THE BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME LX.

VICTORIA, B. C.
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1945.

JUDGES

OF THE

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

During the period of this Volume.

CHIEF JUSTICES OF BRITISH COLUMBIA:

THE HON. DAVID ALEXANDER McDONALD.
THE HON. GORDON McGREGOR SLOAN.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICES:

THE HON. DAVID ALEXANDER McDONALD.
THE HON. GORDON McGREGOR SLOAN.

JUSTICES:

THE HON. GORDON McGREGOR SLOAN.
THE HON. CORNELIUS HAWKINS O'HALLORAN.
THE HON. HAROLD BRUCE ROBERTSON.
THE HON. SIDNEY ALEXANDER SMITH.
THE HON. HENRY IRVINE BIRD.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. WENDELL BURPEE FARRIS.

PUISNE JUDGES:

THE HON. ALEXANDER MALCOLM MANSON.
THE HON. JAMES MOSES COADY.
THE HON. HENRY IRVINE BIRD.
THE HON. ARTHUR DOUGLAS MACFARLANE.
THE HON. JOHN OWEN WILSON.
THE HON. ANDREW MILLER HARPER.

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. 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
HIS HON. JAMES ARTHUR McGEER.	Vancouver
HIS HON. REY AGLER SARGENT.	Vancouver

ATTORNEY-GENERAL:

THE HON. ROYAL LETHINGTON MAITLAND, K.C.

MEMORANDA.

On the 3rd of October, 1944, the Honourable Gordon McGregor Sloan, a Justice of Appeal, was appointed Chief Justice of British Columbia, in the room and stead of the Honourable David Alexander McDonald, deceased.

On the 3rd of October, 1944, the Honourable Henry Irvine Bird, one of the Puisne Judges of the Supreme Court of British Columbia, was appointed a Justice of the Court of Appeal.

On the 3rd of October, 1944, His Honour Andrew Miller Harper, a Judge of the County Court of the County of Vancouver, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Henry Irvine Bird, promoted to the Court of Appeal.

On the 3rd of October, 1944, Rey Agler Sargent, Barrister-at-Law, was appointed a Judge of the County Court of the County of Vancouver and a Local Judge of the Supreme Court of British Columbia, in the room and stead of His Honour Andrew Miller Harper, promoted to the Supreme Court of British Columbia.

On the 3rd of January, 1945, George Herbert Thompson, retired Judge of the County Court of the County of East Kootenay, died at the City of Sherbrooke, Quebec.

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"COURT RULES OF PRACTICE ACT"

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that under the authority of the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," Item 12 of Schedule No. 1 of Appendix M of the "Supreme Court Rules, 1943," be repealed.

And to further order that Items 1 and 2 of Schedule No. 2 of Appendix M of the "Supreme Court Rules, 1943," be repealed, and the following substituted therefor:

"1. To witnesses, other than Police officers, for each day travelling to and from, or attending to give evidence ..... $4.00"

And to further order that the repeal and substitution be effective as and from the 1st day of September, 1944.

R. L. MAITLAND,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., June 28th, 1944.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

CAPONERO v. BRAKENRIDGE AND THE DISTRICT REGISTRAR OF TITLES.

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Dec. 17.
1944
Jan. 11.

Real property—City block—Fronting on two streets—Subdivision—Registration of conveyance—Discretion of registrar—"Frontage"—Definition—Land Registry Act, R.S.B.C. 1936, Cap. 140, Secs. 105 and 232—Effect of Vancouver Incorporation Act, 1921, and Zoning by-law.

One Percival Nye owned the south-west corner of Fourth Avenue and Columbia Street in Vancouver, 107.55 feet on Fourth Avenue and 121.93 feet on Columbia Street. On the original plan this parcel of land appeared as lots 4 and 5 fronting on Fourth Avenue, divided by a line running north and south between them, but lots 4 and 5 were cancelled and formed one lot at the time of this application. In 1909 Nye built four houses on the property, facing Columbia Street. Each house premises is separated by a fence and has an approximate depth of 110 feet and an approximate frontage of 30.48 feet. The four houses were rented since 1909 and the city assessed each house premises separately for water rates. In November, 1943, Nye sold the north half of the south half of the parcel formerly known as lots 4 and 5 to one Caponero. On his application the Registrar of Titles refused to register the conveyance. On appeal by way of petition under section 232 of the Land Rigistry Act the petition was dismissed.

Held, on appeal, reversing the decision of FARRIS, C.J.S.C. (ROBERTSON, J.A. dissenting), that the Registrar of Titles has jurisdiction under section 105 (*a*) of the Land Registry Act to register the Caponero conveyance and the appeal should be allowed.

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APPEAL by the petitioner from the decision of FARRIS, C.J.S.C., of the 29th of November, 1943, dismissing the appellant's petition that the decision of the registrar be reversed on the ground that it is contrary to the provisions of subsection (*a*) of section 105 of the Land Registry Act. The petitioner purchased the north half of the south half of block 10, district lot 302, group one, New Westminster District, having a width on Columbia Street in the city of Vancouver of 30.48 feet and a depth of 109 feet. On the 9th of November, 1943, the petitioner gave the city engineer notice of intention to apply to register a conveyance of said lands. On the 13th of November, the city engineer wrote the registrar objecting to the registration, stating his reasons, and the registrar refused to register said conveyance. The further necessary facts are set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 17th of December, 1943, before MCDONALD, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

Bull, K.C., for appellant: This relates to the construction of section 105 of the Land Registry Act. The registrar is given discretion as to registration of documents in certain cases. This case comes under subsection (*a*) of said section. The lot was divided into four parts facing Columbia Street and the portion in question is the north half of the south half of said lot. In exercising his discretion, he must notify the approving officer who is the engineer. Under the Zoning By-law this is an industrial district. The case turns on the definition of the term "frontage." We submit there may be frontage on four streets. The whole lot before subdivision is on Fourth Avenue and Columbia Street. The engineer says there is frontage on Fourth Avenue but not on Columbia Street. There is nothing in any public Act defining "frontage": see *Justices of Bedfordshire* v. *Bedford* (1852), 7 Ex. 658. On the construction of section 105, see *Warren* v. *Mustard* (1891), 8 T.L.R. 65; *Re Dinnick and McCallum* (1912), 26 O.L.R. 551 and on appeal (1913), 28 O.L.R. 52, at p. 54. Section 83 of the Act is of assistance. The provisions of the Vancouver Incorporation Act, 1921, do not

override said section 105: see *Massey-Harris Co., Ltd.* v. *Strasbourg (Town)*, [1941] 3 W.W.R. 586; *Victoria City* v. *Bishop of Vancouver Island*, [1921] 2 A.C. 384.

Lord, for respondent: The *McCallum* case is wrongly interpreted. It is not the frontage of a house, it is the frontage of a lot: see judgment of Falconbridge, C.J. in *City of Toronto* v. *Schultz* (1911), 26 O.L.R. 554 n. On the discretion of the registrar see *Erickson* v. *The Preferred Accident Ins. Co. of New York* (1928), 40 B.C. 241. The by-law is substantive law after the Act and overrides section 105. Discretion must be in compliance with the law of the land: see *City of Victoria* v. *Meston* (1905), 11 B.C. 341, at p. 346; *The City of Vancouver* v. *Bailey* (1895), 25 S.C.R. 62; Maxwell on Statutes, 8th Ed., 156.

Bull, in reply: They have paid taxes and water rates on this basis for 40 years.

Cur. adv. vult.

11th January, 1944.

McDONALD, C.J.B.C.: This is an appeal from the judgment of Chief Justice FARRIS holding that the Registrar of Land Titles was right in refusing to register a deed of land. The Chief Justice gave no reasons, but simply followed an earlier judgment of SIDNEY SMITH, J., who, in a similar case, had reversed the registrar after the latter had decided to register a deed of a portion of the same parcel of land. The reasons of SIDNEY SMITH, J. are contained in the appeal book, and it is really those reasons which we have to consider on this appeal.

For some 40 years one Percival Nye has been the registered owner of that part of block 10 (formerly consisting of lots 4 and 5), in district lot 302, group 1, N.W.D., plan 5832, in the city of Vancouver. These lots 4 and 5, as shown on the original plan, front on Fourth Avenue, and were divided by a line running north and south. Many years ago the owner took the proper proceedings to amend the plan by cancelling this dividing line, and then, without registering any plan, divided the lots on the ground by fences running east and west, thus creating on the ground 4 lots each with 30.48 feet facing on Columbia Street on the east. When this north-and-south dividing line disappeared it seems clear to me that the owner possessed a square block of

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land with a northerly frontage of 120 feet on Fourth Avenue and an easterly frontage of 120 feet more or less on Columbia Street. Some 30 years ago a house was built on each of these 30.48-foot parcels, and it is a fair inference, though there is no direct evidence, that the necessary building permit was procured before these houses were erected. The area involved is in a part of the city which, so far as residential qualifications are concerned, has greatly deteriorated, and the houses have produced only a very low rental. Each house bears a street number on Columbia Street, and the cost of water has been rated against each residence separately. The owner now finds that by selling the houses separately he will be some $3,000 better off than he would be by holding the 4 lots and letting them to tenants. Recently he sold and conveyed to the petitioner Caponero the premises which he has described as the north half of the south half of the parcel formerly known as lots 4 and 5, and the land registrar, while expressing himself as regretting his inability to register the conveyance, refused registration because he felt bound by Mr. Justice SMITH'S earlier decision regarding a conveyance of the north half of the north half of the same parcel.

As I view the matter, there are only two questions to consider, only the second of which was considered by Mr. Justice SMITH.

The application to register is made under section 105 (*a*) of the Land Registry Act, which provides that

> The Registrar, in his discretion, may accept . . . [an] abbreviated description, with or without a reference plan. . . . :—
>
> (*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.

The respondent, who is the city engineer, and is also the approving officer under the city's Zoning By-law, having been notified of the application, objected to the registration, and his authority so to object is contained in an order in council dated April 30th, 1926, and section 17 (1) (b) of the city's Zoning By-law. This portion of the Zoning By-law was passed pursuant to the powers contained in the Vancouver Incorporation Act, 1921, section 163 (213). This power, "for regulating or controlling the subdivision of city lots and blocks, and for prohibiting the subdivision thereof in contravention of the by-law" has been in force since the year 1900.

