
> (*a.*) Where a subdivision plan creating blocks of lots has been duly registered and the new parcel is created by dividing the frontage of a lot.

It was argued before me that Nye was merely dividing the frontage of his property and so came within this language. The question therefore narrows down to whether lots 4 and 5 front on 4th Avenue or upon Columbia Street. In deciding this point due regard must be had to the entire block, of which lots 4 and 5 form a part, by a consideration of the subdivision plan now on file in the Land Registry office. When this is done it is clearly seen, or so it seems to me, that these lots, and the other northerly lots in the block, front on 4th Avenue and not on Columbia Street. (Compare *Re Dinnick and McCallum* (1913), 28 O.L.R. 52). What Nye seeks to do is not to divide his present defined frontage on 4th Avenue but to create a new frontage on Columbia Street. This he cannot do under the aforesaid sections without the filing of a subdivision plan and the consent of the approving officer. It follows from the foregoing that the new parcel sought to be registered has not been created by dividing frontage and that therefore the learned registrar had no jurisdiction to make the order.

It was argued that the subdivision sections did not apply to this case because there had in fact been a physical subdivision. But to my mind the Act nowhere deals with physical subdivisions. It deals only with subdivisions defined, surveyed, and filed by

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way of plans in accordance with the aforesaid provisions of the Act.

The appeal must therefore be allowed. Counsel may speak to the matter of costs if they so desire.

Appeal allowed.

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Sept. 29, 30;
Oct. 1;
Nov. 2.

STEPHEN *ET AL.* v. STEWART *ET AL.*

Trade-unions—Meetings—Validity—By-laws whether imperative or directory—Election of officers—Validity—Notice of meeting—Sufficiency of—Whether trade-union a legal entity—Right of members to sue.

The Canadian Congress of Labour, empowered to charter local unions, chartered the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, an unincorporated and voluntary union. The Congress's constitution provided that a local union so chartered be governed by certain by-laws. Governing by-law No. 9 provides that the election of officers shall take place at the last regular meeting of the union in December of each year. At an election held in December, 1942, to elect officers for the year 1943, the defendants Stewart, Simpson and others were elected. On January 4th, 1943, Stephen, suing on behalf of himself and other members of the local union, brought an action against the newly elected officers and on February 2nd, 1943, a consent judgment was entered in that action declaring the election of these officers to be null and void. At a special meeting of the local union a resolution was passed that meetings should be held on the 22nd and 23rd of February, 1943, for the purpose of nominating and electing officers for the year 1943. Notices of the meetings were duly posted and the elections were held at which Stewart, Simpson and others were elected. On the 25th of February, 1943, this action was commenced to have all the elections held since January 23rd declared null and void and for an accounting. It was held on the trial that the elections in February were illegal and of no effect in that they did not comply with governing by-law No. 9 and no proper notice of the meetings had been given as required by governing by-law 3, the learned judge being of opinion that the election could only be held in December in accordance with governing by-law 9.

Held, on appeal, reversing the decision of SIDNEY SMITH, J., that the question turns on whether the election provision in by-law 9 is imperative or directory only. There is no special reason suggested why it was imperative or necessary that the election should take place in December of each year. Looking at the consequences that would result from such a construction, the by-law should be construed as directory only.

Held, further, MCDONALD, C.J.B.C. dissenting, that the notice of the meet-

ing of February 12th, 1943, was a proper one and the appeal should be allowed.

As to the second appeal: After judgment in this action had been entered in March, 1943, the local union applied in September, 1943, to be joined as a party defendant and through its officers to enter an appearance and for an order that the judgment be varied or amended by substituting the said union in the place and stead of the plaintiff as the parties to whom the defendants should make an accounting and pay any sums found to be due on such accounting. The reason for the application was that as the judgment above mentioned declared that the election of officers of the local union held in February, 1943, was null and void, it was deemed necessary to elect new officers; and at a meeting held in April, 1943, the majority of the defendants had been so elected and therefore the accounting should not be made to the plaintiffs who were no longer officers or even members of the union as ordered by the judgment. The application was dismissed.

Held, on appeal, affirming the order of SIDNEY SMITH, J., that assuming for the purposes of this judgment only that the local union is a legal entity, parties affected by an "order" made upon an application of which they had no notice may have such order vacated and the matter reopened. But a judgment duly pronounced as the Court intended and duly entered, cannot be set aside except on appeal and it cannot be amended except when there has been a slip in drawing it up and where there has been an error in expressing the manifest intention of the Court.

APPEAL by defendants and cross-appeal from the decision of SIDNEY SMITH, J. of the 20th of March, 1943 (reported, *ante*, p. 84) in an action

for a declaration that all meetings of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, convened and held since the 23rd day of January, A.D. 1943, are null and void and for a declaration that the election of the defendants to various offices in the said Local No. 1, on or about the 22nd, 23rd and 24th days of February, A.D. 1943, is null and void and for a declaration that none of the defendants hold office therein. For a return of goods and damage. Accounting. Injunction, . . .

The Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1 (hereinafter called the union) was chartered by the All-Canadian Congress of Labour in May, 1928, when it was a small body of about 200 men, but on the outbreak of the present war, the membership increased rapidly to about 13,000 members with funds amounting to $30,000. At the tenth regular convention of the parent body its name was changed to the Canadian Congress of Labour with a new constitution, but it was held that this did not affect the *status* of the local union as chartered by the Canadian Congress of Labour. The elections of officers for the

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years 1942 and 1943 were by consent judgment declared null and void on February 2nd, 1943. In January, 1943, the parent body appointed three of its officers a committee to investigate the disputes amongst the members of the union and after holding several meetings, the committee on the 25th of January, 1943, purported to suspend the charter of the union. It was held that the purported suspension was illegal and void for lack of jurisdiction. In February, 1943, a further election was held in which three of the present defendants were elected officers of the union. The plaintiffs were former officers of the union. It was held that the meetings of 12th, 22nd, 23rd and 24th of February, 1943, were illegal in that they did not comply with the provisions of article 14, section 9 of the by-laws nor with the provisions of article 14, section 3 of said by-laws. The elections held at such meetings and all resolutions passed were declared null and void and the defendants were restrained from entering into office. Also appeal by the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, from the order of SIDNEY SMITH, J. of the 13th of September, 1943.

The appeal was argued at Victoria on the 29th and 30th of September and the 1st of October, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

McAlpine, K.C. (*Nemetz,* with him), for appellants: The officers of the union are elected each year. In February, 1943, there was an election and Stewart, McKenzie and Cardwell were elected. There was no opposition and they were elected by acclamation. It was held that the election was invalid because it was not held in December. Another election was held in April, 1943, when Stewart *et al.* were again elected, but it was held to be illegal. We submit the election held in February was good. The Court will not interfere in the internal management as long as they act within their power. The union can cure defects and is not subject to interference by the Court. They have the inherent power to call a meeting and hold an election. That this is a matter of internal management and the Court will not interfere see *Foss* v. *Harbottle* (1843), 2 Hare 461; *Levi* v. *MacDougall, Trites and Pacific Coast Distillers Ltd.* (1940), 56 B.C.

81; Palmer's Company Law, 17th Ed., 236; *Mozley* v. *Alston* (1847), 1 Ph. 790; *Andrews* v. *Mitchell* (1904), 74 L.J.K.B. 333; *Heard* v. *Pickthorne* (1913), 82 L.J.K.B. 1264; *Dominion Cotton Mills Company Limited* v. *Amyot,* [1912] A.C. 546. As long as there is the power to hold an election, it is valid: see *Goode* v. *Langley* (1827), 7 B. & C. 26; *Mayor of London* v. *The Queen* (1848), 13 Q.B. 30, at p. 33; *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13; *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1, at pp. 10, 23 and 25. The C.C.F. purported to interfere by appointing an administrator, but they cannot interfere with internal management: see *Burland* v. *Earle,* [1902] A.C. 83; *Barron* v. *Potter. Potter* v. *Berry,* [1914] 1 Ch. 895, at pp. 902-3; *Foster* v. *Foster,* [1916] 1 Ch. 532. Both are voluntary associations. The internal power of election is in the members: see *Pratt* v. *Amalgamated Ass'n of S. & E. Ry. Employees* (1917), 167 P. 830; 63 C.J. p. 663, sec. 13.

Branca, for respondent: On February 12th, 1943, they attempted to secede. They are no longer members of the association and have no rights with respect to the matters in question: see *Vick* v. *Toivonen* (1913), 12 D.L.R. 299. The time for voting was so short that only a small portion of the members voted. If the voting period had been from 11 o'clock a.m. until 9 p.m., the workers could all attend to vote: see *Courchene* v. *Viger Park* (1915), 23 D.L.R. 693; *Lindsay* v. *Empey* (1915), *ib.* 877; *Luby* v. *Warwickshire Miners Association* (1912), 81 L.J. Ch. 741, at p. 743; *Lyttelton* v. *Blackburne* (1875), 45 L.J. Ch. 219, at p. 223. We submit that *Foss* v. *Harbottle* (1843), 2 Hare 461, does not apply to this case. On the question of costs see *Alert Logging Co. Ltd.* v. *Standard Marine Ins. Co. Ltd.* (1933), 47 B.C. 450, at p. 451; *Civil Service Co-operative Society* v. *General Steam Navigation Company,* [1903] 2 K.B. 756; *McDermott* v. *Walker* (1930), 42 B.C. 354; *Donald Campbell & Co.* v. *Pollak,* [1927] A.C. 732; *Young* v. *Ladies Imperial Club, Lim.* (1920), 89 L.J.K.B. 563; *Labouchere* v. *Earl of Wharncliffe* (1879), 13 Ch. D. 346.

McAlpine, in reply: On question of costs see *Dominion Fire Ins. Co.* v. *Thomson,* [1923] 4 D.L.R. 903, at p. 913. The plaintiffs were not members in good standing, not having paid

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their fees and the learned judge rightly deprived them of costs. As to the appeal from the motion to substitute the union in place of the plaintiffs as to the party to whom an accounting should be made, the plaintiffs are no longer members and the money is the exclusive property of the union: see Annual Practice, 1943, p. 256; *In re Dracup. Field* v. *Dracup*, [1892] W.N. 43. As to whether the union has an entity see *United Mine Workers* v. *Coronado Co.* (1922), 259 U.S. 344; *Hollywood Theatres Ltd.* v. *Tenney* (1939), 54 B.C. 247, at pp. 276-7. This is our money and they are not members of the union: see *McCheane* v. *Gyles (No. 2)*, [1902] 1 Ch. 911; *Fraser* v. *Cooper, Hall, & Co.* (1882), 21 Ch. D. 718; *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q.B. 321, at pp. 324 and 326.

Cur. adv. vult.

2nd November, 1943.

MCDONALD, C.J.B.C.: This case raises many difficult points, and the pleadings and argument have been somewhat confusing.

We have before us two appeals, both arising out of an action brought by three plaintiffs "for themselves and other members of the Boilermakers' and Shipbuilders' Union of Canada, Local No. 1" against nine defendants. The first eight defendants seem to be sued as individuals, the ninth "for himself and as representative of all other members in good standing [of said union] who dissent from the plaintiffs' action." He was apparently given this representative capacity by an order that does not appear in the appeal book.

This action was brought to attack the validity of the election of the first seven defendants to the executive of the union. The plaintiffs are former holders of office in the union.

In the middle of December, 1942, the union held an election of officers, at which it was declared that certain persons, including some of the present defendants, had been elected. One of the present plaintiffs brought an action in the Supreme Court to set aside the election, on grounds that do not now seem material, and a consent judgment was given on 2nd February, 1943, declaring the election void.

Another election was held on 22nd and 23rd February, 1943, at which the first eight defendants were declared to be elected to

the executive. That election was attacked by the present action. After a trial SIDNEY SMITH, J. gave judgment declaring the February election void. The plaintiffs had also complained of the defendants' taking possession of the books and other property of the union and collecting dues and other moneys payable to it. The judgment appealed from orders the defendants to deliver the union's property to the plaintiffs, to account to them, and to pay them the union's funds, to be held by them as trustees for the union. The judgment also deals with other matters not raised in these appeals.

Some six months after judgment the union, acting through Mr. *C. L. McAlpine,* who also represented the defendants as counsel before us, made a motion in the Supreme Court, by notice headed in the original action, to allow the union to appear in the action as a party, and to amend the judgment so as to make the defendants account to the union rather than to the plaintiffs for the moneys in the defendants' hands. This motion was dismissed, and the union appeals from the dismissal. The defendants also appeal from the original judgment invalidating their election in February.

It would seem as though the question whether the union is a legal entity is one of the essential points here. This is not easy to decide, and the parties' way of dealing with it increases the difficulty. Thus we have the plaintiffs, whose procedure clearly implies that they do not wish to regard the union as a legal entity, expressly plead that the union is a "trade union," and the defendants, whose interests would seem to make them favour that very view, flatly deny it in their pleadings.

The legal *status* of a union, though it has often been before the Courts, remains obscure. At common law, of course, a union was not recognized at all. The English Trade Union Act, 1871, first recognized them to some extent, but they were thought to remain outside the cognizance of Courts until the House of Lords' decision in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* [1901] A.C. 426 held that though neither corporations nor partnerships, unions were legal entities that could be sued in their registered names, and that their property was liable for their torts. Actions against them were then restricted

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by legislation; but they continued to be regarded in England as legal entities, able to sue and be sued in certain circumstances, though only when registered.

In Canada the *status* of unions is considerably more obscure. Unfortunately both the Dominion and Provinces have legislated on the subject, with results far from happy. It is clear that any indication that a union is a legal entity must be found in some statute, though this has always been a matter of inference, as from provisions allowing the union to hold property, act by agents, etc. I think the Dominion Trade Unions Act, R.S.C. 1927, Cap. 202 can be eliminated from consideration here, because section 5 thereof provided that:

> . . . this Act shall not apply to any trade union not registered under this Act.

In this case there is no suggestion that the union in question was ever registered. Middleton, J.A. held in *Amalgamated Builders Council* v. *Harman* (1930), 65 O.L.R. 296, that even when a union is registered under the Dominion Act it does not become a legal entity. It is unnecessary to consider that point; but the decisions in *Local Union No. 1562, United Mine Workers of America* v. *Williams and Rees* (1919), 59 S.C.R. 240 and *Society Brand Clothes Ltd.* v. *Amalgamated Clothing Workers of America,* [1931] S.C.R. 321 both binding on us, make it clear that the Dominion Act alone does not make an unregistered union a legal entity, capable of suing or being sued. In those cases there was no Provincial Act to consider.

Here, however, we have our Provincial Trade-unions Act, R.S.B.C. 1936, Cap. 289. The origin of this Act is obscure; it was first passed in 1902; but I have not been able to discover its source; it may be quite original. It is short and sketchy, and its framers obviously intended it to be a protection to unions against certain actions that would lie against individuals at common law. It is a serious question, however, whether its framers, by excluding unions' liability for certain torts, have not by implication saddled them with liability for those not excluded. However, what concerns us is whether the Act impliedly makes unions legal entities.

This Provincial Act says nothing about registration. It does

not even attempt to define a trade-union. The Dominion Act contains a definition in section 2, and this dates back a good many years. It is hard to believe that the Provincial Act is meant to apply to all bodies that may call themselves trade-unions, and seeing that the earlier Dominion Act contains a definition, I find it almost an irresistible conclusion that the Provincial Act is meant to apply to unions as defined by the Dominion Act.

I do not find it necessary to take the further step holding that the Provincial Act only applies to unions registered under the Dominion Act. It may well be that unregistered unions can sue and be sued under the Provincial Act. This still seems to be an open point. In *Schuberg* v. *Local No. 118, International Alliance Theatrical Stage Employees* (1927), 38 B.C. 130 this Court affirmed by equal division a judgment for damages against a union; but no question was raised in either Court as to the right to sue a union. In *Hollywood Theatres Ltd.* v. *Tenney* (1939), 54 B.C. 247 my brother O'HALLORAN expressed the view that the Provincial Act recognizes unions as legal entities; but the point only arose indirectly, since the action was brought not against the union, but against its trustees. The question of registration does not seem to have been raised.

At all events, even assuming that the local Act allows an unregistered union to sue and be sued, I find myself quite unable to say, on the material before us, that the union here is a trade-union within the Act. The definition of a trade-union in the Dominion Act, which I adopt as the test, reads:

> 2. . . . , "trade union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

What we have here falls far short of proving that this union is of that class. It was for the defendants in whose interest it is, to show that the union is a legal entity, and they have neither pleaded nor proved it. Actually all the defendants in their defences expressly denied that the union was a "trade-union."

Such evidence as we have on the scope and activities of the union consists of descriptions of the functions of the shop-

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stewards, and statements in the by-laws of the union that its objects are:

> To obtain for its members the best possible conditions of labour; to regulate the relations between the employees and employer in connection with the trade.

I feel much doubt whether declarations of this kind can be regarded as evidence of fact, particularly in favour of those who make them. The shop-stewards are chosen to see that employers live up to their contracts with employees. None of the above purposes necessarily suggests any restraint of trade, so they do not of themselves bring the union within the statutory definition.

The exact organization of the union is left in most ways very vague. We know little more than that there is a group of individuals calling themselves "Local No. 1" (presumably meaning "Branch No. 1") of some body known as the Boilermakers' and Iron Shipbuilders' Union of Canada. This latter body, by its title, seems to claim that it is Dominion-wide. But we know next to nothing about it; and some knowledge of its origin and *status* may well be essential, since two judges took the view in *Society Brand Clothes Ltd.* v. *Amalgamated Clothing Workers of America, supra,* that the question whether these widespread organizations are or are not legal entities must be tested by the law of their place of origin.

Even if a branch of a foreign trade-union were suable here under our Provincial Act, on the evidence before us I must hold that the defendants have failed to show that their union is a legal entity. It is a matter of proof and proof is incomplete. Especially in view of the defendants' pleadings we must assume that the "local" is a mere voluntary association having no legal *status.*

When the "local" made its motion, it produced no evidence whatever of its *status,* and on that ground alone I would hold that its motion was rightly dismissed. Equally, it has failed to show any *status* to appeal, and its appeal should be dismissed.

Its lack of legal *status* has another important bearing. The main appeal has been based largely on the argument that, however irregular the election, this was a matter that fell within the rules in *Foss* v. *Harbottle* (1843), 2 Hare 461, whereby (1) litigation over the concerns of a corporation must ordinarily be

brought by the corporation itself, not by individual corporators, and (2) a minority cannot complain in the courts of irregular acts of the management which could be put right by ratification of a general meeting. If this "local" had been shown to be a legal entity, the argument might be sound: *Cotter* v. *National Union of Seamen,* [1929] 2 Ch. 58; but even then I would feel doubt as to its full application here. However, the union has not been shown to be a legal entity, so in any case I hold the first rule in *Foss* v. *Harbottle* to be inapplicable.

A voluntary association, having no legal entity, has its most familiar form in a members' club. Decisions on such clubs show that the relation of members to each other is purely contractual, the contract being found in the constitution or rules which they adopt. Unless that contract itself provides for its being varied, it can only be varied with the unanimous consent of all contracting parties; a mere majority as such can do nothing. Our union has no constitution of its own but was "chartered" by the Canadian Congress of Labour, which means that the Congress organized it, and it took form on the terms that it was governed by the provisions in the Congress's constitution relating to "Local Chartered Unions," which form article 14. This article provides indeed for by-laws; but these are not to vary article 14; there is no provision for a local's changing the constitution; hence any variance of that can only be effected by unanimous vote of all members of the local. See *Harington* v. *Sendall,* [1903] 1 Ch. 921; *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615, at p. 620; *Young* v. *Ladies' Imperial Club,* [1920] 2 K.B. 523.

The inability of the Local itself to bring an action excludes the one rule in *Foss* v. *Harbottle* against individual members bringing action, and the fact that an irregularity can only be cured by concurrence of all members seems to exclude the other rule. In the absence of unanimity, we have pure contractual rights, a breach of which by any party to the contract gives every other member a right to sue. The mere fact that a majority of the members do not favour suit is irrelevant. The position of the members has no resemblance to that of members of a corporation who can always change their rights *inter se* through a requisite majority. So far as the majority rule, their inaction implies

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their approval; but where immutable contract rules, even express approval of the majority has no effect.

The contest in this action is over the election of the union executive for 1943, and the main point is as to whether members were properly notified of the meetings at which the elections were held.

The plaintiffs plead that they and the other members "received no notice." This showed a good cause of action at common law: *The King* v. *Langhorn* (1836), 4 A. & E. 538; *Rex* v. *May* (1770), 5 Burr. 2681. To this the pleadings of all defendants merely replied with a denial that they received no notice. I hold that that was insufficient. By Order XIX., r. 15 a party must plead all matters that might otherwise take his adversary by surprise, or raise an issue not raised by the former pleading. Here it now appears that the defendants' real answer is not that all members received notice, but that a particular rule (No. 3 of 14) made actual notice irrelevant, so long as posters were put up. Nothing of this was pleaded at all, and I have no hesitation in saying that it should have been, and that without such a plea the defendants had no right to rely on the posting, under a mere negative plea.

So far I have assumed that good pleading would have been enough. But that is far from my view. Rule 3 reads in part:

> Notice of such special meeting shall be posted in a conspicuous place, or where that is not possible, a written notice shall be given to each member.
>
> . . . .

That is all the authority for notice by posting. I do not know what that language means. The post-office or the court-house lobbies are conspicuous places; but would anyone suggest that posting there would be enough? One might say that the rule means places conspicuous to workers, which presumably will mean shipyards and factories. But in a union like this, with some 13,000 members, there must be many scattered groups that would not be reached. Then the rule says that, when posting in a conspicuous place is not possible, written notice shall be given to each member. I do not know what that means. When can posting be considered impossible? I am far from sure that this rule is not void for uncertainty. But even if it is reasonably certain, what evidence have we that there was sufficient posting?

The defendants gave no evidence on the point. The only evidence is found in cross-examinations of the plaintiffs and their witnesses, and each admission of posting related only to the particular shipyard in which the witness worked. The only piece of evidence which touches in any way the conspicuity of notices was given by the witness Mills, and it related only to his own shipyard. Several of the plaintiffs admitted to seeing the posters, but they admitted no more, and that is perfectly consistent with these being quite inconspicuous.

No attention whatever was directed to showing that there was general posting so that all members would see the posters. It is obvious that the defendants ignored this question, because they considered that once they showed the plaintiffs' knowledge of the meetings, the knowledge of other members ceased to matter. That view, I think, shows a misapprehension of the legal situation. I assume that even in a representative action, plaintiffs must show that they themselves have a grievance, and it is not enough to show that they represent others who have one. But the plaintiffs here do show a grievance. They have a right to a management elected by a membership each of which has received due notice of the election, and it is no answer to say that the plaintiffs themselves had notice. It is hardly arguable that a complaint of an intended candidate that his supporters got no notice is answered by showing that the candidate did. That is a very minor aspect of the matter.

Another objection to the notice given is the form of the posters, which merely announced meetings and their purposes, without showing who were the officers or persons responsible for the meetings. I cannot feel that this was good enough. In this case there were embarrassing doubts as to who had the right to call meetings, which perhaps accounts for the omission. Be that as it may, I think the members had a right to know who was acting, and were entitled to something more than anonymous communications which might have been posted by some practical joker or some busybody, perhaps even outside the union. I think members were entitled to ignore such anonymous notices, and that they were insufficient in law.

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The successful attack on the defendants' election was also based on rule 9 of article 14. Rule 9 reads in part:

> The election of officers shall take place at the last regular meeting of the union in December of each year. . . . The officers of the union shall hold office until the end of December and their elected successors shall assume their duties on the 1st day of January.

By rule 5 " . . . each officer shall hold office for one year."

Since SIDNEY SMITH, J. in his reasons for judgment expressly declared the election illegal for non-compliance with (*inter alia*) rule 9 of article 14, he must have considered that any election not held in December was invalid. For my own part I cannot take that view. For reasons already stated, I do not accept the argument for appellants that the acquiescence of the majority would cure sound objections to the date of the election. The majority had no curative powers. But even taking article 14 and rule 9 as a binding code of procedure in the nature of a contract between all union members, I cannot construe it as rigidly prohibiting an election not held in December. When the members impliedly contracted with each other on the subject, it is impossible to believe that they intended such a result. There could be no advantage in it to anyone. The rule was intended to map out the proper procedure for the union officers conducting the election, and probably no one foresaw that situations might arise where the rule could not be followed. That being so, I think the way is open for implying unexpressed terms. Here the invalidity of the December election was not ascertained until after December; so that in a practical sense it was impossible to comply with the rule. I think the rule *lex non cogit ad impossibilia* applies to such a situation.

A similar situation might easily arise from other causes. For instance, the negligence or wilful misconduct of a secretary or other officer entrusted with preparation for elections could easily take the organization past the date when election ceased to be feasible in December before others were aware of the danger. Is it credible that those who assented to this constitution ever intended that the situation should be irremediable? They should have foreseen such contingencies and provided for them; but it is so obvious that their failure to provide was due to their minds not being directed to the point, that I think it easy to supply an

implied exception to the rule, so that elections may be held out of December when necessary. It is necessary here.

This constitution cannot be regarded as any more rigid than a statute in the same terms would be; and I feel sure that a statute in those terms would be construed in the way I suggest. There is plenty of authority to show that the non-observance of a statutory regulation, even though the language is apparently imperative, does not necessarily involve nullification; but that the probable purpose of the regulation must be considered, and if the nullification of proceedings as the result of non-observance would be unreasonable, that is sufficient ground for holding that the Legislature intended no such result. *Rex* v. *Sparrow* (1740), 2 Str. 1123 is a case fairly close in point, and see the general statement of principle in *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, at p. 632.

I therefore hold that the holding of the election in December was not essential to its validity. The unreasonableness of holding it essential is obvious. I certainly cannot believe that I am forced to that conclusion. The learned judge below, though his reasoning seems to require that conclusion, seems to deal with the question inconsistently. For, after apparently holding one election void for being held out of December, he seems to suggest that another, equally vulnerable on this reasoning, should be held.

So in the result I agree with him that there was insufficient notice of the elections, which are therefore ineffective; but I do not agree that they were bad on the further ground that none could be held after December.

No authority has been cited to show that his order was wrong in directing an accounting and delivery of the union property to the plaintiffs as trustees for the union; so I assume that it was right, on the learned judge's premises. But though that direction was reasonable and convenient on the supposition that it might be impossible for the union to elect another executive until December, 1943, the situation is considerably changed if we hold that there can be a valid election at any time. Of course once we hold that the election is bad the plaintiffs make out their case, and, strictly speaking, what happens later is no answer to it. But in the peculiar circumstances here, and in view of the fact that

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the parties are not acting for themselves alone, I think we should depart to some extent from the general rule. I think it highly inexpedient and inconvenient, as at present advised, to force an accounting and delivery of property which subsequent events in a very few weeks may render nugatory and useless.

I would therefore hear counsel further as to what is the most useful and convenient order for us to make. We have now reached November, and in December presumably the regular election for 1944 should be held. I would be for ordering an immediate election otherwise, or at least be for staying proceedings further only on the terms of an immediate election; but counsel may well conclude that the most expedient course is to postpone this until next month.

Those who set out to hold a new election will be faced with embarrassing doubts as to the proper steps to take, and I think that we should give them sufficient guidance to obviate a third lawsuit.

In my view it is open to the proper officers to call special meetings of their own volition quite apart from rule 3. In view of the uncertainty of rule 3, and of the requirements of the common law, I think those who undertake to call the election meeting would do well to circularize all members as well as post placards.

But who has the right to call the meeting? The case of *Foot* v. *Prowse* (1725), 1 Str. 625, affirmed 2 Bro. P.C. 289 appears to lay down a general common-law principle that even though a corporation's charter prescribes annual election for officers, they hold office until their successors are appointed, though their term of office may run over their year. *Robarts* v. *The Mayor, &c., of London* (1882), 46 L.T. 623, at p. 629 (affirmed (1883), 49 L.T. 455) recognizes the same principle. I do not read *Rex* v. *Philips* (1720), 1 Str. 394 as establishing a general distinction between a charter that prescribes annual elections and a charter that limits tenure of office to one year certain, as the union's does. I think the decision in *Rex* v. *Philips* turns on the special wording of the particular charter and the special circumstances under which it was granted.

I hold then that the officers for 1942 are still in office and can validly call a special meeting for an election.

However, there is also a principle that *de facto* officers can perform necessary acts, even though not legally elected. So in my view, either the old officers, or the present *de facto* officers of the union can validly arrange for an election and call meetings for the purpose.

I think I should mention the direction in the formal judgment below that

> . . . all pleadings herein [should] be deemed to have been amended in order to give effect to this judgment.

This Court has often expressed disapproval of this course; no such general permission should be given. Amendments allowed should be specific, and should be actually filed before judgment is entered.

I would give no costs here or below.

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

O'HALLORAN, J.A.: I would allow the main appeal and dismiss the second appeal for the reasons given by my brother ROBERTSON, in which I concur. I may add in regard to the second appeal, I am definitely of opinion that the union is a suable entity. By the Trade-unions Act, Cap. 289, R.S.B.C. 1936, as well as by the Industrial Conciliation and Arbitration Act, Cap. 31, B.C. Stats. 1937 and amending Acts, the Legislature has made it an *"ens legis"*; and *vide Hollywood Theatres Ltd.* v. *Tenney* (1939), 54 B.C. 247, at pp. 276-7 and cases there cited, and by analogy also *Turner's Dairy Ltd. et al.* v. *Williams et al.* (1940), 55 B.C. 81, at pp. 99-100.

FISHER, J.A.: I agree with my brother ROBERTSON.

ROBERTSON, J.A.: There are two appeals. The first appeal is by the defendants from the judgment at the trial.

The Canadian Congress of Labour (later referred to as the Congress) was and is an unincorporated voluntary association empowered by its constitution to "charter directly" as a "local union," any body of ten or more workers. Some years ago, pursuant to such power, it chartered the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, which of course was also unincorporated and a voluntary association. It will be con-

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venient to refer to it as the "local union." The Congress's constitution provided that a local union so chartered should be governed by certain by-laws, to several of which "governing by-laws" it will be necessary to refer. Governing by-law 9 reads as follows:

9. Election of Officers. The election of officers shall take place at the last regular meeting of the union in December of each year (or, in the case of a newly-organized union, at the first meeting). Candidates for office may be nominated by a member in open meeting. Election shall be by ballot, and a majority of the votes cast shall be necessary to elect. If one candidate only is nominated, one ballot cast by the presiding officer shall be sufficient to declare the election. The president shall appoint two tellers to distribute the ballot papers, collect them and count the votes, and report to the presiding officer, who shall announce the result. The officers of the union shall hold office until the end of December, and their elected successors shall assume their duties on the 1st day of January.

At an alleged election held in December, 1942, to elect officers for the year 1943, the defendants Stewart, Simpson and others were elected. On the 4th of January, 1943, Stephen, one of the plaintiffs in this action, suing on behalf of himself and other members of the local union brought an action against the newly-elected officers and on the 2nd of February, 1943, a consent judgment was entered in that action declaring the election of these officers to be null and void. As pursuant to governing by-law 9, the officers elected for the year 1942 went out of office at the end of that year, and, as the election held in December, 1942, was by the judgment declared to be null and void, there were, in February, 1943, no officers of the local union.

Governing by-law No. 3, later referred to, provided that regular meetings should be held at least once a month at a time and place agreed upon by the union. Governing by-law 21 empowered the local union to adopt by-laws not in conflict with the by-laws or the constitution of Congress.

The local union accordingly passed by-laws of its own. It will only be necessary to refer to one of these, *viz.*, by-law 34—"Regular meeting nights of this union shall be the first and third Thursdays of each calendar month."

In accordance with this by-law a regular meeting of the union at which 2,450 members were present, was held on the 7th of January, 1943. The members present elected a chairman and recording secretary. A resolution was passed that the president

and executive committee of the union be requested to proceed at the earliest possible date to a proper election of officers of the union. As, however, there was no president or executive committee no action was taken upon this resolution; and so at the regular meeting held pursuant to by-law 34, *supra,* on the 4th of February, 1943, it was reported that nothing had been done. The following resolutions were then passed:

That a special meeting of this union be called for 8 p.m. on Friday, the 12th day of February, 1943, at the Hastings Auditorium, Vancouver, B.C. for the purpose of considering the advisability of holding forthwith an election of officers and two members of the executive committee of the union for the year 1943, they to take office immediately upon installation, and, if thought advisable to hold such an election, to pass the following resolutions:

"Resolved that a special meeting of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, be held at 8 p.m. Monday, the 22nd day of February, 1943, at Hastings Auditorium, Vancouver, B.C. for the purpose of transacting the following business: To nominate candidates for the following offices of the union for the year 1943:—President, Vice-President, Secretary-Treasurer, Recording Secretary, Warden, Guard, one Trustee to hold office for three years; one Trustee to hold office for two years; one Trustee to hold office for one year; two members of the executive committee.

. . . . .

"Resolved that the election of the officers and the two members of the executive committee of the union for the year 1943 be held on Tuesday, the 23rd day of February, 1943, and that a special meeting of the union be held on the said 23rd day of February, 1943, at 11 a.m. at the Hastings Auditorium, Vancouver, B.C., for the purpose of electing by ballot the said officers and two members of the executive committee of the union for the year 1943, and that the poll remain open and the meeting be continued until all members who are present at the meeting at any time up to 9 o'clock p.m. have had an opportunity to vote and until the officers and the two members of the executive committee have been duly elected, with power to the presiding officer, in the event of any one or more of the candidates not being elected on the first vote, to direct the continuation of the balloting at such subsequent time or times as may appear to him to be necessary until all officers and two members of the executive committee have been duly elected."

At the meeting of February 12th, 1943, a chairman and secretary were duly elected, and the following resolutions were passed:

That we, the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, consider it advisable to forthwith hold an election of officers and two members of the executive committee of the union for the year 1943, they to take office immediately upon installation. Motion carried.

Resolved that a special meeting of the Boilermakers' and Iron Shipbuilders' Union of Canada, Local No. 1, be held at 8 p.m. on Monday, the 22nd day of February, 1943, at Hastings Auditorium, Vancouver, B.C., for the purpose of transacting the following business: To nominate candidates for the following offices of the union for the year 1943:—President, Vice-Presi-

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dent, Secretary-Treasurer, Recording Secretary, Warden, Guard, one Trustee to hold office for three years, one Trustee to hold office for two years, one Trustee to hold office for one year, and two members of the executive committee. Motion carried.

Resolved that the election of the officers and the two members of the executive committee of the union for the year 1943 be held on Tuesday, the 23rd day of February, 1943, and that a special meeting of the union be held on the said 23rd day of February, 1943, at 11 a.m. at Hastings Auditorium, Vancouver, B.C. for the purpose of electing by ballot the said officers and two members of the executive committee of the union for the year 1943, and that the poll remain open and the meeting be continued until all members who are present at the meeting at any time up to 9 o'clock p.m. have had an opportunity to vote, and until the officers and the two members of the executive committee have been duly elected, with power to the presiding officer, in the event of any one of more of the candidates not being elected on the first vote, to direct the continuation of the balloting at such subsequent time or times as may appear to him to be necessary until all officers and two members of the executive committee have been duly elected. Motion carried.

Notices convening the special meetings of February 22nd and February 23rd are as follows:

Boilermakers' & Iron Shipbuilders' Union of Canada—Local No. 1

SPECIAL MEETING

Monday, Feb. 22nd, 1943,
at 8.00 P.M.
HASTINGS AUDITORIUM
828 East Hastings Street, Vancouver, B.C.

THIS MEETING is called for the purpose of nominating candidates for the following offices of the Union for the year 1943: President, Vice-President, Secretary-Treasurer, Recording Secretary, Warden, Guard, one Trustee to hold office for three years, one Trustee to hold office for two years, one Trustee to hold office for one year, and two members of the executive committee.

Boilermakers' & Iron Shipbuilders' Union of Canada—Local No. 1

SPECIAL MEETING

Tuesday, Feb. 23rd, 1943,
at 11.00 A.M.
HASTINGS AUDITORIUM
828 East Hastings Street, Vancouver, B.C.

THIS MEETING is called for the purpose of electing by ballot the officers and two members of the executive committee of the above Union for the year 1943. The poll will remain open and the meeting will be continued until all members who are present at the meeting at any time up to 9 p.m. have had an opportunity to vote, and until the officers and the two members of the executive committee have been duly elected.

The presiding officer has power, in the event of any one or more of the candidates not being elected on the first vote, to direct the continuation of the balloting at such subsequent time or times as may appear to him to be necessary until all officers and two members of the executive committee have been duly elected.

The above notices were on the same size placards, *viz.*, 22 inches by 24 inches as the notice calling the meeting of 12th February. The placard calling the meeting of the 22nd was yellow and that calling the meeting of the 23rd was white.

At the meeting of February 22nd a chairman and secretary were duly elected and the defendant Stewart and the other defendants were nominated and at the meeting held on the 23rd of February, 1943, were elected as officers of the local union. This action was commenced on the 25th of February, 1943, to have all elections held since the 23rd of January, 1943, declared null and void and for an accounting of all moneys received by them.

The action was tried by SIDNEY SMITH, J. who held that the elections held in February were illegal and of no effect in that they did not comply with governing by-law 9, *supra,* and no proper notices of the meetings had been given as required by governing by-law 3. Both counsel inform us that the learned judge was of the opinion that the election could only be held in December in accordance with governing by-law 9. With great respect I think he was wrong in this.

The appellants submit that an election could be held at any time after December, if an election as provided for by governing by-law 9 had not been held in December.

The respondents submit that the word "shall" in governing by-law 9 shows that it is mandatory that the election should be held in December and as there was no power in the local union to pass a by-law in conflict with by-law 9 the union could not at any general or special meeting provide for an election at any other time.

In my opinion the question turns on whether the mandatory election provision in by-law 9 is imperative or directory only. I think the decisions as to whether or not a statute is imperative or directory are of great assistance. In *Vita Food Products, Inc.* v. *Unus Shipping Co.*, [1939] A.C. 277, Lord Wright in

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delivering the judgment of the Judicial Committee said at p. 293:

> As Lord Campbell said in reference to statutory prohibitions in *Liverpool Borough Bank* v. *Turner* [(1860)] 2 De G. F. & J. 502, 507: "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

Now looking at the intention of the by-law it seems to me that the underlying purpose was to provide for an annual election of officers. It could not have been intended that the failure to hold such an election in December would result in the local union being without any officers for a whole year. To hold otherwise would mean that the 13,000 members of the local union would be powerless to act until an election of officers in December, 1943. Then again there is no special reason suggested why it was imperative or necessary that the election should take place in December of each year. Looking at the above consequence that would result from such construction of the governing by-law 9, it seems to me, with respect, that the by-law is directory only.

In *Howard* v. *Bodington* (1877), 2 P.D. 203, the Court had to consider a section of the Public Worship Regulation Act, 1874, which provided that the bishop "shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of, . . ." A representation under the Act was sent to the bishop on the 29th of August, 1876. He received it on the 30th of August and forwarded it on the 15th of September to the archbishop of the Province. On the 21st of October the archbishop transmitted a copy to the party complained of. The party complained of did not acknowledge receipt of the copy and although subsequently personally served with a duplicate copy of the representation entered no appearance. Afterwards the archbishop required the judge to hear the matter of the representation. It was held that the proceedings were void and must be dismissed by the judge for the provisions as to the time in which a copy of the representation should be transmitted to the party complained of were imperative and had not been complied with. Lord Penzance said at pp. 210-11:

> Well, then, secondly, it was contended that, although it is a positive pro-

vision of the Act that a copy of the representation shall be transmitted to the respondent within twenty-one days from the time the bishop received it, yet that that provision is only what has been called in the law courts "directory." Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still that is the recognised language, and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end.

He then said that he came to the conclusion expressed by Lord Campbell, and which was referred to by Lord Wright as mentioned, and then said as follows:

I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

In *The King* v. *The Justice of Leicester* (1827), 7 B. & C. 6, the Court had to consider a section of a statute which provided that the Michaelmas quarter sessions "shall be holden" in the first week after the 11th of October. It was held there the section was merely directory and that those sessions might, notwithstanding the enactment, be legally holden at another time.