The city engineer is of opinion that the community, in which the land in question is situate, may some day be used for industrial purposes, and insists that since the parcel in respect of which registration is sought has an area of less than 4,800 square feet, the deed ought not to be registered.

As I understand the argument, it is contended in effect that the discretion vested in the registrar under section 105 (*a*) above mentioned, has really been taken away from the registrar and vested in the approving officer. This would mean that section 105 (*a*) has been in effect repealed by the city's incorporation Act and by-laws. Certainly there is no express repeal, and I am equally satisfied there is no repeal by implication.

No one questions that section 17 of the Zoning By-law is perfectly good, but it is good only for what it says, and what it says pursuant to section 163 (213) of the Vancouver Incorporation Act, 1921. The by-law passed by the city is good to the extent that anyone who breaks it is subject to penalties, but it seems clear to me that it was never intended that the Act or the by-law should take away the discretion vested in the registrar and vest it in the approving officer.

The order in council above mentioned refers only to the practice which shall govern in carrying out the provisions of section 105 of the Land Registry Act. Far from suggesting that the registrar's discretion is gone, it simply provides that the registrar, before exercising his discretion, shall be furnished with the consent of the approving officer, or with evidence that he has been duly notified of the application.

This point is not dealt with by Mr. Justice SMITH and was probably not raised before him. In any event, I am satisfied it is unsound, and that the registrar has a discretion to act under section 105 (*a*).

The real question involved is whether he exercised his discretion properly, and that depends upon the simple question whether the petitioner's conveyance creates a new parcel "by dividing the frontage of a lot." It appears that there is no statutory definition of what "frontage" means. If we may look at the ground there is nothing to be said. Each of these 4 residential parcels does front on Columbia Street; the two centre

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parcels front on nothing else; the northerly parcel fronts on Columbia Street and on Fourth Avenue; and the southerly parcel fronts on Columbia Street and on a lane.

Mr. Justice SMITH purported to follow the decision of the Ontario Court of Appel in *Re Dinnick and McCallum* (1913), 28 O.L.R. 52. With respect, I do not think that decision applies to a case such as we have here. I do think, on the other hand, that we may obtain much assistance from the decision (not cited below) in *Justices of Bedfordshire* v. *Bedford* (1852), 7 Ex. 658; 155 E.R. 1112. There the Court had to consider the words " 'for every yard running measure of the length in front of such halls, gaols,' &c." The language of Parke, B. at p. 1116 I think is applicable here:

> In my opinion the expression "in front" has the same meaning as the term "frontage" has in popular parlance.

I have no doubt at all that anyone who did not take an arbitrary and cast-iron view, but did look at the real justice of the case, would say that the deed of land now sought to be registered is a conveyance of a "new parcel created by dividing the frontage of a lot."

I would allow the appeal and uphold the view of the land registrar.

O'HALLORAN, J.A.: The only point we are asked to decide is the jurisdiction of the Registrar of Titles to register a conveyance, and that hinges upon the appropriate meaning of the term "frontage" in section 105 (*a*) of the Land Registry Act, Cap. 140, R.S.B.C. 1936. That section reads in material part: [already set out in the judgment of MCDONALD, C.J.B.C.].

For the past 40 years Percival Nye has owned the south-west corner of Columbia Street and Fourth Avenue in the vicinity of False Creek in the city of Vancouver. According to registered plan No. 5832, it abuts 107.55 feet on Fourth Avenue and 121.93 feet on Columbia Street. About 35 years ago Nye built four houses thereon facing Columbia Street and they are known as Nos. 2001, 2009, 2015 and 2023 Columbia Street. Each house premises is separated by a fence and has an approximate depth of 110.5 feet and an approximate frontage of 30.48 feet where it faces Columbia Street. The four houses have been rented since

1909. The city of Vancouver assessed each house premises separately for water rates.

From 1933 to 1936, tenants of two of the houses were on relief and Nye received his rent through the Vancouver City Relief office. In November, 1943, Nye sold 2015 Columbia Street to Carmen Caponero who had been renting that property. The learned Registrar of Titles refused to register the conveyance to Caponero because of a decision of SIDNEY SMITH, J. in *In re Land Registry Act. In re Guy* (1943), 59 B.C. 406; [1944] 1 W.W.R. 38 (which FARRIS, C.J.S.C. followed in this case), to the effect that Nye's corner lot has frontage on Fourth Avenue but has no frontage on Columbia Street. Caponero's appeal to this Court is opposed by counsel for the city of Vancouver approving officer.

In my view there are a number of convincing reasons why the appeal should succeed. In the first place, I think it is obvious that a corner lot must have frontage on two streets. The Land Registry Act nowhere defines "frontage," or in anywise denies that a corner lot has frontage on two streets. In the result, Nye's corner lot cannot escape having frontage on both Columbia Street and Fourth Avenue. Hence the parcel Nye conveyed to Caponero is "created by dividing the frontage of a lot" within the language of section 105 (*a*), *supra*. In the second place, there is nothing in plan 5832 from which it may be legitimately inferred that Nye's corner lot does not front on Columbia Street. The Land Registry Act does not require subdivision plans to define which side is the front of any parcel of land.

It is true that at one time Nye's corner lot was subdivided into two lots 4 and 5, which then clearly indicated that the inner lot at least—*viz.*, lot 4, had its frontage only on Fourth Avenue, since, because lot 5 then intervened between it and Columbia Street, it could not abut on the latter street. But that was not so at the time of the sale to Caponero, for lots 4 and 5 had then been cancelled, and there was left the large corner lot shortly described in the conveyance as "part of block 10, formerly lots 4 and 5." Plan 5832, therefore, does not indicate that part of block 10 now consisting of cancelled lots 4 and 5 does not front on Columbia Street.

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In the third place, plan 5832 shows that Columbia Street runs in a southerly direction down to False Creek, and that Fourth Avenue is a lateral street, intersecting it. And looking at blocks on the plan similar to block 10 which adjoin Columbia Street, we find that in blocks 14, 15, 20 and 21, corner lots just like Nye's are subdivided into parcels, which, in the case of interior parcels such as the one sold Caponero, can front only on Columbia Street. But some of these lots with no greater width than the Caponero lot, have only 68 feet depth compared with Caponero's 110 feet. Plan 5832 makes it clear that a condition does in fact exist, whereby lots which abut on Columbia Street do face and front on Columbia Street and not on the lateral streets which intersect Columbia Street. That is confirmed by looking at similar properties abutting on Alberta Street, the next street paralleling Columbia Street to the west.

The Ontario Court of Appeal in *Re Dinnick and McCallum* (1913), 11 D.L.R. 509 held that in Ontario, "in front" could not include abutting, as it was construed in *Justices of Bedfordshire* v. *Bedford* (1852), 7 Ex. 658; 155 E.R. 1112, for, because of the Surveys Act in that Province they were of opinion,

> no one would ever think of saying that any lot fronted upon any highway except that upon which it is numbered.

In my view the reasoning in *Dinnick and McCallum* is not applicable here, because (a) since the cancellation of lots 4 and 5, Nye's corner lot has not been "numbered upon any street" in the sense of the Ontario case; (b) we were referred to nothing in our Official Surveys Act or in any other statute, which in an appropriate case, prevents "Abutting on a street" being included in "fronting on a street"; (c) Nye's corner lot naturally fronts on both streets; (d) plan 5832 shows that lots on Columbia Street and Alberta Street do for the most part literally face toward Columbia Street; and (e) the four-house premises on Nye's corner lot have in fact faced on and been numbered on Columbia Street for 35 years.

In the *Bedfordshire* case the statute provided that gaols, etc., should be rated at a stated sum " 'for every yard running measure of the length in front of such . . . gaols,' &c." The only entrance to the gaol was from one street. There was a blank wall 20 feet high for 61 yards along a second street but without any

entrance therefrom. The Court held the frontage on the second street was rateable within the meaning of the statutory language just cited. Pollock, C.B. said every part of the building should be considered as frontage which fronts or abuts upon any public street. Baron Parke agreed, observing that "in front" has the same meaning as the term "frontage" has in popular parlance. Alderson and Martin, BB. were of the same opinion.

In my judgment the reasoning in the *Bedfordshire* case should be applied here. Since the Legislature did not define the popular meaning of "frontage" in section 105 (*a*), *supra*, the term deserves that meaning which is reasonable and appropriate to the specific conditions which exist along Columbia Street, *cf. River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, Lord Blackburn at p. 763, and *Stradling* v. *Morgan* (1560), 1 Plowd. 199, at p. 205; 75 E.R. 305, at p. 315. It is to be noted that in the *Bedfordshire* case, although the statute concerned frontage of land, the frontage was determined by relating the land to the buildings on it, even though there was no entrance to the buildings from the second street. We need not go that far in this case, since the four buildings on Nye's corner lot not only face toward Columbia Street, but have entrances from Columbia Street.

If for taxation purposes, the interpretation of "frontage" is governed by whether or not the property is benefited (*vide* section 188, Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55), I see no reason why benefit to the property as actually used, should not be the safest guide to determine for other purposes as well, where the "front" is, if no other test is prescribed by statute or is plainly demanded by conditions existing in the ground. In *Connecticut Mutual Life Ins. Co.* v. *Ingarson* (1899), 78 N.W. 10, the Supreme Court of Minnesota said:

> . . . people usually understand the words "front" and "frontage" as referring to street frontage, or facing according to the manner in which property is improved and used.

In this case anyone going upon Nye's corner lot, according to plan 5832 and the evidence before us would find, that as improved and used, it faces Columbia Street in common with other lots on that street.

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Counsel for the respondent approving officer also objected to the registrar's jurisdiction on the ground that section 105, *supra,* has been overridden by section 163 (213) of the Vancouver Incorporation Act, 1921, *supra.* The point being, that under the latter statute, the city of Vancouver having passed a zoning by-law that no lot should be subdivided in certain districts if it contained less than a prescribed area, the Registrar of Titles by necessary implication was deprived thereby of the jurisdiction vested in him by section 105, since the Caponero lot contains less than the stipulated area. Reliance was placed upon the general principle that the application of a general statute may be limited by a particular statute to the extent the provisions of the general statute are excluded expressly or by necessary implication. I cannot find that occurs here.

The Land Registry Act is a general statute re-enacted in the revised statutes of 1936, dealing in comprehensive detail with the registration of interests in land. The Vancouver Incorporation Act, 1921, confers no power upon the city corporation to register interests in land. There can be no conflict of jurisdiction in that respect. Also the Registrar of Titles may act under section 105 without the approval of a municipal approving officer. It is noted that by section 87 of the Land Registry Act, no subdivision plan shall be received in a Land Registry office unless it has first been approved by the proper approving officer. If the Legislature had purposed to subject the registrar's jurisdiction in section 105 to a similar restriction, it would undoubtedly have said so in unequivocal language.

In my view the fact that the city of Vancouver has passed a by-law under section 163 (213) of its incorporating Act, prescribing the minimum area of lots to be subdivided, does not deny the jurisdiction of the Registrar of Titles to register the Caponero lot. That such a by-law has been passed is of course one of the matters the registrar ought to take into consideration in exercising his discretion to register or not to register. But he, and not the city of Vancouver or its approving officer, is the agent of the Legislature for the purpose of registration. He takes his jurisdiction from the Legislature, and not from a by-law of another creature of that parent Legislature.

The city of Vancouver is not a state within a state. As a creature of the Legislature, the powers it is given in any subject-matter cannot escape their relation to provisions in general public statutes of provincial-wide application and concern. It is a creature and not a maker of statute law. By section 163 (213), *supra,* the city may pass by-laws:

> For regulating or controlling the subdivision of city lots and blocks, and for prohibiting the subdivision thereof in contravention of the by-law.

As the city of Vancouver is given no power to register titles to land, which power is vested solely in Provincial Registrars of Titles under the Land Registry Act, the city's general powers above cited are necessarily related to the superior jurisdiction of the Registrar of Titles—the more plainly so, when the latter's jurisdiction is as unconfined and unequivocal as it is in section 105 (*a*) and the city's powers are correspondingly general. Were it not so, the city of Vancouver and not the Registrar of Titles, would in practical effect, control the registration of all titles in that city.

In my view the Legislature's purpose was clearly reflected in the order in council dated 30th April, 1926, passed under section 253 (1) of the Land Registry Act, Cap. 127, R.S.B.C. 1924, as follows:

> The Registrar before exercising the discretion given to him by section 105 in respect of matters covered by clauses (*a*), (*b*), or (*e*) of the said section, shall be furnished by the applicant with the consent of the Approving Officer of the Municipality in which the land affected is situate, or with evidence that reasonable notice has been given to the Approving Officer of the proposed application.

That is specifically directed to discretion and not to jurisdiction. It plainly means that the consent of a municipal approving officer is not a condition precedent to his jurisdiction to register.

The question of the proper exercise of the registrar's discretion has not arisen. It could not, because, being confronted with a judicial decision denying his jurisdiction, *vide In re Land Registry Act. In re Guy,* (1943), 59 B.C. 406; [1944] 1 W.W.R. 38, he had not reached the stage at which the exercise of his discretion could be called for. Now that our judgment herein establishes his jurisdiction, he is free to exercise his consequent statutory discretion. In the result I must hold that the Regis-

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trar of Titles has jurisdiction under section 105 (*a*) to register the Caponero conveyance.

I would allow the appeal accordingly.

ROBERTSON, J.A.: This appeal involves the consideration of section 17 (b) of Vancouver City Zoning By-law No. 2516 and section 105 (*a*) of the Land Registry Act. Some 40 years ago one, Nye, purchased lots 4 and 5, block 10, as afterwards shown on subdivision plan No. 5832, registered in 1927. According to this plan lot 4 had a length of 49.5 feet on Fourth Avenue and a depth of 121.93 feet. Lot 5 was on the north-east corner of block 10, immediately to the east of lot 4. It had a length of 58.05 feet on Fourth Avenue and 121.93 feet on Columbia Street. The dividing line between the two lots was cancelled (the material does not show when) and the property then became known as "that part of block 10 (formerly lots 4 and 5), district lot 302, group 1, New Westminster District, plan 5832." Although lot 4 prior to this had no frontage on Columbia Street, I think the effect of throwing the two lots into one was that the combined lots had, in common parlance, a frontage both on Fourth Avenue and Columbia Street.

About 30 years ago Nye put up four houses on this property, each house facing on Columbia Street, and, during the last 25 years, being divided from its neighbour by a fence. Caponero applied to register a conveyance from Nye to himself dated 9th November, 1943, of the north half of the south half of "that part of block 10." On the same date his solicitor gave notice to the city engineer of his intention to apply to register. The engineer objected in writing, taking grounds which were open to him under said section 17 (b), later quoted. The registrar refused the application, but stated he would have been willing to register were it not for a decision of SIDNEY SMITH, J., given the 27th of October, 1943, in which he held, upon an application of a would-be purchaser from Nye of a similar part of block 10, that he had no jurisdiction, as what Nye was seeking to do was not a division of frontage as referred to in section 105 (*a*), but was an attempt to create a new frontage on Columbia Street, and that this could not be done without filing a subdivision plan and

obtaining the consent of the "approving officer," as provided in the Land Registry Act.

There is a great deal to be said in support of this view. However, it is unnecessary to decide it, and I think the judgment appealed from may be upheld on the second ground taken by the city, which is founded on the by-law. The Vancouver City's Act of Incorporation, Cap. 54, B.C. Stats. 1900, Subsec. (156) of Sec. 125, provided:

> For regulating the sub-division of city lots and blocks, and prohibiting the sub-division thereof in contravention of the by-law.

This section is the same as in the city's Act of Incorporation revising and consolidating its charter, Cap. 55, 1921 (Second Session), B.C. Stats., Subsec. (213) of Sec. 163, except that the words "or controlling" appear after the word "regulation"; and this is the subsection under which section 17 (b) of the by-law was passed.

Section 105 (*a*) of the Land Registry Act was originally passed in 1921: see Cap. 26, Sec. 150. Section 17 (b) of the by-law provides:

> In multiple dwelling, commercial and industrial districts, no parcel of land shall be subdivided so as to produce any lot having an area of less than four thousand eight hundred square feet unless in the opinion of such approving officer a lot, or lots or lesser area is considered desirable and not detrimental to surrounding property.

It is admitted the property in question is in "an industrial district." The by-law has the same effect within its limits and with respect to the persons upon whom it lawfully operates as an Act of Parliament has upon the subject at large. See *City of Victoria* v. *Meston* (1905), 11 B.C. 341, at p. 346 and *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, at p. 96.

It seems to me that the provision in the City's Act of Incorporation and section 105 (a) are obviously inconsistent. In the one case the power is to be exercised by the council of the city by means of a by-law, and in the other by the Registrar "in his discretion." Under these circumstances I think the principles laid down by Mr. Justice Rinfret, delivering the judgment of himself and Crocket and Taschereau, JJ. in the case of the *City of Ottawa* v. *Town of Eastview et al.*, [1941] S.C.R. 448, apply. The learned judge said at p. 462:

> The principle is, therefore, that where there are provisions in a special

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Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject-matter of the rule from the general Act (see: *Ontario & Sault Ste. Marie Railway Company* v. *Canadian Pacific Railway Company* (1887), 14 Ont. 432; *Upper Canada College* v. *City of Toronto* (1916), 37 O.L.R. 665, at 670).

In the words of Lord Halsbury, L.C., and of Lord Herschell, in *Tabernacle Permanent Building Society* v. *Knight*, [1892] A.C. 298, at 302, 306:

"Where is the inconsistency if both may stand together and both operate without either interfering with the other? . . . I think the test is, whether you can read the provisions of the later Act into the earlier without any conflict between the two."

It follows that in my opinion section 17 (b) of the by-law governs.

As the lot, in respect of which the application to register was made, contained less than 4,800 square feet, the by-law contained an absolute prohibition against its registration, unless the approving officer approved, which he did not do; so that in my opinion the registrar had no jurisdiction to register.

The appeal must be dismissed with costs.

Appeal allowed, Robertson, J.A. dissenting.

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Mineral claims—Action to recover—Claims transferred by former owner to a company—Action against company—Res judicata.

In 1942 the plaintiffs applied for leave to bring this action. The application was refused by MANSON, J., who held that the matters sought to be litigated were *res judicata*. On appeal, it was held that so far as then appeared, the real question in issue had never been decided in any Court, that the appeal be allowed and that the action do proceed. The action was tried by COADY, J. on the 17th of December, 1943, when he dismissed it on the ground that the matter in issue between the parties had already been decided by the Courts.

Held, on appeal, reversing the decision of COADY, J. (ROBERTSON, J.A. dissenting), that the appeal be allowed and the judgment set aside, the action should proceed to trial. The plea of *res judicata* fails and the case should be tried on its merits.

APPEAL by plaintiff from the decision of COADY, J. of the 17th of December, 1943, dismissing the action against the

defendant Hartin in his capacity as trustee for the Daybreak Mining Co. Ltd. in bankruptcy upon the ground that the matter in issue between the parties had already been decided by the Courts. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 22nd and 28th of December, 1943, before McDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Minnie May, in person, and J. T. Unverzazt (for liquidator), appellants.

Paul Murphy, for respondent.

Cur. adv. vult.

11th January, 1944.

McDONALD, C.J.B.C.: This is an appeal from COADY, J. who dismissed the plaintiffs' action against defendant Hartin in his capacity of trustee for Daybreak Mining Co. Ltd., in bankruptcy, upon the ground that the matter in issue between the parties had already been decided by the Courts, and that hence the plaintiffs were without remedy. With due respect, I think the learned judge was wrong.