Lord Tenterden, C.J. pointed out that the language used in the statute was affirmative only and that negative words could have been used so as to make the statute mandatory.

It is now necessary to refer to governing by-law 3 which is as follows:

3. Meetings. Regular meetings shall be held at least once each month,

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at a time and a place agreed upon by the union. Special meetings shall be called by the President or by the Secretary-Treasurer of the union, upon receipt of a request therefor from five members in good standing. Notice of such special meeting shall be posted in a conspicuous place, or, where that is not possible, a written notice shall be given to each member, at least five days before the date of such special meeting. Such notice shall state the nature of the business to be transacted at such special meeting, and no business other than that specific in the notice shall be transacted at such special meeting.

It was objected that a special meeting could only be called by the president or by the secretary-treasurer of the union on receipt of a request by five members in good standing; that no request had been made by five members in good standing; that in any event, there were no officers of the local union in 1943 to act upon a request.

In my opinion members of the union present at the regular meeting on the 4th of February, 1943, held in accordance with the local union by-law No. 34, *supra,* could themselves provide for the calling of a special meeting. Like an unincorporated club there being no officers, the entire management of the local union was in the hands of its members—Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 483. See also *Barron* v. *Potter. Potter* v. *Berry,* [1914] 1 Ch. 895, at pp. 902-3, followed in *Foster* v. *Foster,* [1916] 1 Ch. 532, at p. 557.

In my opinion the provision in governing by-law 3 with reference to a special meeting was to give the members an additional power. It was not intended to take away from the members of the union present at a regular meeting the right to provide for the holding of a special meeting at any time.

Then it was further objected that, assuming a special meeting could be called by the members of the local union, no proper notice of such meeting had been given as the notices were not signed. The notice convening the special meeting appear in large black type on a yellow card, 22 inches by 24 inches, and reads as follows:

BOILERMAKERS' & IRON SHIPBUILDERS' UNION OF CANADA—LOCAL NO. 1

SPECIAL MEETING

Friday, Feb. 12, at 8.00 P.M.

HASTINGS AUDITORIUM

828 East Hastings Street

THIS MEETING is called for the purpose of considering the advisability of holding forthwith an election of officers and two members of the executive

committee of the union for the year 1943, they to take office immediately upon installation, and, if thought advisable to hold such an election, to make provision for the holding of special meetings of the union to nominate candidates and to elect such officers and two members of the executive committee and to provide for their installation and time of taking office, and for the further purpose of passing upon a resolution that this union forthwith secede from and sever its connections with the Canadian Congress of Labour.

It will be noticed that there was no signature of any officer to the notice. As there were no officers no one could sign it. However, this was not done. It is not always necessary that a notice should be signed—see *Ferrera* v. *National Surety Co.* (1916), 23 B.C. 122, at p. 123. While governing by-law 3 provided for a special meeting being called by the officers mentioned and ordinarily the members might have expected that any notice calling a special meeting would have been signed by the local union's officers; although the by-law did not in terms require a signed notice; yet as all the members of the union knew that there were no officers they would not have expected a notice convening the special meeting to be signed. Further governing by-law 3 provided for the notice of a special meeting being posted in a conspicuous place. Members of the local union are engaged in shipbuilding in the yards in and around Vancouver. The union has about 13,000 members. The men work in three shifts. There would be changes of addresses among these men. From time to time members would leave and other workers be engaged. It was admitted by counsel for the respondents that notices of meetings held prior to 1943 had been given by placards posted in conspicuous places within shipyards but he would not admit they were unsigned. In these circumstances the best way of giving notice of a meeting to the members was by posting notices, convening such meeting, in conspicuous places within shipyards. Now the evidence is that the above notices of special meetings were posted in conspicuous places in the works. In my opinion "conspicuous places" must mean in conspicuous places in the place where the men work. Under all the circumstances I think the notice of the meeting was a proper one.

At the meeting of the 12th of February, 1943, a motion was passed that the local union secede from the Congress. The judgment herein declared that such motion was null and void. The

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appellant does not appeal from this part of the judgment. It is submitted by the respondents that the members present at the meeting of the 12th of February could not provide for a special meeting of the local union as by voting for the resolution they had *ipso facto* ceased to be members of the local union. The local union could not secede, because power was given to Congress by section 10 to terminate the charter of the local union at any regular or special convention of the Congress. The answer to that is that the resolution provided that the whole of the union should secede and that such resolution has been held null and void. The appeal must be allowed and accordingly the cross-appeal must be dismissed.

It is now necessary to consider the second appeal arising under the following circumstances.

After judgment in this action had been duly entered in March, 1943, the local union applied in September, 1943, unsuccessfully, to be joined as a party defendant and through their officers to enter an appearance and for an order that the judgment

be varied or amended by substituting the said union in the place and stead of the plaintiffs as the party to whom the defendants should make an accounting and pay any sums found to be due on such account.

The reason for the application was that as the judgment above mentioned declared that the election of officers of the local union held in February, 1943, was null and void it was deemed necessary to elect new officers; and, at a meeting held on the 15th of April, 1943, the majority of the defendants had been so elected; and it was said that, therefore, the accounting should not be made to the plaintiffs, who were no longer officers or even members of the union, as ordered by the judgment. I shall assume, for the purposes of this judgment only that the local union is a legal entity. A person may be added as a defendant by consent after judgment duly entered if he submits to be bound by the judgment in the very same manner as if he had originally been made a party—see *In re Dracup. Field* v. *Dracup,* [1892] W.N. 43. Yet ordinarily he cannot be added as a defendant after final judgment—see *Heard and Another* v. *Borgwardt,* [1883] W.N. 175.

Parties affected by an "order" made upon an application of which they had no notice may have such order vacated and the

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matter reopened—see *City of Greenwood* v. *Canadian Northern Investment Co.* (1921), 30 B.C. 72. But a judgment duly pronounced as the Court intended and duly entered cannot be set aside except on appeal—see *Vandepitte* v. *Berry* (1928), 40 B.C. 408; and, it cannot be amended except when there has been a slip in drawing it up and where there has been an error in expressing the manifest intention of the Court. See *Paper Machinery Ltd. et al.* v. *J. O. Ross Engineering Corp. et al.*, [1934] S.C.R. 186, at p. 188, and cases there cited.

This appeal must be dismissed with costs.

Appeal allowed; cross-appeal dismissed, McDonald, C.J.B.C., dissenting in part, would dismiss both appeals.

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Oct. 5, 6; *Nov.* 2.

Husband and wife—Action for judicial separation—Charge of cruelty—Evidence—Sufficiency of.

In an action by a wife for judicial separation on the ground of cruelty, it was held on the trial that the evidence as to the plaintiff's state of health and injuries was not sufficient to entitle her to the decree.

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

Per MCDONALD, C.J.B.C., FISHER, J.A. concurring: The learned judge made one finding which to my mind is in itself sufficient to decide the case. It related to a quarrel when the respondent kicked his wife on the base of her spine as she stood at their front door, thereby causing her to go stumbling three steps at a time to the foot of a ten-step stairway. That one act was so grievous by itself to constitute cruelty in law. Further, the evidence of many minor and continued acts of ill-usage have in this case accumulated until a case of cruelty has arisen. Each of these cases involving cruelty must be decided on its own facts and no two that are reported are exactly alike. The two best collections and analyses of the cases are contained in the judgment of Taylor, J. in *Jones* v. *Jones*, [1925] 1 W.W.R. 449 and in that of Boyd, C. in *Lovell* v. *Lovell* (1906), 11 O.L.R. 547.

APPEAL by the petitioner from the decision of ROBERTSON, J. of the 14th of January, 1943, in an action for judicial separa-

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tion. The parties were married in June, 1913. They had one son, now 24 years old and in His Majesty's service. The marriage was happy until 1935 when, owing to eye ailment, Mr. Roach went to a specialist for treatment where one Miss Graham was nurse. Mr. Roach was treated for about three months by the specialist with the nurse attending. Mr. Roach and the nurse became very friendly and she visited the Roach home frequently. This created trouble between husband and wife, the wife accusing her husband of hitting her on a number of occasions and once kicking her on the spine. In July, 1941, trouble arose between them when Miss Graham was present and Mrs. Roach, losing her temper, called Miss Graham vile names, but Miss Graham subsequently continued to visit the Roach house. On April 18th, 1941, Mrs. Roach's thumb was injured in an altercation. On May 23rd, 1941, after the son's wedding, trouble arose in the Roach house when Miss Graham and others were present and she alleges her husband pushed her roughly into a chair and shortly after Mr. and Mrs. Roach drove Miss Graham home. Mrs. Roach stated that on the way Mr. Roach struck her three times, but Miss Graham denied this and said that Mrs. Roach struck her husband while he was driving the car. In July, 1941, Mrs. Roach says her husband kicked her as she was going down the front steps. In this case she is corroborated by a Mrs. Fennell who said she saw him kick her. The evidence was conflicting as to what actually occurred on these occasions.

The appeal was argued at Victoria on the 5th and 6th of October, 1943, before MCDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

Davey, for appellant: The parties were married in 1913. In 1935 trouble arose owing to the husband's relations with a nurse named Miss Graham, and this grew for two and one-half years. There was cruelty, but, owing to conflict of evidence, the learned judge was unable to say who was right. As to what happened on July 11th, 1941, there was corroboration of the petitioner's statement of cruelty which was accepted. The facts are accepted as set out by the learned trial judge and it is submitted that the fair inferences from the undisputed facts disclose that there was cruelty in law: see *Russell* v. *Russell,* [1897] A.C.

395, at p. 420; *Lovell* v. *Lovell* (1906), 11 O.L.R. 547, at p. 561. The husband kicked his wife when going down stairs. One blow may constitute cruelty: see *Mainwaring* v. *Mainwaring* (1942), 57 B.C. 390; Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 650, par. 955; *Reeves* v. *Reeves* (1862), 3 Sw. & Tr. 139; *Grossi* v. *Grossi* (1873), L.R. 3 P. & D. 118; *Waddell* v. *Waddell* (1862), 2 Sw. & Tr. 584.

Gordon A. Cameron, for respondent: The cruelty should be such as to create danger to life, limb or mental apprehension of injury or bodily health: see *Edmonds* v. *Edmonds* (1912), 17 B.C. 28; *Russell* v. *Russell* (1895), 64 L.J. P. 105; *Jones* v. *Jones,* [1925] 1 W.W.R. 449; *Evans* v. *Evans* (1790), 1 Hag. Con. 35; 161 E.R. 466; *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168; 164 E.R. 678; *Kelly* v. *Kelly* (1869), L.R. 2 P. & D. 31. The learned trial judge found there was no apprehension of danger to life, limb or health: see also *Mytton* v. *Mytton* (1886), 11 P.D. 141; *Bethune* v. *Bethune,* [1891] P. 205. All we have in this case is that she lost weight.

Davey, replied. *Cur. adv. vult.*

2nd November, 1943.

MCDONALD, C.J.B.C.: This is an appeal from the learned trial judge's refusal to grant the appellant a decree of judicial separation from her husband upon the ground of his alleged cruelty. The trial judge admits that the situation in the home has become such that he cannot see how they can go on living in the same house, and he regrets that he cannot give the wife any assistance. Quite properly, if I may say so, he strongly criticizes the woman who has come between these spouses and broken up their home, and who has deliberately continued her association with the husband, with full knowledge of the results of her conduct.

The learned judge, after an elaborate review of the evidence, makes this statement:

> The law is quite clear, of course, and I am bound by the law. The only ground upon which a judicial separation can be granted is when there is cruelty. Cruelty may consist of actual assaults or courses of conduct which produce in the recipient a state of health which is dangerous to life, limb, or health.

He then cited the judgment of GREGORY, J. in *Edmonds* v.

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Edmonds (1912), 17 B.C. 28 and the well-known case of *Russell* v. *Russell,* [1897] A.C. 395.

It would seem that some error must have occurred in transcribing what the learned judge said, for one cannot conceive of "a state of health which is dangerous to life, limb, or health." One can, however, without much difficulty, understand what was intended. As I read the judgment the main ground for refusing the petition was that the learned judge thought that without medical evidence the petition could not be granted upon the statement of the petitioner that her health has been injured, that she has lost weight, that her nerves are in a bad condition, and that she still suffers from an injured thumb, the injury to which was caused by her husband.

With great respect, the learned judge here fell into fundamental error, and counsel for the respondent did not attempt before us to contend that medical evidence was essential in every case. In fact he could not well have done so, for this Court in *Mainwaring* v. *Mainwaring* (1942), 57 B.C. 390 held the contrary.

I am satisfied that each of these cases involving cruelty must be decided on its own facts, and no two that are reported in the books are exactly alike. Perhaps the two best collections and analyses of the cases are contained in the judgment of Taylor, J. in *Jones* v. *Jones,* [1925] 1 W.W.R. 449 and in that of Boyd, C. in *Lovell* v. *Lovell* (1906), 11 O.L.R. 547. Nothing is to be gained by listing the authorities again, nor can anything be gained by my doing what has already been done both by the trial judge and by counsel in their careful arguments before us, *i.e.,* reiterating this sordid story in detail.

What has happened may be put in a few words. The parties were married in 1913, and appeared to have lived happily together until some five years ago, when the "other woman" came upon the scene. Her influence over the respondent was such that he ceased to live with the appellant as her husband, or to treat her as his wife, while he and the other woman flaunted their so-called friendship before the injured wife with a cold and callous and, one might almost say, a brutal indifference to her feelings or to her rights. There are many, many incidents of violence

sworn to, and many of them are denied. The learned judge as to many of these makes no definite finding of fact. He does, however, make one finding which counsel before us frankly admitted he could not ask us to reverse, and to my mind that finding is in itself sufficient to decide the case. That related to a quarrel which took place on July 11th, 1941, when the respondent kicked his wife on the base of her spine as she stood at their front door, thereby causing her to go stumbling three steps at a time to the foot of a stairway consisting of some ten steep steps. In my opinion that one act, aside from all others, was so grievous as by itself to constitute cruelty in law. If required to do so in order to reach a decision, I should have no hesitation in going much further and holding that the evidence of many minor and continued acts of ill-usage have in this case accumulated until a case of cruelty has arisen. In other words, I am satisfied that the petitioner has brought herself within the law as laid down in Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 650, and the cases there cited.

I would allow the appeal and grant the decree.

O'HALLORAN, J.A.: The learned trial judge was not convinced there was sufficient evidence to establish legal cruelty. In my judgment the evidence of cruelty is not sufficient to enable a Court to act upon it with safety. If that is a correct view as I think it is, it presents an insuperable obstacle to interference with the trial judge's findings.

The parties have been married 30 years. The wife is 49 and the husband 53 years of age. For some years past they appear to have lived a sort of cat and dog existence. Various incidents were referred to at some length in the evidence, but only one emerges with any degree of certainty. That is the episode of 11th July, 1941. But the legal efficacy of that incident is seriously weakened in that: (1) It appears the appellant would have been knocked off the steep stairway if the alleged kick had been given with any force; (2) medical examination shortly afterward disclosed no resulting bruise; and (3) the respondent husband was provoked into retaliation by his wife striking him in the face and injuring his lip. I find myself in agreement with the learned trial judge in his inability to give to the episode of

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11th July the legal importance which counsel for the appellant desires us to attach to it.

I am impressed also by the lack of convincing evidence of the wife's health and general condition. It rested upon her own testimony. It was not supported by medical testimony as the learned judge thought in the circumstances it should have been. The wife's physician was called and questioned respecting her visits to him, but was not questioned regarding her health and general condition. Medical evidence as to her health and general condition was so readily available, that it is hard to understand why it was not adduced, if the wife's health was in fact impaired in the maner and to the extent it has been contended at Bar. I do not say medical evidence is essential in every case. But with respect, I am unable to avoid the conclusion that this is a case in which the testimony before us is too weak and contradictory without it.

On the evidence presented I do not feel justified in reversing the judgment appealed from. I would dismiss the appeal.

FISHER, J.A.: I would allow the appeal and grant the decree for the reasons given by the Chief Justice.

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

Solicitor for appellant: *E. L. Tait.*
Solicitor for respondent: *Gordon A. Cameron.*

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Oct. 6;
Nov. 2.

REX v. O'LEARY.

Criminal law—Gross indecency—Male persons—Appeal by Crown—Whether corroboration necessary—Misdirection—No substantial wrong or miscarriage of justice—Criminal Code, Secs. 206, 1014, Subsec. 2, and 1020.

Respondent was acquitted on a charge of gross indecency with a boy under section 206 of the Criminal Code. In his reasons for judgment the trial judge stated in effect that he "could" not convict without corroboration, but in his report under section 1020 of the Code he said he "would" not convict without it. In both reasons and report was the statement that there was no corroboration. In the report was the statement that he

found it unsafe to convict without corroboration because the youth was admittedly a pervert. On appeal, the Crown sought a new trial on the ground that the trial judge misdirected himself in holding that the law required him not to convict without corroboration. The respondent conceded misdirection, but invoked section 1014, subsection 2 of the Code on the ground that no substantial wrong or miscarriage actually occurred.

Held, affirming the decision of SHANDLEY, Co. J., that in the circumstances even if the learned judge had not misdirected himself, he must have reached the same conclusion. It follows that despite the misdirection, no substantial wrong or miscarriage of justice had actually occurred and there is no ground for a new trial.

APPEAL by the Crown from the decision of SHANDLEY, Co. J. of the 7th of September, 1943, whereby he found the accused not guilty upon the charge that he on or about the 4th of August, 1943, at the city of Victoria, being a male person did unlawfully commit an act of gross indecency with another male person. On the 4th of August, 1943, a boy named Clarke (15 years old) went to the rest-room in the Causeway a few minutes after 10 in the evening to relieve himself at one of the urinals. While there the accused came to the urinal second away from the boy; then he moved to the urinal next to the boy and reached over and played with the boy's penis. At this time two policemen took two men out of a toilet and took them to the police station. Then the police went back and found the accused and the boy together on the street above the rest-room. They took the boy to the police station and questioned him and then a warrant was issued upon which the accused was subsequently arrested. On the trial the boy gave evidence reciting what had occurred with accused in the rest-room. As there was no evidence corroborating the boy's story, the accused was found not guilty.

The appeal was argued at Victoria on the 6th of October, 1943, before O'HALLORAN, FISHER and ROBERTSON, JJ.A.

Pepler, K.C., D.A.-G., for the Crown: The learned trial judge misdirected himself. The charge is for gross indecency under section 206 of the Criminal Code. There is the right of appeal under section 1013, subsection 4. The charge was dismissed on the ground that there was no corroboration of the evidence of the boy upon whom the accused committed the indecent act. In the

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rest-room on the Causeway, the boy and accused were in adjoining urinals and the accused reached over and played with the boy's penis. The police got a statement from the boy and arrested accused. There is no statute requiring corroboration in this case. There should be a new trial: see *Reid* v. *Regem*, [1943] 2 D.L.R. 786; *Rex* v. *Kagna*. *Rex* v. *Dick*, [1943] 1 W.W.R. 33; *Vigeant* v. *Regem*, [1930] S.C.R. 396; *Rex* v. *Bristol* (1926), 46 Can. C.C. 156. When they were seen together that constituted corroboration.

McKenna, for accused: The learned judge said he did not believe Clarke because Clarke was a pervert: see *Rex* v. *Munroe*, [1940] 2 D.L.R. 579; *Rex* v. *Reid* (1942), 58 B.C. 20, at pp. 21 and 23. Even if there was misdirection, there was no substantial wrong or miscarriage of justice: see *Rex* v. *Tate*, [1908] 2 K.B. 680. Merely evidence of opportunity is not corroboration: see *Forsythe* v. *Regem*, [1943] S.C.R. 98, at p. 101; *Burbury* v. *Jackson*, [1917] 1 K.B. 16; *Rex* v. *Everest* (1909), 2 Cr. App. R. 130; Russell on Crimes, 9th Ed., 653. In this case the charge should have been indecent assault and not gross indecency: see *Jacobs' Case* (1817), R. & R. 331. Reasonable doubt arises in this case: see *Rex* v. *Bush* (1938), 53 B.C. 252; *Boulianne* v. *Regem*, [1931] S.C.R. 621, at p. 622; *Rex* v. *Bourgeois* (1937), 69 Can. C.C. 120; *Rex* v. *Probe*, [1943] 3 D.L.R. 32; *Rex* v. *Nowell* (1938), 54 B.C. 165, at p. 171. In a case of this nature the Court leans towards corroboration: see *Rex* v. *Baskerville*, [1916] 2 K.B. 658, at p. 667; *Rex* v. *Bourgeois* (1937), 69 Can. C.C. 120, at p. 137.

Pepler, in reply, referred to *Rex* v. *Rasmussen*, [1935] 1 D.L.R. 97, at p. 112; *Steele* v. *Regem* (1924), 42 Can. C.C. 375; *Rex* v. *Joseph* (1939), 72 Can. C.C. 28.

Cur. adv. vult.

On the 2nd of November, 1943, the judgment of the Court was delivered by

O'HALLORAN, J.A.: The respondent was acquitted of gross indecency charged under section 206. The Attorney-General seeks a new trial on the one point of law, that the learned county court judge misdirected himself in holding that the law required

him not to convict without corroboration. Counsel for the respondent concedes that misdirection, but asks us to invoke section 1014, subsection 2 and dismiss the appeal, on the ground that "no substantial wrong or miscarriage of justice has actually occurred."

In his reasons for judgment the learned judge said in effect he "could" not convict without corroboration, while in his report under section 1020, he said he "would" not convict without it. The reasons and the report differ in that aspect. But they do agree in this material aspect, that on both occasions the learned judge said there was no corroboration. They are to be read together, *vide Rex* v. *Reid* (1942), 58 B.C. 20, affirmed in the Supreme Court of Canada [1943] 2 D.L.R. 786. It is true the learned judge could have convicted without corroboration. But he explained in his report he found it unsafe to do so, because the youth Clarke was admittedly a pervert. That is consistent with the evidence.

In these circumstances, it seems clear, that even if the learned judge had not misdirected himself, he must have reached the same conclusion as he actually did reach in this case: *vide Boulianne* v. *Regem,* [1931] S.C.R. 621, Anglin, C.J.C. at pp. 622-3, and *Rex* v. *Nowell* (1938), 54 B.C. 165, at p. 171. The recent case of *Rex* v. *Probe,* [1943] 3 D.L.R. 32, at p. 38 is also in point, and see in addition *Rex* v. *Bourgeois* (1937), 69 Can. C.C. 120. It follows that despite the misdirection in question, no substantial wrong or miscarriage of justice has actually occurred, and there is no ground upon which to direct a new trial. *Rex* v. *Kagna. Rex* v. *Dick,* [1943] 1 W.W.R. 33 was cited. But the nature of the judge's report herein as well as the evidence to which that report refers, provide elements for consideration which did not appear in the *Kagna* case.

On the question of what was termed self-direction as touched upon during argument, it is enough to refer without more to *Rex* v. *Bush* (1938), 53 B.C. 252; *Rex* v. *Joseph* (1939), 72 Can. C.C. 28 and *Rex* v. *Meimar,* [1943] 3 D.L.R. 672.

I would dismiss the appeal.

Appeal dismissed.

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Oct. 8;
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PARLBY AND PARLBY v. DICKINSON AND DICKINSON.

Landlord and tenant—The Wartime Prices and Trade Board—Rental regulations—Order 108, Secs. 16, 18, 19 and 23—Notice to vacate by landlord—Lack of notice by tenant of renewal—Procedure by landlord to recover possession—R.S.B.C. 1936, Cap. 143, Secs. 19 and 22.

If a tenant of "housing accommodation" has been given "due notice to vacate" by the landlord under section 16 (1) of order 108 of Regulations Respecting Maximum Rentals and Termination of Leases for Housing (The Wartime Prices and Trade Board) and the tenant does not give the landlord notice of renewal within fifteen days after receipt of the notice to vacate under section 18 (2) of said regulations, the provisions of said order 108 no longer apply and the landlord is left to his ordinary rights to obtain possession of the premises.

APPEAL by Douglas Parlby and Olive Parlby, tenants of the three back rooms of the downstairs portion of the premises 916 North Park Street, Victoria, B.C., from the order of SHANDLEY, Co. J. of the 24th of September, 1943, whereby it was ordered that the tenants surrender possession of said rooms forthwith and in case of their refusing to surrender possession, the sheriff of the county of Victoria was directed to place the landlord in possession of the premises. The appellants had a monthly tenancy of the rooms. Adjoining the said rooms is a back kitchen off of which there is a compartment enclosing a toilet which the sanitary inspector declared was unsanitary and had to be removed. On the 8th of June, the landlords gave the tenants notice to quit and give up possession on the 8th of September, 1943, as they required possession for the purpose of making major structural alterations and additions by removing rotted foundations and replacing with new ones, removing decayed joists and replace with new, to lay a new floor in the kitchen with new door and back window, the addition of a bathroom, removing the unsanitary toilet and installing a new one, also other improvements. On the 13th of September a further notice to quit was served on the tenants to give up possession on the 15th of September, 1943. At the instance of the landlords, a notice of appointment was issued by SHANDLEY, Co. J. on the 17th of September, 1943, to inquire and determine whether the

tenants are entitled to hold possession as against the landlords. On September 24th the above-mentioned order was made.

The appeal was argued at Victoria on the 8th of October, 1943, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Dawe, for appellants: It was not necessary for the tenants to leave the three rooms in order that the contemplated repairs could be proceeded with. The kitchen and toilet were behind the three rooms and not connected with them. There was error in holding that the alterations were major structural alterations. They were merely repairs and removals. There was error in finding that the tenants were under any obligation to give a notice of renewal in respect of the notice served on them by the landlord under The Wartime Prices and Trade Regulations and War Measures Act, as the tenants were not warned in the notice that a notice of renewal must be served within 15 days.

Sedger, for respondents: Three months' notice was given. The regulations have no further application. We come under the Provincial law. The question is whether the notice of the 8th of June, 1943, was a good notice: see *Hurov* v. *Clyde,* [1943] 2 W.W.R. 470; *Slobidnyk* v. *Newman, ib.* 324.

Dawe, replied.

Cur. adv. vult.

2nd November, 1943.

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

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

ROBERTSON, J.A.: The appellants were monthly tenants under a verbal lease "running from the 9th day of the month" of the housing accommodation, belonging to the respondents, mentioned later in the notice to vacate. Subsection (1) of section 16 of order No. 108 enacted by The Wartime Prices and Trade Board, provides that a landlord who wishes to terminate a lease shall give his tenant "due notice to vacate in writing." Subsection (3) of section 16 provides that no notice to vacate any housing accommodation shall be given except by reason of, *inter alia,* the circumstances that the landlord requires possession of the

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housing accommodation for the purpose "of making any major structural alteration or addition specified in the notice."

On the 8th of June, 1943, the respondents served appellants with a notice to vacate on the 8th of September, 1943, in which they stated they required possession of the housing accommodation

for the purpose of making major structural alterations and additions specified as follows: Remove rotted foundations and replace with new foundations; remove decayed joists and replace with new, and to lay new floor in the kitchen; provide and install new door and window in back kitchen; provide an addition by adding a partition for a three-piece bathroom; providing and installing walls, windows and doors to same; remove old outdoor unsanitary toilet condemned by the City Health Department, and provide and install new bath, toilet and basin and boiler; kitchen floor to be taken up and renewed, and to put in new joists, install window; brick foundation to be partly re-built and to plaster new work in the addition, and generally to restore the property to liveable condition, and in consequence of such matters we are entitled to terminate your tenancy.

The notice contained the undertaking mentioned at the end of subsection (*j*) of subsection (3) of section 16. The appellants did not give any notice of renewal.

The appellants remained in possession after the 8th of September. On the 13th of September, 1943, the respondents gave notice to the appellants to go out of possession on the 15th of September, 1943. The appellants did nothing. The respondents then proceeded under sections 19 and 22 of the Landlord and Tenant Act and a hearing was held by the learned county court judge. He ordered the appellants to surrender the premises. The appellants then obtained special leave under section 119 of the County Courts Act to appeal to this Court. The appellants renewed the objections which they had made before the learned county court judge, *viz.*, that the matters specified in the notice to vacate were not major structural alterations or additions; or alternatively, they were in the nature of repairs and were not such as to require possession of the appellants' housing accommodation; and, that in so far as they consisted of additions such additions were not part of the leased premises and could be made without disturbing the appellants.

In my opinion appellants were not entitled on the hearing before the county court judge to object to the notice unless it was clearly not within the terms of the regulations. The regulations

very seriously affect the ordinary rights of a landlord. In this case the appellants although monthly tenants could not be dispossessed until the expiration of at least three months terminating at the end of the lease month—see subsection (2) (*b*) of section 16. They were passed entirely for the benefit of tenants. They gave them rights which they did not have before and were intended to provide a speedy way of testing a landlord's notice to vacate if a tenant wished a renewal. Assuming the notice to vacate was regular *ex facie* I think it was the appellants' duty to give notice of renewal if they wished to preserve their special rights under these regulations.

The appellants were automatically entitled to a renewal of their lease if upon receipt of notice to vacate under section 19, they had within 15 days after receipt of notice of renewal given a notice of renewal (subsection (2) of section 18) subject to the rights of the landlord to apply to the Court for possession. In the event of such an application being made, the Court, if satisfied that due notice to vacate had been given and that any of the applicable circumstances, set forth in section 16, and stated in the notice to vacate, existed, would make the order asked for. Section 23 provides that if the tenant fails to give the landlord due notice of renewal after receipt of due notice to vacate he shall not be entitled to a renewal of his lease and the landlord shall not be entitled to make an application to the Court. The result of these sections is that if due notice to vacate is given and no notice or renewal is given the provisions of order No. 108 no longer apply and the landlord is left to his ordinary rights.

In *Slobidnyk* v. *Newman,* [1943] 2 W.W.R. 324, the facts were that the landlord had given a notice to vacate containing the required undertaking under the regulations in question, assigning a number of reasons within said subsection (3) of section 16. The tenant did not give a notice of renewal and did not give up possession. Then the landlord instituted proceedings. On the return of the application, counsel for the tenant asked leave to attack the *bona fides* of the notice, intimating that the material presented by him would support this position, while counsel for the landlord objected to the holding of an inquiry such as would in the ordinary course have been conducted under

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section 19, *supra,* on the application of the landlord if the tenant had served notice of renewal. Counsel contended that at that stage the door was closed to the tenant provided the landlord's notice was on its face regular. I respectfully agree if I may say so with what McLaurin, J. said at p. 327 as follows:

> The Regulations as now constituted seem to aim at having the respective rights of the parties determined promptly after the notice to vacate. The defendant had an opportunity to take the first step towards a judicial scrutiny of the notice to quit by filing a notice of renewal, but he remained mute and passive. He had a legal duty to speak after receipt of the notice to quit. If such a notice had been defective the defendant could no doubt have disregarded it, and urged at this time that it was a nullity, but no question is raised as to its regularity. I am of the opinion that this tardy attempt to inquire into the merits of the plaintiffs' grounds cannot be entertained.

I am of the opinion that the notice in this case was *ex facie* a "due notice to vacate" as (1) it purported to be given for some of the circumstances mentioned in section 16, subsection (3) (*j*); (2) the length of the notice was at least three months terminating at the end of a lease month; and (3) it contained the required undertaking.

It may be that if the objections which the appellants raised before the county court judge had been taken before the proper forum and in accordance with order 108, that forum might after hearing evidence have given effect to them and held that the notice was defective. But failing that, the notice being *ex facie* regular, the county court judge was bound to give effect to it.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *A. P. Dawe.*
Solicitor for respondents: *G. H. Sedger.*

MITCHELL v. TIMES PRINTING AND PUBLISHING COMPANY LIMITED.

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Oct. 8;
Nov. 2.

Practice—Defamation—Libel—Pleadings—Motion for particulars and to strike out allegations—Murder charge against plaintiff pending—Motion to extend time for delivering defence.

The plaintiff, who had been arrested on a charge of murder, brought action for damages for libel alleged to be contained in a newspaper report (quoted *infra*) of his arrest and filed his statement of claim. The defendant applied for an order for further particulars of certain allegations and to strike out others as embarrassing, also for an order extend the time for delivery of the statement of defence until the pending charge for murder was tried. The application was dismissed.

Held, on appeal, varying the order of COADY, J. (ROBERTSON, J.A. dissenting), that paragraph 7 of the statement of claim is improper and should be struck out:. It reads in part as follows: "The defendant . . . knowing that the plaintiff would subsequently have his trial upon the said alleged charge of murder before a judge and jury at the Court of Assize to be holden at the said city of Victoria . . . well knew or ought to have known that the publication as aforesaid of the said libellous and defamatory statements would have the effect of prejudicing the plaintiff upon his said trial by a jury drawn from persons resident in the said city of Victoria and immediate locality by reason of the said false and contemptuous statements and the ridicule contained in the said article." By this plea the plaintiff seeks to have a civil Court in a subsequent trial of an action pass upon whether or not the accused had had a fair trial in a criminal proceeding before the Assize Court. Alleged prejudice could be advanced in support of an application to the Assize Court for a change of venue.

Held, further, that there was error in not extending the time for the filing of the statement of defence until after the Assize Court trial of the plaintiff upon the murder charge. It offends the judicial sense of propriety and is not consonant with public justice to have this civil action for libel, in which justification might well be pleaded, proceeding parallel with and involving an investigation into the same facts as a criminal proceeding in the Assize Court in which the life of the plaintiff is at stake. Further, difficulties surrounding necessary factual investigations and discovery immediately loom up perhaps to the prejudice of one or other of the parties to the litigation. Section 13 of the Criminal Code does not apply.

APPEAL by defendant from the order of COADY, J. of the 23rd of September, 1943, dismissing the defendant's application in a libel action for particulars for an extension of time for delivering defence until after a certain criminal charge be tried and to

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strike out certain allegations in the statement of claim. The Daily Times of the 19th of June, 1943, contained the following statements regarding the plaintiff herein:

At last the fish the police have been baiting their hooks for in the Molly Justice dim-out murder surfaced and they say have solved the five-month-old mystery. William Mitchell 50 grey-haired logger is brought into Court before magistrate Hall and charged with the murder, after he is arrested in a downtown hotel by sergeant Elwell and detective Dave Donaldson. Police have been seeking Mitchell for weeks in Vancouver and in logging camps up island. He was booked here first on a boy sex charge and police say this led to uncovering Justice murder facts.

The defendant asked for:

(a) Further and better particulars of the words alleged in paragraph 4 of the statement of claim which were calculated and exposed the plaintiff to hatred, contempt and ridicule . . . , and of the further damage which the plaintiff is alleged in paragraph 9 . . . to have suffered. . . . (b) To extend the time for delivery of the statement of defence . . . until the charge of murder . . . against the plaintiff . . . has been tried. (c) To strike out [certain] parts of the statement of claim as irrelevant, unnecessary and intending to prejudice and embarrass [a] fair trial. . . .

The appeal was argued at Victoria on the 8th of October, 1943, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

D. M. Gordon, for appellant: We have not filed our defence. The plaintiff should furnish further and better particulars of the words alleged in paragraph 4 of the statement of claim. The statement of claim does not identify the words. The word "contained" in paragraph 6 is ambiguous, and the paragraph is not specific enough: see *Henfrey* v. *Henfrey* (1842), 4 Moore, P.C. 29, at p. 35; Odgers on Pleading, 12th Ed., 152; 7th Ed., 113; Yearly Practice, 1940, p. 311. There are a number of passages in the statement of claim that should be struck out as embarrassing: see *Davy* v. *Garrett* (1878), 7 Ch. D. 473. The plaintiff is now in custody on a charge of murder and an application to extend the time for delivery of defence until the murder trial is disposed of was refused. It is submitted this case should not be heard until the murder trial is finished: see *Gilding* v. *Eyre* (1861), 10 C.B. (N.S.) 592, at p. 603; *Parton* v. *Hill* (1864), 10 L.T. 414; *Woolley* v. *Morgan* (1887), 4 T.L.R. 211; Salmond on Torts, 9th Ed., 663; Clerk & Lindsell on Torts, 9th Ed., 670. One Court cannot forejudge what will be decided in another Court: see *Fisher* v. *Bristow* (1779), 1 Doug.

215; *Bynoe* v. *Bank of England,* [1902] 1 K.B. 467; *Illingworth* v. *Coyle* (1933), 48 B.C. 81; *Moorehouse* v. *Connell* (1920), 17 O.W.N. 351.

Sinclair Elliott, for respondent: The learned judge's reasons for judgment are complete. The defendant can not set up any relevant defence he chooses. The murder trial does not affect him with relation to his pleadings. He can amend later if he sees fit. He is not prejudiced in any way: see *Boak* v. *Woods* (1926), 36 B.C. 456; *Christie* v. *Christie* (1873), 8 Chy. App. 499. There is nothing embarrassing in the statement of claim: see Holmested & Langton's Ontario Judicature Act, 5th Ed., 668-9.

Gordon, replied.

Cur. adv. vult.

2nd November, 1943.

SLOAN, J.A.: The respondent is a logger now in custody awaiting his trial at the present Victoria Assize for the alleged murder of a young woman named Molly Justice.

After his arrest there appeared in the Victoria "Times," a newspaper published by the appellant, the following item:

> At last the fish the police have been baiting their hooks for in the Molly Justice dim-out murder surfaced and they say have solved the five-month-old mystery. William Mitchell 50 grey-haired logger is brought into Court before magistrate Hall and charged with murder, after he is arrested in a downtown hotel by sergeant Elwell and detective Dave Donaldson. Police had been seeking Mitchell for weeks in Vancouver and in logging camps up Island. He was booked here first on a boy sex charge and police say that this led to uncovering Justice murder facts.

Following the publication of the foregoing the respondent brought an action for damages for libel against the appellant and filed his statement of claim.

The appellant applied below for an order compelling further particulars of certain allegations contained therein and to strike out other allegations as embarrassing. The appellant also applied for an order extending the time for delivery of the statement of defence in the action until the pending murder charge was tried.

The learned judge below dismissed the application *in toto* and the appellant now seeks to have this Court declare the learned judge below in error.

With deference I think he erred in two respects. In my opinion the impugned plea in paragraph 7 of the statement of

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claim is improper and should be struck out. It reads in part as follows:

> The defendant . . . knowing that the plaintiff would subsequently have his trial upon the said alleged charge of murder before a judge and jury at the Court of Assize to be holden at the said city of Victoria . . . well knew or ought to have known that the publication as aforesaid of the said libellous and defamatory statements would have the effect of prejudicing the plaintiff upon his said trial by a jury drawn from persons resident in the said city of Victoria and immediate locality by reason of the said false and contemptuous statements and the ridicule contained in the said article.

It seems to me that by this plea as now framed the respondent seeks to have a civil Court in a subsequent trial of an action pass upon whether or not the accused had had a fair trial in a criminal proceeding before the Assize Court. Alleged prejudice could be advanced in support of an application to the Assize Court for a change of venue.

I also hold the view that the learned judge erred in not extending the time for the filing of the statement of defence until the Assize Court trial of the respondent upon the murder charge. This is tantamount to a stay of the action and in my opinion that is the right direction to have made in this case. We were not referred by counsel to any direct authority upon the point but it seems to me that it offends the judicial sense of propriety and is not consonant with public justice to have this civil action for libel, in which justification might well be pleaded, proceeding parallel with and involving an investigation into the same facts as a criminal proceeding in the Assize Court in which the life of the plaintiff is at stake. Then, too, difficulties surrounding necessary factual investigations and discovery immediately loom up perhaps to the prejudice of one or other of the parties to the litigation—see, *e.g.*, *Staples* v. *Isaacs and Harris* (1940), 55 B.C. 189.

In the circumstances herein it seems to me to be more in accord with our sense of the due administration of public justice to stay the action by extending the time for filing the statement of defence, than to allow it to proceed as a civil companion to the trial of the murder charge.

In my view section 13 of the Code and authorities thereon offer no assistance in this case. The said section might apply herein, assuming it to be within the constitutional competence

of the Dominion Parliament, if the appellant newspaper had been indicted for publishing, as a defamatory libel, the item in question. In that case perhaps the law may not insist the criminal prosecution for defamatory libel proceed ahead of any civil remedy for damages which might arise from the publication of such libel, as suggested in *MacKenzie* v. *Palmer* (1921), 62 S.C.R. 517, at p. 520. But that is not this case. And whatever effect said section 13 may have, "it," as McDONALD, J. (now C.J.B.C.) pointed out in *Illingworth* v. *Coyle* (1933), 48 B.C. 81, at p. 82, "does not purport to take away the right of any civil Court to control its own proceedings." (And see Laws Declaratory Act, R.S.B.C. 1936, Cap. 148, Sec. 5).

I would, with respect, allow the appeal to the extent indicated.

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

ROBERTSON, J.A.: In June of this year the respondent was charged with murder. His trial will probably take place at the Assizes now being held in Victoria, B.C. He sued the appellant, which publishes a daily newspaper in Victoria for an alleged libellous and defamatory article with reference to the murder, appearing in the paper shortly after his arrest. The appellant applied unsuccessfully for particulars and for an extension of time, until after the trial of the charge, to file its defence. In my opinion no case has been made out for interfering with the refusal of particulars. The extension of time for defence was said to be required because until after the trial, the appellant would be unable to decide whether or not to plead justificatian. I think this is not a good reason. The article in question may have done the respondent much harm and I see no reason why he should be prevented from proceeding with his action. Section 13 of the Code reads as follows:

> 13. No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.

In my opinion this would be a complete answer to the appellant's contention were it not for the fact that there is a grave question as to its constitutionality. The section, obviously, was

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intended to do away with the common-law rule applied in *Smith* v. *Selwyn*, [1914] 3 K.B. 98, *viz.*, where injuries are inflicted upon an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution. Even assuming the section to be *ultra vires* I respectfully agree, if I may say so, with what the Chief Justice of Canada (then Duff, J.) said in *MacKenzie* v. *Palmer* (1921), 62 S.C.R. 517, at p. 520, with reference to this section:

> It may be questioned whether it is a subject within the competence of the Parliament of Canada as appertaining to the domain of the criminal law or as a proper subject for the exercise of ancillary jurisdiction in the enactment of a Criminal Code. But at least there is a declaration in the most deliberate and solemn form by the legislative authority having jurisdiction over the criminal law, that the rule is no longer necessary in the interests of public justice. As the rule has its foundation in the supposed interests of public justice, it is at least, I think, exceedingly doubtful whether in this country any action ought to be stayed on such a ground.

But there is a further answer and it is this. The rule above mentioned has no application to a misdemeanour. The article in question is at most a defamatory libel. At common law a defamatory libel was a misdemeanour only. So far as defamatory libel is made an offence by the Code, it is a statutory misdemeanour. See Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 425.

> In the case of misdemeanours, there never seems to have been any ruling that concurrent proceedings might not be taken:

Archbold's Criminal Pleading, Evidence & Practice, 30th Ed., 293.

There may be cases where an extension of time should be granted but in the circumstances of this case I think the learned judge was right. The article may have done much harm to the respondent. No one can tell the effect it might have on his trial. Why should he be prevented from showing before his trial that the accusation was unfounded? What "public justice" will suffer? None, in my opinion. On the contrary a great injustice might be done to him if he were not allowed to prosecute this action.

I would dismiss the appeal with costs.

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

Solicitors for appellant: *Crease, Davey, Fowkes, Gordon & Baker.*

Solicitor for respondent: *P. J. Sinnott.*

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CONYERS AND CONYERS v. ORR AND SKELTON.

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Nov. 2, 5.

Real property—Conveyance—Not registered until after death of grantor—Will—Whether deed a testamentary instrument—Evidence of grantee—Reversal of findings of trial judge—Costs—Funds liable for.

Mrs. Margaret Orr executed a conveyance of certain property on Florence Street in Oak Bay, V.I., to her husband William Orr in 1936. The deed was left with her son-in-law and was not registered until after her death. By will and codicil, with the exception of a small portion of her estate left to her grandchildren, the residue was left to her husband and a grandchild in equal shares. After she died in 1939, the conveyance of the Oak Bay property was registered and a certificate of indefeasible title was obtained in Mr. Orr's name. In an action by the guardian of the grandchild for a declaration, *inter alia*, that the Oak Bay property belongs to Mrs. Orr's estate, it was held on the evidence that Mrs. Orr's intention was to give said property to her husband in 1936 to take effect then.

Held, on appeal, reversing the decision of ROBERTSON, J., that the conveyance in question was intended to operate as a testamentary instrument and not as an immediate gift and therefore did not pass the property.

APPEAL by plaintiffs from the decision of ROBERTSON, J. of the 2nd of July, 1943, in an action for a declaration that certain lands known as 2003 Florence Street, in Oak Bay, V.I., and certain moneys in the joint account of Margaret Orr (deceased) and William Orr belong to Mrs. Orr's estate. In 1936 Mrs. Orr executed a conveyance of the Oak Bay property to her husband William Orr. The deed was left in the hands of her son-in-law Conyers and was not registered until after her death. Margaret Orr died on September 1st, 1939, survived by her husband William Orr and her daughter Mary Hart Conyers, who were

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appointed executors of her will. By her will she left one-twelfth of the residue of her estate to be divided among her grandchildren upon the youngest attaining the age of 21 years. The rest of the estate was left to her husband and daughter in equal shares. The daughter died, leaving one child Leon Conyers and in June, 1939, Margaret Orr by codicil to her will substituted Jean Skelton as one of her executors in place of her daughter and declared that her grandson Leon should take the share of his mother in the estate. The executors obtained probate of Margaret Orr's will and codicil in September, 1939, and the Oak Bay property was transferred to William Orr who obtained a certificate of indefeasible title therefor. L. U. Conyers (husband of Margaret Orr's daughter) as guardian of his child Leon brought this action against the executors of Margaret Orr's will. L. U. Conyers died in January, 1942, and by his will appointed his second wife Mary Forbes Conyers guardian of his child Leon. The main issue was the ownership of the Oak Bay property. After Mrs. Orr's death, Mr. *Clay,* who was solicitor for Mr. Orr, obtained from L. U. Conyers the certificate of indefeasible title and conveyance from Mrs. Orr to Mr. Orr of said property, registered the conveyance and in due course obtained a certificate of indefeasible title in Mr. Orr's name.

The appeal was argued at Vancouver on the 2nd of November, 1943, before MCDONALD, C.J.B.C., SLOAN and FISHER, JJ.A.

D. M. Gordon, for appellants: The whole judgment rests on the trial judge's finding that Mrs. Orr's intention was to make a gift effective at once. This finding cannot be justified. It is against the weight of evidence and the only evidence in favour of the finding is that of Orr which is insufficient under section 11 of the Evidence Act. If Orr's evidence on discovery be accepted, it puts him out of Court. The evidence he gave on the trial is entirely inconsistent with his evidence on discovery and should not be believed. As to the attitude an appellate Court should take on such evidence see *Gerrard* v. *Adam and Evans* (1923), 32 B.C. 114. If the learned judge had found, as he should have, that the deed was only to take effect after Mrs. Orr's death, then Orr had no case, because the deed was then an attempt at a

testamentary disposition and had to comply with the Wills Act: see *Foundling Hospital (Governors and Guardians)* v. *Crane,* [1911] 2 K.B. 367. The learned judge relied on two cases: *Zwicker* v. *Zwicker* (1899), 29 S.C.R. 527 and *Patch* v. *Shore* (1862), 2 Dr. & Sm. 589, but they do not apply. Orr's evidence was not corroborated and under section 11 of the Evidence Act the learned judge cannot make the finding he did without corroboration. The infant plaintiff was an heir of a deceased person and Orr was an opposite or interested party to the action, so the section applies to this case: see also *Rex* v. *Whitehouse* (1940), 55 B.C. 420 and *Thompson* v. *Coulter* (1903), 34 S.C.R. 261; *Crump* v. *Smith* (1940), 55 B.C. 502. The form of this deed and the fact that it was made without consideration raised a presumption not in Orr's favour, but against him, a presumption that anything he took under the deed, he took as a bare trustee for his wife. Where a wife makes a voluntary transfer to her husband, the presumption is that he takes the property as trustee for her. The presumption of resulting trust is not rebutted by the deed's setting out a nominal consideration as this one does: see Lewin on Trusts, 14th Ed., 135; *Fonseca* v. *Jones* (1911), 21 Man. L.R. 168, at p. 176; Maitland on Equity, p. 79; *Coultwas* v. *Swan* (1870), 18 W.R. 746 and *John Deere Plow Co. Ltd.* v. *Peters and Spohn,* [1928] 3 W.W.R 686, at p. 688. Orr did not put a dollar into the house and she bought the site.

Haldane, for respondents: There was no resulting trust here, there was a gift and so whether the gift be *in præsenti* or ambulatory so as to take effect only after her death see Halsbury's Laws of England, 2nd Ed., Vol. 33, pars. 239 and 253; Lewin on Trusts, 14th Ed., 134. Where real property is conveyed unto a grantee and no trust intention is expressed, no resulting trust arises: see Halsbury's Laws of England, 2nd Ed., Vol. 33, par. 254; Underhill on Trusts, 9th Ed., 169; *Young* v. *Peachy* (1741), 2 Atk. 254; *Fowkes* v. *Pascoe* (1875), 10 Chy. App. 343, at p. 348; *M. D. Donald Ltd.* v. *Brown,* [1933] S.C.R. 411, at p. 414; Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 141, par. 239. The *onus* is on the appellants to show that the deed does not mean what it says: see *Patch* v. *Shore* (1862), 2 Dr. & Sm. 589; *Barron* v. *Willis,* [1899] 2 Ch. 578; *Nedby* v.

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Nedby (1852), 21 L.J. Ch. 446; *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, at p. 137; *MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468, at p. 475. There was sufficient delivery: see *Thomas* v. *Thomas*, [1939] 4 D.L.R. 202, at pp. 205-8. Non-registration until after the death of Mrs. Orr is not material. On the question of corroboration it should be noted that of the four people who could give evidence on the matter, three of them are dead. There is corroboration in the fact that Conyers gave the deed to Mr. *Clay* without comment, also by the conveyance itself. The evidence of William Orr establishes the intention to make a gift, a finding of fact by the trial judge. This is corroborated by the conveyance itself. This being established, no resulting trust arises.

Gordon, replied.

Cur. adv. vult.

On the 5th of November, 1943, the judgment of the Court was delivered by

MCDONALD, C.J.B.C.: Prior to 1936 Margaret Orr, wife of the respondent William Orr, owned a house property in Victoria, which she occupied with her husband as the family home. In that year, after a family discussion, she attended on her son-in-law Conyers, Sr. (now deceased), and instructed him to draw a conveyance of the property to her husband. This document was drawn and duly executed as a deed of land; the consideration mentioned was $1, though no money actually passed, it being common ground that the deed was intended to operate by way of gift. The document was left with Conyers and up to the time of Margaret Orr's death in 1939 it had not been registered. Conyers, Sr. died after this action was commenced, and we have no evidence as to what his instructions were. All we know is that after Margaret Orr's death Conyers handed the deed over, without comment, to the respondent Orr's solicitor.

This action was brought on behalf of the infant son of Conyers, to have it declared that the property in question did not in fact pass to the respondent Orr, but forms a part of the estate of Margaret Orr, who was the infant's grandmother.

The neat point for decision is whether the conveyance in question took effect as a deed of gift immediately upon its execution

or whether Margaret Orr intended to retain the ownership of the property until her death—in other words, was the document a deed or a testament? If the latter was intended it is common ground that it must fail since it was not executed in accordance with the requirements of the Wills Act. This being so, it was of vital importance to ascertain Margaret Orr's intention; and, since the respondent Orr is the only living person who could give evidence on that matter, it becomes of equal importance to scrutinize his evidence with the utmost care. This I shall proceed to do.

In his examination for discovery we have the following questions [28 to 34] and answers:

Did she want you to have the house at once? Oh no, not at once.

Then when did she want you to have the house? Well, she wanted me to have it in the event of anything happening to her, I suppose.

That is, she wanted you to have the house after her death? Yes.

But not before her death? Oh yes, before—no, after her death, I guess; it would be part of the estate.

Part of the settlement of the estate? Yes.

Now just tell me what your wife said when this matter was discussed? I can't recollect that.

Can't you recollect any of the conversation? No.

. . . . .

It is clear that, if the above answers state the facts as they were, the respondent is out of Court. From his evidence given on the trial it is equally clear that, by the time that stage was reached, he realized this. The result was that on the trial he tried to retrace his steps. So we have this evidence (given in chief):

Now, what was decided upon at that discussion? She decided she would convey the property to me.

Was anything else said? No, she gave Mr. Conyers instructions to prepare the papers.

. . . . .

In any of those discussions what reasons if any did your wife give for conveying the property to you?

Davey: I think the question should be What did she say?

THE COURT: What did she say?

Haldane: May I ask what reason then was given?

THE COURT: Do you remember what she said? No other reason than she wanted to convey the property to me.

. . . . .

From your various conversations with your wife what was her purpose in executing the conveyance?

Davey: That is not admissible.

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THE COURT: What was said? If he can't remember he can give the purport.

Haldane: I submit it is impossible for a man of his age to remember for eight years.

THE COURT: If he can't give the words he can give the purport.

Haldane: If you are unable to remember the actual words used by your wife, tell me what was the purport?

THE COURT: Do you remember the exact words used by your wife? She wanted to make me a gift of the property.

In cross-examination counsel endeavoured to press home to the witness what he had already said on discovery, and then the witness said:

Yes, I remember that but I was confused. The intention was to convey the property, that is all I know about it.

Further in cross-examination we have this:

Then the intention was you should get this house after your wife's death, that is correct is it? Well, I expect it would be.

. . . . .

I am going back to questions 28 and 32 which I read to you this morning and I will ask you to look at that group, 28 to 32 inclusive, just read it—you have read those questions and answers have you not? Yes.

Is there any explanation you wish to advance for your answers on your discovery? No.

During the course of the cross-examination, and while the witness was being pressed, the learned trial judge interjected this remark:

That is for the witness to say. He said one thing on discovery and says another one today.

When the learned trial judge came to prepare his judgment he seems to have altered his view, since it appears from his reasons that he thought the evidence given on discovery was not in fact inconsistent with that given on the trial. I cannot agree. I think the learned judge's first view was the correct one, and that the two statements cannot be reconciled.

It is suggested that this was entirely a question for the trial judge, and that we have no right to interfere with his finding that the deed was intended to operate immediately. However, we have the authority of this Court for holding that in a plain case such as the present we are not so circumscribed. See *Gerrard* v. *Adam and Evans* (1923), 32 B.C. 114.

I have the less hesitation in reversing the finding below from the fact that everything which occurred after the execution of the deed is consistent with holding that it was not to operate

until after Margaret Orr's death, and inconsistent with any other conclusion. For instance, we have these collateral facts: the deed was left with Margaret Orr's own agent; it remained there undisturbed for three years; she continued, with the respondent Orr's knowledge, to pay the insurance premiums and the taxes out of her own funds; between 1936 and 1939 she renewed the insurance in her own name; she remained the registered owner and William Orr made no move toward obtaining registration; and when on some occasions respondent Orr carried the tax money to the collector on his wife's behalf he brought back to her the receipts in her own name. In addition, there is the fact, which I need not develop at length, that respondent Orr's whole evidence on the trial is far from satisfactory; and, though the trial judge does say that the witness says "he was confused," there is no direct finding that this was so. I am satisfied that any confusion there might be arose not from the questions which were put, but from the possible effect of the answers.

Since the above findings are sufficient to dispose of the case, I refrain from offering any opinion on the other legal questions discussed during the argument.

Upon the above grounds I would allow the appeal with costs here and below.

Appeal allowed.

Solicitor for appellants: *R. S. Stuart Yates.*
Solicitor for respondents: *John L. Clay.*

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CITY OF VANCOUVER v. PUTNAM AND PUTNAM.

Negligence—Municipal corporation—Stones from rockery fall on sidewalk—Injury to pedestrian—Action for damages—Remedy over against third party—Vancouver charter—B.C. Stats. 1921 (Second Session), Cap. 55, Secs. 229 and 230—City by-law No. 1874, Sec. 74.

In 1939 the defendants the Misses Putnam acquired title to a property on Bute Street in the city of Vancouver. The front of the lot was ten feet back from the sidewalk. On the plot between the sidewalk and the lot, which was part of the street area, previous owners had constructed a rockery for the length of the lot and close to the sidewalk, about three feet high. On going into possession, the Putnams built a cement walk from the left side of the house through the rockery with four steps to the sidewalk and fixed up the rockery close to and on each side of the walk and the steps. No permission had been given the Putnams by the city to construct the cement walk and steps. On the 10th of January, 1940, the plaintiff in the action stumbled over a rock that had fallen from the rockery on to the sidewalk close to said steps and was severely injured. In an action for damages, a jury found that the city was 75 per cent. responsible for the accident and the Putnams 25 per cent. for which judgment was entered. The city claimed to be indemnified by the Putnams in third-party proceedings under sections 229 and 230 (quoted *infra*) of the Vancouver Incorporation Act, 1921, and it was held that there was no evidence that the Putnams either erected or maintained the rockery in question and the claim was dismissed.

Held, on appeal, affirming the decision of SIDNEY SMITH, J., that the city is entitled to a remedy over against the Putnams if it shows that it was not guilty of an independent primary act of negligence and that the negligence of the Putnams was the primary cause of the accident, but the jury found the city was three-quarters responsible for the accident and the most that can be said as to the Putnams is that they constructed the concrete steps, but there is nothing to show that in doing so there was any negligence on their part or that their doing so caused the rock to fall on the sidewalk. The city failed to put forward any evidence which would show that anything the Putnams did was the primary cause of the accident and the appeal fails.

APPEAL by the city of Vancouver from the decision of SIDNEY SMITH, J. of the 28th of January, 1943, with respect to the third-party proceedings taken by the defendant city of Vancouver against the defendants Helen Putnam and Annie Putnam. The action was brought by the plaintiff Mary S. Marshall resulting from personal injuries caused by stepping on or coming in contact with a rock or stone, which is alleged to have fallen or been

displaced from a rockery or retaining wall situate on the boulevard or street between the sidewalk and the Putnams' lot on Bute Street in the city of Vancouver. The city claims to be entitled to a remedy over and to be indemnified against liability in respect of said injuries and any and all damages and costs arising therefrom under and by virtue of sections 229 and 230 of the Vancouver Incorporation Act, 1921, and on the ground that the rockery maintained by the Putnams constituted an obstruction in the street. The city further claims that the damages claimed were sustained by reason of the Putnams' wrongful act and failure to comply with section 74 of the Use of Streets Regulations By-law, being by-law No. 1874 of the city of Vancouver.

The appeal was heard at Vancouver on the 3rd of November, 1943, by SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Lord, for appellant: The city is entitled to full indemnity against the Putnams under sections 229 and 230 of the city charter. The Putnams were found guilty of negligence by the jury on the trial. That finding brings them within section 230. They were responsible for placing the rockery on the city street. We are entitled to judgment against the co-defendant whether the city is found guilty or not. The Act reads "placing, leaving or maintaining" this rockery. That this case comes within the above sections see *McKelvin* v. *City of London* (1892), 22 Ont. 70, at pp. 72-3; *Atkinson* v. *City of Chatham* (1899), 26 A.R. 521; *Mitchell* v. *Winnipeg* (1907), 17 Man. L.R. 166; *Robe and Clothing Co. Limited* v. *City of Kitchener* (1923), 55 O.L.R. 1, at p. 14 and on appeal [1925] S.C.R. 106; *McMichael* v. *Town of Goderich* (1928), 62 O.L.R. 547.

Farris, K.C., for respondents: This is a technical argument and must be construed in a technical manner especially when the city is found by the jury to be three times more responsible than the third party. In the face of this, to hold the third party wholly responsible would be a clear miscarriage of justice. Section 229 is substantive and section 230 is procedure. There are two distinct judgments. There is a judgment against both in different proportions and they were three times as negligent as we were. The pleadings are not framed within section 229.

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This is indemnity not contribution. You cannot infer from the verdict a finding for which there is no evidence. There is no evidence that the Putnams made, kept and maintained the rockery. We never touched these rocks or had anything to do with them. He has no right to rely on the verdict at all.

Lord, replied.

Cur. adv. vult.

26th November, 1943.

SLOAN, J.A.: The claim of the defendant city of Vancouver to be indemnified by the co-defendants Putnams must fail because, in my opinion, section 229 of the Vancouver Incorporation Act, 1921, under which the claim for indemnity arises, has no application. I reach this conclusion firstly because, as the learned trial judge below found, there is no satisfactory evidence to establish with any certainty that the Putnams either erected or maintained the rockery in question; secondly, because the jury found the city primarily liable for negligence directly contributing to the plaintiff's injuries, and, as a corporation can act only through its servants or agents, such negligence so found must have been that of its servants or agents. Said section 229 by its own terms is stated not to apply under such circumstances. In consequence it cannot apply herein.

I would therefore dismiss the appeal.

O'HALLORAN, J.A.: Mary S. Marshall was injured in January, 1940, by a fall occasioned by a rock lying on the Bute Street cement sidewalk opposite the premises owned by the Misses Putnam. The city of Vancouver is the owner of the land on both sides of the sidewalk; the street side is in boulevard, while the other side is largely in rockery for a distance of some ten feet until it meets the property line of the premises owned by the Misses Putnam since October, 1939. The rockery is part of Bute Street, although it is not part of the travelled highway.

Miss Marshall sued both the Misses Putnam and the city of Vancouver for damages. In her statement of claim it was alleged all the defendants had erected the rockery or caused it to be constructed, and further that the rockery was owned and controlled by the city of Vancouver. The city claimed to be indemnified

by the Misses Putnam in third-party proceedings relying upon sections 229 and 230 of the Vancouver Incorporation Act, 1921, Cap. 55, B.C. Stats. 1921 (Second Session), and amending Acts, which read in material part:

229. In case an action is brought against the city to recover damages sustained by reason of any obstruction, . . . , in or near to or over a public highway, street, . . . placed, made, left, or maintained by any person, . . . , other than a servant or agent of the city, or to recover damages sustained by reason of any negligent or wrongful act or omission of or failure to comply with the provisions of any statute or by-law of the city, or any contract, . . . by any person, . . . , other than a servant or agent of the city, the city shall have a remedy over against such person, . . . , and may enforce payment accordingly of the damages and costs (if any) which the plaintiff in the action may recover against the city.

230. The city shall be entitled to such remedy over in the same action if the other person, . . . is or are made a party to the action, and if it is established in the action as against such other person, . . . that the damages were sustained by reason of an obstruction, . . . in . . . a public highway, street, . . . placed, made, left, or maintained by such person, . . . , or by reason of any negligent or wrongful act or omission of any person, . . . , other than a servant of the city; . . . .

Miss Marshall's suit was heard before a jury which found the city of Vancouver and the Misses Putnam guilty of negligence and awarded her special damages $1,348.86 and general damages $2,000, "all in the proportion of 75 per cent. by the city of Vancouver and 25 per cent. by the Misses Putnam." The third-party indemnity issue was heard more than 18 months later, before a judge without a jury when the city called additional evidence. The learned judge then dismissed the city's claim for indemnity on the ground that he was "unable to find any evidence which satisfies me that the said co-defendants either erected or maintained the rockery in question."

No appeal was taken by either defendant against the jury's verdict in favour of Miss Marshall, but the city of Vancouver now appeals from the judgment of the learned judge refusing its claim to be indemnified by the Misses Putnam. The two grounds advanced on appeal are sought to be brought within what were described as two branches of section 229, *supra*: (1) That the learned judge was wrong in holding in the third-party issue that there was insufficient evidence the Misses Putnam had erected or maintained the rockery; and (2) the city is entitled to a remedy over against the Misses Putnam on the ground the jury

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on the trial of the main action, found them guilty of a negligent or wrongful act or omission within the meaning of section 229, *supra,* when it assessed them with 25 per cent. responsibility.

To entitle the city to a remedy over against the Misses Putnam on the first ground of appeal, demands satisfactory evidence that the damages were sustained by reason of

> any obstruction, . . . , in or near to or over a public highway, street, ... placed, . . . , left or maintained by any person, . . . other than a servant or agent of the city.

Miss Helen Putnam admitted they built the cement steps leading to the sidewalk in 1939 and that "the place was fixed up at that time." But it appears the rockery was there before they acquired the property. There is evidence also that the rock came from the rockery. But there is no evidence whatever, direct or by legitimate inference, that the Misses Putnam built, "placed" or "maintained" the rockery, or "placed, left or maintained" the rock on the sidewalk. How the rock came to the sidewalk is pure speculation. Whether by the agency of small boys or in what manner, the record gives no clue.

Neither the rockery nor the rock were the property of the Misses Putnam. They had no duty of maintenance or supervision. The rockery is on the property of the city of Vancouver, which is also the owner of the rock, if it came from the rockery, as the evidence indicates it did. In *Latham* v. *R. Johnson & Nephew, Limited,* [1913] 1 K.B. 398 Lord Sumner (then Hamilton, L.J.) said at p. 413:

> . . . a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook* (1828), 4 Bing. 628; *Lynch* v. *Nurdin* (1841), 1 Q.B. 29) that injury would not have occurred.

That passage was applied by Sir Lyman Duff, C.J. (then Duff, J.) in *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200, at p. 212. It would appear therefore that the city of Vancouver as owner of the rock and the rockery could be held responsible at common law, quite apart from the provisions of its incorporating statute.

However, the matter does not rest there. The rockery, being on city property, was inspected four times a year by a city official

who so testified in evidence. The safety of the public was necessarily a governing factor in these inspections. The city knew the rockery was there, and so was fixed with knowledge also of the consequent danger of the rocks loosening and rolling on to the sidewalk by reason of weather conditions, children's play or other interference. If, for the moment, it could be assumed that the Misses Putnam had built the rockery (of which there is no evidence), nevertheless the city had notice of the existence and condition of the rockery, but had not directed its removal, as happened in *Mitchell* v. *Winnipeg* (1907), 17 Man. L.R. 166. If the rockery was in a dangerous state of disrepair it was the city's duty to safeguard the public from injury.

I fail to appreciate how the city can have a remedy over under this branch of section 229, in the absence of evidence that the rock reached the sidewalk through the negligence of the Misses Putnam, or that they had built or were maintaining the rockery without the knowledge of the city. In *McKelvin* v. *City of London* (1892), 22 Ont. 70 the jury found the third party had placed the obstruction on the street and that the city knew it was there. In *Atkinson* v. *City of Chatham* (1899), 26 A.R. 521 the third party had erected the pole in the street and the city knew it was there. In *Robe and Clothing Co. Limited* v. *City of Kitchener* (1923), 55 O.L.R. 1, the third party with the city's knowledge had set up the barrier which caused the trouble. While the Supreme Court of Canada in [1925] S.C.R. 106 reversed the Ontario Court of Appeal in the latter case to the extent of holding the third party liable, it was not done under the statute (comparable to section 229), but under an indemnity agreement, *vide* Anglin, C.J.C. at pp. 113 and 114. (The *Kitchener* case was recently considered by this Court in *McFall* v. *Vancouver Exhibition Association* (1943), [*ante*, p. 1].

This brings us to the second ground of appeal. To entitle the city to a remedy over under the latter part of section 229, there must be shown a

> negligent or wrongful act or omission of or failure to comply with the provisions of any statute or by-law of the city . . .

This divides itself into two parts, *viz.*, (a) a negligent or wrongful act or omission and (b) a failure to comply with section 74

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of the city Streets Regulation By-law 1874. First, as to (a): unless it is found that the rock reached the sidewalk through the negligence of the Misses Putnam or that they without knowledge of the city "placed, left or maintained" the rockery within the meaning of the first branch of section 229, there can be no negligent or wrongful act or omission on their part. That aspect of the matter has been disposed of for reasons given in considering the first ground of appeal. We then turn to (b) and the city by-law which reads in material part as follows:

> 74. It shall be unlawful for any person to build, construct, place, . . . , or cause to be built, constructed, placed, . . . , or put (except in accordance with the provisions of this by-law or the Building By-law, or except with the approval and subject to such conditions as shall be determined by the Council) in any street, any structure, . . . , or any object, substance, or thing which is an obstruction to the free use of such street, or which may encroach thereon, or to lay or construct or reconstruct any sidewalk, without first obtaining therefor the written permission of the City Engineer.

The gist of this ground is that when the Misses Putnam built the cement steps leading to the sidewalk in 1939, they did not obtain the written permission of the city engineer.

But there is no evidence to show the construction of the cement steps in 1939 contributed in any way to rocks from the rockery rolling on to the sidewalk. There is no evidence that such danger (if it existed at all), was lessened or increased by the construction of the steps. Since the rockery was inspected four times a year by a city inspector, it seems a reasonable inference that if such danger had been increased, the inspector would at least have called the attention of the Misses Putnam to it. He admitted it was his duty to see whether the rockery was safe or not. As the evidence does not disclose a causative relation between the construction of the steps in 1939 and the presence of a rock on the sidewalk in 1940, failure to obtain the written permission of the city engineer to build the cement steps is not *ad rem.* For it cannot be said Miss Marshall's injuries were sustained by reason thereof.

But it is contended by counsel for the appellant city that the jury, in finding the Misses Putnam negligent to the extent of 25 per cent., have found a "negligent act or omission" within the meaning of section 229, and since they did not appeal from it, that such finding ought to have been accepted by the learned

judge as conclusive of the city's right to indemnity. But the jury was concerned only with the question of the primary responsibility of the three co-defendants for Miss Marshall's injuries, and were not concerned with the city's right to indemnity under section 229 over against its co-defendants the Misses Putnam. The latter question was determined 18 months later by a judge without a jury.

The jury's verdict was conclusive against the three co-defendants on the question it decided, *viz.*, the respective degrees of primary responsibility for Miss Marshall's injuries. But it did not, and obviously could not determine the city's right to indemnity since that question was not before the jury. The jury's verdict provided a foundation of fact for the city to advance a claim in law to be indemnified under section 229 in the third-party proceedings. But for reasons presently stated, the city's claim to indemnity could not be accepted in the Court below, because by the verdict of the jury the city was held directly responsible in part for Miss Marshall's injuries.

Viewed in this manner, it becomes apparent the city's claim to indemnity fails on two main grounds: (1) that the jury in finding the city negligent, found also that such negligence contributed to the extent of 75 per cent. to Miss Marshall's injuries, and (2) as the evidence discloses the city's negligence was due to its servant or agent, *viz.*, the official who inspected the rockery, the city is barred from any remedy over by the express terms of section 229. This latter ground seems conclusive against the appellant. It also appears in respect to the first ground, that if the Misses Putnam were negligent to the extent of 25 per cent., the city had knowledge of their negligence, *vide Robe and Clothing Co. Limited* v. *City of Kitchener* (1923), 55 O.L.R. 1. The real liability of the city depended upon its own negligence, and not upon any negligence the jury ascribed to the Misses Putnam.

For reasons already stated, the jury's verdict must be regarded as a finding that the city and the Misses Putnam combined to cause Miss Marshall's injuries. Riddell, Latchford and Logie, JJ.A. seem to have agreed with Middleton, J.A. in the *Kitchener* case, that the resulting damage was due to the combined negligence of the city and the third party, and on that ground to have

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refused the city a remedy over on a statute comparable to section 229. It is true that the finding of the Ontario Court of Appeal on the third-party liability in the *Kitchener* case was reversed in the Supreme Court of Canada. But the reversal was not due to a wrong construction of the statute (*vide* Anglin, C.J.C., p. 114), but rested upon a different interpretation of specific provisions of the indemnity agreement between the city and the third party as is made clear at p. 114.

The Supreme Court of Canada concluded it was plain from that agreement as it viewed the evidence, that the third party was primarily responsible. Significantly, in *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200, the city failed to succeed under an indemnity agreement, because it was "mostly responsible due to defective connections or stringing of the wires." In the case at Bar the jury held the city "mostly responsible" (*viz.*, 75 per cent.) without saying why, but there is ample evidence to attribute that finding of primary responsibility to inadequate or negligent inspection of the rockery during the period in which it knew that cement steps had been constructed by the Misses Putnam and "the place fixed up." That negligence consisted of commission and omission, *vide* Anglin, C.J.C., p. 112 of the *Kitchener* case.

In my judgment the right of the city under section 229 to claim over against a third party for injury to A for which the city has been held liable, is grounded upon the essential prerequisite that the third party is primarily responsible for the injury. That is to say, the right of the city to claim over is confined to cases in which its vicarious responsibility arises, and does not extend to cases in which it has itself incurred primary responsibility. To illustrate, under its Incorporation Act the city's liability could arise: (1) By reason of its own negligence in failing to provide against a danger, the existence of which it knew or which its inspections as actually made ought to have revealed, or (2) by reason of its vicarious responsibility for maintenance and repair of city streets and *vide Gregson* v. *City of Vancouver* (1939), 55 B.C. 40, at p. 44 and cases there cited.

No claim for indemnity could reasonably arise in the former as it does in the latter instance, because the city's own primary

responsibility denies it the right to blame someone else for the consequences of its own negligence, and *vide Macpherson* v. *Vancouver* (1912), 17 B.C. 264, and also in the *Kitchener* case, Middleton, J.A. at p. 14 and Anglin, C.J.C. at p. 114. The city can only claim to be indemnified where it has become statutorily responsible notwithstanding the injury has been caused by the negligence of someone else. The right to claim over in section 229 is founded upon indemnity, and not upon contribution between wrongdoers both primarily responsible for the injury.

I would dismiss the appeal with costs here and in the Court below.

ROBERTSON, J.A.: The plaintiff sued the city of Vancouver and Helen and Annie Putnam for damages for injuries sustained on the 10th day of January, 1940, by reason of her stepping on a rock on a city sidewalk. The Putnams bought the property known as 1104 Bute Street, in 1939. At that time there was a rockery extending along the north side of Bute Street on the boulevard between the Putnam property and the sidewalk. The boulevard was part of the public highway. The city of Vancouver's Act of Incorporation vested all public highways in it and directed that it should keep them in reasonable repair.

In 1939 the Putnams cut a passageway through the rockery and built concrete steps in the opening. The plaintiff while walking along the sidewalk in front of the Putnam property stepped upon a rock upon the sidewalk and was injured. In her statement of claim she alleged that the accident to her was caused by her stepping on, or coming into contact with the rock which had fallen, rolled or was displaced, and was deposited on the sidewalk in question from the rockery which the defendants had negligently erected or constructed, or had permitted, allowed or caused to be constructed, or alternatively in a faulty manner, and had permitted the rockery to remain in a dangerous condition. The city pleaded, *inter alia,* that it had not caused, erected, constructed, placed, made, or maintained, or permitted to remain, by or with its authority or that of its agents, the said rockery; that it had no notice or knowledge or any reason to anticipate the existence thereof; further, alternatively, that if the plaintiff

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had suffered any damage by reason of the rock, that the rockery was created, constructed, placed, made or left by the Putnams, and maintained by them without the sanction or knowledge of the city or its officials; it claimed that the Putnams had put the rockery there contrary to the terms of city by-law 1874, which reads as follows [already set out in the judgment of O'HALLORAN, J.A.]

No permission had been given by the city engineer. It therefore claimed indemnity against the Putnams under sections 229 and 230 of the said Act. Sections 229 and 230 read as follows, *viz.*: [already set out in the judgment of O'HALLORAN, J.A.].

The city served a third-party notice on the Putnams. An order was made on the 14th of November, 1940, that the claim for a remedy over and for indemnification should be tried at or immediately after the trial of the action. At the trial questions were submitted to the jury, one of which was: if both the city and the Putnams were negligent, what was the degree of respective negligence? They found the defendants guilty of negligence and awarded damages

in the sum of $3,348.86 to the plaintiff all in the proportion of 75 per cent. by the city of Vancouver and 25 per cent. by Miss Putnams.

No appeal was taken from the verdict. While the jury did not purport to settle any question of remedy over as between the defendants, its verdict was valid as between the city and the Putnams. See section 232 of its Act; *McFall* v. *Vancouver Exhibition Association* [*ante*, p. 1]; [1943] 3 D.L.R. 39; *Holden* v. *Grand Trunk R.W. Co.* (1901), 2 O.L.R. 421; *Benecke* v. *Frost* (1876), 1 Q.B.D. 419, at pp. 421-2 and *Pettigrew* v. *Grand Trunk R.W. Co.* (1910), 22 O.L.R. 23, at p. 25, where Middleton, J. said:

There ought only to be one trial of the question of the defendants' liability, and at that the facts ought to be so ascertained that the question between the defendants and third parties will be in train for adjustment. This can be accomplished by questions being submitted to the jury.

The third-party hearing took place in 1943, when further evidence was called by the city. The learned trial judge held as follows:

In these proceedings brought by the city of Vancouver against its co-defendants for indemnity, I am unable to find any evidence which satisfies me that the said co-defendants either erected or maintained the rockery in

question. Its claim must therefore be dismissed but in view of the unusual circumstances of the case, without costs.

In contracts to indemnify it is well settled that when a tortious act of the party covenanting to indemnify, of the very class against the consequences of which such indemnity has been stipulated for, is the primary cause of injury, that party cannot escape the liability to indemnify merely because that act itself, or neglect to provide against its consequences, has also entailed liability to the person injured of the party in whose favour the stipulation for indemnity was exacted. It is upon the very liability thus entailed that the claim for indemnification rests: see *City of Kitchener* v. *Robe and Clothing Company,* [1925] S.C.R. 106, at p. 113 followed and applied in this Court in *McFall* v. *Vancouver Exhibition Association* [*ante,* p. 1]; [1943] 3 D.L.R. 39. Cases under indemnity contract where a corporation guilty of independent primary negligence has been held not to be entitled to indemnity over are: *City of Toronto* v. *Lambert* (1916), 54 S.C.R. 200 and *Sutton* v. *Town of Dundas* (1908), 17 O.L.R. 556. Sections 229 and 230 are practically the same as sections passed in Ontario for the purpose of changing the law laid down in *Corporation of Vespra* v. *Cook* (1876), 26 U.C.C.P. 182, and like decisions. The history of the legislation in Ontario is set out in the report of the *Robe* case in (1923), 55 O.L.R. 1, at p. 14 and *Atkinson* v. *City of Chatham* (1899), 26 A.R. 521, at p. 534. In the *Vespra* case the facts were that the corporation, through its negligence in permitting a pile of lumber placed upon the highway by the defendant to remain there, was held liable to a man whose horse had sustained injuries by coming in contact with the lumber. The corporation sued the defendant for indemnification and it was held that the fact that the defendant had placed the obstruction in the street did not enable the corporation to recover.

Pursuant to sections like 229 and 230, *supra,* municipal corporations have been held entitled to a remedy over where negligence of the persons or corporation against whom the remedy was sought was the primary cause of the injury. See *Balzer* v. *Corporation of Gosfield* (1889), 17 Ont. 700; *McKelvin* v. *City of London* (1892), 22 Ont. 70; *Atkinson* v. *City of Chatham* (1899), 26 A.R. 521 and *Mitchell* v. *Winnipeg* (1907), 17 Man. L.R. 166.

It is therefore apparent the city is entitled to a remedy over

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against the Putnams if it shows that it was not guilty of an independent primary act of negligence and that the negligence of the Putnams was the primary cause of the accident.

The learned judge submitted questions to the jury. In these the jury were invited to say whether or not the city of Vancouver was guilty of negligence contributing to the accident and if so, in what did such negligence consist. Like questions were submitted in the case of the Putnams. The jury did not answer these questions. If these questions had been answered it might have been easy to decide the question as between the city and the third parties.

If one looks at the case from the point of view of the pleadings and the verdict, then all the defendants were guilty of all or some part of the negligence, as set out in the statement of claim, *supra,* and the city's negligence was three times that of the Putnams. If one looks at the evidence the most that can be said is that the Putnams constructed the concrete steps which have been mentioned. There is nothing to show that in doing so there was any negligence on their part, or that their doing so caused the rock to roll on to the sidewalk.

My conclusion is that the city has failed to put forward any evidence which would show that anything the Putnams did was the primary cause of the accident. I agree with the learned judge in his conclusion on this point.

The appeal should be dismissed with costs here and below.

Appeal dismissed.

Solicitor for appellant: *A. E. Lord.*
Solicitors for respondents: *Farris & Co.*

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Nov. 16.