In the year 1942 the plaintiffs applied before MANSON, J. for leave to bring this action. The application was refused. While making that order disposing finally of the plaintiffs' rights, MANSON, J. did not furnish reasons for his judgment, but simply held that the matters sought to be litigated were *res judicata.* The plaintiffs appealed from this order. At that time my brother SLOAN, our late lamented brother FISHER, and I, went into the matter with great care. We traced the history of this tragic case, and we decided that, so far as then appeared, the real question in issue had never been decided in any Court, and on 12th January, 1943, reversing MANSON, J., we ordered the action to proceed. It is true that in our reasons, set forth in the judgment of FISHER, J.A., we did not finally and conclusively decide the question of *res judicata.* We thought the time had not arrived for so final a conclusion, but obviously we would not have allowed the action to proceed had we not been of opinion that the real question in issue was still open. While we were satisfied that the door ought not to be closed to the plaintiffs, we were also desirous that the

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defendants should not be precluded, on the trial, from bringing to the attention of the Court, any matters by way of defence which were not before us on the record as it then stood. We did not expect that when the matter came on for trial, the trial judge, with no further material before him than had been before us, would reach a contrary view to that which we had expressed. Of course, it was open to him to do so, and it is equally open to us to decide whether he was right. That is our duty and our responsibility.

In April of 1943 the defendants moved to have the action struck out upon the ground that it was frivolous and vexatious, and that the matters in question had already been decided. That application came before FARRIS, C.J.S.C., who, on 27th April, 1943, dismissed the application. We are told that the learned Chief Justice expressed the view that the matters in question ought to be referred to the trial judge. An application to us to extend the time for appealing from this last-mentioned order was refused.

To my mind, the issue which the plaintiffs ask the Court to decide in this action is very simple. The plaintiffs hold a judgment against a number of the individual defendants, to whom I shall refer as the "Roberts gang," though the description may be too complimentary. Both in the Courts of the United States and of Canada, wherever the merits of this dispute have been discussed, it has been held that the plaintiffs have been bilked out of their mining property by the rankest chicanery and fraud. As I say, the plaintiffs hold a solemn judgment of this Court to that effect. But, when they seek to reap the fruits of that judgment they are met with the situation that the property is not now in the hands of the "Roberts gang," but, as it is alleged, has been handed over, without consideration, to the Daybreak Mining Company, a dummy creation, brought into being by Roberts and his co-conspirators, with the dishonest purpose of holding the property and so perpetuating the fraud. The defendant Hartin, acting as trustee for the Daybreak Company, is in possession of the property and refuses to give it up. If the plaintiffs can prove these allegations, is there any Court in any civilized jurisdiction anywhere that will dare to hold that the plaintiffs are

without remedy? Is the robber to hold the loot as against the true owner by simply handing it over to his fellow criminal? I should hardly think so. And yet, if the situation is as the plaintiffs allege, that is what has happened here.

It is true that this litigation has been protracted and costly. On one occasion a judge of this Court said "I consider that there should be an end to this litigation," and COADY, J. on the present occasion counts up and finds that this is the fifth action which the plaintiffs have brought. Well, whose fault is that? Can the plaintiffs be blamed, because of their importunities, if every time they knock at the door of the place of justice, they are denied admittance? So far as Hartin and the Daybreak Company are concerned, the plaintiffs have asked for bread and have been given a stone.

The tragedy of this case, so far as the plaintiffs are concerned, is that, having been stripped of their property by fraud, and so reduced to the threadbare condition of a worn-out litigant, they have been left without the sinews of war, and so, for the most part, have been obliged to seek relief from the Courts, without having had legal advice or assistance. In such circumstances, it is no cause for wonder, that they have from time to time fallen into some of the snares and pitfalls that await the unwary in the conduct of a lawsuit. But right is right, and justice is justice, and our Courts are constituted with the purpose that the right shall prevail.

We boast ourselves of our system of jurisprudence, which Lord Kenyon 150 years ago hoped he might "be indulged in supposing had never yet been equalled in any other country on earth." Then let us live up to our boast. In *Martin* v. *Kennedy* (1800), 2 Bos. & P. 69, at p. 70 Lord Eldon, C.J. said this:

> Though every attempt to shorten litigation is entitled to the favour of the Court, yet before we stop a party in a regular course of proceeding, we ought to be certain that we shall not deprive him of that justice which the law authorizes him to seek.

Has such certainty been in evidence here? Without any hesitation, I would say it has not.

Let us look at what another great judge had to say in 1878. In *Combe* v. *Edwards,* 3 P.D. 103, at p. 142, Lord Penzance said this:

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The picture of law triumphant and justice prostrate, is not, I am aware, without admirers. To me it is a sorry spectacle. The spirit of justice does not reside in formalities, or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the handmaid of justice, and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque.

And so one could go on indefinitely, quoting from the great judges who, through the centuries, have created and laid down the basic principles of justice and fair play which ought to guide us, and must, if we are to be entrusted with the responsibility of deciding the disputes which arise among our citizens, otherwise, as Lindley, M.R. said in *Frankenburg* v. *Great Horseless Carriage Company*, [1900] 1 Q.B. 504, at p. 508, "substantial justice would be sacrificed to a wretched technicality."

I would with deference allow this appeal and set aside the judgment with costs. The action should proceed to trial. The plea of *res judicata* fails, and the case should be tried on its merits, and that, without delay.

SLOAN, J.A.: I would allow the appeal for the reasons given by the Chief Justice.

ROBERTSON, J.A.: The facts with regard to the litigation in question are fully set out in the reasons for judgment of COADY, J. in this action and of O'HALLORAN, J.A. in 59 B.C. 39, at p. 41 *et seq.* It will be convenient to adopt Mr. Justice O'HALLORAN's mode of referring to the judgments at p. 42.

The 1932 judgment was against some of the defendants, but the action as against the Daybreak Mining Company was dismissed, and this latter part of that judgment still stands. The Gibson Mining Company was not a party to either of the actions resulting in the 1932 and 1934 judgments. It was to all subsequent proceedings.

As to the 1938 judgment I have this to say: On the 2nd of February, 1937, D. K. May and his wife, suing as well on their own behalf as on behalf of all the shareholders of Gibson Mining Co. Ltd. similarly situated, *et al.*, had commenced an action against Kane, trustee of the Daybreak Mining Co. Ltd., in bankruptcy, Joseph C. Roberts, trustee *ex maleficio* for the plaintiff,

et al. By order made the 27th of May, 1937, the Gibson Mining Co. Ltd. and the two Mays in their personal capacity were added as plaintiffs in the action, and Roberts as a defendant personally. The object of this action, *inter alia,* was to obtain the relief against the Daybreak Company which had been refused in the 1932 action.

Kane died in March, 1937, and Hartin was appointed in his place in May, 1937. On the 21st of December, 1937, the plaintiffs obtained judgment in default of defence against all the defendants except Hartin as trustee of the Daybreak Company. This, of course, did not affect the title, ownership or possession of the Daybreak Company. Later, on the 10th of January, 1938, Hartin moved to dismiss the action or stay any 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 to strike out the statement of claim against it on the grounds that the statement of claim disclosed no reasonable grounds of action against the company.

Our late lamented brother FISHER, J.A., then a judge of the Supreme Court, refused the motion on the 5th of April, 1938. He referred to the fact that on the 5th of July, 1937, MCDONALD, J., as he then was (now C.J.B.C.), made an order that leave be granted to the Mays, suing personally, and suing as well on their own behalf as on behalf of all the shareholders of Gibson Mining Co. Ltd., similarly situated, and Gibson Mining Co. Ltd., N.P.L., in liquidation, to bring an action against the said Hartin, as trustee of the Daybreak Mining Company, in bankruptcy, by joining or adding the said Hartin as defendant in an action No. M. 156/1937 commenced on the 2nd of February, 1937, in the Vancouver Registry of the Supreme Court of British Columbia, for the purpose of recovering from Daybreak Mining Company, in bankrupcy, and from the said trustee, the seven mineral claims or interest therein, and all other assets of Gibson Mining Co. Ltd., in liquidation, allegedly fraudulently obtained from the last-mentioned company, and fraudulently held by the said Daybreak Mining Company, in bankruptcy, subject to the directions of the Court in the said action No. M. 156/1937.

Hartin's appeal against this order was dismissed. The

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majority of the Court, MARTIN, C.J.B.C. and MCPHILLIPS, J.A. held that the learned judge was quite justified on the facts in making the order he did, particularly in view of the fact that a new party had appeared, that is to say, the Gibson Mining Co. Ltd. MCQUARRIE, J.A. dissented on the ground that the matter was *res judicata.*

FISHER, J. held that it was not clear whether or not the Court had dealt with the question of *res judicata* and felt that he must reach his own conclusion on the matter. He was of the opinion that the matter was not *res judicata* as the Gibson Mining Company was not a party to the previous actions. He did not deal with the position so far as the other plaintiffs were concerned. He dismissed the application. An appeal was taken from his decision. The appeal was heard by MARTIN, C.J.B.C., MACDONALD and MCQUARRIE, JJ.A.

The learned Chief Justice held that before he could reverse the learned judge below he should "be entirely free from any doubt and be prepared to go so far as to hold that there is now the existence of a certainty that no reasonable cause for action is disclosed, or that frivolity, or vexation, or abuse alone found this action." He was not prepared to go that length, so he dismissed the appeal. MCQUARRIE, J.A. would have allowed the appeal, because he held the matter was *res judicata,* as he had held in the previous appeal from the order dated 5th April, 1937, *supra.*

MACDONALD, J.A. did not say, expressly, that he held the matter was *res judicata.* However, the statement of claim was stricken out and the action dismissed as against the Daybreak Mining Company. Conditional leave to appeal to the Privy Council was granted. The matter came before the Privy Council for leave to appeal *in forma pauperis,* which was refused.