Defence of Canada Regulations—Offences relating to—Issuing letter intended or likely to prejudice recruiting—Consent of Attorney-General required for prosecution—Interpretation of regulation 39B (1)—Effect of proviso therein—Regulation 39A (b).

On August 9th, 1943, an information was laid charging the accused with having issued a letter intended or likely to prejudice the recruiting, training, discipline or administration of any of His Majesty's forces contrary to regulation 39A (*b*) of the Defence of Canada Regulations (Consolidation) 1942. On August 17th, 1943, the Attorney-General gave his consent to the institution of the prosecution. On August 20th, 1943, the accused appeared on summons before the deputy police magistrate and was sentenced to six months' imprisonment. On appeal to the county court, it was held that the conviction was a nullity because under regulation 39B (1) the laying of the information was the institution of the prosecution, as the consent of the Attorney-General had not been obtained prior to that proceeding, the magistrate acted without jurisdiction.

Held, on appeal, reversing the decision of BOYD, Co. J. (MCDONALD, C.J.B.C. dissenting), that the effect of the proviso in regulation 39B (1) (quoted *infra*) is to permit all regular procedural steps in the prosecution preliminary to trial to be effectively carried on without the consent of the Attorney-General, but when the trial stage is reached the prohibition in the paragraph and not the proviso operates.

APPEAL by the Crown from the decision of BOYD, Co. J. of the 4th of October, 1943, setting aside a conviction of the defendant on a charge that he unlawfully did issue a letter dated March 12th, 1943, to one S. Paul of Sault St. Marie, containing statements intended or likely to prejudice the recruiting, training, discipline or administration of any of His Majesty's forces contrary to section 39A (*b*) of the Defence of Canada Regulations (Consolidation) 1942. The information herein was sworn on the 9th of August, 1943; the consent of the Attorney-General to prosecute was given on the 17th of August, 1943, and accused was convicted on the 20th of August, 1943. Regulation 39B (1) reads as follows:

A prosecution for an offence against Regulation 39, 39A or 39C of these Regulations shall not be instituted except by, or with the consent of, the Attorney-General of Canada or of the province, or by, or with the consent of, counsel representing such Attorney-General: Provided that this paragraph shall not prevent the arrest, or the issue or the execution of a warrant for

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the arrest, of any person in respect of any such offence, or the remanding, in custody or on bail, of any person charged with such an offence, notwithstanding that the consent herein required for the institution of a prosecution for the offence has not been obtained.

The appeal was argued at Vancouver on the 16th of November, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

Scott, for appellant: The appeal is taken under order in council P.C. 4600 of June 7th, 1943. Paul was charged under regulation 39A (*b*) of the Defence of Canada Regulations (Consolidation) 1942, was convicted and sentenced to six months' imprisonment. He appealed to the county court and BOYD, Co. J. quashed the conviction. The proviso in regulation 39B (1) was added by amendment, the effect of which would appear in editorial note to *Rex* v. *Kluge* (1940), 74 Can. C.C. 261; see also *Rex* v. *Becker,* [1943] 3 W.W.R. 352, at p. 356.

Fleishman, for respondent, referred to Maxwell on Statutes, 8th Ed., 225-6; *Rex* v. *Hellenic Colonization Association* (1943), 80 Can. C.C. 22.

Scott, replied.

MCDONALD, C.J.B.C.: On 9th August, 1943, an information was laid against the respondent for a breach of the Defence of Canada Regulations. For our present purposes it may be said that he was charged with having issued a letter intended or likely to prejudice the recruiting, training, discipline or administration of any of His Majesty's forces. On 17th August, 1943, the Attorney-General gave his consent to the institution of the prosecution. The respondent appeared on summons before the deputy police magistrate and was sentenced to six months' imprisonment. He appealed to His Honour Judge BOYD, who allowed the appeal upon the ground that the consent of the Attorney-General had not been obtained in time. From this latter decision the Crown now appeals to us.

The appeal involves the construction of regulation 39B (1), which reads as follows:

A prosecution for an offence against Regulation 39, 39A or 39C of these Regulations shall not be instituted except by, or with the consent of, the Attorney-General of Canada or of the province, or by, or with the consent of, counsel representing such Attorney-General: Provided that this paragraph

shall not prevent the arrest, or the issue or the execution of a warrant for the arrest, of any person in respect of any such offence, or the remanding, in custody or on bail, of any person charged with such an offence, notwithstanding that the consent herein required for the institution of a prosecution for the offence has not been obtained.

The proviso did not appear in the regulation as originally drawn, but was added by amendment.

Upon first reading the regulation it seemed to me reasonably clear that what the draftsman intended was that while an arrest might be made without the consent of the Attorney-General, for instance, where the accused man was caught in the act, no prosecution could be instituted—in other words, that no information could be laid until such consent had been obtained. After hearing argument, while the matter does not appear quite so clear as on first impression, I still think that that is what was intended.

The Crown bases its appeal entirely upon the contention that it is not necessary to obtain the consent until the morning of the trial. This of course would mean that an accused person may be put to the expense of retaining counsel, summoning witnesses and arranging for his trial, and then find that this was all wasted because the Attorney-General withheld his consent.

If the draftsman of the regulation intended what the Crown contends for he could have said so in a few words, thus:

> No one shall be brought to trial for an offence under these Regulations until the consent of the Attorney-General shall have first been obtained.

This being so, I, for one, do not conceive it to be my duty, even in war time, to try to work out some deep-hidden and ingenious construction which would give to the regulation that meaning which is the most disadvantageous to the accused.

I think His Honour Judge BOYD was right, and I would dismiss the appeal.

SLOAN, J.A.: The respondent was charged with an offence under regulation 39A of the Defence of Canada Regulations (Consolidation) 1942 and was found guilty thereof by the deputy police magistrate at Vancouver. From that conviction he appealed under Part XV. of the Code to the County Court of Vancouver and BOYD, Co. J. quashed the conviction. The Crown now appeals to us under the powers conferred by order in council P.C. 4600.

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The question for determination involves the construction of regulation 39B (1), which reads in part as follows:

> A prosecution for an offence against Regulation 39, 39A or 39C of these Regulations shall not be instituted except by, or with the consent of, the Attorney-General of Canada or of the province, or by, or with the consent of, counsel representing such Attorney-General.

The relevant facts are that the information herein was sworn the 9th day of August, 1943; the consent of the Attorney-General to prosecute was given on the 17th of August, 1943; the accused was convicted on the 20th day of August, 1943. On these facts the learned county court judge held that the conviction was a nullity, because, in his opinion, under said regulation 39B (1) the laying of the information was the institution of the prosecution and, as the consent of the Attorney-General had not been obtained prior to that proceeding, the magistrate had acted without jurisdiction.

If the regulation as quoted in part above stood alone I would agree with the conclusion reached by the county court judge, and, interpreting "prosecution" as "proceeding" and "institute" as "commence," would hold that the laying of the information was the commencement of the proceedings and that the consent of an authority designated by the regulation was a condition precedent to its validity.

I base this view upon a number of authorities in point (although not cited to us) and draw attention to *Beardsley* v. *Giddings,* [1904] 1 K.B. 847 wherein, at p. 851, Wills, J. said:

> The institution of a prosecution seems to me to mean ordinarily the commencement of the proceedings by which a person is brought before the Court;

an expression of opinion which Lord Alverstone, C.J., with the concurrence of Kennedy and Phillimore, JJ., said in *Brooks* v. *Bagshaw,* [1904] 2 K.B. 798, at p. 801 "correctly stated the principle." (It should, however, be noted that in the *Beardsley* case, *supra,* Wills, J. added to the quoted excerpt

> . . . , and I do not think that there are any words in the section sufficient to shew a contrary intention.

(For reasons which will later appear herein, in my view in this case there are words in the proviso in the regulation from which a contrary intention must of necessity be implied.)

In *In re Vexatious Actions Act, 1896. In re Boaler,* [1914] 1 K.B. 122, at p. 131 Bankes, J. said in reference to this matter:

I can draw no distinction between the word "institute" and the word "commence" as applied to legal proceedings. . . . I find a strong body of authority and judicial opinion to the effect that the preferring of a bill of indictment or the laying of an information before a magistrate is the commencement or institution of a criminal proceeding.

And see *Regina* v. *Lennox* (1873), 34 U.C.Q.B. 28 and *The King* v. *Ostler & Christie,* [1941] N.Z.L.R. 318.

In this case, however, the matter is not quite so easy of solution, because, as I intimated above, a proviso was added to said regulation 39B (1) reading as follows:

Provided that this paragraph shall not prevent the arrest, or the issue or the execution of a warrant for the arrest, of any person in respect of any such offence, or the remanding, in custody or on bail, of any person charged with such an offence, notwithstanding that the consent herein required for the institution of a prosecution for the offence has not been obtained.

It must be at once apparent that if this proviso is to be given any meaning at all "prosecution" in regulation 39B (1) cannot be interpreted to mean "proceeding" and nothing more, otherwise the paragraph and its proviso are mutually destructive. To illustrate: How could a magistrate order the remand "in custody or on bail of any person charged with such offence" unless the information had been laid? Or under what theory of criminal practice can a warrant for arrest be issued in the absence of an information? Compare sections 659, 660, 664 and 711 of the Code. It is my opinion that as the exercise of these specified powers is all based upon the existence of an information and as these powers can be exercised without the consent of the Attorney-General, it must follow that an information can be laid without his consent. If that is so, then a "prosecution" *i.e.,* a "proceeding," may be instituted without his consent. But the difficulty is that the main part of the regulation says that a "prosecution," *i.e.,* "proceeding," shall not be instituted without his consent. Therefore "prosecution" cannot mean "proceeding" *solus* and must mean something else. What else then does it mean? Reading the entire regulation as a whole and in order to give it an interpretation that will not lead to an obvious absurdity, in my opinion the word must be given a distributive meaning, that is to say, to include the whole procedure which the law provides for the institution of charges and their pursuit to judgment. See New Oxford Dictionary, p. 1490, The Encyclopædia Dictionary,

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p. 3781, and Words and Phrases Judicially Defined, Vol. 6, p. 5737.

The use of "prosecution" in this wider sense seems apparent in regulation 39B (2) reading as follows:

> It shall be a defence to any prosecution for an offence against Regulation 39 or 39A to prove that the person accused intended in good faith merely to criticize. . . .

The effect of the proviso then is to permit all regular procedural steps in the prosecution preliminary to trial to be effectively carried on without the consent of the Attorney-General, but when the trial stage is reached the prohibition in the paragraph and not the proviso, operates. The prosecution then cannot be continued, *i.e.*, the trial cannot be commenced, without first obtaining the required consent specified in the regulation.

In the result, in my opinion, with respect, the learned county court judge erred in allowing the appeal on this point. The consent of the Attorney-General was obtained before the commencement of the trial before the magistrate, and that, in my view, is a compliance with said regulation 39B (1).

I would therefore allow the appeal and remit the case to the learned county court judge to be tried on its merits.

O'HALLORAN, J.A.: I agree with my brother SLOAN.

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

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

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

REX v. MILLER CONSTRUCTION COMPANY, INCORPORATED.

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1943
Nov. 24, 25.

Criminal law—Duty in respect to care of dangerous article—Breach of—Dynamite and detonating caps—Storage of—Explosion—Two workmen killed—"In his charge or under his control"—Criminal Code, Sec. 247.

The defendant company and a company known as the Oman-Smith Company obtained separate contracts from the American Government to construct a telephone line from Edmonton to Fairbanks, the defendant company having the southern half of the line to construct and the Oman-Smith Company the northern half. For convenience the Oman-Smith Company requisitioned for its supplies through the defendant company's agents in Seattle who purchased the supplies, paid for them and forwarded them to the Oman-Smith Company. The dynamite and detonating caps in question were shipped from Seattle consigned to the Oman-Smith Company at Dawson Creek, arriving there on February 10th, 1943. On February 12th Oman-Smith Company employees took the dynamite and detonating caps from the railway station and stored them in a warehouse in the town which had previously been rented by the defendant company, but was taken over by the Oman-Smith Company on February 9th, 1943, for repairing and storage purposes. On February 13th, 1943, the warehouse caught fire, the dynamite exploded and two workmen were killed. On a charge against the defendant company under section 247 of the Criminal Code the company was found guilty.

Held, on appeal, reversing the decision of WOODBURN, Co. J., that the evidence did not show that the defendant company had the dynamite under its "charge or control."

Per MCDONALD, C.J.B.C.: "It is true that the defendant company, under its arrangement with the army engineers and the Oman-Smith Company, ordered the dynamite and paid for it, but that is far from saying that the defendant company ever had possession of it. Moreover, it was no part of the defendant's duty to follow the course and use of the dynamite.

APPEAL by defendant from the decision of WOODBURN, Co. J. of the 4th of October, 1943, convicting the defendant company on a charge

that . . . , on the 13th day of February, A.D. 1943, at the village of Dawson Creek, in the county of Cariboo, at the time and place aforesaid, having in their charge and under their control inanimate things, to wit, sixty (60) cases of dynamite and twenty (20) cases of detonating caps, which in the absence of precaution and care might endanger human life and being thereby under legal duty to take reasonable precautions against and use reasonable care to avoid such danger, did then and there omit without lawful excuse to perform such duty, thereby causing the deaths of Norman Wasley and J. Kazinsky.

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In August, 1942, the defendant company entered into a contract with the United States Government for the construction of the southern half of the telephone line between Edmonton and Fairbanks and on its recommendation a contract for the northern half was given to the Oman-Smith Company. The contracts were distinct, but for convenience materials requisitioned by the Oman-Smith Company and approved by the U.S. engineers were purchased and paid for by the office of the Miller Construction Company and any goods so purchased were shipped to the Oman-Smith Company. The dynamite and detonating caps in question were routed from Seattle to Dawson Creek. The warehouse in Dawson Creek where the dynamite and detonating caps were stored had been rented by the defendant company in 1942 for storage purposes, but one John Rolls, who was the contact man between the Miller company and the Oman-Smith Company, gave the Miller company notice on the 3rd of February, 1943, that the Oman-Smith Company was taking over the said warehouse for storage purposes and as a repair shop. On reaching Dawson Creek on February 10th, 1943, the consignment of dynamite and detonating caps was stored in said warehouse and on February 13th, 1943, the building took fire and the dynamite exploded, killing the two men above mentioned.

The appeal was argued at Vancouver on the 24th and 25th of November, 1943, before MCDONALD, C.J.B.C., SLOAN and ROBERTSON, JJ.A.

Wismer, K.C., for appellant: This is a charge under section 247 of the Criminal Code. It must be shown that the dynamite was in the "charge and control" of the defendant company. The dynamite was consigned to the Oman-Smith Company and when taken from the station at Dawson Creek was in the charge of the employees of the Oman-Smith Company until the explosion took place. The two companies had separate and distinct contracts with the United States Government. The defendant company was to construct the southern half of the telephone line between Edmonton and Fairbanks and the Oman-Smith Company the northern half. The dynamite for the Oman-Smith Company was purchased through our agents as a matter of convenience as the

work of the Oman-Smith Company was much further north. We had a licence for purchasing explosives and the Oman-Smith Company did not, but the question of licence makes no difference: see *Rex* v. *Brooks* (1906), 11 Can. C.C. 188; *Rex* v. *Angelo* (1914), 19 B.C. 261; *Rex* v. *Morelle* (1927), 39 B.C. 140. There is no evidence of negligence on the part of Nelson who was defendant company's agent at Dawson Creek: see *The City of St. John* v. *Donald,* [1926] S.C.R. 371. The principle to be applied in this case will be found in *Rex* v. *Canadian Allis-Chalmers Ltd.* (1923), 48 Can. C.C. 63, at pp. 69 and 73.

Pepler, K.C., D.A.-G., for the Crown: The charge is under section 247 of the Criminal Code against a company and there is evidence and it was found that the Oman-Smith Company was a sub-contractor of the defendant: see *Union Colliery Co.* v. *Reginam* (1900), 4 Can. C.C. 400. They are subject to a fine: see *Rex* v. *Michigan Central R.R. Co.* (1907), 17 Can. C.C. 483; *Rex* v. *Canadian Allis-Chalmers Ltd.* (1923), 48 Can. C.C. 63. The dynamite and other supplies were purchased and paid for by the defendant for the Oman-Smith Company showing they were connected with the project. The evidence of the witness Jones taken on the preliminary hearing was admissible under section 999 of the Code. He had left the country and could not be found. The company is liable under said section 247 and also for creating a nuisance. This Court cannot apply the question of reasonable doubt. The doctrine of reasonable doubt only applies to the trial: see *Rex* v. *M.* (1926), 46 Can. C.C. 80; 58 N.S.R. 512, at p. 518.

Wismer, replied.

MCDONALD, C.J.B.C.: This charge is laid under section 247 of the Criminal Code. The predominant words in that section are "who has in his charge or under his control," and the simple question which we have to decide here is whether on the evidence the dynamite which caused the injuries to Wasley and Kazinsky was under the charge or control of the appellant company. The learned judge below, while not dealing specifically with this question, obviously must have answered it in the affirmative, otherwise he could not have convicted. From his reasons it appears that he based his conclusions upon three grounds:

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1. The failure of the appellant company "to adequately follow the course and use of the substance [*i.e.*, the dynamite] coming into their possession." This ground fails because it is quite clear that the dynamite never did at any time come into the possession of the Miller Construction Company. It is true that the appellant under its arrangement with the army engineers and the Oman-Smith Company, ordered the dynamite and paid for it, but that is far from saying that the appellant ever had possession of it. Moreover it was no part of the appellant's duty to follow the course and use of the dynamite. Under all the circumstances it was physically impossible for the company to do it.

2. That Nelson, the appellant's purchasing agent,

> knew of the dynamite and caps and did nothing about the situation that came up; at least, he ordered the dynamite in question and must have known it was coming and he certainly knew the caps were in storage where they were, because he went down and borrowed some, and the storing of the caps was dangerous without even taking the dynamite into consideration.

The clear answer to this is that the evidence does not establish that Nelson ever did "go down," *i.e.*, to the storehouse. He did obtain an order from Oman-Smith's employee to obtain some caps on loan, but there is no evidence that he ever went to procure them. If he did go personally to the warehouse there is nothing to show when he went, and it may well have been that he went before the dynamite had arrived. Further, even if the appellant's purchasing agent had the knowledge which the learned judge imputes to him, surely such knowledge would not bring criminal responsibility home to the appellant company. A reference to *Rex* v. *Canadian Allis-Chalmers Ltd.* (1923), 48 Can. C.C. 63 I think will make this clear.

As to the finding that the storing of the detonating caps was dangerous in itself, this is not a sufficient finding to justify a charge that the detonating caps caused the deaths of Wasley and Kazinsky, and, as I understand the evidence, no such conclusion could possibly be reached.

3. That the appellant failed to advise the Oman-Smith Company that there was a Harvey magazine available not far from Dawson Creek, which had been used by the appellant and might be used by the Oman-Smith Company. I know of nothing either

on the facts or in law which imposed any such responsibility upon the appellant company—certainly, in any event, any such responsibility as would lead to penal consequences for failure in its observance. Moreover, there is no evidence to prove that the appellant company did not advise the Oman-Smith Company of the existence of the Harvey magazine, but, which is more to the point, there was no reason for the appellant company to suppose that any magazine or storage space was necessary for the Oman-Smith Company at or near Dawson Creek. The intention was that the explosives should be taken directly from the railway station by truck to the scene of the Oman-Smith Company's operations, some 500 miles to the north.

In my view a simple illustration will serve to indicate the position of these two companies: Suppose I write to the Remington Arms Company to forward to my friend in Toronto (whom I know to be a careful huntsman) a rifle, and I enclose my draft in payment. I write to my friend telling him I am having this rifle sent to him as a courtesy so that he may use it during the hunting season in Northern Ontario. He receives it from the express company, takes it on a hunting trip and negligently shoots his companion. Can I under those circumstances possibly be held criminally liable for his negligence? In my opinion the answer is emphatically "no."

Much has been made of the fact that it was stated in evidence that the relation between the Miller Construction Company and Oman-Smith was that of contractor and sub-contractor. Though I do not think the argument is relevant to the question we have to decide, this much may be said: The mere statement that such relationship existed does not make it so. A sub-contract is no different from any other contract; it must contain the ingredients common to all contracts, and certainly nothing has been disclosed here to indicate a contract between these two companies which could make the Miller Construction Company responsible for the acts or defaults of the Oman-Smith Company.

No matter how the case is looked at, we must come back to the question whether the appellant company had these dangerous articles in its charge or control. The question, I am satisfied, must be answered in the negative.

The appeal should be allowed and the conviction quashed.

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SLOAN, J.A.: In my opinion, in the language of section 1014 of the Criminal Code, the conviction herein cannot be supported, having regard to the evidence. I would, in consequence, and with deference, allow the appeal.

ROBERTSON, J.A.: In my opinion the conviction is not supported by the evidence, and I would therefore allow the appeal.

Appeal allowed.

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Nov. 26, 29;
Dec. 6.

WESTMINSTER MILLS LIMITED AND KEYSTONE SHINGLES & LUMBER LIMITED v. INGHAM.

Practice—Pleading—Statement of claim—Sale and operation of timber limits—Allegations of trusteeship—Motion to strike out certain paragraphs as irrelevant and embarrassing—Rules 217 and 223.

The plaintiff alleges in its statement of claim that certain agreements entered into with reference to certain lands, timber licences, timber berths and timber with other facts alleged show that the defendant was constituted a trustee for the plaintiff, and it claims relief for breach of trust and of covenants therein contained. The defendant moved to strike out certain paragraphs of the statement of claim, submitting that the agreements in question show that the plaintiff made an outright sale to the defendant, that no question of trust could possibly arise, that the plaintiff had mixed up claims of breach of trust and covenants so that it is extremely difficult to plead and that the unwarranted claim of a trust will greatly increase the cost of the action. It was held on the motion that in order that allegations should be struck out, their irrelevancy must be quite clear and apparent. Although the allegations here may be entirely erroneous, it cannot be held that this is so clearly apparent at this stage that they cannot succeed thereon and thus be prevented from attempting to establish their relevancy at the trial.

Held, on appeal, affirming the decision of COADY, J., that the respondent should not be precluded from setting up the claim that there is a trust.

APPEAL by defendant from the order of COADY, J. of the 30th of September, 1943, dismissing the defendant's application to strike out certain paragraphs of the plaintiffs' statement of claim as tending to prejudice, embarrass or delay the fair trial of the action. The objection to the pleading is largely based on the

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submission that the plaintiffs have alleged a trusteeship on the part of the defendant of certain timber leases, licences and moneys, and that the documents on which the plaintiffs rely and plead are clearly insufficient to show such trusteeship.

The appeal was argued at Vancouver on the 26th and 29th of November, 1943, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Guild, for appellant: The leases were purchased and paid for by Ingham. He was the owner and it was not subject to any trust. The documents in question are clearly insufficient to show a trusteeship. The paragraphs in the statement of claim, alleging a trusteeship on the part of the defendant of the timber leases and licences in question should be struck out as embarrassing under rule 223. Their inclusion will very much increase the expense of the litigation: see *Morse* v. *Hurndall* (1926), 37 B.C. 216; *M'Intyre* v. *Belcher* (1863), 14 C.B. (N.S.) 654; *Dooby* v. *Watson* (1888), 57 L.J. Ch. 865.

J. A. MacInnes, for respondents: The Westminster Trust operated the property from 1921 until 1926 when Ingham took over under the agreement of the 16th of November, 1926. This is a trust agreement and for the purpose of administering a trust estate: see Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 87, par. 140 and p. 98, par. 161; *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, at p. 194; *Page* v. *Cox* (1851), 10 Hare 163, at p. 168; *Soar* v. *Ashwell,* [1893] 2 Q.B. 390, at pp. 394 and 397; *In re Williams. Williams* v. *Williams,* [1897] 2 Ch. 12, at p. 18; *Briggs* v. *Newswander* (1902), 32 S.C.R. 405. The order was discretionary and should not be interfered with: see *American Securities Corporation* v. *Woldson* (1927), 39 B.C. 145; *Maddison* v. *Donald H. Bain Ltd.* (1928), *ib.* 460.

Guild, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 30, p. 161; *Bank of Scotland* v. *Macleod,* [1914] A.C. 311, at pp. 322-3 and 336-7. The cases referred to by respondent have no application. The $400,000 paid for the property by Ingham was a payment, not an advance.

Cur. adv. vult.

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SLOAN, J.A.: I agree with my brothers that this appeal should be dismissed.

O'HALLORAN, J.A.: This appeal lies from the refusal of the learned Chamber judge to strike out certain paragraphs of the statement of claim as embarrassing within rule 223, in that it is submitted the documents pleaded do not disclose a trust as alleged in the impugned paragraphs.

The statement of claim contains some 70 paragraphs and refers to three agreements. Whether these agreements justify the allegations of trust depends not only upon their language, but also upon the commercial reality of the transactions to which they relate. The Court cannot very well reach its conclusions by studying these agreements *in vacuo*. At the trial the Court will require to learn enough about the surrounding conditions to understand why the agreements came into being, and will thus come to appreciate their effect in a practical business sense.

In *Charrington & Co.* v. *Wooder* (1913), 83 L.J.K.B. 220 Lord Dunedin said at pp. 224-5:

> In order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as that in which the parties to the contract were placed, in fact, when they made it—or, as it is sometimes phrased, to be informed as to the surrounding circumstances.

I think the learned Chamber judge was right in declining to prejudge the nature of the transactions to which the documents relate, and I agree with his reasons for denying the application.

In my view *Mayor, &c. of City of London* v. *Horner* (1914), 111 L.T. 512, upon which the learned judge relied, is a helpful guide in the present circumstances. Applying the test there laid down by Cozens-Hardy, M.R., at p. 512 and restated in other words by Swinfen Eady and Pickford, L.JJ. at p. 514, I am of opinion that on reading through the statement of claim in this case it is not clearly manifest (quite apart from what might appear after considerable argument) that the allegations of trust do not admit of plausible argument. It must be said that counsel for the respondents did advance a plausible argument in support of the existence of a trust. But whether a Court would ultimately

hold with him in that respect is not a determining consideration at this stage of the proceedings.

Counsel for the appellants relied on *Morse* v. *Hurndall* (1926), 37 B.C. 216, which allowed an appeal from an order permitting an amendment alleging that an agreement constituted a partnership. But as I read that case it does not support the appellants in principle, since the decision of the majority was founded upon their clear conviction that the agreement, in the existent circumstances could not justify an allegation of partnership, that is to say, applying the test in *Mayor, &c. of City of London* v. *Horner, supra,* the allegation of partnership did not admit of plausible argument.

Some aspects of the trend of decision in the allowance of amendments and the striking out of pleadings were recently considered in *Willett* v. *Fallows* (1943), 58 B.C. 490 and cases there cited, particularly at p. 498. It may be unnecessary to add, that if any allegation in the statement of claim lacks essential particularity the appellants may demand particulars, and, if they are not given or are insufficient, application may be made to the Court below for an appropriate order.

I would dismiss the appeal.

ROBERTSON, J.A.: Pursuant to rule 223 the then defendant applied, unsuccessfully, to COADY, J. to strike out certain paragraphs in the statement of claim on the ground that they were embarrassing. After the decision appealed from had been given and before the hearing of the appeal, the defendant died. His executors were later substituted for him, and they now prosecute the appeal.

The alleged embarrassment arises in this way: The respondent in the statement of claim alleges certain agreements with reference to "lands, timber leases, timber berths, timber licences, and timber" were entered into, and that these agreements and certain other facts set out in the statement of claim show that the original defendant was constituted a trustee for the plaintiff, and it claims relief for breach of trust and of covenants in the agreement A between the plaintiff and the then defendant. The appellants submit that the agreements in question show that the

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plaintiff made an outright sale to the then defendant; that no question of trust could possibly arise; that the respondent has inextricably mixed up claims of breach of trust and covenant so that it is extremely difficult to plead; and that in any event the unwarranted claim of a trust will greatly increase the cost of the action. They rely upon *Morse* v. *Hurndall* (1926), 37 B.C. 216. Counsel for the appellants admits that unless it is clear that there is no trust the appeal must fail.

The respondents submit that the transaction is one in which an advance was made to it of the sum of $400,000 and various provisions in the agreement are pointed to, which it is alleged support this position, and that the transaction, viewed as a whole, shows that the then defendant was a trustee.

In my opinion it is not necessary to consider this submission. There is one point which seems to me to indicate that there may be a trust and it is this: Let it be assumed that there was an outright sale to the then defendant by the respondent of its half interest in the property in question. The consideration for that half interest as shown by the agreement A was, in addition to certain cash and shares, half the net returns as defined in paragraph 5 of the agreement. The said agreement contemplated an immediate sale to the Campbell River Mills Limited and in fact on the same day as agreement A was entered into, the then defendant entered into an agreement to sell the very same property to the Campbell River Mills Limited for a consideration of $1,391,072; so that, if the transaction had gone through, the net returns divisible between the then defendant and the respondent would have been between $500,000 and $600,000. The Campbell River Mills Limited failed in their agreement, with the result that the then defendant regained possession of the property in question. The agreement A provided that if for any reason the Campbell River Mills Limited should make default under the said agreement and it should become necessary for the purchaser to cancel the same and to repossess himself of the said premises, he

> shall with all due despatch proceed to log the said timber or resell the same to the best advantage possible, due regard being given to offers of prospective sales by or through the company.

It would appear under these circumstances that the respondent

may have a vendor's lien, coupled with an obligation on the part of the then defendant to log or resell the same to the best advantage.

In Underhill's Law of Trusts and Trustees, 9th Ed., 189 the learned author points out that where a vendor has actually conveyed the property but the purchaser has only paid part of the purchase price, the vendor has a lien upon the property for the unpaid portion and the purchaser holds the estate "as a trustee *pro tanto*" unless the vendor has plainly manifested his intention to rely not upon the estate but upon some other security or upon the personal credit of the individual. Storey on Equity at p. 514 says that the lien arises from a constructive trust.

Lord Justice Pickford in the *Mayor, &c. of City of London* v. *Horner* (1914), 111 L.T. 512, at p. 514 said:

> In order that allegations should be struck out from a defence upon that ground, [of embarrassment] it seems to me that their irrelevancy must be quite clear and, so to speak, apparent at the first glance.

If the pleading attacked is not one which falls within this rule, then it should not be struck out. I think it does not. It is needless to say that I am not deciding there is a trust. That is for the trial judge. *Morse* v. *Hurndall, supra,* is clearly distinguishable, for in that case the majority of the Court were satisfied the documents in question did not show a partnership.

In view of the foregoing I think the respondent should not be precluded from setting up the claim that there is a trust. The appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Lawson, Clark & Lundell.*
Solicitors for respondents: *MacInnes & Arnold.*

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Nov. 8, 9, 10, 11, 12, 15.
1944
Jan. 11.

LYFORD v. CARGILL COMPANY OF CANADA, LIMITED.

Principal and agent—Sale of timber limits—Contract for commission—"Any sales you might negotiate"—Meaning of—Purchaser introduced—Sale not completed—Subsequent sale to same purchaser through another agent—Right of action for damages—Judge on appeal hands reasons to Chief Justice for delivery—Dies before delivery—Whether it should be included in judgment of Court—B.C. Stats. 1943, Cap. 10, Sec. 3.

Lyford was a licensed broker in Vancouver and A. S. Cargill was business manager of the defendant company with head office in Minneapolis, U.S.A. The defendant company owned timber licences covering various tracts in British Columbia, including the Bonanza Lake tract on Vancouver Island, and from 1934 to 1939 Lyford was trying to sell the various tracts as a broker, and a large amount of correspondence ensued between them in relation to the various tracts. On November 28th, 1939, Lyford wrote Cargill suggesting that a 5 per cent. commission for introducing a purchaser and negotiating a sale was a reasonable charge and suggesting that the timber properties be placed in his hands for sale and management. On December 4th, 1939, Cargill replied, agreeing as to 5 per cent. commission on any sales he might negotiate, but refused him the exclusive sale of the timber. These two letters were recognized as constituting the bargain between them. In December, 1939, Lyford wrote one Bonney, woods representative of Pacific Mills Limited, regarding the Bonanza Lake tract and later in January, 1940, he had an interview with Bonney in Vancouver and he reported the interview to Cargill, pointing out that Pacific Mills Limited was a logical purchaser as it needed pulpwood. In October, 1940, Lyford wrote Bonney as to the Bonanza Lake tract and Bonney replied he would see him in Vancouver in the following month, but he did not call and there was nothing further between them. In the Fall of 1940, one Swigert, of Portland, became interested in the Bonanza Lake tract and he consulted one Denman, vice-president of Crown Zellerbach Corporation which controlled Pacific Mills Limited, with a view to a sale. He then saw Cargill, advising him of having an undisclosed prospective purchaser of the Bonanza Lake tract and Cargill agreed to pay him 5 per cent. if his company made a sale to Swigert's client. On April 4th, 1941, Swigert got the parties together (when Cargill first knew that the prospective purchaser was Pacific Mills Limited) when Pacific Mills Limited took an option on the Bonanza Lake tract and on December 24th, 1941, they completed their purchase. Cargill then paid Swigert his commission. In an action for a declaratory judgment that the plaintiff was the effective agent of the defendant in bringing about the sale of said timber or in the alternative for damages for breach of contract, it was held that the Pacific Mills Limited, the purchaser of the Bonanza Lake tract first learned who the owners were and that the property was for sale through the plaintiff; that the defendant first

learned of the activities of the Pacific Mills Limited in the area of the Bonanza Lake tract, and that the Pacific Mills Limited was a prospective purchaser through the plaintiff; that the plaintiff did have actual negotiations with the purchaser and that the plaintiff's efforts were the effective cause of bringing about the sale to Pacific Mills Limited.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C. (MCDONALD, C.J.B.C. dissenting), that according to the true construction of the contract between the parties the conditions had been fulfilled, the consideration required from the plaintiff under the contract, having been substantially executed by him, that the event had happened, upon the happening of which, the plaintiff acquired a vested right to the commission, and no act or omission of the defendant or anyone else could deprive him of that right.

The late Mr. Justice FISHER sat on the hearing of this appeal. He wrote his reasons for judgment and handed same to the Chief Justice of the Court, authorizing him to announce his judgment dismissing the appeal. He died before judgment was delivered. Both counsel expressed the view that under section 25 of the Court of Appeal Act as amended in 1943, the judgment may be filed as if it had been delivered prior to Mr. Justice FISHER'S death.

Per MCDONALD, C.J.B.C. and ROBERTSON, J.A.: The vital point is that the judge has given his opinion. Upon the wording of section 25 the majority of the Court may deliver judgment giving full effect to the opinion of FISHER, J.A. and his opinion should be read and announced in open Court and left with the registrar.

Per SLOAN and O'HALLORAN, J.J.A.: Section 25 of the Court of Appeal Act as amended by section 3 of the Court of Appeal Act Amendment Act. 1943, does not permit a construction that the opinion of a deceased judge may be used as if he were alive and absent.

APPEAL by defendant from the decision of FARRIS, C.J.S.C. of the 21st of July, 1943, in an action for a declaratory judgment that the plaintiff was the effective agent of the defendant in bringing about the sale of certain timber lands known as the Bonanza Lake tract, comprising 40 timber licences located near Beaver Cove on Vancouver Island, to Pacific Mills Limited. Judgment for $20,000, being 5 per cent. upon the purchase price of $400,000 actually received by the defendant on account. Directions in regard to future accounting and in the alternative for damages for breach of contract to pay said commission. The defendant held several tracts of valuable timber lands in the Province and by correspondence between the plaintiff and defendant from January, 1937, to May, 1942, the plaintiff offered and defendant accepted, his services in finding and bringing to his notice purchasers willing and able to purchase from

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the defendant the whole or any part of the defendant's timber holdings. Several letters passed between the plaintiff and defendant as the defendant's holdings and the Bonanza Lake tract was first mentioned by the plaintiff in a letter of September 7th, 1939, in which he stated that interest was manifested in the tract by Crown Zellerbach Corporation which controls Pacific Mills Limited. Shortly after the plaintiff received a letter from one Bonney, manager of woods operations for Pacific Mills Limited and the plaintiff asked the defendant's permission to submit the Bonanza Lake tract to Pacific Mills Limited, suggesting that he be given exclusive agency to bring about a sale, to which the defendant replied on December 4th, 1939, that they would consider any offer, but would not give any one the exclusive sale of their timber. On January 3rd, 1940, the plaintiff advised the defendant he expected to see Bonney with reference to the Bonanza Lake tract and on January 29th, 1940, the plaintiff reported to the defendant that he had had a long interview with Bonney in which he stated there was a good chance of making a sale of the Bonanza Lake tract. To this the defendant replied, expressing his interest in the report. Correspondence then ensued as to other prospective purchasers without any result. On December 3rd, 1940, one Swigert saw the defendant and advised him that he knew an American firm that was interested in the Bonanza Lake tract and Cargill (president of defendant company) authorized him to find a purchaser and terms were agreed upon. On January 2nd, 1941, Swigert informed the defendant that the buyer he proposed to interest was Pacific Mills Limited and the sale was made on April 4th, 1941. Swigert was paid a commission of $20,000.

The appeal was argued at Vancouver on the 8th to the 12th and the 15th of November, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

Locke, K.C., for appellant: The agreement between the parties was that the respondent should be paid a commission of 5 per cent. of any sales of the appellant's properties, which the respondent might negotiate and the respondent did not negotiate the sale of the property in question. The terms of the contract are clear. By letter of November 28th, 1939, the respondent stated that a

broker was entitled to 5 per cent. commission for introducing a purchaser and negotiating a sale and suggested that the handling of the properties be left to him, in reply to which the appellant agreed as to the commission but rejected the suggestion that respondent should have the exclusive sale of the timber. The law on the construction of commission contracts is clearly stated in *Howard, Houlder and Partners* v. *Manx Isles S.S. Co.* (1922), 92 L.J.K.B. 233. The respondent did not negotiate the sale from the appellant to Pacific Mills Limited and the trial judge did not so find. The statement of claim does not allege that the respondent negotiated a sale. It is submitted that no claim upon a *quantum meruit* can succeed when the evidence discloses, as in this case, that there was a contract between the parties defining the terms upon which the respondent should be entitled to recover a commission. The respondent had correspondence with one Bonney, the manager of woods operations of Pacific Mills Limited regarding the appellant's properties in general, including the Bonanza Lake tract, from October, 1939, until October, 1940, when Bonney wrote that he would call on the respondent in the following month, but he did not call and there was no further correspondence between them. This was the full extent of the respondent's activities. It is obvious that the sale of the property to Pacific Mills Limited, which resulted in consequence of that company exercising the option granted on April 4th, 1941, was not negotiated by the respondent. This is decisive of the matter upon respondent's claim for commission. In November, 1940, one Swigert, of Portland, Oregon, took an interest in the Cargill properties and a result of his efforts was that the appellant and Pacific Mills Limited were brought together, resulting in the signing of the agreement of April 4th, 1941. A cruise of the property was made and the sale took place late in 1941. This sale was not in the language of the agreement of December 4th, 1939, and the respondent cannot recover unless he shows that the conditions of the agreement have been fulfilled: see *Howard, Houlder and Partners* v. *Manx Isles S.S. Co.* (1922), 92 L.J.K.B. 233; *Bentall, Horsley and Baldry* v. *Vicary* (1930), 100 L.J.K.B. 201, at p. 202; *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper* (1940), 110 L.J.K.B.

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131, at p. 137; *Bull* v. *Price* (1831), 7 Bing. 237; *Alder* v. *Boyle* (1847), 16 L.J.C.P. 232; *Clack* v. *Wood* (1882), 9 Q.B.D. 276; *Brinson* v. *Davies* (1911), 27 T.L.R. 442; *French & Co.* v. *Leeston Shipping Co.* (1922), 91 L.J.K.B. 655; Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 257, par. 432. The learned trial judge erred in holding in the alternative that the respondent was entitled to recover damages. By amendment at the trial the respondent claimed that the appellant sold the property to Pacific Mills Limited behind his back and deprived the respondent of the opportunity of completing negotiations, whereby he was greatly damnified. He was not an exclusive agent and he was to receive 5 per cent. commission on any sale he might negotiate. The difference between such an arrangement and the agreement that was considered in *Inchbald* v. *The Western Neilgherry Coffee, Tea and Cinchona Company (Limited)* (1864), 34 L.J.C.P. 15 was pointed out in *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper* (1940), 110 L.J.K.B. 131, at p. 135; see also *Trollope & Sons* v. *Martyn Bros.* (1934), 103 L.J.K.B. 634; *Trollope (George) & Sons* v. *Caplan* (1936), 105 L.J.K.B. 819. The application of the principle enunciated by McCardie, J. and these cases is fatal to the respondent's claim for damages. The learned judge erred in holding that the appellant had prevented the respondent from carrying on negotiations with Pacific Mills Limited and was accordingly liable in damages to the respondent. There is nothing in the evidence to justify a finding that the appellant prevented the respondent from carrying on negotiations with Pacific Mills Limited. The learned judge erred in finding that the respondent's efforts were the effective cause of bringing about the sale. This is directly contrary to the evidence and is not the point in the case. The question is whether the respondent performed the work which, under the contract, entitled him to a commission. If this is the point in the case, it would be necessary for the agent to show that the transaction was the direct cause of the agency: see Halsbury's Laws of England, 2nd Ed., Vol. 1, p. 259, par. 434; *Lumley* v. *Nicholson* (1885), 2 T.L.R. 118; *Millar, Son, and Co.* v. *Radford* (1903), 19 T.L.R. 575; *Nightingale* v. *Parsons,* [1914] 2 K.B. 621; *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681, at

p. 686; *Travis* v. *Coates* (1912), 27 O.L.R. 63. There was error in construing the contract between the parties as evidenced by the respondent's letter of November 28th, 1939, and the reply of December 4th, 1939. The terms thereof were adopted and agreed to by the respondent. There was error in admitting as evidence letters passing between the parties between January 29th, 1937, and November 22nd, 1939, also other letters between the parties after December 4th, 1939 (other than those relating to the sale of Bonanza Lake properties). The parties having agreed in writing to the terms upon which respondent should be entitled to a commission, the other correspondence was inadmissible to add to or vary the contract. There was error in finding that the respondent was entitled to recover by way of commission 5 per cent. of payments of principal, if any, to be made hereafter. The agreement was that the respondent would be entitled to his commission if and when he negotiated the sale. There cannot be a right of action until the whole amount is ascertained.

J. A. MacInnes, for respondent: The learned trial judge was correct in looking at the whole correspondence and should not be confined to the two letters of November 28th and December 4th, 1939, to ascertain the contractual relationship between the parties: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 321, par. 450; Anson on Contracts, 16th Ed., 328; *Ford* v. *Beech* (1848), 11 Q.B. 852. The defendant took the stand that we did not "negotiate" the sale and the question arises as to the meaning that should be attributed to the term "negotiate." The plaintiff submitted the property to Pacific Mills Limited and finally stimulated interest sufficient to bring about a deal. The fact that the defendant completed the final steps in the negotiations behind the plaintiff's back after deliberately misleading him, does not affect the plaintiff's position. The defendant claims the right to determine the plaintiff's agency at any time and take advantage of the work done by the plaintiff, including the introduction of Pacific Mills Limited as a prospective purchaser, and by direct negotiations on through another agent, complete the sale of the property to the plaintiff's prospective purchaser, relying on *Luxor, Ltd.* v. *Cooper,* [1941] 1 All E.R. 33. The *Luxor* case is not an authority for any such proposition and is clearly

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distinguishable from the case at Bar. It is no authority for a case wherein a sale has actually been completed by the defendant to the very purchaser introduced and interested by the plaintiff: see *Burchell* v. *Gowrie and Blockhouse Collieries, Limited,* [1910] A.C. 614. They challenge the finding that the plaintiff was the effective agency in this sale to Pacific Mills Limited. That the learned trial judge properly so found see *Cunard and Others* v. *Van Oppen* (1859), 1 F. & F. 716; *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681; *Burton* v. *Hughes* (1885), 1 T.L.R. 207; *Osler* v. *Moore* (1901), 8 B.C. 115; *Spenard* v. *Rutledge* (1913), 23 Man. L.R. 47; *Turner Meakin & Co.* v. *Field* (1923), 33 B.C. 56; *Cole* v. *Read* (1914), 20 B.C. 365, at p. 369; *Griffith* v. *Anderson,* [1926] 1 W.W.R. 956; *Carr* v. *La Dreche* (1927), 38 B.C. 97; *Wilkinson* v. *Martin* (1837), 8 Car. & P. 1; *Steere and Another* v. *Smith* (1885), 2 T.L.R. 131; *Lee* v. *O'Brien and Cameron* (1910), 15 B.C. 326, at p. 329; *Stratton* v. *Vachon* (1911), 44 S.C.R. 395, at pp. 397 and 406; *Chappell* v. *Peters* (1913), 3 W.W.R. 738; *Howard* v. *George* (1913), 49 S.C.R. 75; *Prentice* v. *Merrick* (1917), 24 B.C. 432, at p. 436; *Nicholson* v. *Debuse,* [1927] 3 W.W.R. 799, at p. 800; *Graves* v. *McLean,* [1931] 2 W.W.R. 895. From the letters between the parties, it will appear that the defendant recognized and acknowledged the effectiveness of the plaintiff's efforts until Swigert intervened and concluded the contract behind the plaintiff's back. I would move to amend the reply by setting up waiver and estoppel. The appellant is estopped from relying on non-performance as by letter he directed Lyford not to do anything further under the agency agreement and accepted what he had done as sufficient performance of the agreement.

Locke, in reply: The amendment should not be granted as there was evidence we would have brought out if this amendment had been in at first. The proposed amendment is a departure in pleading: see rule 212; *Empire Sash and Door Co.* v. *Maranda* (1911), 21 Man. L.R. 605; *Whyte* v. *National Paper Co.* (1915), 51 S.C.R. 162, at p. 172. Estoppel must be alleged: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 478, par. 546; Annual Practice, 1943, p. 478; *Ex parte Adamson. In re*

Collie (1878), 8 Ch. D. 807, at p. 817. On waiver it is a question of intent: see *King* v. *Wilson* (1904), 11 B.C. 109; *Bushby* v. *Tanner* (1924), 34 B.C. 270; *Kipp* v. *Simpson* (1928), 40 B.C. 248; *Cropper* v. *Smith* (1884), 26 Ch. D. 700. On the word "negotiate," which means "to conclude by bargain, treaty or agreement," see *Inhabitants of Palmer* v. *Ferry* (1856), 72 Mass. 420, at p. 423. The case should be decided on the evidence properly admissible: see *Forman* v. *Union Trust Co.*, [1927] S.C.R. 1, at pp. 7-8; *Lee* v. *Alexander* (1883), 8 App. Cas. 853, at pp. 871-2; Taylor on Evidence, 12th Ed., Vol. II., p. 723.

Cur. adv. vult.

11th January, 1944.

MCDONALD, C.J.B.C.: This is an action for commission on the sale of certain timber licences. Though the trial, as well as the argument before us, took several days, I am satisfied, after a good deal of consideration, that in the end the case falls within rather narrow limits, and that what we really have to decide is what was the contract (if any) between the parties, and, secondly, whether or not the plaintiff performed his part.

Unfortunately, the law regarding claims for commission, both in the Old Country and here, had during the past quarter of a century become rather uncertain. We are fortunate however in that the whole question came before the House of Lords in *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper* (1940), 110 L.J.K.B. 131, where their Lordships gave elaborate and considered judgments, wherein all the principal previous decisions were reviewed. Briefly, it may be stated that the House of Lords in the case mentioned overruled *Trollope & Sons* v. *Martyn Bros.* (1934), 103 L.J.K.B. 634 and *Trollope (George) & Sons* v. *Caplan* (1936), 105 L.J.K.B. 819, and approved of the judgment of McCardie, J. in *Howard, Houlder and Partners* v. *Manx Isles S.S. Co.* (1922), 92 L.J.K.B. 233, and, by implication at least, the judgment of the same very able judge in *Bentall, Horsley and Baldry* v. *Vicary* (1930), 100 L.J.K.B. 201.

It seems to me that it is not now fairly arguable that terms can be implied which do not appear in the agreement between the parties, unless it is necessary to imply them. It would be

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impossible to put the matter more simply than it was put by McCardie, J. in *Bentall, Horsley and Baldry* v. *Vicary, supra,* at pp. 202-03:

> "It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails."

And I would add McCardie, J.'s other pithy remark in *Howard, Houlder and Partners* v. *Manx Isles S.S. Co., supra,* at p. 235:

> There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money and skill.

If this is good law, and it clearly is, there is no room in the present case for implying any terms whatever, and on that branch of the case, though with every respect, I would unhesitatingly overrule the learned judge below.

In the judgment below, the plaintiff was awarded commission at the rate of 5 per cent. on the price received for the timber licences. The learned judge went on to say that if he was wrong in allowing commission he would allow $20,000 by way of damages. It was put to counsel for the respondent before us to state to us which ground he relied on and he said that, while abandoning nothing, he would argue his case as one for commission, *simpliciter.* Moreover this is the form in which judgment was entered below.

In such circumstances, since able and experienced counsel has appeared in the case throughout, I am content to deal with the case in the light in which counsel views it, and this judgment will be based upon a consideration of whether or not the respondent has earned a commission. In any event, it is my opinion that if the respondent cannot succeed on a claim for commission he cannot succeed at all.

It may not be out of place to say, before going further, that I have not overlooked any of the cases (and their name is legion) cited by counsel. One difficulty is that the decision of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited,* [1910] A.C. 614 has not always been read perspicaciously. In many cases we find learned judges treating that case as if a commission had been awarded, whereas the case did not so decide. What was allowed there was not a commission, but damages. If this is kept in mind many misunderstandings disappear.

Upon consideration, my conclusion is that the proper way to approach the present case is to follow the line taken by the Divisional Court in *Robins* v. *Hees* (1911), 19 O.W.R. 277, a case as close to the present as one is likely to find. There the Court was inclined to treat the agreement to pay a commission as an offer by the owner, which could be accepted by the first agent complying with its terms. The well-known case of *Carlill* v. *Carbolic Smoke Ball Company,* [1893] 1 Q.B. 256 was cited by Middleton, J. who wrote the judgment of the Court.

Whether what is set out in the plaintiff's letter of November 28th, 1939, and defendant's reply of December 4th, 1939, from which I quote below, constitutes an offer only, or a contract, is of importance only on the question whether terms may be implied, and secondly whether damages may be recovered. It would seem to be clear that if the letter of December 4th, 1939, is an offer merely, then no terms or conditions may be added to that offer; and, moreover, if there was no acceptance according to the terms of the offer, then there was no contract, and hence there could be no damages for any breach of contract. I mention this phase only because it was discussed at considerable length before us, for I think that, on the authorities mentioned above, the law does not permit the Court to invoke terms which the parties did not themselves impose, and that this is so even if we have a completed contract and not merely an offer.

Mr. *MacInnes* in his able argument made much of the various *dicta,* which run like this: the agent is entitled to recover, if not his commission, then damages, where the vendor has gone behind his back and sold either directly or through another agent to a purchaser whom the agent has introduced. With deference, I submit that put so broadly, the statement is unsound both in principle and on compelling authority. Such *dicta* must be read with due regard to the facts of the case which was being decided. What was meant was that the vendor is so liable if what he did was "wrongful," *i.e.,* if it was in contravention of his obligation to the agent. And there's the rub. If, under his agreement, he did no more than he was in law entitled to do, then he is under no liability; and that I think is the position here.

The facts have been stated in detail by the trial judge, who

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also in his reasons quoted at considerable length from many letters which passed between the parties. I shall confine myself to what I think are the salient facts upon which the case must be decided. Lyford is a licensed broker, residing in Vancouver; Cargill Company of Canada, Limited has its head office at Minneapolis, and its business is carried on for the most part by A. S. Cargill; Crown Zellerbach Corporation has its head office at Seattle and controls the operations of Pacific Mills Limited, a British Columbia company; the property with which we are concerned is known as the Bonanza Lake tract, located at or near Beaver Cove, Vancouver Island, B.C. For some time prior to 1937 the Cargill Company owned timber licences covering various tracts of timber in British Columbia, and Lyford from 1937 until 1939 was trying to sell same as a broker. There is a large file of correspondence in the appeal book relating to these various tracts of timber.

We have heard an elaborate argument as to whether the trial judge was right in admitting all these letters, but in the view I take, even if these letters are admitted, they do not advance the plaintiff's case, for in the end letters passed between Lyford and Cargill which finally settled their agreement. On November 28th, 1939, Lyford wrote Cargill as follows:

. . . In my correspondence up to the present time with reference to your timber properties here I have not referred to the matter of commission, I have been handling a number of properties for non-resident owners, both in Canada and the United States, on the basis of a 5% commission which covers both the commission for making the sale and administration fee for looking after the details of carrying out the provisions of the purchase and sale agreement. This covers a continuous service over a considerable period of years. Ordinarily a timber broker is entitled to at least a 5% commission for merely introducing a purchaser and negotiating a sale. I have followed the practice, however, of asking a 5% commission for both services in cases where the timber property is exclusively in my hands for sale and general management. This has worked out very satisfactory to my clients and enables me to devote all of the time and effort necessary to efficient handling of timber properties without the serious risk of my efforts being entirely wasted. It works out very well from the standpoint of the timber owner also, because it saves a lot of running down of false clues. It generally takes quite a lot of careful selection to bring the most suitable buyer in touch with the timber property which is most satisfactory for his requirements.

I have been following this line of procedure in dealing with your timber properties during the past few months but without any definite understand-

ing with regard to the arrangement. I hope that the suggested rate of commission and administration fee is acceptable to you and perhaps, also, the matter of leaving the handling of these properties to me and thereby saving yourself a good deal of correspondence and avoiding possible complications with the numerous agents and brokers who become more active when market conditions improve the chances for additional logging activity.

To this letter Cargill replied on December 4th, 1939, saying:

I have your letter of November 28 and note the inquiry you have received on the Fulmore Lake limits. I also note the arrangements you usually work on in connection with timber sales. While it is entirely satisfactory to us to work on a basis of 5% commission on any sales you might negotiate, we have religiously avoided numerous attempts to secure the exclusive sale of our timber and I would not at this time want to deviate from that past policy.

. . . . .

That Lyford recognized these two letters as constituting the bargain, is indicated by his letter to Cargill, dated 16th January, 1942, wherein, after stating that he had been going through his files, he says:

. . . . .

I see now that in response to a letter of mine dated November 28th, 1939, you replied under date of December 4th, 1939, agreeing to the basis of five per cent. commission which I had suggested. This will apparently obviate the necessity of further consideration as to the percentage rate.

It seems clear to me therefore that the real point we have to decide is what was meant by the following words: "on any sales you might negotiate."

Whether we look on this as an offer which might be accepted by conduct or whether we look upon it along with the letter of November 28th, 1939, as constituting a contract, we still have to ascertain the meaning of the words I have quoted. It was with a view to assisting the Court in construing these words that, both below and here, counsel for the plaintiff was so diligent in getting in the correspondence I have mentioned. His reason was that the word "negotiate" is used time and time again both by Lyford and Cargill, and it is argued that by looking at these letters we are enlightened as to what they meant by it. The difficulty is that the words we have to construe are "any sales you might negotiate."

It is argued that the words simply mean that if the broker introduced a prospective purchaser who afterwards bought, either directly from the company or through another agent, then the

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commission was earned; and the learned trial judge took this view. In my opinion the bargain cannot be so construed.

It is common ground that, during the period covered by the correspondence, Lyford talked the property up to one Bonney, the woods representative of Pacific Mills Limited, and that he pressed on Bonney the value of the Bonanza Lake pulpwood to that company. It is also clear that Lyford so informed Cargill and pointed out to him that Pacific Mills Limited was a logical purchaser, as this company needed the pulpwood for its mill.

Where the trouble arises is that in the Fall of 1940, after a long lull in the correspondence, and after Lyford had been talking the property up to the B.C. Pulp Company and to the H. R. McMillan Company, another man appears upon the scene. This was one Swigert of Seattle, who is a manufacturer of logging machinery, and is generally familiar with timber operations being carried on in this Province. Swigert interviewed one Denman, of Crown Zellerbach Corporation, about purchasing this Bonanza Lake timber, and aroused Denman's interest to the extent that he told Denman he was going East, and was going to see Cargill in the hope of putting through a sale. Swigert went to Minneapolis in December, 1940, and saw Cargill. They made an agreement whereby Cargill agreed to pay Swigert a commission of 5 per cent. if his company made a sale to Swigert's "client." Finally, on 4th April, 1941, Swigert brought the parties together and Pacific Mills Limited took an option on the timber licences and later completed their purchase. The Cargill Company paid Swigert his commission for his services, he having attended with Denman's representative in Minneapolis and taken an active part in getting the parties together. I think the true position is that it was Swigert, and not Lyford, who "negotiated the sale."

It is vital to state here that Swigert, when he first interviewed Cargill, did not name his prospective customers, but stated that they were American people. Cargill did not know until January, 1941, that Swigert's "client" was the Crown Zellerbach Corporation, which company, so far as we are concerned, is Pacific Mills Limited.

When it was put to respondent's counsel during the argument

to state to us just what was Cargill's obligation to Lyford when he was first interviewed by Swigert, he found himself obliged to contend that Cargill at that moment was precluded by his agreement with Lyford from making any sale either directly or through another agent. If this was not his contention I misunderstood him. In any event, if he is to succeed at all it seems to me he must succeed on that basis, and yet I think it is not fairly arguable that Cargill had so tied his own hands. This was in fact the very issue that Lyford and Cargill were considering when they wrote the letters of November 28th, 1939, and December 4th, 1939. Lyford asked for an exclusive agency and this, Cargill distinctly refused to grant.

During the argument respondent's counsel moved before us for leave to amend his pleadings to set up that, if he did not carry out all he was obliged to do, this was because appellant waived further performance. I think it would be unfair to allow any such amendment at this stage, and I would refer to the judgment of Duff, J., as he then was, in *Whyte* v. *National Paper Co.* (1915), 51 S.C.R. 162, at p. 168. Aside from specific authority, waiver is always a matter of intention, and I cannot possibly see how Cargill can be held to have intended to waive anything, when he was never examined on that question, when such question was never in issue on the trial, and when it is obvious that such an idea never entered his mind. To hold otherwise would be to say that when Swigert came to Cargill with his proposition, Cargill reasoned thus with himself: "Lyford has now done all I shall require him to do in order to earn his remuneration; I shall now proceed to make a bargain with Swigert which will oblige me if his efforts succeed, to pay him a second commission, if by chance, his 'client' should turn out to be Pacific Mills Limited"—which is absurd.

As to respondent's application to amend now by setting up an estoppel, this should be refused. No evidence was offered to establish any such plea; appellant had no opportunity to meet any such plea; and the appellant would be unjustly prejudiced by allowing any such amendment at this stage.

In my opinion the action fails and the appeal should be allowed.

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On 23rd November, 1943, our late brother FISHER handed to me the judgment which he had written in this case and authorized me to announce his judgment dismissing the appeal. Our brother having died before judgment was delivered, the question arose whether his judgment could be used. This involved a discussion of section 25 of the Court of Appeal Act as amended in 1943. Doubts having arisen, counsel were invited to give us their opinion, and they were good enough to do so, both expressing the opinion that under the section as it now stands the judgment may be filed as if it had been delivered prior to our brother's death.

I have had the privilege of discussing with my brother SLOAN the views expressed by our brother FISHER, and I understand that our brother SLOAN intends to adopt that opinion. Our brother ROBERTSON takes a very strong view in line with the opinion expressed by counsel.

I have given the matter a good deal of consideration during the past month, and, while I think the Act is far from clear, still, inasmuch as all the members of the Court except myself are in favour of dismissing the appeal, the present discussion is academic.

I am therefore prepared to accept the view of my brother ROBERTSON, and shall decide accordingly.

SLOAN, J.A.: Before the death of our late brother FISHER I had discussions with him concerning the subject-matter of this appeal and he furnished me with a copy of his reasons for judgment. Had he lived to pronounce his judgment at the opening of this term I would have concurred therein.

The situation now is, however, that by reason of an equal division between the four present members of the Court as to whether or not the relevant provisions of the Court of Appeal Act permit the announcement of the judgment of our late brother, after his death, no effective order may be made in that regard.

While I agree with that interpretation of the said Act which would not permit the announcement of our late brother's judgment nevertheless in order to have the advantage and benefit of his opinion I adopt it as my own and append hereto as my own

judgment his original reasons for judgment received by me from the custody of the Chief Justice.

If precedent is sought for this course of procedure it will be found in *Spinner* v. *Farquharson* (1902), 32 S.C.R. 58, at p. 61.

The following are the reasons for judgment of FISHER, J.A. which are adopted as the reasons of

SLOAN, J.A.: In this matter I will deal first with the question as to whether the whole of the considerable correspondence passing between the parties or only a portion thereof should be considered as evidence in ascertaining whether or not there was any contract, and, if so, the nature of same. Counsel for the respondent contends that the whole correspondence should be considered. On the other hand, counsel for the appellant contends that appellant's letter to the respondent dated December 4th, 1939, in answer to respondent's letter dated November 28th, 1939, is clear and unambiguous and submits in effect that the existence or non-existence of a contract, and, if one, the terms of same must be ascertained from one or both of the said letters.

The correspondence was between the respondent Mr. Lyford and Mr. Cargill, the vice-president of the appellant company, and a portion of the evidence given at the trial by Mr. Cargill is as follows:

> And from time to time Mr. Lyford did continue to advise you? Well, Lyford has done that for several years on all the properties. Not only that particular property, but all our other properties. I have relied on Mr. Lyford to really keep me posted out here in a general way, and some of it has come in connection with his activities as a broker, and some in connection with his official activities in the American Timber Holders' Association. I remember that very well, and Mr. Lyford, he has been my broker—

It is clear from the evidence of Mr. Cargill as aforesaid that the respondent for several years had been the appellant's broker and kept him advised from time to time as to all its properties, including the particular property in question herein, *viz.*, the Bonanza Lake tract in the neighbourhood of Beaver Cove, Vancouver Island. There was correspondence prior to the said November 28th, 1939, in reference to the said Bonanza Lake tract. There is obviously no extrinsic evidence, and, in my view, no intrinsic evidence to show that the said two letters were written to formulate precisely, or actually did reduce fully to

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writing, the intentions of the parties. Under the circumstances my conclusion is that the existence of a contract or the entire contract, if one, should not be determined without consideration of the whole of the correspondence. See Halsbury's Laws of England, 2nd Ed., Vol. 7, par. 450, reading in part as follows:

> . . . When the contract is to be ascertained from a series of letters or documents the whole of the correspondence must be looked at, . . .

I pause here to say that in reaching such conclusion I have not overlooked the argument of counsel for the appellant that the last paragraph of a letter written by the respondent to the appellant dated January 16th, 1942, shows that the respondent regarded the letter of December 4th, 1939, as containing the whole agreement of the parties. The said paragraph reads as follows:

> I see now that in response to a letter of mine dated November 28th, 1939, you replied under date of December 4th, 1939, agreeing to the basis of five per cent. commission which I had suggested. This will apparently obviate the necessity of further consideration as to the percentage rate.

With all deference I have to say that this letter only confirms my view that the only things settled beyond any doubt by the letter of December 4th, 1939, were that the rate of commission should be 5 per cent. and that the respondent was not to have the exclusive sale of the property. In any event I have to say that in considering the said letter of December 4th, 1939, alone or along with the said letter of November 28th, 1939, I find enough doubt as to the meaning of the parties to come to the conclusion that the whole of the correspondence should be looked at to ascertain the meaning of particular parts thereof. I think under the circumstances the learned trial judge was right in looking, as he did, at the whole of the correspondence to ascertain whether there was any contract between the parties, and, if so, what the contractual relationship was.

When all the correspondence is considered I have no hesitation in holding that there was a contract and that this is not a case where there was no contract but merely an offer, which would be accepted by the first agent complying with its terms and bringing an acceptable purchaser. In my view *Robins* v. *Hees* (1911), 19 O.W.R. 277 and *Carlill* v. *Carbolic Smoke Ball Company*, [1893] 1 Q.B. 256, relied upon by counsel for the appellant, are distinguishable.

I come now to deal with the further submission of counsel on behalf of the appellant that, even if there was a contract, it is of such a nature that in order to recover any amount as commission thereunder the agent or broker must not only introduce but bring the parties together and influence them till the price, terms and conditions are agreed upon and the sale negotiated by him in that sense. If this is the proper interpretation of the contract counsel for the respondent apparently concedes that the evidence does not show that the conditions of the contract were fulfilled. Counsel for the respondent, however, first contends that this is not the proper interpretation of the contract and alternatively that the appellant accepted what was done by the respondent as sufficient performance of the contract. It seems to me that the real difficulty in the case is the construction of the contract and before indicating my view I propose to refer to some of the authorities cited.

I think it should first be noted that in their factums and arguments both counsel rely on the judgments or passages in the judgments in the case of *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper* (1940), 110 L.J.K.B. 131; [1941] 1 All E.R. 33, and that the learned trial judge in his reasons for judgment also quoted and relied upon certain passages in the judgment of Lord Wright in such case. In his reasons, after setting out a quotation from the judgment of Lord Wright, he says in part as follows:

> It is quite clear from these words that his Lordship took it as a matter of course that there was an implied term in that particular contract, that the owner could not deal independently with a purchaser introduced by the agent.
>
> Again at p. 146 his Lordship says:
>
> "But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that 'it goes without saying,' some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended."
>
> In the *Luxor* case the contract did not contain any condition that the owner would not act independently of the agent in respect of any purchaser introduced by the agent. Yet, as before pointed out, Lord Wright seemed to take it as a matter of course that this followed. The present case goes much farther than the *Luxor* case in that the defendant specifically requested the plaintiff to furnish the name of any prospective purchaser, and in answer to such request the plaintiff furnished the defendant with the name of the plaintiff's prospective purchaser long before the defendant entered into

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negotiations with the second agent. To my mind it was obviously the intention of the parties that there was an implied term of the contract between the plaintiff and the defendant that if the plaintiff did so submit the name of the prospective purchaser that the defendant would not deal independently himself for knowingly through others with a prospective purchaser of the plaintiff. In respect to such implied conditions I can do no better than quote the words of Lord Wright, "It goes without saying."

Counsel for the appellant pointed out that the first quotation from the judgment of Lord Wright, as set out in the reasons, stops before the end of the sentence and, with deference, submitted that the learned trial judge had misinterpreted what Lord Wright said (110 L.J.K.B. at p. 152; [1941] 1 All E.R. at p. 61) which was as follows:

> It may be said that on the view of Scrutton, L.J., and on the view which I have been propounding, the prospect of the agent getting his reward is speculative and may be defeated by the arbitrary will of the principal. That may perhaps be so in some cases. But it is, I think, clear that under a contract like the present the agent takes a risk in several respects; thus for instance the principal may sell independently of the agent to a purchaser other than the purchaser introduced by him, or where the employment is not as sole agent, he may sell through another agent.

With deference, I think it might be said that the meaning of the last sentence in this passage is not as clear as it might be, but I have to say that I am more concerned with what the learned trial judge says was an implied term of the contract between the plaintiff and the defendant in the present case, namely,

> that if the plaintiff did so submit the name of the prospective purchaser that the defendant would not deal independently himself or knowingly through others with a prospective purchaser of the plaintiff.

If I understand aright the argument of counsel for the respondent, he does not contend in the first place that there was such an implied term, but concedes that, even if the respondent did submit the name of his prospective purchaser, the appellant could deal independently itself or knowingly through others with such prospective purchaser, but at its and not the respondent's risk, that is, at the risk of having to pay commission to the respondent, if it sold to such prospective purchaser and the respondent was the effective cause of such sale.

In his factum counsel for the respondent says:

> The defendant did not negotiate this sale to Pacific Mills in the sense of the term as used in the correspondence. All it did was step in and complete the negotiations originated by the plaintiff, thereby exercising the right

always expressly reserved to itself, of determining the final price, terms and conditions of sale. . . .

. . . the defendant, in closing the deal behind the plaintiff's back was assisting the plaintiff by exercising the right at all times reserved to itself, ...

It seems clear to me that, whatever his alternative position may be, the original position of counsel for the respondent is that, in a case where the name had been submitted by the respondent, the appellant had the right at all times to complete the negotiations originated by the respondent and sell to the prospective purchaser of the respondent, but in such case the appellant could not, by completing the negotiations, avoid liability for payment of a commission to the respondent, but would have to pay same if, as the learned trial judge found, the respondent's efforts were the effective cause of bringing about the sale. I think however that the respondent cannot recover a commission as such unless he shows that the conditions of the written bargain have been fulfilled. In *Howard, Houlder and Partners* v. *Manx Isles S.S. Co.* (1922), 92 L.J.K.B. 233, McCardie, J. said in part as follows at p. 235:

It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money and skill.

In *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper, supra,* Viscount Simon, L.C. (110 L.J.K.B. at p. 136; [1941] 1 All E.R. at p. 39) says:

The owner is offering to the agent a reward if the agent's activity helps to bring about an actual sale, but that is no reason why the owner should not remain free to sell his property through other channels. The agent necessarily incurs certain risks, for example, the risk that his nominee cannot find the purchase price, or will not consent to terms reasonably proposed to be inserted in the contract of sale. I think, upon the true construction of the express contract in this case, the agent also takes the risk of the owner not being willing to conclude the bargain with the agent's nominee.

And 110 L.J.K.B. at p. 137; [1941] 1 All E.R. at p. 41 he further says:

The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him.

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In the same case Lord Russell of Killowen said (110 L.J.K.B. at p. 141; [1941] 1 All E.R. at pp. 46-47):

> If according to the true construction of the contract the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is *debitum in præsenti* even though only *solvendum in futuro*), then no act or omission by the principal or anyone else can deprive the agent of that right; . . .

In the same case Lord Wright said (110 L.J.K.B. at p. 145; [1941] 1 All E.R. at pp. 51-52):

> There is nothing unusual in an agreement that commission is to be payable out of the purchase price when received by the vendors. But the expression used in the letters, "on completion of the sale," is, I imagine, the more normal formula, and was obviously in this case chosen by the parties as the precise expression of their agreement. The two expressions may be for practical purposes the same, though not technically identical. I shall, however, treat the agreement here as being for payment on completion of the sale. In any event the agreement contained not merely the stipulation of a point of time at which, but the expression of a condition on which, the payment was to become due. The respondent had in pursuance of his undertaking introduced the prospective or potential purchaser. Substantially the consideration emanating from him had been executed. But the reciprocal consideration on the part of the appellant companies was in the future; their promise was only to pay on completion of the sale, and thus the promise only took effect on the happening of that event. I think all the Courts below have accepted this construction of the contract.

In the *Luxor* case the sale was not completed but in the present case it was and the sum of $400,000 has already been paid to the appellant by the Pacific Mills Limited for the said Bonanza Lake tract under the agreement for sale. I pause here to note that the appellant has already paid another party, *viz.*, Mr. Ernest G. Swigert, commission at the rate of 5 per cent. on said sum. The question still remains, however, as to whether commission is payable by the appellant to the respondent. This depends upon what the contract was and whether the conditions thereof were fulfilled. Counsel for the appellant submits that one of the conditions was that the sale should be negotiated by the respondent in the sense already indicated, and that the sale was so negotiated by Swigert and not by the respondent. As I have already intimated, the whole of the correspondence should be considered, and I have considered it all, but propose to set out only a portion thereof as follows:

On September 7th, 1939, the respondent had written the

appellant referring to the Bonanza Lake tract, and went on to say:

. . . I was wondering if you have any negotiations on for this Bonanza Lake tract and whether or not you have any control of a portion of the waterfront for booming ground which would be necessary for a logging operation on your property if logged separately from the main Nimpkish River Valley which also comes out to Beaver Cove. . . .

This is just a general letter to report on these various points concerning which I have written you several times during the past few months. We anticipate a possible good market for cedar and hemlock, but for the time being the fir log market is pretty flat on account of bad shipping conditions.

On September 27th, 1939, the appellant, after dealing with the Bonanza Lake tract, wrote the respondent as follows:

. . . I appreciate very much your efforts to keep me posted on the situation out there and hope you will continue to let me know of any new developments that may occur.

On October 4th, 1939, the respondent wrote a long letter to the appellant reporting in regard to the Bonanza tract and the area immediately surrounding, the last paragraph reading as follows:

. . . This is resulting in a stronger demand for hemlock and balsam logs which have been more or less a drug on the market for the past 3 or 4 years. It is quite possible that some activity in the direction of Beaver Cove would develop within the coming year which might bring your Bonanza Lake tract into the operating picture.

I will keep you advised of anything which may appear to be of interest.

On November 22nd, 1939, the respondent wrote the appellant as follows:

The prospect I have in mind at the moment may be a good one for either the Tom Brown Lake tract or the Bonanza Lake tract. I enclose letter from Bonney of Pacific Mills Limited which will indicate to you that he is interested to look into a pulpwood timber property. . . .

I think there is a fair chance he will be interested in the Tom Brown Lake tract and possibly as good a chance that he will be interested in the Bonanza Lake tract. My thought was to submit both of them by letter if you approve of such procedure, and if his serious attention is obtained we can get down to final negotiation when Bonney comes to Vancouver in January.

I presume you will make a price on the Bonanza Lake tract somewhat in line with the price you gave me for Milburn on the Tom Brown Lake tract.

. . . . .

Please advise if you approve my following the line of procedure suggested in this letter and, if so, I will go ahead and see what we can do with Bonney on one or both of the tracts and have Milburn as a possibility in reserve for the Tom Brown Lake tract as well as Bloedel, Stewart & Welch Limited.

This letter was replied to by letter from the appellant to the respondent under date of November 29th, 1939, as follows:

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I return the letter of Pacific Mills Limited which you sent me. This looks like a real prospect and we, of course, want to include the Bonanza Lake tract in our negotiations.

At this stage I do not think it is necessary to attempt any definite price on Bonanza Lake beyond figuring that it is worth approximately twice what the Tom Brown Lake tract is. For your information, we had the Bonanza Lake tract sold to International Paper Company for $750,000, but, as you know, their negotiations with the pulp mill broke down and the deal never went through.

On November 28th, 1939, the respondent wrote the appellant in part as follows: [already set out in the judgment of MCDONALD, C.J.B.C.].

The appellant replied to this letter by letter dated December 4th, 1939, reading in part as follows: [already set out in the judgment of MCDONALD, C.J.B.C.].

In interpreting the correspondence certain principles ought to be applied: see *A. R. Williams Machinery Co. Ltd.* v. *Moore,* [1926] S.C.R. 692, where Newcombe, J., delivering the judgment of the majority of the Court, said in part, at p. 705, as follows:

> . . . In order to interpret the correspondence we must look to the state of the facts and circumstances as known to and affecting the parties at the time. As said by Blackburn, J. in *Foxkes* v. *Manchester and London Life Assurance and Loan Association* (1863), 3 B. & S., 917, at p. 929, "the language used by one party is to be construed in the sense in which it would be reasonably understood by the other."
>
> And Lord Watson said in *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, at p. 353,
>
> "I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract."

In *Ford* v. *Beech* (1848), 11 Q.B. 852, Parke, B. at p. 866, says in part as follows:

> In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.

In *Dufort* v. *Dufresne,* [1923] S.C.R. 126, Anglin, J. at pp. 132-3 says:

> . . . , I find enough doubt as to the meaning of the parties to the latter agreement to bring it within the purview of Art. 1013 C.C. I know of no better means of solving that doubt than the conduct of the parties

themselves in so far as it throws light on the interpretation they have placed upon their contractual rights.

In seeking to apply the principles of the above-named cases I note that it is apparent from the correspondence that the appellant never at any time fixed a definite price or named the conditions upon which it would sell or close a deal. At no time was the respondent ever put in a position where he could quote definite prices, terms or conditions to any would-be purchaser. It would seem to me then that according to the correspondence the final completion of the negotiations with respect to price, terms and conditions was expressly reserved by the appellant for its own determination as the negotiations proceeded, and that the submission of counsel for the appellant that under the contract the respondent in order to be entitled to his commission was under obligation personally to conduct and carry through a sale to completion, is contrary to the position taken by the appellant throughout the whole correspondence.

In *Toulmin* v. *Millar* (1887), 58 L.T. 96, at p. 97 Lord Watson said:

> When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations.

In the present case it seems to me that the approximate price suggested in the letter of November 29th, 1939, from the appellant was merely given as the basis of future negotiations, leaving the actual price to be settled in the course of negotiations by the appellant itself, and that this is a case of general employment in the sense that the expression is used by Lord Watson in the *Toulmin* case. The respondent was a broker for the appellant employed to find and make known to the appellant a competent purchaser who would negotiate with the appellant and buy on appellant's terms. According to the contract, as I interpret it, the respondent would be entitled to his commission should the property be eventually sold to the purchaser found and made

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known to the appellant by the respondent if the respondent was the effective cause of the sale and negotiated the same in this sense.

I have also to add that, though in interpreting the correspondence between the parties I do not rely upon the correspondence between Mr. Swigert and Mr. Cargill, my view of what the parties intended as heretobefore indicated is confirmed by the position taken by Cargill in his letter of December 3rd, 1940, to Mr. Swigert, reading in part as follows:

> In line with our conversation today, this letter is to serve as your authority for entering into negotiations with a party or parties at the present time unnamed for the purchase of our Bonanza Lake timber tract. It is our understanding that if and when negotiations develop to a point where a discussion of the terms is necessary, you are to submit the name of the principal to us and we, in turn, are to guarantee you as commission five per cent. of any sale made to these parties.

See also the fourth paragraph of Mr. Swigert's letter of January 2nd, 1941, to Mr. Cargill, in which he says:

> I did not discuss any price or terms with Mr. Denman for, as I have told you, I feel that actual negotiations are better carried on between principals rather than through an intermediary.

and Mr. Cargill's reply of January 9th, 1941.

I now come to consider whether or not the conditions were fulfilled upon which commission was payable to the respondent. In this connection I have first to say that there was evidence upon which the learned trial judge could find, and I am convinced that he was right in finding the following facts, namely: 1. That the Pacific Mills Limited, the purchaser of the Bonanza Lake tract, first learned who the owners were and that the property was for sale through the respondent. 2. That the appellant first learned of the activities of the Pacific Mills Limited in the area of the Bonanza tract, and that the Pacific Mills Limited was a prospective purchaser through the respondent. 3. That the respondent did have actual negotiations with the purchaser. 4. That the respondent's efforts were the effective cause of bringing about the sale to Pacific Mills Limited.

My conclusion on this question is that, according to the true construction of the contract between the parties and the finding of facts as aforesaid, the conditions had been fulfilled, the consideration required from the respondent under the contract had

been substantially executed by him, the event had happened, upon the happening of which the respondent acquired a vested right to the commission, and no act or omission of the appellant or anyone else could deprive him of that right. See the *Luxor* case, *supra,* and also the following British Columbia cases, in which many of the cases referred to in the argument before us were discussed, namely: *Prentice* v. *Merrick* (1917), 24 B.C. 432; *Turner Meakin & Co.* v. *Field* (1923), 33 B.C. 56 and *Bunting* v. *Hovland* (1924), *ib.* 291. Reference might also be made to *Campbell* v. *National Trust Co. Ltd.,* [1931] 1 W.W.R. 465.

Counsel for the appellant, however, submitted that in any event the respondent is not entitled to payment of commission of 5 per cent. on the payment of $400,000 in view of the clause in the agreement reading as follows:

> Whenever, on the 30th day of either of the months of June or December in each year during the continuance of this agreement, the said account shows a net charge or debit against the purchaser for timber cut hereunder, after giving credit for the said sum of four hundred thousand ($400,000.00) dollars advance stumpage as aforesaid, the purchaser shall pay the amount of such charge or debit to the vendor at Minneapolis, Minnesota, on the 15th day of the month next following. If upon full and complete performance of this agreement by the purchaser, said account shows a net credit in favour of the purchaser, the vendor shall within thirty (30) days after such full and complete performance by the purchaser, pay to the purchaser the amount of such net credit in Canadian funds. None of the amounts entered in said account, either in favour of or against either party hereto, whether or not resulting in net credits to or debits against either party, shall bear interest.