On the 2nd of October, 1939, the Daybreak Company being then in bankruptcy, the liquidator of the Gibson Mining Company and the Mays, pursuant to rule 142 of the Bankruptcy Rules, moved before MCDONALD, J., as he then was, for the same 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 applications that the issues involved had been previously determined between the parties. McDONALD, J. sustained that objection, and dismissed the application. On appeal this Court, *coram* MARTIN, C.J.B.C., McQUARRIE and O'HALLORAN, JJ.A. upheld his decision on the 8th of March, 1940. See *Gibson Mining Co. Ltd.* v. *Hartin* (1940), 55 B.C. 196. O'HALLORAN, J.A. pointed out that the application before McDONALD, J. was under rule 142 of the Bankruptcy Rules. He referred to the decision of the Court of Appeal given on the 2nd of December, 1938, from the decision of FISHER, J., and the remarks of the Chief Justice in giving judgment when granting conditional leave to appeal to the Judicial Committee, namely (p. 201):

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

He pointed out that the petition to Mr. Justice McDONALD on the 2nd of October, 1939, was asking him to reagitate the same issues anew on the same grounds, and not to accept the judgment of the Court on 2nd December, 1938, as a final disposition thereof between the Gibson Company and Hartin. That it was asking him to adjudicate upon allegations against Hartin by the Gibson Company which the Court had declared did not disclose a reasonable cause of action, and he held that of necessity that judgment was decisive in the matter. The result was that O'HALLORAN, J.A., as I read his judgment, felt that the matter was *res judicata.* McQUARRIE, J.A. agreed the appeal should be dismissed. He had on two previous appeals said that he thought the matter was *res judicata.* See *May* v. *Hartin* (1938), 53 B.C. 411, at p. 421. Chief Justice MARTIN said at p. 199:

> . . . I am, however, not, with every respect, without doubt as to the conclusion they have reached "upon the merits" (if such they can appropriately be styled in this unusual and distressing case) but my doubt is not sufficient to warrant my dissent from said conclusion.

One would have thought that this would have disposed of the matter finally, but on the 13th of April, 1942, Mrs. May and one Unverzagt, as liquidator of the Gibson Mining Company, applied to MANSON, J. for an order that leave be granted to them to bring

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an action against Hartin personally and as trustee of the Daybreak Mining Company, in bankruptcy, for the purpose of recovering from the said company and trustee the several mining claims or interest therein, and all other assets of Gibson Mining Co. Ltd., in liquidation, fraudulently obtained from it, and fraudulently held by the said Daybreak Mining Company, and now held fraudulently by the said Hartin, and for all proper conveyances of title and possession of all the said mineral claims. MANSON, J. refused the application. An appeal was taken. MCQUARRIE, J.A. agreed with MANSON, J. that the matter was *res judicata*. O'HALLORAN, J.A. reviewed all the previous litigation and held that the matter was *res judicata*. MCDONALD, C.J.B.C. agreed with FISHER, J.A. and SLOAN, J.A. allowed the appeal for the reasons given by FISHER, J.A.

As I view the judgment of FISHER, J.A., he drew a distinction between a decision (1) in a case where an appeal was taken from a refusal of leave to commence proceedings and (2) in a case where an appeal was taken from an application in an action to stay or dismiss on the ground that the action was frivolous, and (3) in a case where an appeal was taken from an order made upon an application under rule 142, *supra*.

As to one and two, the reasons for this appear to me to be that on an application for leave to commence an action all the grounds which afterwards might be raised in the statement of claim might not be before the Court; but when a statement of claim has been filed, it would be clear whether it set up any issues which had not been determined in the previous litigation, and then the Court would be in a position to deal effectively with the defence of *res judicata*. He did not express any opinion on "what might be called the merits of the question," although he thought that much might be said "for and against the contention that new issues arise in the proposed action." He preferred to follow the decision of the Court of Appeal on the 2nd of November, 1937, affirming the order made on the 5th of July, 1937, giving leave to bring action, and he said that "the question of *res judicata* should not be determined" on the application then under appeal before the Court. So that the majority of the Court merely

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decided that the action should proceed to trial. The action came on for trial before COADY, J.

It appeared from the statement of claim that the only new issue was a claim for possession. As pointed out by O'HALLORAN, J.A. in his judgment in 59 B.C. 39, at p. 52 and COADY, J., the question of possession was not a new issue. Further, it having been held finally in the previous litigation that title was in the Daybreak Mining Company, I am quite unable to see how any judgment for possession in favour of the plaintiffs could be given.

For the reasons set out in the judgment of COADY, J. I am of opinion that the matter was *res judicata*.

In my opinion the appeal must be dismissed with costs.

Appeal allowed, Robertson, J.A. dissenting.

IN RE ESTATE OF E. S. BROWNE, DECEASED.

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Sept. 13;
Nov. 1.

Costs—Right of Attorney-General to costs—Ex officio committee of estate of lunatic—Crown Costs Act, R.S.B.C. 1936, Cap. 67, Sec. 2—R.S.B.C. 1936, Caps. 162, Sec. 69, and 292, Sec. 78.

The Attorney-General, acting as *ex officio* committee of the estate of a lunatic is an officer, servant or agent of and acting for the Crown within section 2 of the Crown Costs Act and not entitled to an order for costs. The fact that he is directly appointed by Act of Parliament can make no difference.

Section 69 of the Lunacy Act and section 78 of the Trustee Act do not, either separately or in combination, expressly, within the meaning of the Crown Costs Act, authorize the Court or a judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown.

APPLICATION by the trustee of the estate of Edward Sloan Browne for leave to sell certain real property of the estate. The question arose as to whether costs can be directed to be paid to the Attorney-General. Heard by COADY, J. in Chambers at Vancouver on the 13th of September, 1943.

Pratt, for petitioner.

Wyness, for Attorney-General.

Cur. adv. vult.

S. C.
In Chambers
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IN RE ESTATE OF E. S. BROWNE, DECEASED

1st November, 1943.

COADY, J.: This is an application by the trustee of the estate of Edward Sloan Browne for leave to sell certain real property of the estate. The Attorney-General, as *ex officio* committee under the Lunacy Act of the estate of Lizzie Browne, one of the beneficiaries of the estate of Edward Sloan Browne, was represented by counsel on this application. The order for sale was made with costs payable out of the estate of Edward Sloan Browne to the other parties appearing, but the question has arisen as to whether costs can be directed to be paid to the Attorney-General. Section 2 of the Crown Costs Act reads as follows:

> No Court or Judge shall have power to adjudge, order, or direct that the Crown, or any officer, servant, or agent of and acting for the Crown, shall pay or receive any costs in any cause, matter, or proceeding except under the provisions of a Statute which expressly authorizes the Court or Judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown.

Counsel for the Attorney-General submits that the Act has no application in that the Attorney-General as *ex officio* committee of the estate of a lunatic is not an "officer, servant, or agent of and acting for the Crown," but is acting for the estate of the lunatic. Alternatively, he submits, that if it is held that he is such officer, there is special authorization in the Lunacy Act and the Trustee Act to permit the making of an order for payment of costs to him.

The first point for consideration therefore is whether the Attorney-General "is [an] officer, servant, or agent of and acting for the Crown." Section 47 of the Lunacy Act provides, *inter alia,* that in case any lunatic admitted to a public hospital for insane has no committee the Attorney-General shall by virtue of this Act be *ex officio* the committee of this lunatic. The section further provides that without application to the judge in lunacy and without obtaining any order or directions that the said committee shall have full power over and be competent to manage and appropriate, take, or recover possession of, lease, mortgage, sell, and convey all or any part of the real or personal property of such lunatic.

Section 50, subsection (1), provides that the Attorney-General in order to secure the payment or delivery to him of any moneys or property of the lunatic may, subject to the approval of the Lieutenant-Governor in Council, give to the person, corporation,

or Government paying or delivering the money or property an undertaking or obligation in writing under his hand which shall be binding upon the Crown in right of the Province to repay the moneys or to redeliver or pay over the property or the proceeds realized from its sale, upon the conditions set out in such undertaking or obligation. Subsection (2) provides for the advance from the Consolidated Revenue Fund of the Province such sums of money as may be deemed requisite for the advantageous administration of any estate in the hands of the Attorney-General under the Act, and further provides that such moneys expended by the Attorney-General shall constitute a first lien or charge in favour of the Crown in the right of the Province against all the property and assets of the estate in priority to all other charges or encumbrances thereon. Subsection (3) provides that for the purpose of meeting the costs of administering the estate the Attorney-General may retain out of all moneys of the estate of every lunatic of which he acts as committee a sum equal to 5 per cent. of the gross amount of such moneys, and all sums retained by the Attorney-General under this subsection shall be paid into the Provincial Treasury, to be accounted for as part of the Consolidated Revenue Fund.

In the view of the foregoing it appears to me that the Attorney-General under the Act is an "officer, servant, or agent of and acting for the Crown." The fact that he is directly appointed by Act of Parliament can make no difference. See *Watson* v. *Howard* (1924), 34 B.C. 449. The decision in *The Minister of Finance* v. *The King,* at the *Prosecution of Andler et al.,* [1935] S.C.R. 278) does not in my opinion affect the reasoning in *Watson* v. *Howard,* for in the *Andler* case it is clear that the fund in question was not a part of the Consolidated Revenue Fund, and under the special legislation there considered it was held that the Minister of Finance was not acting as an officer, servant or agent of the Crown but was a mere agent of the Legislature to do a particular act. The cases are clearly distinguishable. The question then arises, does he come within the exception provided in section 2 of the Crown Costs Act entitling him to costs. He can only be so entitled

under the provisions of a Statute which expressly authorizes the Court or

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Judge to . . . make an order or direction as to costs in favour of or against the Crown.

The Lunacy Act provides for the payment of costs to the Attorney-General in two instances only. Section 49 provides that on an application for the appointment of another committee notice of such application shall be served upon the Attorney-General and the costs incurred by the Attorney-General in connection with the application are to be paid either by the person making the application or out of the estate of the lunatic as the Court or judge may direct. Section 52 provides that on an application to the Court by the Attorney-General for payment out of any funds or moneys which may be in the Court belonging to the lunatic, to provide for the maintenance of such lunatic, the judge shall in all cases make such order as to costs or otherwise that may to him seem proper.

There is no other provision in the Lunacy Act under which an order for costs in favour of the Attorney-General is expressly authorized. The fact that such special authorization is given in the two sections above referred to would appear to support the view that the Legislature intended that the Attorney-General should be the representative of the Crown and acting for and on behalf of the Crown, and not being entitled to costs unless specially authorized to receive the same, provision was accordingly made for the payment of costs to him in these special instances. It will be noted, too, that the costs directed to be paid by these special sections are payable out of the estate of the lunatic. There is no provision in the Act for payment of costs to him from any other source. But here it must be noted the Attorney-General seeks costs out of the estate of Edward Sloan Browne and not out of the estate of the lunatic. I can find no special authorization for it.

In the absence of any express provision in the Lunacy Act or elsewhere for an order directing the payment of costs to the Attorney-General, counsel for the Attorney-General seeks support for his submission for costs in the general provisions for the payment of costs set out in the Lunacy Act and in the Trustee Act. The sections of the Lunacy Act to which my attention is directed are sections 26 and 69. Section 26 has reference to the

costs of all proceedings for the purpose of ascertaining whether the person is a lunatic. This is of no assistance because the Attorney-General is not necessarily a party to such proceedings. Section 69 is as follows:

69. The Judge in lunacy may order the costs of and incident to all proceedings under the provisions of this Act, and carrying the same into effect, to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the Judge may think fit.

The provision under the Trustee Act relating to costs is as follows:

78. The said Supreme Court or Judge may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court or Judge shall think proper.

The question then is, do these sections either separately or in combination expressly within the meaning of the Crown Costs Act authorize the Court or a judge to pronounce a judgment or to make an order or direction as to costs in favour of or against the Crown.

In my opinion they do not. The meaning of the word "expressly" in the Crown Costs Act is dealt with in the case of *Watson* v. *Howard* (1924), 34 B.C. 449, as meaning necessarily or even naturally implied. I cannot find that the particular sections of the Lunacy Act or Trustee Act expressly or by necessary intendment authorize an order for payment of costs in favour of or against the Attorney-General—see *Rex* v. *McLane*. *Rex* v. *Noon* (1927), 38 B.C. 306; *In re Land Registry Act and Scottish Temperance Life Assurance Co.* (1919), 26 B.C. 504; *In re Gardiner and District Registrar of Titles* (1914), 19 B.C. 243; *Rex* v. *Volpatti*, [1919] 1 W.W.R. 358; *Rex and Attorney-General for Saskatchewan* v. *Milicke (No. 2)*, [1938] 2 W.W.R. 97.

It is submitted that in refusing costs to the Attorney-General on this application the Court is in effect depriving the estate of the lunatic of costs, which must be charged against the estate by the Attorney-General. That I do not think follows, although I am not called upon to decide the point on this application. It may be that such costs incurred are payable out of the 5 per cent.

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to which the Attorney-General is entitled by statute for the purpose of meeting the cost of administering the estate. Even if the submission were sound that would not in my opinion be a reason for granting costs in the absence of some express statutory provision authorizing the same.

As pointed out in *Rex* v. *Liden* (1922), 31 B.C. 126, by MCPHILLIPS, J.A., at p. 132:

> . . . ; the Crown is sheltered under a parliamentary enactment of protection from paying costs and is also deprived of receiving costs.

The application for costs must therefore be refused.

Application refused.

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REX v. LILLIAN ELDRIDGE.

Criminal law—The Opium and Narcotic Drug Act, 1929—Unlawful possession—Sentence—Jurisdiction exceeded—Habeas corpus with certiorari in aid—Right to examine depositions—Power of Court—Criminal Code, Sec. 1124.

On an application by way of *habeas corpus* with *certiorari* in aid to quash a conviction which is defective on its face, the magistrate having sentenced accused to a term of imprisonment at hard labour in default of payment of the fine imposed, thereby exceeding his jurisdiction, the Court is entitled and is under a duty to examine the depositions to see whether an offence in the nature of that described in the conviction has been committed as a condition precedent to invoking the curative provisions of section 1124 of the Criminal Code, and to quash the conviction if there is no evidence to support it. In the present case it was held that there was no evidence to support the conviction and it was therefore directed that the conviction be quashed and the applicant released from custody.

APPLICATION by way of *habeas corpus* with *certiorari* in aid to quash a conviction made by William Irvine, Esquire, stipendiary magistrate, at Nelson. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 29th of October, 1943.

Pelton, for the applicant.
Crux, for the Crown.

Cur. adv. vult.

1st November, 1943.

FARRIS, C.J.S.C.: This is an application to quash a conviction made by William Irvine, Esquire, stipendiary magistrate at the city of Nelson. The applicant was summarily tried pursuant to the provisions of The Opium and Narcotic Drug Act, 1929, for unlawfully having morphine in her possession. The applicant was convicted and sentenced to six months in gaol with hard labour and to a fine of $200, and in default of payment to be imprisoned and kept at hard labour for the term of six months, to commence at the expiration of the term of imprisonment in sentence above mentioned. The warrant of commitment followed the terms of the conviction. This matter came before me by way of *habeas corups, certiorari* in aid.

Counsel for the Crown contended that I had no right to examine the depositions taken before the magistrate to see whether or not there was any evidence upon which the conviction could be based, relying upon *Rex* v. *Nat Bell Liquors Ltd.* (1922), 37 Can. C.C. 129, and *Rex* v. *Ryan* (1939), 54 B.C. 13. Counsel for the applicant argued that where there was a defect in the conviction or warrant of committal that I had the right to review the depositions in order to satisfy myself that an offence such as was described in the conviction or warrant of committal had been committed, and relied upon the case of the *Attorney-General of Manitoba* v. *Zalig* (1941), 76 Can. C.C. 131. Counsel for the applicant pointed out that there was a defect in the conviction and warrant of committal, in that the magistrate had imposed a sentence not provided for in the Act, namely, that in default of payment of the fine the applicant was to serve a term of six months in gaol with hard labour, and there was no provision for the imposition of hard labour. Section 4 (1) (ii) of The Opium and Narcotic Drug Act, 1929, provides:

> (ii) upon summary conviction, to imprisonment with or without hard labour for any term not exceeding eighteen months and not less than six months, and to a fine not exceeding one thousand dollars and not less than two hundred dollars.

Section 14 of the same Act provides that in default of payment of fine and costs,

> . . . , the person so convicted shall be imprisoned until such fine, and any costs imposed by the said sentence, are paid or for a period not exceed-

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ing twelve months, to commence at the end of the term of imprisonment awarded by the sentence or forthwith as the case may require.

It is therefore clear that the magistrate exceeded his jurisdiction in sentencing the applicant to hard labour in default of the fine, and to this extent the conviction and warrant of committal is defective and should, if it were not for section 1124 of the Code, be quashed. Section 1124 of the Code, however, gives the judge or Court the right to correct technical defects in the conviction or warrant of committal, provided the judge is satisfied that the offence as described in such conviction or warrant of committal has been committed.

It would seem, therefore, that there is a clear distinction between examining the depositions when brought before the Court by *certiorari* where the conviction and warrant of committal is regular on its face and where the conviction and warrant of committal is defective on its face. This distinction was clearly recognized by their Lordships in the *Nat Bell* case (see p. 158, 37 Can. C.C.). It is quite clear to me that when the judge or Court is asked to correct a defect in the conviction or warrant of committal by virtue of section 1124 of the Code that the judge or Court is vested with the right, and not only the right but the duty to examine the depositions to ascertain whether or not an offence such as is described in the conviction and the warrant of committal has been committed, and if the judge or Court finds that such offence has not been committed, then it is his duty not only to refuse to amend the conviction and warrant of committal but to quash the conviction. In this case I find that there is no evidence to support the conviction, and I therefore direct that the conviction be quashed and the applicant released from custody.

At the time of argument the same counsel appeared in the case of *Rex* (respondent) v. *Anvoots* (applicant), and *Rex* (respondent) v. *George Eldridge* (applicant). Counsel agreed that the facts and circumstances were identical as to the points in issue in this case, and that the order made in this case should be similarly made in the *Anvoots* case and the *George Eldridge* case. I therefore direct that in the case of *Rex* v. *Anvoots* the conviction be quashed and the applicant released from custody, and

similarly in the case of *Rex* v. *George Eldridge* I direct that the conviction be quashed and the applicant released from custody. There will be no costs.

Conviction quashed.

WILSON v. WILSON *ET AL.*

Will—Interpretation—Whole estate to wife "for her sole use and benefit forever"—Upon her death the residue to be divided between his two sons—Wife's interest a life interest only—Effect of "forever."

A testator by his will, after appointing his wife executrix and directing payment of his debts, gave the wife all his property, both real and personal, "for her sole use and benefit forever." The next paragraph directed that upon the decease of his wife, the residue of the estate should be equally divided between the testator's two sons or their direct issue. The next paragraph named two persons to be executors upon the decease of the wife.

Held, that the wife took only a life interest and that the remainder should go to the sons. The use of the word "forever" sought only to emphasize that during the life of the widow, she should have the sole use and benefit of the property.

ACTION for a declaration that by the terms of a will made by Charles Wilson, deceased, the defendant Ann Elizabeth Wilson was entitled to a life interest only in the property bequeathed and the remainder vested in the two sons of the deceased. Tried by FARRIS, C.J.S.C. at Nanaimo on the 2nd of October, 1943.

Cunliffe, for plaintiff.
V. B. Harrison, for defendants.

Cur. adv. vult.

3rd November, 1943.

FARRIS, C.J.S.C.: This is an action, *inter alia*, by the plaintiff for a declaration that by the terms of a will made by Charles Wilson, deceased, on the 28th of February, 1922, that the defendant Ann Elizabeth Wilson was entitled to a life interest only in the property bequeathed and the remainder vested in the defendant George F. Wilson and the plaintiff.

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An application was made, apparently with the consent of counsel, before HARRISON, Co. J., sitting as local judge of the Supreme Court for a reference to this Court, as to whether or not under the said will the defendant Ann Elizabeth Wilson was entitled to a life interest only in the property devised, and such reference was duly ordered by the said judge, and came before me for argument at Nanaimo on October 2nd. No evidence was adduced and it was agreed by counsel that the will in question was in the words and figures following:

I CHARLES WILSON, of the City of Nanaimo, in the Province of British Columbia, Carpenter, being of sound and disposing mind and memory, do make and publish this my last Will and Testament, hereby revoking all former Wills by me at any time heretofore made. 1st. I hereby appoint my wife Ann Elizabeth Wilson, to be the Executrix of this my last Will, directing my said Executrix to pay all my debts, funeral and testamentary expenses out of my estate as soon as conveniently may be after my decease.

2nd. After the payment of my said debts, funeral and testamentary expenses, I give, devise and bequeath all my real and personal estate which I may now or hereafter be possessed of or interested in, in the manner following: that is to say:

3rd. I give, devise and bequeath to my beloved wife Ann Elizabeth Wilson, all my property both personal and real, whatsoever and wheresoever situated for her sole use and benefit forever.