Reference should, however, be made to the evidence of Mr. Denman reading as follows:

> What are the prospects of any refund being given to you on that? I don't think there is any prospect. I do not think so. We would not have made that payment if we thought it was in that category.
>
> It would be a poor deal for the company if there was a refund? That is right.

In answer to interrogatories Mr. Cargill said:

> What commission, if any, has been paid to Swigert up to date? Twenty thousand dollars in Canadian funds.

On this phase of the matter I have to say that I agree with the submission of counsel on behalf of the respondent that upon the evidence the respondent had made out a *prima facie* case for the payment to him by the appellant of the commission of $20,000,

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which was not rebutted by any evidence given on behalf of the appellant.

I would therefore dismiss the appeal. An application was made before us by counsel for the respondent to amend his pleadings. As I think the respondent is entitled to hold the judgment in his favour on the pleadings as they stand, it may not be necessary for me to express an opinion on the application, but, in any event, I would say that I would refuse the application.

O'HALLORAN, J.A.: Subsection (2) of section 25 of the Court of Appeal Act was enacted following the majority judgment in *Skelding* v. *Daly*. *Smith v. Stubbert* (1941), 57 B.C. 109. The object of that amendment as its language discloses and perusal of our judgments in that case confirms, was to provide that if the Court as constituted in any appeal is deprived of the statutory quorum, because one of the judges who has heard an appeal dies or is incapacitated from giving his opinion, the remaining judges, even if they do not form a statutory quorum, shall be deemed to constitute the Court for delivery of judgment.

In my view the amendment does not permit a construction that the opinion of a deceased judge may be used as if he were alive and absent. First of all the amendment does not say so. And secondly if that were its object there would then be no reason to provide therein that the survivors should constitute the Court notwithstanding the lack of the statutory quorum. I cannot see that subsection (1) may be invoked for assistance, as that is clearly confined to the case of a judge absent when judgment is delivered. Death is not absence in the sense the context there requires. Absence there is related to an existing judge and not to one who has died and is no longer a judge, and *cf.* the reasoning applied in *Rex* v. *McLeod* (1940), 57 B.C. 17, a decision upon section 831 of the Code.

The truth is, the Court of Appeal Act does not provide for the acceptance and filing of the valuable opinion of our late and much esteemed brother FISHER. However, that opinion so coincided with my own views that in his lifetime I had adopted its reasoning as the basis of my own judgment, which I shall hand down shortly.

The respondent Lyford interested and introduced the eventual purchaser of the appellant's Bonanza Lake timber limits, but the sale itself was not ultimately completed by him. The learned trial judge upheld Lyford's claim for commission on the ground his initial services and introduction were the real foundation upon which the ultimate purchase rested.

Counsel for the appellant company submitted the agency agreement is contained in two interparty letters of 28th November, 1939, and 4th December, 1939 (letters 45 and 47 of Exhibit 1), and that Lyford's right to a commission is determined by the expression "negotiating a sale" as used therein. He argued that expression in its own setting clearly meant that Lyford was to complete the sale, and since he did not comply with that condition precedent, the learned judge ought to have dismissed the action.

Counsel for the respondent submitted the agreement is not confined to those two letters, but is extracted from the whole of the correspondence, some 147 letters extending from 29th January, 1937, to 19th June, 1942, and particularly the letters anterior to April, 1941, when the sale of the timber was completed. And he urged further it is demonstrably clear from that correspondence, that the expression "negotiate a sale" did not confine itself literally to a sale completed by Lyford, but included a sale to a purchaser Lyford had introduced, no matter by whom the sale was completed, if in fact it was brought about by, or resulted from work Lyford had done.

As I appreciate this case, there are three effective questions for our decision, *viz.*: (1) Is the agency agreement between the parties restricted to the two letters, or ought it to be extracted from the whole of the correspondence; (2) what was that agreement; and (3) did Lyford do all he was required to do under that agreement in order to earn a commission, or in the alternative to obtain damages equivalent to that commission.

Upon the first question, I remain in no doubt that the agreement ought to be extracted from the whole of the correspondence between the parties, and also that the meaning to be ascribed to expressions used in the two letters, is controlled by the whole correspondence. To take two letters out of an extended corres-

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pondence and contend that the rest of the correspondence cannot be looked at to interpret expressions used in the two letters, leads to a rigidity and an inflexibility of construction repugnant to one's sense of fair dealing and completely at variance with any kind of a realistic attitude toward commercial transactions, *cf. A. R. Williams Machinery Co. Ltd.* v. *Moore,* [1926] S.C.R. 692, at p. 705.

The first thing to do in any contract case, is to ascertain the real intention of the parties from a perusal of the agreement. And in this case that means a perusal of the whole correspondence, for that alone can truly reflect the agency agreement. If that is done, we find that the two letters in question contain one of several terms of an agreement disclosed in the correspondence. These two letters may be said to contain the term of the agreement relating to the agent's remuneration. But the meaning of individual letters, let alone the correct appreciation of any term of the agreement, cannot be ascertained with certitude if they are torn from their context by divorcing them from the background of the entire correspondence to which they refer and belong.

In an opening letter of the correspondence (letter 2 of Exhibit 1) the appellant informed the respondent that it would not place any definite price on its timber limits. The appellant never did instruct Lyford what actual figure it would accept, although it did on one occasion (letter 46 of Exhibit 1), give him a broad hint of an approximate figure. The appellant evidently did not think it advisable to disclose to an agent the price it would accept. The marketable value of its timber limits was subject to changeable factors (international and national as well as the local consequences thereof), and the price and terms to a suitable purchaser were certain to give rise to astute bargaining, which the appellant naturally desired to conduct directly with the purchaser.

We then come to the second question for decision, *viz.*, what was the agreement? That term of the agency agreement which stipulated the appellant would not place any definite price on its timber limits, was simply another way of saying that the final stage of negotiation at which the price would be settled and the

sale completed, could not be conducted by Lyford. Hence the term "negotiate a sale" as used by the parties in the two letters in question could not be construed as completing a sale. The term "negotiate a sale" may have several meanings. Standing alone, it is capable of the meaning counsel for the appellant sought to give it, and it is equally capable of the meaning counsel for the respondent ascribed to it. But its meaning in the present case must be governed by the sense in which the parties used "negotiate" and "negotiation" as disclosed by the whole of the correspondence, *cf. River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, Lord Blackburn at p. 763.

The meaning the parties intended is reflected in their language and course of conduct as pictured in their correspondence read in its entirety. The words "negotiate" and "negotiation" are used frequently throughout the extensive correspondence. In not one instance does it appear to me, are the words used in the sense counsel for the appellant desires us to accept. In my judgment they are used throughout in the sense advocated by counsel for the respondent. That is to say "negotiate" and "negotiation" were employed in the sense of acts or discussions tending to induce a prospective purchaser to come forward and bargain with the appellant as to price and terms.

Since Lyford could not tell a prospective purchaser the price and terms, he had to concentrate upon establishing the desirability of the timber limits as a pulp as well as a timber proposition, the convenience of their locality, the existence of an inviting market, and the opportunities for profitable operation, together with other advantageous conditions, and then bring these inducing considerations to the interested attention of some likely buyer who possessed the financial ability to buy, and who was also willing to bargain with the appellant directly as to price and terms. In short, the correspondence as a whole discloses the agency agreement to be, that Lyford was an agent to find a purchaser for the timber limits at a price to be fixed by the appellant when such purchaser came forward, *cf. Stratton* v. *Vachon* (1911), 44 S.C.R. 395, at pp. 397 and 406.

Then as to the third question for decision—did Lyford do all he was required to do under that agency agreement in order to

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earn a commission? The answer must be in the affirmative, for he did find a purchaser who bought the timber limits at a price fixed by the appellant. That is the conclusion reached by the learned trial judge after a careful scrutiny of the oral and documentary evidence. His exhaustive review of the evidence leads inevitably to what I regard as the only conclusion permitted by the testimony, *viz.*, that Lyford's initial services and introduction were the real foundation upon which the ultimate purchase rested. His work and services were an effective cause of the sale which ultimately took place.

The correspondence shows that Lyford had an intimate knowledge of the British Columbia coast timber and pulp situation in its many aspects, and by reason of his insight into these conditions, and his knowledge of the factors which governed the operations of the large timber operators and prospective operators, he knew pretty well who would likely find it desirable to acquire the appellant's Bonanza timber tract and why they would be so motivated. He conveyed that information to the appellant from time to time, and kept it informed generally of the timber and pulp situation to a degree that was essential to the appellant if it were to obtain the best price and terms, when the logical purchaser would appear to discuss with the appellant directly the price and terms upon which it would sell.

Exemplifying their relations in this respect is the frank admission of the vice-president of the appellant company, "I have relied on Mr. Lyford to really keep me posted out here in a general way." To take a few illustrations from the correspondence. On 4th October, 1939, Lyford submitted a reasoned analysis (letter 38 of Exhibit 1) why Crown Zellerbach Corporation could be interested to buy. On 29th November, 1939 (letter 46 of Exhibit 1), the appellant admitted Pacific Mills "looks like a real prospect." On 29th January, 1940 (letter 52 of Exhibit 1), Lyford mentioned the Crown Zellerbach Paper Corporation as the United States parent company of Pacific Mills Limited its Canadian subsidiary, and tells what he had learned of the parent company's likely future policy through its subsidiary in respect to the Bonanza timber.

That letter displays a keen appreciation of the factors operat-

ing on Pacific Mills Limited and a shrewd judgment of the likelihood of sale to that company in the not distant future. Subsequent events verified the accuracy of his vision. On 1st November, 1940 (letter 89 of Exhibit 1), Lyford gave reasons why Pacific Mills ought to develop interest in the Bonanza Lake timber. On 6th December, 1940 (letter 92 of Exhibit 1), Lyford mentions that because of its parent United States company, Pacific Mills Limited, was in a very favourable position to arrange for payment in American funds. This was a term of sale which the appellant had added to the agency agreement, on 3rd December, 1940 (letter 91 of Exhibit 1). It is interesting to note the purchase agreement of 4th April, 1941, called for payment in Canadian funds.

Here as in *Ecclestone* v. *Union Mining and Milling Co. Ltd.* (1932), 45 B.C. 297, it is not material that the sale was consummated by someone else than Lyford. As MACDONALD, C.J.B.C. (then MACDONALD, J.A.), said in that case at p. 302:

> The evidence justified a finding that the relationship of buyer and seller was brought about by the exertions of the respondents. A claim to a commission is not defeated by a sale behind the agent's back to a purchaser introduced by the agent.

The correspondence and evidence to which the learned trial judge refers, show that Lyford laid the ground work which at first interested, and then finally convinced Pacific Mills Limited, of the desirability of acquiring the Bonanza Lake timber. This is illustrated by letters 52, 85, 86, 89, and 92 of Exhibit 1, the more so when read in the light of the oral evidence. But the price and terms had to be fixed not by Lyford but by the appellant itself. That another person stepped in at a final stage and reaped the advantage of the work done by Lyford, did not destroy or nullify the effectiveness of his work in bringing about the relation of buyer and seller which resulted.

I refer to a few only of the authorities cited by counsel as many of them were grounded on facts easily distinguishable from the factual findings of the learned trial judge in this case with which I agree. In my view the House of Lords' decision in *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper* (1940), 110 L.J.K.B. 131 stands on no comparable foundation to the kind of case we have to decide. No sale was completed there, let

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alone a sale completed as here with the very purchaser the agent had introduced. As I read the judgments therein, particularly Lord Wright's speech which was widely discussed during the argument, they were premised upon the fact that no sale had taken place. Certainly there is nothing in *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper* to cast doubt upon the long-accepted principle that the agent who introduces the purchaser is entitled to commission even if the ultimate sale is completed by another, provided his services have in fact brought about or influenced the sale in a determining degree.

The latter principle as stated by Erle, C.J. in *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681, at pp. 683 and 685 was approved in its entirety in *Burchell* v. *Gowrie and Blockhouse Collieries, Lim.* (1910), 80 L.J.P.C. 41, at p. 45. *Vide* also *Bow's Emporium, Limited* v. *A. R. Brett and Company, Limited* (1927), 44 T.L.R. 194, Lord Shaw at pp. 198-9. It is true as counsel for the appellant pointed out, that in *Burchell* v. *Gowrie and Blockhouse Collieries, Lim.* the judgment took the form of damages. But that was because the claim was advanced not for commission, but for damages for breach of contract to pay commission. I think it is clear from a reading of that case, that if the claim had been for commission the judgment would have gone in that form, for after approving the *Green* v. *Bartlett* principle at pp. 45-46, Lord Atkinson makes it quite plain at p. 47 that the plaintiff's acts were "an effective cause of the sale which actually took place." The learned trial judge has found, and in my view correctly, that although Lyford did not complete the ultimate sale, he was an effective cause of the sale which took place.

I am of the view that Lyford did all he was required to do in order to earn a commission under the agency agreement. But alternatively, if it can be said that he did not, then I agree also with the learned trial judge in his alternative finding, that Lyford was prevented by the appellant from doing so. He was prevented because the appellant entered into direct negotiation as it advised him on 16th December, 1940 (letter 93 of Exhibit 1). Whether the appellant knew at the time that the "American firm" to which it referred in that letter, was the Crown Zellerbach Paper

Corporation, the parent company of Pacific Mills Limited the eventual purchaser, is not of any importance, since it did become aware of that fact a few weeks later on or about 4th January, 1941, some three months before the sale was completed, as appears from Exhibit 6, a letter from Swigert to Cargill.

If Lyford's claim is regarded in this alternative form, then he is entitled to damages for breach of the agency agreement equivalent to the commission which he was thus prevented from earning—*cf. Whyte* v. *National Paper Co.* (1915), 51 S.C.R. 162, Anglin, J. (with whom Davies, J. concurred) at pp. 175-6, and also Duff, J. dissenting, but not on this point, at foot of p. 168 and top of p. 169. *Vide* also *Burchell* v. *Gowrie and Blockhouse Collieries, Lim.* (1910), 80 L.J.P.C. 41, at p. 47. As in the latter case a secret sale deprived Lyford of the chance of earning the commission.

During the argument on appeal, counsel for the respondent moved to amend the reply by setting up waiver and estoppel, alleging the appellant had waived or was estopped from relying upon non-performance of the agency agreement, owing to its having directed Lyford not to do anything further under the agency agreement, or having excused him from doing so, or alternatively, because it had taken advantage of or adopted, or accepted what he had done, as sufficient performance of that agency agreement. In the view I take of the case, the amendment sought is not necessary to support the judgment. But if the respondent desires the amendment to uphold the judgment on the additional grounds of waiver and estoppel, then, as I see no prejudice to the appellant by granting the amendment, I would do so, to enable the pleadings to conform to the facts in evidence, *cf. Wilkinson* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 161. I would reserve any question of costs arising thereout.

I would affirm the judgment, and dismiss the appeal.

ROBERTSON, J.A.: All the members of the Court were present at the hearing of this appeal. Judgment was reserved. Our late lamented brother FISHER, J.A., as he expected to be absent from the Province for some time, handed to the Chief Justice his

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opinion in writing, to be read or announced by him in open Court at the delivery of judgment, and then to be left with the registrar. As he died before judgment, the question is whether or not the majority of the Court can deliver judgment and whether or not his opinion should be considered in determining the judgment of the Court.

Originally four judges constituted the Court of Appeal. In 1913 provision was made for a fifth judge. The quorum has been at all times three. Up until 1936 three or more judges might hear an appeal. In that year it was provided that in no case should an even number of judges sit for the hearing of an appeal; so since 1936 either three or five judges must sit to hear an appeal.

Section 25 as it stands today is as follows:

25. (1.) All judgments of the Court of Appeal shall be delivered in open Court. Where judgment has been reserved at the hearing, reasonable notice shall be given to all parties of the time when judgment will be delivered, but it shall not be necessary for all the Judges who have heard the argument in any case to be present at the delivery of judgment, and any Judge who has heard the case and is absent at the delivery of judgment may hand his opinion in writing to any Judge present at the delivery of judgment, to be read or announced in open Court and then to be left with the Registrar of the Court.

(2.) Where one of the Judges who heard the argument in any case dies before judgment is delivered by the Court, without having handed his opinion to any Judge as provided in subsection (1), or by reason of sickness or other cause is incapacitated from giving his opinion in the case, the remaining Judges shall, notwithstanding the provisions of section 11, be deemed to constitute the Court for the purpose of delivering judgment in the case .

Subsection (1) has been the same throughout from the inception of the Court. Subsection (2) was added in 1943, because, no doubt, of the decision of this Court in *Skelding* v. *Daly*. *Smith* v. *Stubbert* (1941), 57 B.C. 109. In that case it appeared that the late Chief Justice MACDONALD and two of the other judges had heard several appeals and reserved judgment. The Chief Justice died. The question was whether or not the two remaining judges, in each appeal, if agreed, could deliver the judgment of the Court. The majority of the Court decided the appeals should be reheard and found it unnecessary therefore to decide the question of jurisdiction. O'HALLORAN, J.A. held there was jurisdiction.

When three judges hear an appeal and reserve judgment, the judgment of the Court must be delivered in open Court, that is, the three judges sit and the presiding judge announces the judgment of the Court, and the opinion of each judge may be announced or read and then left with the registrar. Where one of the three judges is "absent at the delivery of judgment," the remaining two judges may sit and deliver the judgment of the Court, although they do not constitute a quorum of the Court, only, and if, the third judge has handed his opinion in writing to one of the two judges present at the delivery of judgment, to be read or announced in open Court and then to be left with the registrar of the Court. In other words, this subsection (1) dispenses with a quorum where one of the judges has handed in an opinion in the manner and for the purpose mentioned. The reason is obvious because the judgment of the Court is the result of the opinions of the three judges. The Court sits for the purpose of delivering judgment. If all are present it is not necessary that any opinion should be handed to the registrar. The presiding judge may simply say the appeal is allowed or is dismissed.

Subsection (2) was designed to cover the case when it is desired to deliver judgment and there is not a quorum because of the death of a judge, or his incapacity from giving his opinion, in either case no opinion having been given. In such case the remaining two judges are deemed to constitute the Court for the purpose of delivering judgment. If no effect is to be given to these words, *viz.*, "without having handed his opinion to any Judge as provided in subsection (1)," why were they inserted? Obviously, they were put there for a purpose. They were inserted to cover the case where a deceased judge had handed his opinion to another judge as provided in subsection (1), that is, "to be read or announced in open Court and then to be left with the Registrar of the Court." If this is not so, then while two judges would constitute the Court for the purpose of delivering judgment in a case where the deceased judge had died without having handed his opinion to a judge as provided in subsection (1), the same two judges could not constitute the Court for the purpose mentioned where the deceased judge had handed his

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opinion in writing to one of them to be read or announced in open Court and then to be handed to the registrar.

The judgment of a trial judge is delivered as soon as he has completed his judgment and put it in the usual place where letters are mailed or put. See *Attorney-General* v. *Dunlop* (1900), 7 B.C. 312, at p. 314, where MARTIN, J., as he then was, said:

> In the present case when I finally settled, signed, dated, and posted (or its equivalent) my judgment on the 11th of August, I had finally determined the matter so far as I was concerned—in other words I had pronounced judgment on that day, and a party to the action should not be prejudiced by any delay in the registry, the post-office or otherwise. Supposing that after putting that letter in the mailing place in my room I had suddenly dropped dead, could it be said that I had not delivered judgment, and that it could not be acted upon? There can only be one answer to such a question—the judgment had already taken effect.

But in the case of the Court of Appeal the judgment of the Court has to be delivered in open Court: What difference does it make whether a judge is absent or dead or incapacitated if one of his brother judges has his written opinion handed to him for the purpose of being read or announced in open Court, and then to be left with the registrar of the Court? The vital point is that the judge has given his opinion, and that is all that matters. Then the Court is in exactly the same position as it is under subsection (1), that is, there are two judges able to be present, with the written opinion of the deceased judge.

As I have come to the conclusion that upon the wording of section 25 the majority of this Court may deliver judgment, giving full effect to the opinion of FISHER, J.A. and that his opinion should be read and announced in open Court and then left with the registrar, it has not been necessary to consider the point that the right of the majority to give judgment may be inherent in the Court. See *Re Rex* v. *Imperial Tobacco Co.*, [1942] 2 D.L.R. 167, at p. 170.

The facts are fully set out in the reasons for judgment of the learned Chief Justice. The first thing to be considered is: What agreement, if any, there was between the respondent and the appellant.

The business relationship which had existed for a number of

years between the parties is best shown by the evidence of Cargill, vice-president, and, as the Chief Justice says, "directing head" of the appellant, as follows:

> From time to time Mr. Lyford did continue to advise you? Well, Lyford has done that for several years on all the properties. Not only that particular property, but all our other properties I have relied on Mr. Lyford to really keep me posted out here in a general way, and some of it has come in connection with his activities as a broker, and some in connection with his official activities in the American Timber Holders' Association. I remember that very well, and Mr. Lyford, he has been my broker. . . .

During the relevant period the respondent did not meet any of the officers of the appellant. The business was carried on entirely by correspondence. The respondent submits that the agreement is to be found in the correspondence between the parties from the 29th of January, 1937, until the 4th of December, 1939, while the appellant argues that the agreement (if any) contained in the letters of the 28th of November, 1939, respondent to appellant, and, the reply of 4th December, 1939; and, that therefore the Court should not consider any other correspondence.

I am of the opinion that the whole correspondence should be considered, for two reasons: The first is that it is obvious that the respondent's letter of the 28th of November, 1939, was not intended to set out the precise terms of the agreement, but was an attempt (a) to settle the amount of commission he was to be paid in the event of his bringing about a sale and (b) to secure, if possible, an exclusive agency. The appellant's reply of the 4th of December, 1939, covered only these two points. It follows then that the other terms of the agreement must be looked for in the earlier correspondence. The other reason is that the parties differ as to the meaning of the words "negotiating a sale" and "any sale you might negotiate" in the letters of the 28th of November, 1939, and the 4th of December, 1939, respectively. The Judicial Committee in *Bank of New Zealand* v. *Simpson,* [1900] A.C. 182, at p. 188 approved the following statement of the law laid down by Blackburn, J.:

> The general rule seems to be that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected.

With reference to the second reason, *supra,* the words of New-

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combe, J. in delivering the judgment of the Supreme Court of Canada in *A. R. Williams Machinery Co. Ltd.* v. *Moore*, [1926] S.C.R. 692, at p. 705, show what evidence the Court should consider. He said in part as follows:

> In order to interpret the correspondence we must look to the state of the facts and circumstances as known to and affecting the parties at the time. As said by Blackburn, J., in *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1863), 3 B. & S., 917, at p. 929, "the language used by one party is to be construed in the sense in which it would be reasonably understood by the other."
>
> And Lord Watson said in *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, at p. 353,
>
> "I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract."

Again Parke, B. in *Ford* v. *Beech* (1848), 11 Q.B. 852 said at p. 866 in part as follows:

> In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.

It is not alleged that there was "anything peculiar to the words by reason of the custom of the trade." See *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at p. 462. Then what was the agreement? It is clear first of all that the respondent's agency was not exclusive. He was a general agent. It was first submitted that there was no agreement, but merely an offer contained in the letter of the 4th of December, 1939. I do not think this letter was intended as an offer. The parties had been corresponding with each other for a couple of years before. It is clear to me its only purpose was to settle the question of commission and exclusive agency. The appellant submits that the words in dispute mean conducting all the negotiations leading up to the entry into of a binding sale. It is necessary to mention the circumstances surrounding the making of this contract. The respondent lived in Vancouver, B.C. Cargill, who conducted practically all the business in connection with the matter on behalf of the appellant, lived in Minneapolis, in the State of Minnesota, U.S.A., about 1,500 miles away. The timber lands which the respondent was endeavouring to sell consisted of some 25,000 acres of land situate

roughly 200 miles from Vancouver, B.C., near the north-east coast of Vancouver Island. The appellant never gave to the respondent any sale price, except the very general statement contained in the letter of 29th November, 1939, although Cargill knew then that the respondent was corresponding with Bonney of Pacific Mills Limited, and Cargill considered it looked like a "real prospect." One reason for this may have been that the market price for timber was fluctuating and prices were changing.

It seems clear that no one would buy a property of this sort without a thorough investigation, which would be expensive, and before making such investigation would require an option for a long enough period to allow an investigation to be made, and thereafter direct negotiations between the parties.

In the letter of 4th February, 1937, the appellant had promised to protect the respondent "on any sales from offers submitted by you." There was little chance of any offer as no sale price had been fixed. The respondent had told him of his efforts to interest the Pacific Mills Limited and the appellant in his letter of 29th November, 1939, had described this company as a good prospect.

In view of all the circumstances which I have mentioned and the correspondence set out in the reasons of the learned Chief Justice, I think the agreement was that the appellant would pay the respondent a commission of 5 per cent. if he found and introduced to the appellant a person who was able, willing and competent to purchase, and who did purchase, upon terms to be agreed upon between the appellant and such person.

The appellant knew in January, 1940, that the respondent had interested the Pacific Mills Limited and considered it a "*bona-fide* prospect." On the 29th of January, 1940, the respondent wrote the appellant in part as follows:

I had a long talk with Mr. Bonney of Pacific Mills Limited yesterday afternoon after he had returned from a visit to Seattle and Portland where he had been in consultation with his company's people down there. Mr. Don Denman of Seattle and Portland, is the chief man in the Crown-Zellerbach organization in charge of timber lands and logging. Bonney is woods manager for the Pacific Mills Ltd. which as you probably know is the Canadian company, and Bonney's activities with respect to purchasing timber are under Denman's control.

I gather from the report given me by Bonney that the whole organization

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has been actively engaged in expanding their production to meet the recent demand due to war conditions, and have not yet had time to give thorough consideration to any possible purchasing of timber. Bonney does not hesitate to say that he is recommending some substantial additions to the company's holdings in British Columbia, but final decision in such matters does not rest with him, and the general policy is determined with relation to the company's entire Pacific Coast operations rather than to British Columbia alone. For this reason, I believe it will be another month or so before any definite steps can be taken toward dealing with the Bonanza Lake tract, which is the one they will be interested in if they buy any at all. . . .

This is a progress report, and I think we are moving toward a promising development in the right direction.

Cargill replied by letter dated 2nd February, 1940, that he had noted the "contents in your letter of January 29th with great interest" and later by letter dated 19th February, 1940, that he considered the Pacific Mills Limited "a *bona-fide* prospect." On the 3rd of December, 1940, the appellant gave authority to Swigert to enter into negotiations with a party unnamed, for the purchase of the Bonanza timber tract. The respondent wrote the appellant on the 6th of December, 1940, stating he expected to see Bonney, and the appellant replied on the 16th of December, 1940, stating:

We have no objections, however, to your contacting Mr. Bonney providing it can be done with the understanding that those negotiations will in no way interfere with the activities we are entering into direct.

By the end of December, 1940, the appellant knew that Swigert's prospect was Pacific Mills Limited. Cargill should then have told him the property had already been introduced to that company by the respondent, unless he preferred to carry on through Swigert, in which case his company ran the risk of having to pay two commissions. Apparently he did not tell Swigert this, and did not inform the respondent of what was taking place through Swigert.

I agree with the Chief Justice that the appellant was "negotiating with the plaintiff's prospect Pacific Mills Limited" behind the plaintiff's back.

The appellant "relied strongly" upon *Luxor (Eastbourne), Ltd. (in Liquidation)* v. *Cooper* (1940), 110 L.J.K.B. 131. I think that case has no bearing, as in my opinion the plaintiff failed on the express terms of the contract, which were that he was to be paid a commission "upon completion of the sale." The Law Lords held that the sale had never been completed.

In *Walker, Fraser, & Steele* v. *Fraser's Trustees,* [1910] S.C. 222 the facts were that in 1898 Fraser, the owner of the estate of Balfunning, employed Walker, Fraser, & Steele, estate agents, to sell it at the minimum price of £38,000. In 1903 one Scott applied to Walker, Fraser, & Steele for information regarding another estate. In reply Walker, Fraser, & Steele sent particulars not only of this estate, but of other estates, including one called Balfunning. Scott thought well of Balfunning, but considered the price too high, and negotiations ceased. In 1906 Scott applied to Walker, Fraser, & Steele for particulars regarding Balfunning and obtained them, and, although urged by Walker, Fraser, & Steele to make an offer for it, did not do so. In October, 1907, Scott inserted an advertisement in a newspaper for estates of the description he desired. In November, 1907, he received from Fraser, the owner of Balfunning, a letter calling attention to it. Negotiations followed between them which resulted in the sale of Balfunning to Scott at the price of £31,000. Walker, Fraser, & Steele then sued Fraser for payment of commission on the price, and it was held that as their exertions as duly-authorized agents of the seller, did, to a material degree, contribute to the sale of the estate to Scott, they were entitled to their commission.

Lord Dundas delivered an opinion, which was concurred in by the Lord President and Lord Kinnear. What he said is referred to by Lord Shaw in a case in the House of Lords, *Bow's Emporium, Limited* v. *A. R. Brett and Company, Limited* (1927), 44 T.L.R. 194. It was held in that case where the parties are brought together through the efforts of an agent, he is entitled to commission, even where the actual purchase is ultimately effected through the intervention of another agent, provided that his services were really instrumental in bringing about the transaction. Lord Shaw, with whom Viscount Dunedin agreed, said at pp. 198-9 as follows:

> In Scotland, later decisions appear to me to have come exactly into line with the acknowledged law of England. I refer to *Walker, Donald, & Co.* v. *Birrell, Stenhouse & Co.* [(1883)] (11 R., 369), and to *Kennedy* v. *Glass* [(1890)] (17 R., 1085, at p. 1087)—and in particular to the judgment of Lord Adam, in which the common sense of the matter is put as a principle of law:

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"It is a known principle that if one man uses another for the purpose and with the effect of doing business, the ordinary rule is that the person employed is entitled to some remuneration."

This was a case in which remuneration was granted to an agent who was not a professional broker. I desire, however, with your Lordships' leave, to adopt the judgment of Lord Dundas in *Walker, Fraser, & Steele* v. *Fraser's Trustees* ([1910] S.C. 222, at p. 229). "Shortly put," says Lord Dundas, "I think the test is whether or not the ultimate sale of Balfunning was brought about, or materially contributed to, by actions of the pursuers, as authorized agents of the defenders. Actual introduction of the purchaser to the seller is not a necessary element in a case of this sort; it is enough if the agents introduce the purchaser to the estate, and by their efforts contribute in a substantial degree to the sale."

It comes in the end back exactly to the line which has been so long adopted in the law of England, which is thus expressed by Chief Justice Erle in *Green* v. *Bartlett* (14 C.B., N.S. 681, at p. 685):

"The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated; and it has usually been decided, that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him."

There is no difference whatsoever, as it appears to me, between the law thus laid down by Chief Justice Erle and by Lord Dundas. (1) When it is proved—and it must, of course, be proved—that parties to a transaction are brought together, not necessarily personally but in the relation of buyer and seller through the agency of an intermediary employed for the purpose, the law simply is that if a transaction ensues, then that intermediary is entitled to his reward as such agent; (2) nor is he disentitled thereto because delays have occurred, unless the continuity between the original relation brought about by the agent and the ultimate transaction has been not merely dislocated or postponed but broken; and (3), finally, the introduction by one of the parties to a transaction of another agent or go-between does not deprive the original agent of his legal rights, and he cannot thus be defeated therein.

The head-note in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited,* [1910] A.C. 614 reads:

In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected:—

Held, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.

This case was followed in *Stratton* v. *Vachon* (1911), 44 S.C.R. 395. In that case the facts were that the owner of a property instructed the plaintiff to secure a purchaser for some of his lands. The plaintiff introduced a prospective purchaser named Moore, who associated himself with other persons unknown to the

plaintiff, to carry out the purchase. The sale was made to Moore's associates on altered terms, Moore having retired from the transaction. The plaintiff was held entitled to his commission. Davis, J. said at p. 401 in part as follows:

> The knowledge on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, but the fact whether the agent's acts have really been the effective cause of the sale, and if the agent's acts have brought a person or persons into relation with his principal as an intending purchaser, and the sale is effected, the agent has done what he contracted to do and is entitled to be paid.

In the case at Bar the appellant knew by the end of December, 1940, before any direct dealings with the Pacific Mills Limited, that Swigert's proposed purchaser was the Pacific Mills Limited. Murphy, J. said in *Bunting* v. *Hovland* (1923-24), 33 B.C. 291, at p. 293:

> The law is clear. It is laid down in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), 80 L.J.P.C. 41 at pp. 45 and 46. If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him. The plaintiff must show that some act of his was the *causa causans* of the sale or was the efficient cause of the sale.

The appeal from his judgment was dismissed. In the case of *Prentice* v. *Merrick* (1917), 24 B.C. 432 our Court of Appeal followed *Burchell* v. *Gowrie and Blockhouse Collieries, Limited, supra.*

I also refer to the able judgment of FISHER, J., as he then was, in *Graves* v. *McLean,* [1931] 2 W.W.R. 895.

The learned Chief Justice found as a fact that the respondent's efforts were the effective cause of bringing about the sale. I agree with him.

The appellant submitted that in any event the respondent was not entitled to payment of a commission of 5 per cent. on the sale price of $400,000 because of a clause in the agreement, which provided for a refund of part of the $400,000 in certain circumstances. On this point it is only necessary to refer to the evidence of Mr. Denman of the Pacific Mills Limited as follows:

> What are the prospects of any refund being given to you on that? I don't think there is any prospect. I do not think so. We would not have made that payment if we thought it was in that category.
>
> It would be a poor deal for the company if there was a refund? That is right.

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Further than this the appellant had no hesitation in paying, as it has done, the full commission of $20,000 to Swigert. If the appellant's submission in this connection were given effect to it would mean that the respondent might have to wait 15 years for his commission and in the end might not be able to recover it should the appellant fall into financial difficulties. I think the appeal should be dismissed.

In view of this it may not be necessary to deal with respondent's application, made on the hearing of the appeal, to amend his pleadings. The amendment may not be necessary. If it is, I feel that it should not be allowed at this stage as appellant's counsel said he would be prejudiced because he would have called evidence to meet the proposed amendment if it had been made at the trial.

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

Solicitors for appellant: *Lawson & Davis.*
Solicitors for respondent: *MacInnes & Arnold.*

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Criminal law—Seizure of liquor—Proceeding by accused under section 81 of Government Liquor Act—Subsequent charge of keeping liquor for sale—Conviction—Appeal—R.S.B.C. 1936, Cap. 160, Secs. 79, 81 and 96.

The appellant, who lived at Alert Bay, purchased about 40 bottles of liquor in a Government liquor store at Vancouver for herself and some friends. She arrived at Alert Bay with the liquor in four suit-cases on January 16th, 1943. The suit-cases were taken to an hotel which was operated by herself and her husband and placed in a suite which was occupied by herself and her husband. The hotel was owned by her daughter. Shortly after the arrival of the liquor at the hotel and on the same day, the police arrived on the scene with a search warrant and took possession of the liquor. On the next day the appellant appeared before A. M. Wastell, Esquire, stipendiary magistrate, and made claim for the liquor under section 81 of the Government Liquor Act. The magistrate set a date and after due notice to the Liquor Control Board, as required by section 81 (4) of said Act, he heard the parties and on March 9th gave his decision in favour of the appellant. In the meantime the police laid

an information before magistrate F. Earl Anfield, Esquire, who on February 20th, 1943, convicted the appellant of keeping liquor for sale. The appellant appealed to the county court judge who dismissed the appeal.

Held, on appeal, reversing the decision of HANNA, Co. J. (ROBERTSON, J.A. dissenting), that the appeal be allowed.

Per MCDONALD, C.J.B.C.: That magistrate Wastell became seized of the matter on January 17th when the appellant appeared before him and he remained seized of it until he gave his decision.

Per O'HALLORAN, J.A.: Six witnesses testified before police magistrate Wastell that appellant bought the liquor at their request and the magistrate made an order that the liquor be returned, from which no appeal was taken. That order, when read with the testimony of the defence witnesses, confirms the nature of the appellant's possession of the liquor. The defence evidence excluded any inference pointing to the commission of the offence. The balance of probability was irresistibly in the appellant's favour and accordingly she has met the *onus* imposed upon her by section 96 of said Act.

APPEAL by the accused from her conviction by HANNA, Co. J. on the 14th of September, 1943, on a charge that on the 16th of January, 1943, at Alert Bay in the county of Nanaimo, British Columbia, Wilhelmina Lawson unlawfully did keep liquor for sale. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 14th of December, 1943, before MCDONALD, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

Castillou, K.C., for appellant: The learned judge misdirected himself. There is no evidence whatever that she was keeping liquor for sale. She got the liquor from the liquor store in Vancouver. The judge saying she put the liquor in the room is contrary to evidence. When the liquor was seized, she immediately proceeded under section 81 of the Government Liquor Act. Her daughter was the owner of the premises. On the question of husband and wife see *Rex* v. *Martha Hughes* (1813), 2 Lewin, C.C. 229; *The Queen* v. *Hannah Banks* (1845), 1 Cox, C.C. 238; *Rex* v. *Anderson* (1942), 58 B.C. 88; *Rex* v. *Cramer* (1936), 51 B.C. 310; *Rex* v. *Pais* (1941), 56 B.C. 232; *Rex* v. *Hubin* (1926), 46 Can. C.C. 202. She complained to the magistrate on January 17th, and the proceedings in relation to her conviction started 13 days later: see Phipson on Evidence, 8th Ed., 411.

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There was error in not allowing in the transcript of the first proceeding before magistrate A. M. Wastell.

J. A. Macdonald, for the Crown: Wastell's judgment was without jurisdiction. The hearing before magistrate Anfield was prior to his: see Daly's Criminal Procedure, 3rd Ed., 162; *The King* v. *Sainsbury* (1791), 4 Term Rep. 451, at p. 456. The magistrate must act in his official capacity. Any preliminaries are of no effect: see *The King* v. *Wright,* [1915] W.N. 269; *Babiuk* v. *Anderson* (1929), 52 Can. C.C. 23. She has full control over the liquor.

Castillou, in reply: She went to the magistrate and fixed a date for hearing and then notified the Board.

Cur. adv. vult.

11th January, 1944.

MCDONALD, C.J.B.C.: On January 16th, 1943, the appellant arrived at Alert Bay, in the county of Nanaimo, with several suit-cases containing liquor, which she, as agent for her husband and others, had purchased at the Government liquor store in Vancouver. The suit-cases were taken from the dock and placed in a suite occupied by the appellant and her husband in an hotel operated by the husband with the assistance of his wife. Shortly after the suit-cases arrived at the suite the police were on the scene with a search warrant. They took possession of the liquor forthwith.

Next day appellant appeared before A. M. Wastell, Esquire, a stipendiary magistrate of and for the county of Nanaimo, and made a claim to the liquor in question, pursuant to section 81 of the Government Liquor Act. In these proceedings she claimed to be legally entitled to the possession of the said liquor, and magistrate Wastell took the proper proceedings, set a date, and, after due notice to the Liquor Control Board as required by section 81 (4), heard the parties. He took evidence at considerable length and, acting judicially, decided the issue in favour of the appellant, his decision being dated March 9th, 1943. A perusal of the evidence and argument before him makes it clear that the issues were identical with those presently to be mentioned.

In the meantime, while the above proceedings were in progress

before magistrate Wastell, the police laid an information before another stipendiary magistrate of the county, namely, F. Earl Anfield, Esquire. Both proceedings appear to have run along at the same time, but Mr. Anfield managed to reach a decision first. He convicted the appellant on the 20th of February, 1943, of unlawfully keeping the liquor for sale contrary to the provisions of the same statute.

If the matter stopped here I think it is clear that the judgment of the magistrate who first became seized of the matters in issue would govern. However, the matter went further. The appellant appealed to the county court judge from the decision of magistrate Anfield.