4th. I direct that upon the decease of my said wife Ann Elizabeth Wilson, that the residue of my estate shall be equally divided between my sons George Frederick Wilson and Charles Wilson or their direct issue, share and share alike.

5th. I also direct that upon the decease of my said wife Ann Elizabeth Wilson, Conrad Reifle, Brewer, and William Rumming, Aerated Water Manufacturer, both of the City of Nanaimo, Province of British Columbia, shall be the Executors of this my LAST WILL AND TESTAMENT.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 28th day of February in the year of our Lord one thousand nine hundred and twenty-two.

Signed, published and declared by the said Charles Wilson the testator, as and for his LAST WILL AND TESTAMENT in the presence of us both present together at the same time, and in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses to the due execution thereof. } Charles Wilson.

Albert Manifold
Horace Tyler

Counsel for the plaintiff contended that under the said will the defendant Ann Elizabeth Wilson was entitled to a life interest

only, and cited in support thereof: *Sherratt* v. *Bentley* (1834), 2 Myl. & K. 149; Jarman on Wills, 5th Ed., Vol. 1, p. 436; 7th Ed., Vol. 1, p. 543. *In re Bagshaw's Trusts* (1877), 46 L.J. Ch. 567; *In the goods of Lupton* (1905), 74 L.J. P. 162; *In re Brooks's Will* (1865), 34 L.J. Ch. 616; *In re Holden* (1888), 57 L.J. Ch. 648; *Shearer* v. *Hogg* (1912), 46 S.C.R. 492; *Dinsmore et al.* v. *Dinsmore et al.* (1936), 11 M.P.R. 196; *Lister et al.* v. *Gilbert et al.* (1938), 12 M.P.R. 566; *In re Robinson Estate,* [1930] 2 W.W.R. 609.

Counsel for the defendant contended that the terms of the will gave the defendant Ann Elizabeth Wilson an absolute interest in the whole estate and cited in support thereof: *In re Scott Estate* (1937), 52 B.C. 278; *In re Foss Estate,* [1940] 3 W.W.R. 61; *In re Cooper Estate,* [1921] 3 W.W.R 76; *Re Walker* (1925), 56 O.L.R 517; *Re Scott* (1925), 58 O.L.R. 138; English and Empire Digest, Vol. 44, p. 963; *In re Bonnes Estate,* [1920] 1 W.W.R. 321.

From a perusal of all of these authorities one general principle is established, namely:

"It is the duty of the judge to determine the construction of the particular will before him, and not to rely on the construction of other wills, although similar in nature, by any other judge."

There has been, however, laid down two principles of law to assist the judge in the construction of a will:

First, "if the general intention of the testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected, as introduced by mistake or ignorance, on the part of the testator, as to the force of the words used"; secondly, "where the latter part of the will is inconsistent with a prior part, the latter part must prevail":

Sherratt v. *Bentley* (1834), 2 Myl. & K. 149, at p. 157.

The words of Jessel, M.R. in *In re Bagshaw's Trusts* (1877), 46 L.J. Ch. 567, at p. 569, are particularly helpful. These words are:

You must read it all first, and gather the meaning from the whole, and you have no right to take one clause alone, and treat it as if it were a substantive and independent instrument to be confined by some clause coming afterwards.

Having in mind the principles enunciated, I have carefully examined the will in question. The first paragraph appoints the testator's wife, Ann Elizabeth Wilson, to be the executrix of the

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will, followed by the usual clause concerning the payment of all debts. The second clause provides that after the payment of debts that all of the estate of the testator is devised and bequeathed in manner following. And then follows as the third clause in the will a devise to testator's wife, Ann Elizabeth Wilson, of all of the property of the testator for her sole use and benefit forever. This is then followed by the fourth clause,

> that upon the decease of my said wife Ann Elizabeth Wilson, that the residue of my estate shall be equally divided between my sons, George Frederick Wilson and Charles Wilson or their direct issue, share and share alike,

which is followed by the fifth clause which appoints certain named persons as executors of the will upon the decease of the testator's wife, Ann Elizabeth Wilson.

It is to be noted that under the fourth clause that upon the decease of the wife the residue of the estate is to go to the sons as directed.

If the third paragraph of the will is to be treated as an absolute bequest to the wife, then, of course, the fourth paragraph is repugnant to such a bequest, as, of course, there is no residue. And again in paragraph five there is a provision for the new executors on the death of the testator's wife. There is no mention of the fact that these new executors are only to act in the event of the testator's wife predeceasing him, but would seem rather to contemplate even if the wife does not predecease the testator that after the wife's death there shall be a continuity which would permit the residue of the estate of the testator being distributed in accordance with the bequest contained in the fourth paragraph.

Upon reading the will as a whole it would seem that there is no repugnancy or inconsistency between the various provisions of the will, if the third paragraph contemplated only giving the wife a life interest rather than an absolute interest. It is my opinion that the testator in devising the property to his wife for her sole use and benefit forever did not realize the force of the word "forever," but by the use of this word "forever" merely meant to emphasize that during the life of the widow she should have the sole use and benefit of the property. It is my opinion, therefore, that all the testator intended to do was to give to his wife a life

interest in the property and that the remainder should go to the sons in the exact manner as provided for in the will. The costs of this application will be dealt with by the trial judge upon the determination of all of the issues in the action.

Judgment for plaintiff.

CATHERINE I. SPENCER *ET AL.* v. THE CONTINENTAL INSURANCE COMPANY.

Practice—Pleadings—Statute pleaded—Long and complicated statute—Demand for particulars—Necessity for stating sections relied on—Insurance Act, R.S.B.C. 1936, Cap. 133.

Where a party relies on a long and complicated Act, he is not entitled to plead the Act as a whole, but should specify the section or sections thereof on which he relies.

The plaintiffs in their reply pleaded the Insurance Act (containing 248 sections and divided into XI. Parts), and in answer to a demand for further and better particulars as to the sections on which they rely, replied that they pleaded "each and every section." On the application of the defendant, they were ordered to furnish the defendant with further and better particulars of the sections they relied on under said Act.

APPLICATION by defendant for further and better particulars of the particulars given by the plaintiffs on demand for particulars in respect to the reply and joinder of issue of the plaintiffs. The facts are set out in the reasons for judgment. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 6th of December, 1943.

Hossie, K.C., for plaintiffs.
Bull, K.C., for defendant.

Cur. adv. vult.

15th December, 1943.

FARRIS, C.J.S.C.: This matter came before me in Chambers on an application made on behalf of the defendant for further and better particulars of the particulars given on demand for par-

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ticulars in respect to the reply and joinder of issue of the plaintiffs. I dealt in part with such application in Chambers, reserving for consideration the particulars given by the plaintiffs in respect to paragraph 7 of the reply and joinder of issue, paragraph 7 being as follows:

> In the alternative and in further answer to paragraphs 8, 14, 15 and 16 of the said defence, the plaintiffs say that if they or the late Thomas Arthur Spencer or his agents failed to comply in whole or in part with the conditions of the insurance policy alleged in paragraph 13 of the said defence (which is not admitted but denied) the plaintiffs plead the Insurance Act, being chapter 133 of the Revised Statutes of British Columbia, 1936, and amendments thereto, and ask to be relieved against the forfeiture or avoidance of the said insurance policy.

The defendants demanded further and better particulars as to the sections of the Insurance Act relied upon by the plaintiffs, and the plaintiffs in answer to such demand for further and better particulars as to the sections of the Insurance Act relied upon by the plaintiffs, replied as follows:

> The plaintiffs plead each and every section of the Insurance Act.

The plaintiffs contended that it was unnecessary to give particulars of the sections of the Insurance Act upon which the plaintiffs were relying and cited in support of this contention the judgment of Kekewich, J. in *James* v. *Smith*, [1891] 1 Ch. 384.

The defendant contended that the Insurance Act contained 258 sections and is divided into XI. Parts, and particulars of the section relied upon were necessary to prevent surprise and to limit the inquiry at the trial, and relied upon the case of *Sachs* v. *Speilman* (1887), 37 Ch. D. 295, at p. 305.

The *James* v. *Smith* case is contrary to the decision in *Pullen* v. *Snelus* (1879), 40 L.T. 363. Grove, J. at p. 396 (48 L.J.C.P.) says:

> I think that it is not sufficient for the defendant to state that he will avail himself of the Statute of Frauds. Such a statement does not afford a sufficient definite issue to which the opposite party may reply, and it may be embarrassing. Whether it is in fact embarrassing I am not able to know, I can only say it is calculated to embarrass and to lead to unnecessary expense. If it were sufficient for a party to say that he relies on the statute, he might do so with reference to a statute which has a great number of sections. On the other hand, I do not say that it will never be sufficient to refer only to a statute, for a statute may be so short and of such a nature that a reference to it will at once definitely point to that matter on which the party pleading relies; but all that I need say is that in the present case the reference to the statute is not enough.

In the case of *Dodge* v. *Smith* (1901), 1 O.L.R. 46, a similar point but in respect to the Real Property Limitation Act came before the Master in Chambers in Ontario. The paragraph in question in that action was similar to the paragraph in question in this action, that paragraph reading as follows:

> The plaintiffs' alleged claim was and is barred by the Real Property Limitation Act, and all the right and title, if any, which the plaintiffs ever had to the said land, or to the said mines, minerals, and ores were extinguished by virtue of the said Act.

The Master directed the defendant to state the Act and section of such Act under which the defendant claims the plaintiffs were barred. This was appealed to Falconbridge, C.J. who refers to the cases of *James* v. *Smith* and *Pullen* v. *Snelus (supra)*. He says (p. 47):

> In *James* v. *Smith*, [1891] 1 Ch. 384, Kekewich, J., seems to have ignored *Pullen* v. *Snelus*. He thought that the rule did not oblige a defendant to plead the particular section of the Statute of Frauds, but the defendant having pleaded sec. 4, the learned Judge did not allow him to amend or to avail himself of sec. 7.
>
> The reasoning of the Judges in *Pullen* v. *Snelus* is as applicable to a defence of the Statute of Limitations as to one of the Statute of Frauds.