On the hearing before the county court judge the appellant tendered a copy of the proceedings before, and the decision of, magistrate Wastell. The judge refused to consider these. In my opinion he was wrong. It is perfectly plain from the appeal book that the county court judge was proceeding to decide a case which, as between the Crown and the prisoner (the appellant), had been already decided, and this he had no right to do—subject to which I am now about to say: Mr. *Macdonald,* appearing for the Crown, quite frankly admits that, if magistrate Wastell became seized of the "claim" made by the appellant under section 81, before the information was laid before magistrate Anfield, then the county court judge was bound to take cognizance of magistrate Wastell's decision, since the judge was trying the case *de novo.* As I view the case it is clear that a given fact, *viz.,* the question whether the appellant possessed the liquor illegally, had been already litigated between the Crown and herself and the judgment therein was conclusive. See Phipson on Evidence, 8th Ed., 411, citing *The Queen* v. *Willshire* (1881), 6 Q.B.D. 366.

Counsel, however, takes issue on one ground only, *viz.,* that, so far as appears on the record, magistrate Wastell did not become seized of the appellant's claim on 17th January when she appeared before him and (as she says) made a complaint. Unfortunately, the evidence is not very satisfactory, but my conclusion is that magistrate Wastell did become seized of the matter on that day and remained seized of it until he gave his decision.

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We have no evidence that on 17th January he actually fixed a date for the hearing, but the only inference I can draw is that he did.

Section 81 must be read reasonably, and I see no room for the suggestion made by the Crown that when the appellant made her complaint she made it unofficially and with no effect. If this was so it was quite easy for the Crown to have brought it out in cross-examination or otherwise. The only inference I can draw from the evidence is as I have stated.

In my opinion therefore the appeal should be allowed and the conviction now before us should be set aside.

In view of the conclusion which I have reached it is not necessary to deal with the other matters argued before us.

I quite appreciate that the situation is far from satisfactory, but if the matter be in doubt, it does not appear to be the fault of the appellant, and I think I should give her the benefit of any such doubt.

O'HALLORAN, J.A.: The appellant, who is a married woman, appeals from her conviction by HANNA, Co. J. at Cumberland on 14th September last of keeping liquor for sale contrary to the Government Liquor Act, Cap. 160, R.S.B.C. 1936, in the private apartment (a living-room, one bed-room and a bath) in which she lived with her husband in the Bay Hotel at Alert Bay, which he managed and operated with her help. It appears the Lawsons have resided at Alert Bay for more than 20 years.

In January, 1943, when the appellant was about to go to Vancouver for a few days, a number of Alert Bay people asked her to buy liquor for them at the Government liquor stores there. They gave her authorizations for that purpose. Alert Bay is an isolated place and there is no liquor store there. The Bay Hotel has not a beer licence. When the appellant returned from Vancouver on 16th January she brought with her the liquor purchased under her own and her husband's permits, and the balance for friends under their permits.

It consisted in all of some 24 bottles of rum, gin and Scotch, 12 bottles of wine and three bottles of beer in several suit-cases. Six or eight bottles in addition had broken in a suit-case, and the

liquor saturating through it, was noticed by a Provincial police constable at the wharf when the ship docked at Alert Bay in the early evening. Shortly after she arrived home in the hotel, three police officers came with a search warrant. The liquor she had brought from Vancouver was found in the suit-cases in the private rooms in which the Lawsons lived The rooms were locked at the time of the arrival of the police. The police seized the liquor together with some 48 glasses, 30 corks, some money and papers and five used glasses.

The appellant complained of the seizure to magistrate Wastell the next day. She consulted a lawyer, and about the 3rd of February proceedings on behalf of her husband and herself and her friends were commenced under section 81 of the Government Liquor Act to recover the liquor and things seized by the police. In the meantime, she was charged on 29th January before magistrate Anfield with keeping liquor for sale, and was convicted by him of that offence on 20th February. The hearing under section 81 was opened on 12th February and adjourned to 16th February when it was heard on that day and the next. Magistrate Wastell reserved judgment until 9th March when she and her husband and five of her friends who had appeared before him obtained an order for the return of their liquor. The balance of the liquor claimed by the persons who did not appear before him was ordered to be forfeited.

On the appeal from the conviction before HANNA, Co. J. *de novo* at Cumberland, the learned county court judge held that "in spite of the fact that he (the husband) may have been the licensee," the hotel was "actually operated" by the husband and wife, and held also the wife was in possession and control of the private apartment where the liquor was found. The husband and wife both testified. The learned judge relying on section 95 of the Government Liquor Act, drew the inference from the above recited quantity of liquor and from the number of glasses and corks in the rooms, that the wife was keeping the liquor for sale. The learned county court judge did not refer to the evidence of three witnesses (two hotel employees and one resident at the hotel) who testified the liquor they had asked the appellant to buy for them in Vancouver was included in that quantity. Nor

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did he refer to the order of magistrate Wastell ordering the liquor seized to be returned to the appellant and her husband and five of their friends (including the above three witnesses), who had applied therefor under section 81 of the Government Liquor Act.

When a husband and wife live together, it is a presumption of law that the husband is in possession and control of the premises in which they reside, *cf. Rex* v. *Hand* (1931), 55 Can. C.C. 65, *Rex* v. *Cramer* (1936), 51 B.C. 310, and *Rex* v. *Anderson* (1942), 58 B.C. 88. That is a rebuttable presumption of course. But in its effort to do so, the prosecution in a criminal case such as this is, does not escape the *onus* which rests upon it to the very end of the case, of proving the wife is in possession and control, *cf. Woolmington* v. *Director of Public Prosecutions* (1935), 104 L.J.K.B. 433 (H.L.), at pp. 439-40. To satisfy that measure of proof, the prosecution must advance evidence which does more than establish the balance of probabilities which suffices in a civil case. That proof must compel practical certainty—*vide* Pollock, C.B. in *Reg.* v. *Kohl* (1865) mentioned in 4 F. & F. 930 (foot-note); that is to say it must consist of evidence which is not merely consistent with the wife's possession and control, but necessarily excludes any other reasonable hypothesis.

In this case the presumption of law that the husband was in possession and control of the Bay Hotel was not rebutted by evidence carrying that degree of certainty. The husband testified he was the licensee of the hotel and managed and operated it. The evidence which the learned judge cites to support his finding that "in spite of the fact that he [the husband] may have been the licensee," the hotel was "actually operated" by the husband and wife, consists of an answer in cross-examination of two women who worked in the hotel, that they were employed by Mrs. Lawson, and also an answer in cross-examination by a lodger in the hotel, that it was "run" by Mr. and Mrs. Lawson. That evidence when read with all the testimony could equally support a conclusion that the wife was under the supervision and control of the husband. At most it went to the balance of probabilities. It falls short of that practical certainty essential in a criminal prosecution to rebut the presumption of the husband's possession and control of the premises.

Nor was the presumption of law that the husband was in possession and control of their private apartment in the hotel rebutted by evidence of the kind I have described, *viz.*, extending to practical certainty as distinguished from greater probability. The learned judge's finding that the wife was in possession and control of the family rooms is based largely upon a finding that when the wife arrived home from Vancouver,

> the husband was given the key to the rooms and the grip by the accused, and afterwards she went to him under the direction of the police apparently, and asked him for those keys. He gave them to her.

And from this he concluded:

> If he had control of these rooms, and had control of the articles in the rooms, it would seem natural to me that he would not have given her the keys and would have asserted his rights to control. This he did not see fit to do, and I think that those facts eliminate the supposition that the wife is under the control of the husband.

That conclusion is vulnerable in two respects. In the first place, no inference against the appellant can be drawn from the fact the husband did not refuse to hand over the key of the rooms to enable the police officers to conduct their search. That is so, because the search warrant (Exhibit 2) authorized the police to search the Bay Hotel, which was described therein as "under the control of Mr. and Mrs. William Lawson." If he had refused, he would have exposed himself to a charge of obstructing the search, under section 77 (2) of the Government Liquor Act. In the second place, while there is evidence that when she returned home, the appellant gave her husband the key of the suit-case which contained their own liquor, I fail to find evidence that she then also gave him the key to their rooms. If there had been, it would lead no doubt to a strong inference that the husband was not admitted to those rooms without her authority. Not only was there no such evidence, but there was evidence to the contrary, and also other evidence that those rooms were his home, and that he was in actual occupation thereof while his wife was in Vancouver.

As the prosecution failed to rebut the legal presumption that the husband was in control of the family rooms, it must follow that any inferences permitted under section 95 of the Government Liquor Act, which might point to keeping for sale because of the quantity of liquor, number of glasses and corks and five

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unused glasses found in the rooms, could not be directed against the wife, but were permissible against the husband only, *cf. Rex* v. *Cramer* (1936), 51 B.C. 310. But he was not charged with any offence. It is not necessary therefore to examine the legal effect of the explanations given by the husband concerning the number of glasses and corks and the presence of the five unused glasses. It would also appear from *Rex* v. *Hand* and *Rex* v. *Cramer, supra,* that in the circumstances, if the husband and wife had been charged jointly with keeping liquor for sale, there is grave doubt that the charge against the wife could have been sustained.

There remains for consideration the effect of section 96 of the Government Liquor Act, which reads:

> If, on the prosecution of any person charged with committing an offence against this Act, in . . . keeping for sale . . . , *prima facie* proof is given that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted, then, unless such person proves that he did not commit the offence with which he is so charged, he may be convicted of the offence.

The first question arising, is there "*prima facie* proof" that the wife was in "possession, charge or control" of the liquor? The use of the inartistic expression "*prima facie* proof" in a criminal prosecution begets perplexity rather than clarity. But I am prepared to assume for present purposes at least, that it is evidence of a nature which, if not negatived by a presumption of law, would call upon the accused for an explanation, *cf. Rex* v. *Lemaire* (1920), 57 D.L.R. 631, at p. 633.

So regarded, section 96 cannot apply here (except perhaps in a respect later mentioned). For as it is a presumption of law that the husband was in control of the rooms, and therefore in "possession charge or control" of the contents thereof, and that presumption has not been rebutted, there is no ground upon which the wife could be called on for an explanation. Such possession or control as the wife had, was at best jointly with and under the direction of the husband, *cf. Rex* v. *Parker* (1941), 57 B.C. 117, at p. 119, and *Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204, at p. 210. The prosecution failed to reach that point in its chain of proof at which section 96 could be invoked to shift the *onus* to the defence.

There is another aspect to section 96 which would seem to exclude its present application, *viz.*, that it does not apply to the mere presence of liquor and glasses in private apartments or family living-quarters in premises unconnected with a beer parlour. As was said by the majority of the Manitoba Court of Appeal in *Rex* v. *Hubin* (1926), 46 Can. C.C. 202, at p. 204:

> The contrary view would create an unreasonable and intolerable situation. No person could purchase liquor in accordance with the terms of the statute and have it in his home, without bringing himself under the *prima facie* presumption that he had acquired it illegally or was unlawfully keeping it for sale.

We were not referred to any section of the Government Liquor Act which compels a contrary conclusion. That is not to say that the existence of other circumstances pointing to an offence against the Act would deny its application. But the record before us fails to disclose the existence of circumstances which come within that description. The prosecution proved nothing more than the bare possession of liquor in a place where it was lawful to have it. There was no evidence the rooms were used for any other purpose than private residence.

However, the appellant testified as detailed at the outset, that the bulk of the liquor belonged to friends which she had bought for them in Vancouver under their own permits. We are not concerned here with infractions of the Government Liquor Act in the purchase of the liquor (if there were such). In any event the evidence is the appellant bought most of the liquor for her friends. That she was acting under a substantial colour of right, is evidenced by magistrate Wastell's order for return of the liquor to six of those people. But the appellant's own evidence in that respect establishes that she, and not her husband, had possession and control of that liquor. If section 96 could apply to a case of this kind, then the *onus* which it contemplates would shift to the appellant to prove that she was not keeping the liquor for sale. Assuming for the present that section 96 does apply, did she meet that *onus?* Apparently this aspect of the matter was not considered in the Court below.

When a statute shifts an *onus* of proof to an accused, the proof then required of the defence is limited to that of greater probability which suffices in a civil case. The defence is not thereby

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required to establish that practical certainty demanded of the prosecution—*vide Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205, at pp. 210-11. In *Rex* v. *Carr-Braint,* [1943] 2 All E.R. 156, the Court of Criminal Appeal considered a conviction under the Prevention of Corruption Act, 1916 (c. 64), s. 2, which contained a presumption against the accused unless the contrary was proved. The Court after reviewing the authorities there examined came to the conclusion that in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved," the burden of proof required of the defence is less than that demanded of the prosecution which must prove its case beyond a reasonable doubt. And the Court held the defence had satisfied the *onus* there placed upon it by establishing a preponderance of probability in its favour.

Six persons appeared before magistrate Wastell in the proceedings under section 81 of the Government Liquor Act and testified the appellant had bought the liquor for them at their request. The claimants for the balance of the liquor did not appear, but counsel attributed their absence to the expense they would have incurred in coming from distant points to recover a comparatively small amount of liquor. The magistrate made an order returning that liquor to the seven applicants. He could not have made that order unless he was satisfied, in the language of the section, that the liquor was not had or kept by the appellant contrary to the provisions of the Government Liquor Act. It does not appear that the Liquor Control Board has sought to quash that order. Magistrate Wastell's order appears to have been admitted in evidence before HANNA, Co. J.

That order when read with the testimony of defence witnesses confirms the nature of the appellant's possession of the liquor to which she testified. The defence evidence thus excluded any inference pointing to the commission of the offence with which the appellant was charged. The evidence left open only one judicial conclusion, *viz.*, that the balance of probability was irresistibly in the appellant's favour, and accordingly that she had met the *onus* imposed by section 96, if in the special circumstances of this case such *onus* did apply. To hold otherwise, in

my judgment, would involve misdirection both as to the legal effect of the evidence and the duty of the prosecution to prove its case beyond a reasonable doubt *cf.* the *Woolmington* case, *supra,* and *Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205, MARTIN, C.J.B.C. (then J.A.) at pp. 209-11 applied in *Rex* v. *Hellenic Colonization Ass'n* (1943), 80 Can. C.C. 22, at pp. 25-6.

I would quash the conviction and allow the appeal.

ROBERTSON, J.A.: The accused was convicted of keeping liquor for sale. Her husband, at the material time, had a licence for the Bay Hotel at Alert Bay, B.C. Her daughter was the registered owner of this property, but the accused was the assessed owner. The accused cooked and did other work in the hotel and she and her husband lived in the hotel in a suite consisting of two rooms, Nos. 24 and 25, and a bath-room. On the 13th of January, 1943, she went to Vancouver and on the 16th of January, 1943, about 7.30 p.m. she returned to Alert Bay, carrying a hand-bag, and with four pieces of luggage consisting of a grey suit-case, a gladstone bag, a small square suit-case and a club-bag. The four suit-cases and bags were taken to the hotel and placed in room 25. Shortly after 8 p.m. on the same night the police, having obtained a search warrant pursuant to section 77 (1) of the Government Liquor Act, found these four suit-cases and bags in this room. Mrs. Lawson had obtained the keys for the room from her husband and let them into the room, but she obtained the key for the grey suit-case from her hand-bag, which was in room 24. These four suit-cases and bags contained about 40 bottles of rum, gin and whisky. There was also in the room three bottles of beer and two other bottles of rum. Pursuant to sections 79 and 81 (2) of the Act, the police seized and kept all this liquor.

On the 29th of January, 1943, an information was laid at Alert Bay against the accused of unlawfully keeping liquor for sale on the 16th of January, 1943. She was tried before and convicted by, police magistrate Anfield, a police magistrate in and for the county of Nanaimo, at Alert Bay, and sentenced on the 20th of February, 1943. She appealed. The appeal came on for hearing on the 18th of May, 1943, before HANNA, Co. J.

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Evidence was given by witnesses for the Crown and the defence. At the conclusion of the oral evidence counsel for the accused sought to put in the transcript and judgment in another proceeding, particulars of which are as follows:

On the 17th of January, 1943, the accused went to Mr. Wastell, also a stipendiary magistrate in and for the county of Nanaimo, and complained that the police had wrongfully taken her liquor. However, nothing was done until the 6th of February, 1943, when she and others, acting pursuant to subsection (3) of section 81 of the Act, forwarded by post to the Liquor Control Board notices dated between the 3rd and 6th of February. The notices were not produced on the hearing. The matter came on before magistrate Wastell on the 12th of February, 1943. Corporal Lashmar appeared on behalf of the police and pointed out that as a result of the seizure a charge had been laid against the accused before Mr. Anfield, on the 29th of January, 1943, of having unlawfully kept liquor for sale on the 16th of January, 1943; that the matter had been before magistrate Anfield on the 1st and 9th of February, and had been adjourned at the request of the accused on each of these occasions; that the liquor would be put in as an exhibit on the trial before Mr. Anfield; and he submitted that Mr. Wastell had no jurisdiction. Nevertheless Mr. Wastell proceeded; witnesses were called, amongst them the accused and her husband, and on the 9th of March, 1943, Mr. Wastell held that the accused and her husband and others had proved their right to the return of the liquor. The learned judge refused to allow the transcript and judgment to go in. He convicted the accused on the 14th of September, 1943.

The accused now appeals on the following grounds: (1) That there was no evidence that the accused kept liquor for sale; (2) that the accused was under the control of her husband and therefore not liable for keeping liquor for sale, and (3) that as police magistrate Wastell had found that part of the liquor belonged to the accused and her husband and others, the matter was *res judicata*, or in the nature of *autrefois acquit*.

The appeal to this Court is limited to questions of law. Dealing with the first point: Whether or not there is any evidence is

a question of law. It is to be noted that under section 96 of the Act the *onus* is put upon a person charged with keeping liquor for sale to prove his innocence if *prima-facie* evidence has been given that he had in his possession, charge or control the liquor in respect of or concerning which he is being prosecuted.

As stated, the evidence shows that although the accused's husband held the licence for the hotel, the property belonged to the accused's daughter, and the accused was the assessed owner. Further, the learned judge has found, and the evidence supports this, that the accused and her husband operated the hotel. Further, the accused bought the liquor in question in Vancouver, brought it to Alert Bay, and it was placed in the room occupied by her and her husband, and was contained in suit-cases and bags belonging to her and her husband. She produced the key to one of these to the officers on the night of the 16th of January, 1943, so that they might open it. She states that she bought some of the liquor for her husband and herself, and the balance for friends at Alert Bay. The only independent witnesses to prove this were two employees at the hotel and a boarder at the hotel. She said that she and her husband wanted the liquor to celebrate their silver wedding anniversary. They had been married on the 1st of August, 1925, so that the silver wedding anniversary would not take place until the 1st of August, 1950. She admitted that on the 1st of January, 1943, the sale of liquor was restricted to a bottle per day to each person, and that she bought liquor on permits belonging to people other than her husband and herself and the three witnesses mentioned. The other persons for whom she said she bought were not called as witnesses. There was evidence also as to a large number of glasses being found in the room.

Under section 95 of the Act the learned judge was entitled to draw inferences of fact from the kind and quantity of liquor found in the possession of the accused or in any place, building or premises occupied or controlled by her. There was ample evidence from which the learned judge could draw the conclusion that the liquor in question was kept for sale by the accused. There being evidence to support his finding, this Court cannot interfere.

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As to the second point, the presumption arising under section 95 is neutralized by the contra-presumption arising from the relationship of husband and wife, *i.e.*, the presumption as to coercion. The question then becomes one of fact which is beyond the jurisdiction of this Court, as again, it is necessary to state, the appeal to this Court is restricted to questions of law. See *Rex* v. *Anderson* (1942), 58 B.C. 88.

Turning now to a consideration of the third point. In my opinion the learned judge was right in refusing to allow in evidence the proceedings before Mr. Wastell. I think his position was sound on two grounds:

1. The question to be tried by Mr. Wastell was as to the ownership of the liquor. The question being tried by Mr. Anfield was whether or not the accused was keeping it for sale. So that two entirely different matters were to be tried by these two magistrates.

2. I think the proceedings before Mr. Wastell were without jurisdiction. When the matter first came before Mr. Wastell on the 12th of February, 1943, corporal Lashmar informed him as above mentioned. He knew that if the proceedings before Mr. Anfield were successful the liquor would be forfeited under section 79. Before he disposed of the matter he knew Mrs. Lawson had been convicted and therefore the liquor had been forfeited to the Crown under section 79.

In my opinion he could not decide any question as between the accused and the Crown, as her liquor had been forfeited to the Crown. Further, once the matter was before Mr. Anfield exclusive jurisdiction had attached to him to deal with the question, and no other magistrate in the county of Nanaimo could interfere. See *The King* v. *Sainsbury* (1791), 4 Term Rep. 451 and *Babiuk* v. *Anderson* (1929), 52 Can. C.C. 23, at pp. 31-32 where Mackenzie, J.A. said:

> Thus in *Rex* v. *Sainsbury*, 4 Term Rep. 451, it was held that, when two sets of justices have a concurrent jurisdiction and one set proceeds to take action upon a matter within the competence of both, the jurisdiction of the former attaches so as to exclude the latter from taking similar action. The reason for such a rule is thus disclosed by Lord Kenyon, at p. 456:—
>
> "But another question has arisen, and which is proper should be settled, whether it be legal (for whether it be decent or decorous no person can doubt) for two different sets of magistrates, having a concurrent jurisdic-

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tion, to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous."

This opinion was later adopted in *Lawson* v. *Reynolds*, [1904] 1 Ch. 718. See also Paley on Summary Convictions, 9th Ed., p. 144 *et seq.*; *Reg.* v. *McRae* (1897), 2 Can. C.C. 49.

The appeal must be dismissed.

Appeal allowed, Robertson, J.A. dissenting.

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Husband and wife—Purchase and sale of property—Purchase and management of rooming-house—Joint tenants—Separate accounts—Action for an accounting.

The husband and wife came from England in 1911 and settled in Edmonton, Alberta, the wife still having a portion of moneys she received by inheritance. The husband was a labourer and from his earnings purchased a lot on which a house was built and paid for by their earnings and the wife's money and money raised by mortgage; it was operated as a rooming-house. The property was in the husband's name. In 1922 they sold the house on deferred payments and moved to Vancouver where they purchased a rooming-house on Howe Street. The wife looked after the rooming-house while the husband worked as a longshoreman. They sold the house and purchased another rooming-house on Alberni Street in 1925 and after being there for a year, they sold the house at a profit and in 1927 they purchased a rooming-house on Nelson Street where she looked after the house and he continued to work as a longshoreman. They were joint tenants in this property and the husband paid about $1,000 in alterations and furnishings. The wife took a separate suite in the house in 1938 and in 1939 she left the house, but came back in 1940 to her own suite. In 1939 the husband took charge and has been in receipt of the revenue ever since. The purchaser of the Edmonton property, after making certain payments which were divided between husband and wife under an agreement in writing that she was to have three-fifths of the payments on the house and he two-fifths, defaulted and the husband took a quit claim from him. Later he made an even trade of the house for a house in Victoria, taking the title in his own name. The wife recovered judgment in an action for a three-fifths' interest in the Victoria property and for an accounting as to the rents and profits of the Nelson Street property.

Held, on appeal, varying the judgment of ELLIS, J., that the learned trial judge was right in holding that the Victoria property was held on the same terms as the Edmonton property in which she had a three-fifths'

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interest, but the direction to account as to the Nelson Street house was wrongly made because the only type of accounting contemplated is really impossible and must prove abortive as it is impossible for the registrar to say how much of the gross returns from a rooming-house are returns from dwelling space, how much from personal labour and how much from expenditures of capital. The directions to account as to the Nelson Street property should be struck out.

APPEAL by defendant from the decision of ELLIS, J. of the 31st of July, 1942, in an action by a wife against her husband in relation to their respective interests in certain properties acquired by them known and referred to as the Edmonton property, the Comox Street property, the Nelson Street property and the Victoria property and for an accounting. The plaintiff and the defendant were married in England and came to Canada in 1911, the wife having previously received by inheritance about £1,400, part of which was spent in England. They settled in Edmonton and shortly after purchased a lot on which they built a house which they operated as a rooming-house. The property was in the husband's name, but it was agreed between them that the husband hold three-fifths of the property in trust for his wife and two-fifths for himself. In 1922 they sold the property on deferred terms and moved to Vancouver where the wife purchased a rooming-house on Howe Street and the husband worked as a stevedore. Shortly after she sold the Howe Street property and purchased a property on Comox Street. In 1925 the defendant purchased a rooming-house on Alberni Street and the plaintiff looked after it. About this time the purchaser of the Edmonton property was in default in his payments. They recovered the property and later exchanged it for a Victoria property which was taken in the defendant's name. Early in 1926 they sold the Alberni Street property and lived apart until December, 1926, when they came together again and purchased a rooming-house on Nelson Street. During all this time they kept separate accounts. They lived together on Nelson Street until 1939 when they separated. Up to that time the plaintiff looked after the house and the defendant continued as a longshoreman. The house was in their joint names. On September 1st, 1940, the wife moved back to Nelson Street, but the husband continued

to look after the house and kept the revenue without any accounting to his wife.

The appeal was argued at Vancouver on the 30th of November and 1st of December, 1943, before McDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

McAlpine, K.C., for appellant: The agreement between the parties as to the Edmonton property can only be construed as a gift of a portion of the money received from the purchaser and does not confer an interest in the land. She received more than her share of the moneys paid by the purchaser prior to his default, then the property reverted to the husband who exchanged it for the Victoria property in which she had no interest: see Halsbury's Laws of England, 2nd Ed., Vol. 16, p. 630; *Mews* v. *Mews* (1852), 15 Beav. 529; *Pope* v. *Bushell and Co.* (1888), 4 T.L.R. 610; *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110; *In re Simpson Estate,* [1941] 3 W.W.R. 268; *Birkett* v. *Birkett* (1908), 98 L.T. 540. The order as to accounting is confined to the Nelson Street property. This is most inequitable as it deprives the husband of the credit of large sums expended on the property for alterations and furnishings and excuses the wife from accounting for the period from 1927 to 1939 when she alone was in receipt of the rents and profits. A complete accounting should be ordered: see *Hanson* v. *Keating* (1844), 4 Hare 1. In relation to accounting see also *Wheeler* v. *Horne* (1740), Willes 208; *Henderson* v. *Eason* (1851), 17 Q.B. 701; *Gingles* v. *Magill,* [1926] N.I. 234; *Gibson* v. *Goldsmid* (1855), 24 L.J. Ch. 279, at p. 284.

J. A. MacInnes, for respondent: By agreement the wife was to have three-fifths of the Edmonton property. When this was exchanged for the Victoria property she would have the same interest in the Victoria property as she had in the property for which it was exchanged, and it was so found on the trial. The direction for the Victoria accounting should not be disturbed. As to the Nelson Street property, the only proper course was that directed by the learned judge that each should account. There was no pleading by defendant claiming accounting by the plaintiff. If required, the necessary allegations should be made and

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claim formulated: see *Toulmin* v. *Reid* (1851), 14 Beav. 499, at p. 505; Annual Practice, 1943, p. 572; *Munro* v. *Finlinson* (1903), 116 L.T. Jo. 109. When the parties were living together and operating for the joint benefit, there is no accounting between them: see *Adolf* v. *Adolf*, [1919] 2 W.W.R. 908. Any extension of the time for accounting is barred by the Statute of Limitations.

Cur. adv. vult.

On the 31st of January, 1944, the judgment of the Court was delivered by

MCDONALD, C.J.B.C.: This case deals with the titles to a house in Edmonton, and one in Victoria which was later exchanged for this, also with the right to rents and profits of a house on Nelson Street in Vancouver. The parties are husband and wife.

The Edmonton house was bought in the husband's name. He entered into an agreement to sell the house, payment to be made partly in cash and partly by instalments, and later executed a document, Exhibit 1, which I think amounted to a declaration that he held the house as to a three-fifths' interest in trust for his wife and as to a two-fifths' interest for himself. The purchaser defaulted, and the husband took a quit claim from him. Later he made an even trade of the house for a house in Victoria taking title in his own name.

In this action brought by the wife, she claimed that the Edmonton house had been held as to a three-fifths' interest in trust for her, and that the Victoria house was similarly held. The husband simply claimed full title to both, and the trial judge held against him.

I think the trial judge was perfectly right. The husband tried to explain away Exhibit 1 as a deed of gift, and also argued that if the wife had ever held an interest in the Edmonton property, it was extinguished by the quit claim. Neither of these arguments can be taken seriously. After he had lost, the husband tried to raise, by amendment, a claim to an account in respect of the Edmonton property. The trial judge having died in the meantime, ROBERTSON, J. who was assigned to the case, refused an amendment. I cannot feel that he was wrong in refusing.

The conclusion that the Victoria house was held on the same terms as the Edmonton house seems to me inescapable.

The Nelson Street property was held in the names of both parties as joint tenants, and no trust was raised, the wife simply suing for an account of rents and profits. Apparently, for many years before 1939 the parties had lived together in this house, the wife running a rooming-house. She seems to have collected from the roomers, but a good deal of the takings were applied in paying off a mortgage. In 1939 she left her husband and the house, and in her absence the husband ran the rooming-house and kept the takings. Later she returned to cohabitation. The judgment appealed from orders both parties to account for "rents and profits" received during the six years preceding the judgment.

The wife's pleadings and evidence all base her claim to "rents and profits" on personal occupation and the takings from the rooming-house. The defence made no counterclaim for accounting by her, and it was ordered on the basis that a plaintiff's claim for accounting involves a submission to herself account.

Several other points were raised as to the application of the Statute of Limitations to the wife's accounting. However, at the threshold of the whole matter lies the question whether accounts by either party can be ordered at all, in view of the parties being joint tenants.

At common law there was no obligation to account between joint tenants or tenants in common, unless one excluded the other from the property or one expressly contracted to act as the other's bailiff: *Wheeler* v. *Horne* (1740), Willes 208. The law was changed by the statute (1705) 4 Anne, Cap. 16, by Sec. 27 of which,

> actions of account shall and may be brought and maintained . . . by one joint-tenant, and tenant in common, . . . , against the other, as bailiff for receiving more than comes to his just share or proportion, . . .

Several cases hold that this statute is in force in Ontario, and I do not doubt that it is in force in this Province by virtue of the English Law Act, R.S.B.C. 1936, Cap. 88. The question, however, remains,—What is more than a co-tenant's "just share or proportion" within the statute?

The leading case on this point is *Henderson* v. *Eason* (1851),

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17 Q.B. 701, a decision of the Exchequer Chamber. The point there was whether one co-tenant, who was out of possession voluntarily, could claim a proportion of the profits made by another in farming the property held under a tenancy in common. The Queen's Bench had so decided; but this was reversed by the Exchequer Chamber. Parke, B., giving the judgment of the Court, stated (p. 719 *et seq.*):

> The statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share: and he becomes, as to that excess, the bailiff of the other, and must account.
>
> But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation, than the other, we have insuperable difficulties to encounter.
>
> There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling-house, or barn, or room, is solely occupied by one tenant in common, without ousting the other, or a chattel is used by one co-tenant in common, nothing is received; and it would be most inequitable to hold that he thereby, by the simple act of occupation or use, without any agreement, should be liable to pay a rent or anything in the nature of compensation to his co-tenants for that occupation or use to which to the full extent to which he enjoyed it he had a perfect right. It appears impossible to hold that such a case could be within the statute; and an opinion to that effect was expressed by Lord Cottenham in *M'Mahon* v. *Burchell* [(1846)], 2 Phillips's Rep. 134. Such cases are clearly out of the operation of the statute.
>
> Again, there are many cases where profits are made, and are actually taken, by one co-tenant, and yet it is impossible to say that he has received more than comes to his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, the subject of the tenancy, in a mode in which the money and labour expended greatly exceed the value of the rent or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops: and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the co-tenants? The risk of the cultivation, and the profits and loss, are his own; and what is just with respect to the very uncertain and expensive crop of hops is just also with respect to all the produce of the

land, the *fructus industriales*, which are raised by the capital and industry of the occupier, and would not exist without it. In taking all that produce he cannot be said to receive more than his just share and proportion to which he is entitled as a tenant in common. He receives in truth the return for his own labour and capital, to which his co-tenant has no right.

All this seems to apply to the present case. A similar decision is *Munsie v. Lindsay* (1883), 10 Pr. 173. The reasoning disposes of any claim for occupation rent, and I think of the claim for profits made in running a rooming-house too.

A roomer does not pay merely rent as such; he is paying not only for a room but for service in the way of care-taking, house-cleaning, bed-making, and the supply of clean bed-linen. The keeper is clearly required to provide capital to run the business, probably more than a farmer is. It is true that the element of speculation and risk is not large; but it is quite possible for a rooming-house keeper to put himself in a position where he must run at a loss, for short periods at least. This danger has been increased by war-time regulations.

Neither of the above cases was cited before us, nor were the principles laid down in them discussed. After the hearing we asked counsel for written submissions on the cases. Counsel for the wife then relied strongly on the claim that the husband had excluded the wife from the Nelson Street house and from the rents and profits. However, the trial judge held that the wife left the house without cause, and his finding is not appealed against, so it disposes of exclusion from the house. It is true the statement of claim also alleges that the husband (apparently since her return) was excluding her from taking part in the management of the rooming business. But I do not find that the evidence supports this claim to which very little attention seems to have been paid at the trial by either side. On such evidence as is available, I would conclude that since the wife's return she has stood sullenly aloof, refusing to assist her husband and leaving all the work of dealing with the roomers to him. That is, he has been managing the rooming business, and with her acquiescence, much as she had been doing with his acquiescence before she went away.

Having heard argument on the question whether the appellant had in fact appealed from that part of the judgment ordering an accounting as to the Nelson Street property, I am satisfied that

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whether this is covered by the notice of appeal or not, we are in any event possessed under rule 5 of the Court of Appeal Rules to make such order as we think ought to have been made below.

I think, therefore, that it is clear that the directions to account as to the Nelson Street house were wrongly made. Difficulty, however, arises from the appellant's conduct of this appeal. The notice of appeal (paragraph 3) raised the point that accounting should not have been ordered at all; but this point was dropped in both the factum and the hearing before us.

In spite of this, I feel we must still set aside the directions for accounting, simply because the only type of accounting contemplated is really impossible and must prove abortive. How is the registrar to say how much of the gross returns from a rooming-house are returns from dwelling space, how much from personal labour, how much from expenditure of capital? He cannot. If we let this matter go to the registrar, I think he is bound either to ignore the law or to certify that there were no rents or profits. We ought not to stultify ourselves by putting the registrar in such a position or countenancing such a farce.

I think, therefore, the directions to account as to the Nelson Street property should be struck out, and this will apply equally to accounting by both parties, since the wife's only obligation arises from her obtaining accounts from her husband.

If we strike out these directions, all questions on the Statute of Limitations go by the board.

In other respects the judgment below should be affirmed. There is not the same difficulty as to the accounting for the Victoria house, since this was not held under a joint tenancy. Here, too, the takings seem to have been pure rent an[illegible] blended payments.

As appellant succeeds only in part and on a point not raised by him, he should have no costs at all. Respondent, since she has succeeded on the main issue and failed on the more minor issue, I think, under all the circumstances, should have three-fourths of her taxed costs of the appeal. I would not disturb the trial judge's order as to costs below.

Appeal allowed in part.

Solicitor for appellant: *D. J. McAlpine.*

Solicitor for respondent: *E. J. Grant.*

IN RE TRUSTEE ACT AND *IN RE* ESTATE OF WILLIAM PETER SINCLAIR, DECEASED.

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Dec. 1, 13.

Trustees—Remuneration—Sale of property—Real-estate agents' commission—Allowed to executors as disbursements—R.S.B.C. 1936, Cap. 292.

On the employment of an agent by trustees for work in connection with the administration of an estate, the principle that should be followed is that where the work is not such as the executors themselves are qualified to do, it is reasonable that they should employ the services of such agents as may be necessary.

Held in this case, that the sums paid to real-estate agents as commission on the sale of property be allowed to the executors as disbursements in addition to the remuneration to which otherwise they may be entitled in this estate.

Stephen v. *Miller* (1918), 25 B.C. 388; (1919), 59 S.C.R. 690, distinguished.

APPLICATION to vary the registrar's report herein. The facts are set out in the reasons for judgment. Heard by MACFARLANE, J. in Chambers at Victoria on the 1st of December, 1943.

J. A. Baker, for the executors.

Cur. adv. vult.

13th December, 1943.

MACFARLANE, J.: This is an application to vary the registrar's report herein. The registrar has recommended that sums paid to real-estate agents as commission on the sale of property should not be allowed to the executors as disbursements in addition to the remuneration to which otherwise they may be entitled in this estate.

In *Stephen* v. *Miller* (1918), 25 B.C. 388, affirmed (1919), 59 S.C.R. 690, it was held by the Court of Appeal that trustees could not charge an estate with commissions paid to a real-estate agent for the collection of interest on mortgages belonging to the estate following *Cox* v. *Bennett (No. 1)* (1891), 39 W.R. 308.

I do not think that commission paid to real-estate agents on the sale of property is on the same footing as commission paid for the collection of mortgage interest except in those special cases where the executor himself is a real-estate agent.

I do not think as a rule that it is practicable for executors to

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attempt the sale of real property without the intervention of agents except in the special cases where as I have mentioned the executors are in that business themselves. The sale of real property by listing through agents is a specialized business and is a certain duty which persons are licensed to perform and in respect of which only those licensed are entitled to collect a commission.

A testator in choosing his executors is aware whether or not they are themselves engaged in the purchase and sale of real estate, and if not, I think it is reasonable to assume that he expects them to employ properly-qualified persons to do this particular work.

The employment of agents to effect a sale of real property more nearly approximates the employment of solicitors to collect moneys which the executors have found it difficult personally to collect as was the case in *In re Estate of Louis Level, Deceased* (1926), 38 B.C. 211. In that case the employment of the solicitors chosen in accordance with directions contained in a will was held justified and their commission on the collection from a recalcitrant debtor of moneys owing under an agreement for sale was allowed as a disbursement.

The principle that should be followed is that where the work is not such as the executors themselves are qualified to do, it is reasonable that they should employ the services of such agents as may be necessary. In the result I would vary the report of the registrar by allowing the commission paid to the real-estate agents on the sale of the property as a disbursement.

The report of the registrar will be varied accordingly.

Order accordingly.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

COLE v. COLE (p. 372).—Affirmed by Supreme Court of Canada, 27th April, 1944. See [1944] S.C.R. 166; [1944] 2 D.L.R. 798.

MURDOCK v. O'SULLIVAN AND O'SULLIVAN (p. 249).—Affirmed by Supreme Court of Canada, 4th February, 1944. See [1944] S.C.R. 143; [1944] 1 D.L.R. 790.

REX v. BEATTY (p. 211).—Affirmed by Supreme Court of Canada, 7th October, 1943. See 81 Can. C.C. 1; [1944] S.C.R. 73; [1944] 1 D.L.R. 689.

REX v. LANGS (p. 112).—Leave to appeal to Supreme Court of Canada refused, 17th June, 1943. See 80 Can. C.C. 86; [1943] 3 D.L.R. 440.

REX v. SIMPSON AND SIMMONS [Rex v. Hall and Simmons; Rex v. Walsh] (p. 132).—Leave to appeal to Supreme Court of Canada refused, 17th June, 1943. See 80 Can. C.C. 78; [1943] 3 D.L.R. 367.

SAPERSTEIN v. DRURY (p. 281).—Appeal to the Supreme Court of Canada quashed by said Court, 10th March, 1944. See [1944] S.C.R. 148; [1944] 2 D.L.R. 511.

Cases reported in 58 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

ATTORNEY-GENERAL OF CANADA, THE, THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA, AND CANADIAN NORTHERN PACIFIC RAILWAY COMPANY v. CITY OF VANCOUVER (p. 371).—Reversed by Supreme Court of Canada, 15th December, 1943. See [1944] S.C.R. 23; [1944] 1 D.L.R. 497.

BRIDGE RIVER POWER COMPANY LIMITED v. PACIFIC GREAT EASTERN RAILWAY COMPANY (p. 420).—Reversed by Supreme Court of Canada, 25th April, 1944. See [1944] 2 D.L.R. 673.

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CRIMINAL LAW—*Assault with intent to rob—Alternative defence—Instructing jury upon—Rule as to—Insanity sole defence at trial—Lack of mental capacity to form intent—Defence raised on appeal—Whether open to accused — Sentence — R.S.C. 1927, Cap, 36, Sec. 19.*] The accused was charged that while armed with an offensive weapon, to wit, a revolver, he unlawfully assaulted one M. with intent to rob M. Said M. was the manager of a branch of The Canadian Bank of Commerce and it was in the branch office that the accused held the revolver in front of M. and told him to "stick 'em up." At the trial the sole defence was insanity. Accused was convicted and sentenced to four years' imprisonment. *Held*, on appeal, that both the conviction and sentence be affirmed. On the contention by counsel for accused, raised for the first time on the appeal, that the trial judge should have directed the jury that if they rejected the defence of insanity, they must nevertheless take into consideration the accused's mental condition in determining whether he was capable of forming and did form an intent to rob:—*Held*, that even if this point was now open to the accused and was good in law, yet there was no evidence to support the theory of lack of mental capacity to form the intent to rob. There is no obligation upon the trial judge to charge upon alternative defences, unless there is "material before the jury which would justify a direction that they should consider it." *Per* SLOAN, J.A.: On the ground that there was no evidence to support the conviction the accused contended that the indictment charged him with assaulting Mutch with intent to rob Mutch whereas in fact he intended to rob the bank and not Mutch. There are, I think, two sufficient answers to that submission. In the first place if Mutch had handed over his own money to Flett I feel quite satisfied Flett would have received it from him and it was open to the jury upon the judge's charge to have reached the same conclusion. However, and apart from that aspect of it, the evidence discloses that Mutch had, as bank manager, the possession of and a special property in the money of the bank and therefore if the jury believed that Flett had intended to rob the bank and not Mutch personally even then the indictment was properly laid and the evidence supports the conviction. REX v. FLETT. - - - - - - **25**

CRIMINAL LAW—*Continued.*

2.——*Charge of manslaughter—Accused found not guilty of manslaughter but guilty of reckless driving—Whether sufficient evidence to go to jury on charge as laid—Criminal Code, Secs. 285, Subsec. 6 and 951, Subsec. 3.*] Shortly after 11 o'clock on the night of January 14th, 1943, the deceased Alexander McRae was standing at a point on Broadway close to the south track about 50 feet west of the Vine Street intersection, when he received fatal injuries in a collision with a motor-car driven by the accused easterly on Broadway and carried as far as the pedestrian lane on the west side of Vine Street. At the west end of the block immediately west of Vine Street (about 500 feet long) the accused passed a motor-car coming out from the kerb driven by one Lovell) with his wife as a passenger) and he then passed an east-bound street-car which was going at about 20 miles an hour and was about 200 feet ahead of the street-car when he struck the deceased. Mrs. Lovell saw a man walk out from the south kerb at the south-west corner of the intersection to the south track and although she did not see the impact, she saw deceased's body rolling under accused's car and accused continued on without stopping. The motorman on the street-car did not see the impact, but he saw the body rolling under the car. A head-light was broken and the radiator and left front side of accused's car was damaged by the collision. The visibility was good, the street was dry and there was no other traffic on the street. The jury acquitted the accused on a charge of manslaughter, but applied section 951, subsection 3 of the Criminal Code and convicted him of "reckless driving." *Held*, on appeal, affirming the decision of ROBERTSON, J. (O'HALLORAN, J.A. dissenting), that there was evidence to go to the jury on the charge of manslaughter. The state of the radiator is a matter of irresistible inference that accused's car ran into the deceased. There is strong evidence of the car running at an illegal speed and running down a man under good lighting conditions. Further, the accused never stopped after running over deceased. *Per* MCDONALD, C.J.B.C.: On the point raised that there was no *prima-facie* case of manslaughter to go to the jury and that that was necessary before the jury could even consider the matter of reckless driving, under section 951, subsection 2 of the Code, where the charge is murder and the evidence does not make out a *prima-facie* case of murder, but there is evidence on which the jury could find manslaughter, the case cannot be taken

CRIMINAL LAW—*Continued.*

from them. By analogy I think that if the charge is manslaughter and there is evidence of reckless driving (assuming that there is a difference in the evidence needed to establish the two offences) the case must go to the jury. REX v. BRUNTON. **182**

3.——*Charge of obstructing a peace officer—Accused playing bagpipes on street—Followed by a number of children—Told to move on by police—Accused refused to do so—City by-law prohibiting objectionable noise.*] At about 6.30 in the evening of the 12th of April, 1943, the accused was playing his bagpipes on 23rd Avenue in Vancouver. There were six or eight children following him on the road; a police officer told him to move on, but he refused to do so. Twenty-five minutes later the policeman returned with another policeman. Accused was still playing and the children were marching with him. The policeman again told him to move on and he refused to do so. There was the occasional passing of cars on the street. Accused was convicted of obstructing a police officer in the execution of his duty. *Held*, on appeal, reversing the decision of deputy police magistrate Matheson, that there was no evidence to justify the finding that accused was obstructing traffic on 23rd Avenue, and on the suggestion that the conviction might be sustained under the city by-law which prohibits the making of any loud and objectionable noise, there is no legal evidence even to suggest that the music produced by the bagpipes is a loud and objectionable noise. REX v. SUTHERLAND. - - **159**

4.——*Charge of robbery with violence—Identity of the accused—Rebutting evidence on behalf of the prosecution—Admissibility—Discretion of trial judge.*] Whether or not rebutting evidence on the part of the prosecution ought to be admitted at a criminal trial after the close of the evidence for the defence is a matter in the discretion of the judge at the trial. On the submission that the record shows the trial judge exercised no discretion:—*Held*, that it is not necessary in order to show that the trial judge exercised a discretion that some long argument should take place and that the judge should say "I exercise my discretion," etc. Here the discretion was exercised even though no objection was taken and the Court of Appeal ought not to interfere. REX v. THERIEN AND SANSEVERINO. **264**

5.——*Charge of stealing a pig of the value of $22—Consent to be tried by magistrate—Plea of guilty—Sentence of three months and fine of $100—Habeas corpus—Criminal Code, Secs. 369, 773 (a), 774, 778 and 1035.*] Accused was tried by a magistrate on a charge "for that he on the 7th of January, 1943, in the municipality of Richmond in the county of Vancouver unlawfully did steal certain cattle, to wit, one pig, of the value of $22." Accused consented to be tried by the magistrate, pleaded guilty and was convicted and sentenced to three months' imprisonment with hard labour and to forfeit and pay $100 and in default of payment, three months' additional imprisonment. On motion for a writ of *habeas corpus*, counsel for accused contended that by reason of the reference in the warrant of commitment to "the value of $22" and to the fact that the warrant recites that the accused consented to be tried by the magistrate, that the charge is laid and the magistrate dealt with the charge as being an offence under section 733 (*a*) of the Code. He submitted that the penalty for an offence under that section is limited by section 778 to imprisonment with or without hard labour for any term not exceeding six months. Further, that upon a charge laid under section 773 (*a*), resort may not be had to section 1035 in order to give jurisdiction for the imposition of a fine in addition to imprisonment. *Held*, that accused was charged with theft of certain cattle, to wit, one pig, of the value of $22. Section 369 of the Code provides that "Everyone is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle." The charge was properly laid under section 369. The magistrate had jurisdiction with the consent of the accused, which was given, to try such an offence by virtue of section 774. The charge could not be said of necessity to have been laid under section 773 (*a*). The words of the information relating to value were merely descriptive of the pig, and did not bring the charge under section 773 (*a*) to the exclusion of section 369. The motion was dismissed. *Ex parte* CIMINELLI. - - - - - - - - **81**

6.——*Conspiracy to defraud the Crown by false invoices—Evidence—Incriminating documents—Previous inquiry under Departmental Inquiries Act—Accused witness on inquiry—Power to compel production on inquiry—Protection of Canada Evidence Act—Indictment—Power of Acting Attorney-General to lay it—R.S.C. 1927, Cap. 59, Sec. 5, Subsec. 2—R.S.B.C. 1936, Cap. 130, Sec. 6 (1).*] The accused were charged for that "they . . . did unlawfully conspire,

CRIMINAL LAW—*Continued.*

combine, confederate and agree together and with James Maynard Limited and divers other persons unknown, by deceit, falsehood and fraudulent means, to defraud His Majesty the King in the right of the Province of British Columbia, by means of presenting certain false invoices for shoes and boots to the British Columbia Provincial Police and fraudulently obtaining for James Maynard Limited certain moneys from His Majesty the King in right of the said Province in payment thereof." After trial they were found guilty and sentenced to four years' imprisonment. *Held*, on appeal, affirming the conviction, that the appeal should be dismissed. On appeal it was contended that the indictment was bad in law in that it improperly bore the signature of the "Acting Attorney-General." *Held*, that the objection is unsound and is met by the decision of this Court in *Rex* v. *Faulkner* (1911), 16 B.C. 229 and the case of *Rex* v. *Nyczyk*, 30 Man. L.R. 17; [1919] 2 W.W.R. 661. On the trial the Crown tendered in evidence certain books and documents as evidence against both accused and the accused Simpson unsuccessfully objected to their reception. The grounds upon which the objection was based were that pursuant to the Departmental Inquiries Act, a commissioner had previously been appointed to inquire into and report, *inter alia*, upon the state of management of the quartermaster's stores of the Provincial police force. Pursuant to the terms of the commission, the commissioner caused a *subpœna* to be served on the accused Simpson (managing-director of James Maynard Limited) to attend and give evidence before him and produce the books of account of Maynard's Limited and other documents. Simpson attended, was sworn, testified and during his examination he claimed that his testimony might incriminate him and asked for the protection of the Canada Evidence Act and the British Columbia Evidence Act, to which the commissioner replied, "To the extent to which it applies to any of the evidence that Mr. Simpson gives, or to documents he may produce, he has that protection." Simpson then produced the books and documents now tendered in evidence. The books and documents were subsequently taken out of the commissioner's possession by the police under the sanction of a search warrant. *Held*, on appeal, that the question comes down to the narrow inquiry as to whether or not these books and documents were under the circumstances improperly admitted in evidence against Simpson in violation of any statutory privilege to

CRIMINAL LAW—*Continued.*

which he might be entitled and in breach of the common-law privilege expressed in the maxim "*nemo tenetur seipsum accusare.*" Under the circumstances of this case, a submission based upon this principle of the common law cannot succeed. Under section 6 (1) of the Departmental Inquiries Act, the commissioner was appointed to hold his inquiry and was empowered to force the attendance of witnesses and compel them to testify and to produce documents. Said section compels the production to the commissioner of incriminating documents and is destructive of the common-law principle that no one can be compelled to incriminate himself. Section 5, subsection 2 of the Canada Evidence Act is limited by its express terms to an answer by a witness to a question and says nothing whatever about the use of incriminating documents produced by a witness under compulsion and after objection. This section, therefore, can have no application to the facts of this case and could not and cannot be invoked by Simpson to protect him from the use of these documents against him at the trial. The incriminating books and documents were not privileged from production by virtue of either the Canada Evidence Act or the common-law principle that no one can be compelled to incriminate himself. REX v. SIMPSON AND SIMMONS. - - - - - - - **132**

7.——*Conspiracy—To defraud the public—Sufficiency of indictment—Criminal Code, Secs. 444 and 863.*] The appellants were convicted upon a charge "for that [they] at the city of Vancouver between the 15th day of April, A.D. 1942, and the 10th day of June, A.D. 1942, unlawfully did conspire, confederate and agree together and with each other and with divers other persons unknown to defraud the public by fraudulent means, contrary to the form of the statute in such case made and provided." On the question of whether the charge as laid is sufficient in law, objection was taken on the appeal that it is deficient in that while it sets out "time and place," it fails to set out the necessary "matter." *Held*, affirming the decision of LENNOX, Co. J., that the objection to the validity of the charge is answered by section 863 of the Criminal Code. REX v. LANGS, PERMAN, MCKINNON AND PULICE. - - - **112**

8.——*Duty in respect to care of dangerous article — Breach of — Dynamite and detonating caps—Storage of—Explosion—Two workmen killed—"In his charge or*

CRIMINAL LAW—*Continued.*

under his control"—Criminal Code, Sec. 247.] The defendant company and a company known as the Oman-Smith Company obtained separate contracts from the American Government to construct a telephone line from Edmonton to Fairbanks, the defendant company having the southern half of the line to construct and the Oman-Smith Company the northern half. For convenience the Oman-Smith Company requisitioned for its supplies through the defendant company's agents in Seattle who purchased the supplies, paid for them and forwarded them to the Oman-Smith Company. The dynamite and blasting caps in question were shipped from Seattle consigned to the Oman-Smith Company at Dawson Creek, arriving there on February 10th, 1943. On February 12th Oman-Smith Company employees took the dynamite and blasting caps from the railway station and stored them in a warehouse in the town which had previously been rented by the defendant company, but was taken over by the Oman-Smith Company on February 9th, 1943, for repairing and storage purposes. On February 13th, 1943, the warehouse caught fire, the dynamite exploded and two workmen were killed. On a charge against the defendant company under section 247 of the Criminal Code the company was found guilty. *Held*, on appeal, reversing the decision of WOODBURN, Co. J., that the evidence did not show that the defendant company had the dynamite under its "charge or control." *Per* MCDONALD, C.J.B.C: It is true that the defendant company, under its arrangement with the army engineers and the Oman-Smith Company, ordered the dynamite and paid for it, but that is far from saying that the defendant company ever had possession of it. Moreover, it was no part of the defendant's duty to follow the course and use of the dynamite. REX v. MILLER CONSTRUCTION COMPANY, INCORPORATED. - - - - - - - **481**

9.——*Gross indecency—Male persons—Appeal by Crown—Whether corroboration necessary — Misdirection — No substantial wrong or miscarriage of justice—Criminal Code, Secs. 206, 1014, Subsec. 2, and 1020.*] Respondent was acquitted on a charge of gross indecency with a boy under section 206 of the Criminal Code. In his reasons for judgment the trial judge stated in effect that he "could" not convict without corroboration, but in his report under section 1020 of the Code he said he "would" not convict without it. In both reasons and report was the statement that there was no

CRIMINAL LAW—*Continued.*

corroboration. In the report was the statement that he found it unsafe to convict without corroboration because the youth was admittedly a pervert. On appeal, the Crown sought a new trial on the ground that the trial judge misdirected himself in holding that the law required him not to convict without corroboration. The respondent conceded misdirection, but invoked section 1014, subsection 2 of the Code on the ground that no substantial wrong or miscarriage actually occurred. *Held*, affirming the decision of SHANDLEY, Co. J., that in the circumstances even if the learned judge had not misdirected himself, he must have reached the same conclusion. It follows that despite the misdirection, no substantial wrong or miscarriage of justice had actually occurred and there is no ground for a new trial. REX v. O'LEARY. - **440**

10.—*Habeas corpus—Successive applications to different judges—Charge of stealing a pig—Value $22—Consent to be tried by magistrate — Plea of guilty — Sentence — Charge under section 773 (a) of Code—Whether sentence limited to that prescribed by section 778 — Application of section 1035.*] Accused was tried before a magistrate on a charge "for that he . . . on or about the 7th day of January, A.D. 1943, at the municipality of Richmond in the county of Vancouver unlawfully did steal certain cattle, to wit, one pig, of the value of twenty-two dollars. . . ." Accused consented to be tried by the magistrate, pleaded guilty and was convicted and sentenced to three months' imprisonment with hard labour and to forfeit and pay $100, and in default of payment, three months' additional imprisonment. On motion for a writ of *habeas corpus*, preliminary objection was taken by the Crown to the hearing proceeding on the ground that this application had been previously heard by BIRD, J. and dismissed. *Held*, that the case of *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*, [1928] A.C. 459, overruled the judgment of the Court of Appeal of British Columbia in *Rex* v. *Loo Len* [1923], 33 B.C. 213, and this Court is bound to hear the application although heard previously by another member of this Court. Where a person is tried before a magistrate on a charge of theft of property, the value of which does not exceed $25, under section 773 (*a*) of the Criminal Code, the jurisdiction of the magistrate as to sentence is not limited to imprisonment only under section 778, but he may by virtue of section 1035, impose a fine in addition thereto and in lieu

11.—*Indecent assault upon child—Corroboration—Lack of—Criminal Code, Sec. 1003, Subsec. 2.*] The accused, a janitor in a school, after cleaning up the school, went to the basement where he burnt the refuse in the furnace. When there the complainant, a girl six years of age, went into the basement. The accused took her on his knee and, according to her evidence, pulled down her panties and put his hand on her private parts. The accused admitted taking her on his knee, but denied any impropriety. He was convicted of indecent assault. *Held*, on appeal, reversing the decision of stipendiary magistrate Powell, of Powell River (O'HALLORAN, J.A. dissenting), that there was no evidence to supply the corroboration required under section 1003, subsection 2 of the Criminal Code. REX v. HOBER. **362**

12.—*Keeper of disorderly house—Conviction—Tried by magistrate without consent of accused—Habeas corpus—Application dismissed — Appeal — Criminal Code, Secs. 229, Subsec. 1, 771 (a) (iii) and (vii), 773 (f), and 777.*] The defendant was convicted by a police magistrate for keeping a disorderly house contrary to section 229 (1) of the Criminal Code. The magistrate, holding that he had absolute jurisdiction to try the accused by virtue of sections 771 (*a*) (iii), 773 (*f*) and 777, proceeded without the accused consenting to be tried by him. Accused pleaded guilty and was sentenced. On applying for his release on *habeas corpus* on the ground that the magistrate had no power to try him without his consent, his application was dismissed. *Held*, on appeal, affirming the order of SIDNEY SMITH, J., that the appeal should be dismissed on the ground that the "magistrate" referred to in section 777 of the Code is the magistrate defined in section 771 (*a*) (iii) and that section 771 (vii) does not derogate from the definition in subsection (*a*) (iii). *Rex* v. *Berenstein* (1917), 24 B.C. 361, followed. *Per* MCDONALD, C.J.B.C.: I would dismiss the appeal on the ground that no appeal lies. *Habeas corpus* is always a criminal remedy when used to question imprisonment on a criminal charge, following *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147. *Per* O'HALLORAN, J.A.: The right conclusion was reached by SIDNEY SMITH, J. in holding that the learned magistrate had jurisdiction to try and convict the accused

and I would further hold that the Court of Appeal has jurisdiction to hear this appeal, following *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541. *Ex parte* LUM LIN ON. - - - - - - - - - **106**

13.—*Murder—Voluntary oral admission of by accused — Written confession given including admission of theft of a revolver—Admissibility of written confession—Effect of admission of theft—Instructions to jury —Criminal Code, Secs. 69, Subsecs. 1 and 2 and 1014, Subsec. 2.*] On the morning of the 10th of October, 1942, the accused, a soldier, was detained by the police for questioning in connection with the theft of six army-service revolvers from the Seaforth Armouries on September 18th, 1942. Accused admitted he had a revolver and on request handed it over. An hour and a half later he was again interviewed by a detective who told him he would be charged under section 115 of the Criminal Code with carrying an offensive weapon and gave him the usual warning. The accused then confessed he had stolen the revolver. On the 11th of October the body of one Phil Davis, a taxi-driver, was found in a bush in a cemetery in Burnaby. On the 12th of October, the detectives had a third interview with accused when they told him he would also be charged with theft. They also told him the body of a missing taxi-driver was found. When the interview appeared to be concluded and the detectives were leaving, the accused suddenly blurted out "you will likely find out anyway. I killed Phil Davis." The usual warning was given and accused agreed to have his confession of murder taken down in writing in which he confessed to the murder and also to the theft of the revolver. He then gave the detectives an account of his activities from midnight on October 2nd until 4 o'clock on the morning of October 3rd, including a description of the murder. The written statement, including both confessions was admitted in evidence on accused's trial for murder, it having been found to be free and voluntary. The accused testified, denied that he shot Davis and swore that he loaned the revolver to one Spike Williams, who some hours later had returned the revolver to him together with some money, a watch and a flash-light and he pawned the watch and flash-light which later were found to belong to the deceased. The judge instructed the jury that they could find the accused guilty of murder either on the confession itself or apart from it, on his evidence given in the witness box when he repudiated the

CRIMINAL LAW—*Continued.*

confession and explained his possession of deceased's watch and flash-light. The accused was convicted of murder. *Held*, on appeal, O'HALLORAN, J.A. dissenting, that under all the circumstances, the fact of the illegal possession of the revolver was admissible and the appeal should be dismissed. *Per* FISHER, J.A., SLOAN, J.A. concurring: The revolver in question was the weapon from which, as the Crown alleged and attempted to prove, the fatal shot was fired, and evidence tracing its possession to the accused was relevant and cogent even if in the process of proof the fact might emerge that he had stolen it. On the application of section 69 (2) of the Criminal Code to a common intention to commit a crime, what was said in the judge's charge to the jury in that regard was not objectionable and even if there was any irregularity in the charge in this or any other respect, section 1014, subsection 2 of the Code applied, since any jury properly instructed and acting reasonably must have found on the evidence the accuseed was guilty as charged. REX v. BEATTY. - - - - - - - - **211**

14.—*Possession of house-breaking instruments by day—Intent to commit indictable offence—Evidence of intent—Criminal Code, Sec. 464 (b).*] At about 7 o'clock on the morning of April 4th, 1943, a police officer saw the accused and one Murphy enter the Cadillac Hotel in Vancouver. Five minutes later the policeman entered the hotel and saw accused and Murphy coming down the stairs. He asked accused for his registration card and then searched him. He found two keys, one a skeleton key for Yale locks, a penknife and a pair of gloves, then on further search, he found two pieces of celluloid concealed in a sock on one of his feet. He asked accused what the purpose of the celluloid was and the reply was "Don't be so dumb, copper." The policeman then put the articles in a wallet which was found on accused and put it on the banister-rail in the hotel and proceeded to search Murphy. Accused then grabbed the wallet and ran out the door. He was convicted on a charge that he unlawfully did have in his possession by day instruments of house-breaking, to wit, two pieces of celluloid, two pass-keys and one pair of gloves. *Held*, on appeal, affirming the conviction by LENNOX, Co. J. (O'HALLORAN, J.A. dissenting), that the Crown must show: (1) That the accused was found having in his possession by day a house-breaking instrument and (2) with intent to commit an indictable offence. There is ample proof of the first.

CRIMINAL LAW—*Continued.*

As to the second, the mere finding of a person having in his possession by day an instrument which may be used for house-breaking is not sufficient to show intent. There must be something else. This is to be found in the present case in the extraordinary concealment of the pieces of celluloid. The learned trial judge was justified in the inference he drew from the circumstances as to the accused's intent. REX v. ELLIS. - - - - - - - - **393**

15. — *Rape — Accused employs female taxi-driver—Instructions to drive to lonely spot—Brutal assault on taxi-driver—Appeal from sentence of ten years — Dismissed.*] The accused, having been convicted on a charge of rape, appealed from a sentence of ten years' penal servitude. The complainant was a female taxi-driver hired by the accused in Alberni, who instructed her to drive to Sproat Lake and then to Great Central Lake. On reaching a lonely spot on the way he made her stop the car, proposed sexual intercourse with her and on refusal, he attacked her with violence and brutality in accomplishing his purpose. *Held*, that the Court must be sensible of the fact that today in many industries and occupations a large number of women and girls are employed doing an important part in the prosecution of the war. Their work takes them into closer proximity to men at night and in lonely places, and the Courts must see that they are protected. The facts disclose an aggravated and brutal case of rape and the sentence imposed should not be interfered with. REX v. BAKSHISH SINGH. - - - - - - - - **238**

16.—*Reckless driving—Death of passenger—Accused gives evidence on his own behalf—Proof of his competency as a driver—Cross-examination as to previous convictions for reckless driving—Canada Evidence Act, R.S.C. 1927, Cap. 59, Sec. 12.*] The accused was driving his car with three passengers on the Island Highway intending to go from Victoria to Duncan. When they reached a point on the Malahat called "The Corner" about 25 miles from Victoria where there is a heavy guard-rail to protect cars from a deep declivity on the east side of the road, the accused lost control, drove through the guard-rail and rolled down the hill about 200 feet. One of the passengers was killed. On a charge of killing one P. A. Campbell, the accused was found guilty of reckless driving. On the trial the accused gave evidence in an endeavour to prove that he was a competent driver of motor-cars

cation on the preliminary objection that the notice above mentioned was not sufficient in form in that the addition of the words "or before" rendered the notice invalid as one of less than the required three months. *Held*, on appeal, reversing the decision of LENNOX, Co. J., that the preliminary objection was not well founded and the notice was sufficient in form. But if there was any doubt that the notice demanded, by the use of the phrase "on or before" termination of the tenancy at the end of the month, it was dispelled by the subsequent words "on or after" above referred to. The appeal was allowed and the matter was remitted to the learned judge to be heard in accordance with the provisions of sections 19 to 22 of the Landlord and Tenant Act, reserving all other objections to the respondent. ROWLEY V. ADAMS. - - - - - - **36**

4.——*The Wartime Prices and Trade Board — Rental regulations — Order 108, Secs. 16, 18, 19 and 23—Notice to vacate by landlord—Lack of notice by tenant of renewal—Procedure by landlord to recover possession—R.S.B.C. 1936, Cap. 143, Secs. 19 and 22.*] If a tenant of "housing accommodation" has been given "due notice to vacate" by the landlord under section 16 (1) of order 108 of Regulations Respecting Maximum Rentals and Termination of Leases for Housing (The Wartime Prices and Trade Board) and the tenant does not give the landlord notice of renewal within fifteen days after receipt of the notice to vacate under section 18 (2) of said regulations, the provisions of said order 108 no longer apply and the landlord is left to his ordinary rights to obtain possession of the premises. PARLBY AND PARLBY V. DICKINSON AND DICKINSON. - - - **444**

5.——*Written agreement for lease—Certain terms not included—Signed by one of four owners—Letters "O.K."—Interpretation—Warranty of authority—Amendment of pleadings—Statute of Frauds—R.S.B.C. 1936, Cap. 104, Sec. 4.*] On the 3rd of June, 1941, the plaintiff by letter offered to rent a 30-foot frontage premises in Victoria, owned by the defendant, his two brothers and a sister, that he would renovate the front of the building at his own expense in accordance with a certain sketch, the lease to be for a term of five years at $125 per month with the right of renewal for a further five years. On receipt of same, the defendant wrote at the bottom thereof "O.K. Kenneth Drury." It was orally agreed at the time that the plaintiff would keep the sewer clear and keep the inside walls in repair and the defendant would repair the outside walls and secure an easement over an alleyway to a lane at the back of the premises. The sketch for the frontage improvements was submitted to contractors (Luney Brothers Limited) who made a tender for the work at $1,850, which was accepted. Later, owing to the former tenant (one Stewart) wanting to sublease part of the premises, at the instance of the defendant, a meeting was arranged and the parties met on July 22nd, 1941, when the plaintiff adhered to his original agreement, but desired to accommodate the parties interested. It was then agreed that Stewart would sublease 12 feet frontage of the premises. This necessitated a change in the frontage improvements. The architect made further plans and when submitted to the contractors, it was so changed from the original sketch that the cost of the improvements increased to $4,250. The plaintiff refused to agree to this expenditure. In an action for specific performance of the agreement for a lease and for damages for breach, the plaintiff at the trial, having only served Kenneth Drury and his sister, abandoned his claim for specific performance and claimed only damages for breach. The action was dismissed as against the sister, but liberty was given the plaintiff to amend his statement of claim by inserting therein a claim for damages against Kenneth Drury for breach of warranty of authority and the plaintiff was awarded damages against Kenneth Drury for breach of warranty to be assessed. *Held*, on appeal, reversing the decision of ROBERTSON, J., that the evidence did not admit of the inference that the defendant represented to the plaintiff that he had authority from his co-owners to enter into an agreement for a lease and there was error in holding the defendant liable for damages for breach of warranty of authority. *Per* MCDONALD, C.J.B.C.: The letter of the 3rd of June did not contain all the terms of the agreement and the letters "O.K." followed by the defendant's signature were not an acceptance of the offer, the defendant intended to say and the plaintiff knew, that the terms in so far as expressed would be satisfactory, if satisfactory to the other owners, and further, the writing does not satisfy section 4 of the Statute of Frauds because it does not contain all the terms of the agreement. SAPERSTEIN V. DRURY. - - - **281**

reasonable and substantial prior entry of the taxicab into the intersection. She was bound to look in front of her and to see what was then plain to be seen. The taxi-driver, having made a reasonable and substantial prior entry into the intersection, was entitled to believe that other cars not yet within the intersection would respect the priority of his position. FEWSTER v. MILHOLM AND VALLIERES AND MCANDLESS. - - - - - - - - - - **244**

3.——*In treatment of diabetic patient—Findings of fact—Credibility of witnesses.* - - - - - - - - - - **165**

See PHYSICIANS AND SURGEONS.

4.——*Motor-vehicles—Collision at intersection of highway and road—Right of way—Speed—Stop sign on road—Drivers of both vehicles guilty of negligence—Division of liability.*] On the 16th of October, 1941, at about 2 o'clock in the afternoon when the weather was clear and the road surfaces dry, the plaintiff was driving his Cord motor-car northerly on the Mission-Abbotsford highway and the defendant was proceeding east on Clayburn Road. There was some brush and trees on the west side of the highway just south of Clayburn Road which obstructed the view of both drivers. When the plaintiff was about 240 yards from the intersection of the two streets, he saw the defendant's car starting forward in an easterly direction about 100 feet from the intersection and he reduced his speed from 60 to 45 or 50 miles per hour and when about 150 feet from the intersection, the defendant's car again came into view at a point within 20 feet from the intersection. The plaintiff sounded his horn and reduced his speed, assuming the defendant would stop. Immediately afterwards he realized the defendant did not intend to stop, so he swerved to the east and accelerated his speed. The plaintiff said the defendant was proceeding at about 15 miles per hour, but the defendant says he was going at only seven miles per hour and slowed down on entering the intersection, but he continued past the stop sign on the road and said he did not see the plaintiff until he reached the centre of the intersection. He ran into the left centre of the plaintiff's car about six feet past the middle line of the highway. In an action for damages for negligence:—*Held*, that the defendant was guilty of negligence, which largely contributed to the accident, in ignoring the stop sign and failing to come to a full stop before crossing the highway and in failing

to maintain a proper look-out for traffic on the highway when approaching it. When the plaintiff saw the defendant the second time, he should have brought his car under control by reducing speed and his failure to do so constituted negligence which contributed to the accident. The negligence of the defendant contributed to a substantially greater degree than that of the plaintiff and the plaintiff is found liable to the extent of 25 per cent. and the defendant 75 per cent. ADAMS v. FRIESEN. - - - - - **351**

5.—*Municipal corporation—Stones from rockery fall on sidewalk—Injury to pedestrian—Action for damages—Remedy over against third party—Vancouver charter—B.C. Stats. 1921 (Second Session), Cap. 55, Secs. 229 and 230—City by-law No. 1874, Sec. 74.*] In 1939 the defendants the Misses Putnam acquired title to a property on Bute Street in the city of Vancouver. The front of the lot was ten feet back from the sidewalk. On the plot between the sidewalk and the lot, which was part of the street area, previous owners had constructed a rockery for the length of the lot and close to the sidewalk, about three feet high. On going into possession, the Putnams built a cement walk from the left side of the house through the rockery with four steps to the sidewalk and fixed up the rockery close to and on each side of the walk and the steps. No permission had been given the Putnams by the city to construct the cement walk and steps. On the 10th of January, 1940, the plaintiff in the action stumbled over a rock that had fallen from the rockery on to the sidewalk close to said steps and was severely injured. In an action for damages, a jury found that the city was 75 per cent. responsible for the accident and the Putnams 25 per cent. for which judgment was entered. The city claimed to be indemnified by the Putnams in third-party proceedings under sections 229 and 230 (quoted *infra*) of the Vancouver Incorporation Act, 1921, and it was held that there was no evidence that the Putnams either erected or maintained the rockery in question and the claim was dismissed. *Held*, on appeal, affirming the decision of SIDNEY SMITH, J., that the city is entitled to a remedy over against the Putnams if it shows that it was not guilty of an independent primary act of negligence and that the negligence of the Putnams was the primary cause of the accident, but the jury found the city was three-quarters responsible for the accident and the most that can be said as to the Putnams is that

PRACTICE—*Continued.*

Supreme Court on the ground that the judgment is interlocutory and the appeal out of time. The action involved a dispute over the title to real property in Victoria, Vancouver and Edmonton. The judgment declared the plaintiff entitled to a three-fifths' interest in the Victoria property (registered in the defendant's name), ordered the defendant to convey the interest, directed an accounting of the rents and profits while the title was in the defendant and ordered payment of the amount found due. The judgment further declared that the parties each owned a half-interest in the Vancouver property and ordered the parties to account for rents and profits received by them respectively and finally directed that the appointment of a receiver, the sale and partition of the property and the costs of the action and counterclaim be reserved. *Held*, that it was a final judgment and the motion was dismissed. SPELMAN v. SPELMAN. - - - - - - - - **120**

3.——*Application for leave to bring action—Whether issues already disposed of—Appeal.*] Minnie M. May and the liquidator of the Gibson Mining Company applied for an order for leave to bring action against the trustee in bankruptcy of the Daybreak Mining Company, Limited and the trustee personally and it was held that an examination of the numerous exhibits filed disclosed that the issues sought to be litigated were all disposed of by judgments of our Courts which are binding upon the parties and upon this Court and the application was dismissed. *Held*, on appeal, reversing the decision of MANSON, J. (McQUARRIE and O'HALLORAN, JJ.A. dissenting), that in view of the argument, the Court has considered the cases of *May* v. *Hartin* (1938), 53 B.C. 411; *Gibson Mining Co. Ltd.* v. *Hartin* (1940), 55 B.C. 196 and the order of McDONALD, J. of the 5th of July, 1937, affirmed by this Court on the 2nd of November, 1937, and has concluded, without expressing any view on what might be called the merits of the question, that much may be said for and against the contention that new issues arise in the proposed action. Seeking guidance, therefore, from the three decisions of this Court as aforesaid, it is noted that the only decision upon any exactly similar application is that made by this Court on 2nd November, 1937, affirming the order of McDONALD, J. of the 5th of July, 1937, giving leave to bring action. The course taken by the Court at such time should be followed and the question of *res judicata* should not be determined upon the present application. *In re* THE BANKRUPTCY OF DAYBREAK MINING COMPANY, LIMITED (N.P.L.). MAY *et al.* v. HARTIN. - - - - - - - - **39**

4.——*Divorce — Order for interim alimony — Default in payments — Motion to commit—Proof of service of order with endorsement of warning—Service of affidavit of service with notice of motion—Rules 573 and 699.*] In an action for dissolution of marriage, an order was made providing for *interim* alimony. The defendant, being in default, on motion to commit, copies of the notice of motion, the affidavit in support and the order for *interim* alimony, being served on the defendant, an order for commitment was made. *Held*, on appeal, reversing the decision of SIDNEY SMITH, J., that the appeal be allowed and the order be set aside. *Per* McDONALD, C.J.B.C., SLOAN and FISHER, JJ.A.: That the service was irregular as the affidavit of service does not show that the order for *interim* alimony served on the defendant had the memorandum endorsed upon it as required by rule 573. *Stockton Football Company* v. *Gaston*, [1895] 1 Q.B. 453, followed. *Per* O'HALLORAN, J.A.: The appeal should be allowed on two grounds. No affidavit of service of the order was served as required by rule 699 and the affidavit of service produced does not show that the necessary warning was endorsed on the order served on the defendant. *Per* ROBERTSON, J.A.: There must be an affidavit showing service of the order that affidavit was produced in Court upon the hearing of the motion, but was not served with the notice of motion, as required by rule 699. WILLIAMS v. WILLIAMS. - - - - - - - **359**

5.——*Judgment including order for accounting—Application for stay of accounting pending appeal—Granted by trial judge on terms—Application to Court of Appeal for stay of accounting without terms—Jurisdiction—Application granted—R.S.B.C. 1936, Cap. 57, Secs. 9 and 30.*] In February, 1943, an election of officers of the Boilermakers' and Iron Shipbuilders' Union of Canada Local No. 1 took place and three former officers of the union, on behalf of themselves and other members of the union, brought action against the officers so elected and other members for a declaration that the election was illegal and void, for the return of equipment and for an accounting of union moneys collected by the defendants. It was held on the trial on the 20th of March, 1943, that the election was null and

PRACTICE—*Continued.*

void and the plaintiffs were entitled to a return of the equipment and that there be an accounting as asked for. The defendants appealed and pending the appeal, on motion by the defendants, an order was made on the 21st of June, 1943, by the trial judge for a stay of the accounting until the hearing of the appeal upon the defendants posting a bond in the sum of $20,000. On the 29th of June, 1943, the defendants moved before the Court of Appeal for an order that the taking of accounts as ordered on the 20th of March, 1943, be postponed until the hearing of the appeal. *Held*, SLOAN, J.A. dissenting, that two objections were raised that this Court lacked jurisdiction to entertain the motion: (1) That no appeal was taken from the order of the 21st of June, 1943, and (2) that what is now sought is in reality a stay of execution of a judgment which "directs the payment of money" within the meaning of section 30 (*d*) of the Court of Appeal Act and this Court is deprived of jurisdiction to stay execution because the section vests such jurisdiction exclusively in the Court appealed from. The first objection fails because the learned judge below was without jurisdiction to make the order of the 21st of June, 1943, and his order was not merely voidable, but void. There was no jurisdiction to stay proceedings in a matter pending before the Court of Appeal. On the second objection, as judgment has not been signed and cannot be signed before the accounting and as a consequence, execution cannot now issue, the present motion cannot be accepted as one for a stay of execution. It is clearly a motion to stay proceedings which cannot amount to execution. It is, therefore, a proceeding over which this Court has exclusive jurisdiction during the pendency of the appeal. The question of the postponement of the accounting is "a further proceeding in relation to the appeal" within the meaning of section 9 of the Court of Appeal Act. *Held*, on the motion, that in the circumstances, this Court would not be justified in imposing any terms as a condition for postponement of the accounting pending the hearing of the appeal. The motion is granted and the accounting ordered by the judgment of March 20th, 1943, is postponed without terms, pending the hearing of the appeal therefrom. STEPHEN *et al.* v. STEWART *et al.* (No. 2). - **297**

6.——*Order for payment of alimony—Default — Motion for attachment — Order made—Appeal—Motion for stay pending the determination of the appeal—Affidavit not filed proving that the order for payment had been served—Order granted—Divorce Rule 77.*] The appellant was ordered to pay alimony. He made default and, on motion by respondent, an order was made for his attachment for contempt. The appellant now moves for a stay pending the hearing of an appeal from said order. On the motion for the attachment order, the respondent filed a notice of motion and gave notice therein that the material to be used on the return included a copy of the original order for payment of alimony and an affidavit proving that such order had been disobeyed. The notice of motion was then served together with the material mentioned and an affidavit of such service was before the learned judge. On this application objection was taken by appellant that before the notice of motion was filed or any step taken for attachment for contempt, an affidavit should first be filed proving that the order for payment had been served. No such affidavit had been made or filed, although a copy of the order was served with the notice of motion. *Held*, that although the objection is highly technical, the argument has thrown sufficient doubt to satisfy the Court that a stay of the proceedings should be granted until the appeal from the attachment order be heard. WILLIAMS v. WILLIAMS. - - - **319**

7.——*Pleading — Statement of claim — Sale and operation of timber limits—Allegations of trusteeship—Motion to strike out certain paragraphs as irrelevant and embarrassing — Rules 217 and 223.*] The plaintiff alleges in its statement of claim that certain agreements entered into with reference to certain lands, timber licences, timber berths and timber with other facts alleged show that the defendant was constituted a trustee for the plaintiff, and it claims relief for breach of trust and of covenants therein contained. The defendant moved to strike out certain paragraphs of the statement of claim, submitting that the agreements in question show that the plaintiff made an outright sale to the defendant, that no question of trust could possibly arise, that the plaintiff had mixed up claims of breach of trust and covenants so that it is extremely difficult to plead and that the unwarranted claim of a trust will greatly increase the cost of the action. It was held on the motion that in order that allegations should be struck out, their irrelevancy must be quite clear and apparent. Although the allegations here may be entirely erroneous, it cannot be held that