Falconbridge, C.J. affirmed the finding of the Master in Chambers. The appellant appealed to the Divisional Court which, without dealing with the reasoning of the Master of the Rolls or Falconbridge, C.J., dismissed the appeal apparently on the ground that appeals should not be encouraged in matters of practice when an appeal had already been taken from the Master in Chambers.

Again, in the case of *Stone* v. *Stone* (1908), 11 O.W.R. 801, the Master of the Rolls followed *Dodge* v. *Smith, supra,* and ordered that in respect of the pleading of the Statute of Limitations the particular section relied on should be indicated. An appeal was taken from the Master's finding, which appeal was dismissed by Clute, J. (1908), *ib.* 936.

It does seem to me that the principle underlying our form of pleadings and discovery before trial is to narrow down the issues and to avoid either party being taken by surprise on the trial. In other words neither party, to use a common phrase, should "keep a joker up his sleeve." It would seem to me highly unreasonable that in such long and complicated Acts as the Railway Act, Land Registry Act, and the Insurance Act, that a party could simply

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plead any one of these Acts, and by inference say that "hidden somewhere in this statute is a defence that I propose to rely upon, but you must yourself go through the various sections of the Act and see if you can discover the point that I am relying upon." To my mind such a proposition is unthinkable and I would have had no hesitation in finding in the present case that the defendants are entitled to the particulars demanded if it were not for the case of *Kirk* v. *Kirkland* (1899), 6 B.C. 442. This case was an appeal from an order of IRVING, J., dated 24th January, 1899, dismissing the plaintiff's summons for particulars, and decided by the Full Court. The head-note of such case is as follows:

> Where there are two statutes, the short titles of which are identical, a defendant pleading one of them should make it plainly appear on which he relies, but he need not plead the particular section.

It appears in that particular case the defendant had pleaded the Assessment Act. It appeared that there were two Acts in British Columbia at that time, both entitled the "Assessment Act." The plaintiff's summons was for particulars as to which Assessment Act the defendant relied upon, and apparently in the Full Court the plaintiff (the appellant) only sought to have particulars as to which Assessment Act the defendant relied upon. The respondent's counsel apparently ignored in his argument the issue involved, *i.e.*, as to whether he should give particulars as to the Assessment Act relied upon, and contended that he was not bound to give particulars of the section of the Act. This issue was not raised in the summons nor apparently by counsel for the appellant before the Full Court. The Court's judgment was:

> The defendant should specify the particular Act on which she relies, but not the particular sections.

A careful study of this case indicates to me that the Court did not intend to lay down any general rule that sections of the statute did not have to be pleaded, but rather directed its judgment entirely to the case before it, and in that case the Court allowed the appeal and directed particulars to be given as to the statute relied upon, but not the particular sections. The reference to the particular sections by the Court clearly referred to the case before it and was undoubtedly in answer to the argument of the respondent's counsel. There was no demand made in that case for the particular sections, and consequently the respondent was

not required to specify the particular sections. If I am wrong in this view it was not an issue before the Court as to whether particular sections of the statute should be pleaded or not, and was not argued by counsel for the appellant. Therefore the reference by the Full Court as to not pleading particular sections is but *obiter dicta*. In my opinion the Insurance Act of today covering the various fields that it does, is in effect a number of statutes combined together under one heading, and the defendant is entitled to know upon what section or sections of that Act the plaintiffs rely. I think I can do no better than adopt *mutatis mutandis* the language of Grove, J. quoted *supra* in *Pullen* v. *Snelus*.

I therefore direct that the plaintiffs furnish the defendant with further and better particulars of the sections relied on by the plaintiffs under the Insurance Act, these particulars to be delivered by the plaintiffs to the defendant within a period of ten days from the date hereof. Costs of this application to be dealt with by the trial judge.

I might add that since the hearing of this application I have had the benefit of a conference with all of my brother judges upon this matter.

Application granted.

MITCHELL v. THE VICTORIA DAILY TIMES. (No. 3).

Libel—Newspaper comment on plaintiff's arrest on charge of murder—Fair comment—Privilege.

The following article was published in The Victoria Daily Times of the 19th of June, 1943: "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 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 that this led to uncovering Justice murder facts." The plaintiff was subsequently tried for murder and acquitted. In an action for damages for libel the plaintiff alleges that

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the article was defamatory of him in that it meant and was understood to mean that: (1) The plaintiff was the person who in fact murdered Molly Justice; (2) that the plaintiff had been a fugitive from justice.

Held, that the article is defamatory of the plaintiff in its ordinary and natural meaning. It imputes to the plaintiff not only that he has been suspected or accused, but is in fact guilty of the crime of murder. Further, there is implied in it that Mitchell has been evading the police. Reasonable men who read the article would have understood it in a libellous sense.

Held, further, that fair and reasonable latitude should be given to newspapers in reporting Court proceedings, otherwise there would be no safety for them in publishing any such reports. The privilege to which newspapers are entitled under the law does not extend to cover such an article as that under consideration here, one which assumes the guilt of the person accused and includes untrue statements set up as statements of fact to which no reference was made in the course of the proceedings. The defence of fair comment does not extend to protect the defendant against liability for publication of this defamatory article.

ACTION for damages for libel by reason of the publication on the 19th of June, 1943, by the defendant in its daily newspaper. The facts are set out in the reasons for judgment. Tried by BIRD, J. at Victoria on the 9th and 10th of December, 1943.

Sinnott, for plaintiff.

H. W. Davey, for defendant.

Cur. adv. vult.

3rd January, 1944.

BIRD, J.: The plaintiff claims damages for libel in consequence of the publication on June 19th, 1943, by the defendant in its daily newspaper, The Victoria Daily Times, of the following article:

> 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 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 that this led to uncovering Justice murder facts.

The plaintiff alleges that the article complained of was defamatory of him in that it meant and was understood to mean that (1) the plaintiff was the person who in fact murdered Molly Justice; (2) that the plaintiff had been a fugitive from justice.

He complains further that he was held up to hatred, ridicule and contempt by the general tenor of the article, and particularly by reference therein to the plaintiff as a fish. The defendant contends that the article is not defamatory in its ordinary and natural sense and that it is incapable of the meaning attributed to it by the plaintiff.

I apprehend that as Lord Selborne has said in *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, at p. 745:

> The test, according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libelous sense.

What then were the circumstances under which the article was published?

It is established here that Molly Justice was murdered on January 18th, 1943, and that the police had been investigating the murder for several months prior to the publication of the article; that on June 17th, 1943, an information was laid against the plaintiff in the following terms:

> The information and complaint of Eric C. Elwell of Saanich taken this 17th day of June in the year one thousand nine hundred and forty-three before the undersigned who saith that William Mitchell of Victoria, B.C. on the 18th day of January, 1943, in the Municipality of the District of Saanich in the County of Victoria did unlawfully murder Annetto Margaret Clive Justice.

The plaintiff was then under arrest upon another charge which might properly be described as a boy-sex charge.

The plaintiff appeared before magistrate H. C. Hall, on June 17th when the foregoing charge of murder was read to him. He then said, "I am not guilty of this charge." The plaintiff was then remanded to June 24th, 1943, and was subsequently committed for trial.

On November 3rd, 1943, the plaintiff was acquitted of the charge of murder following trial before a judge and jury at Victoria, B.C.

The question for determination then is: How would reasonable men be likely to have understood the article taken as a whole and considered in light of all the surrounding circumstances as at the date of publication of the article?

I cannot think there is room for doubt that the article, quite apart from innuendoes pleaded by the plaintiff, would have been

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understood by reasonable persons generally, as meaning that the Justice murder has been solved by the arrest of Mitchell for whom the police have been seeking for weeks, and that his arrest upon the boy-sex charge led to discovery of facts which establish commission of the murder by Mitchell.

It is clear from the evidence adduced that various allegations of fact contained in the article were untrue.

The Justice murder mystery was not solved by the arrest of Mitchell, nor does the evidence show that the police said that the mystery was solved by the plaintiff's arrest, unless the fact of the information being laid against Mitchell can be interpreted as an assertion by sergeant Elwell that Mitchell had committed the murder. I do not consider that either the defendant's representative or any intelligent person who heard the information read at the hearing on June 17th, 1943, before magistrate Hall, would be justified in placing such an interpretation upon it. Sergeant Elwell, a witness called by the defendant, says that he did not make any such statement to the defendant's representatives. The statement that police had been seeking Mitchell for weeks, etc., is conceded by the defendant to be untrue. The facts were that the police were aware that Mitchell had been working at Youbou, B.C., a logging-camp on Vancouver Island a few weeks prior to his arrest, and in fact had interviewed Mitchell there relative to the Justice murder, on two occasions, in late May and early June of 1943. On one such occasion Mitchell volunteered to submit to finger printing.

No evidence was adduced to establish the truth of the statement in the article that "the arrest of Mitchell on the boy-sex charge led to uncover the Justice murder facts," and sergeant Elwell denies that it did so.

Ferguson, J. in *Macdonald* v. *Mail Printing Co.* (1901), 2 O.L.R. 278, at pp. 282-3 has said that:

> Any written words published are defamatory which impute to the plaintiff that he has been guilty of any crime, . . . or dishonourable conduct, or has been accused or suspected of such misconduct, and so too are all words which hold the plaintiff up to contempt, hatred, scorn or ridicule, and which, by thus engendering an evil opinion of him in the minds of right thinking men, tend to deprive him of friendly intercourse and society.

The article in my opinion is defamatory of the plaintiff in its ordinary and natural meaning apart from any consideration of

the innuendoes alleged, since, in my judgment, it imputes to the plaintiff not only that he has been suspected or accused, but is in fact guilty of the crime of murder. Further, there is implied in it that Mitchell has been evading the police. It appears that the only allegations of fact contained in the article which are true are the allegations relative to Mitchell's having been arrested and charged with murder, and to his having been booked on a boy-sex charge. The latter reference appears to have no relation to the fact of plaintiff's arrest for murder. I consider that reasonable men who read the article—in the words of Lord Selborne—would have understood it in a libellous sense.

The defendant raises further defences of privilege, fair comment, and that the action was prematurely begun.

Dealing first with the latter, counsel for defendant seeks to apply, by analogy, decisions in actions for malicious prosecution such as *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210, and *Gilding* v. *Eyre* (1861), 10 C.B. (N.S.) 592. If I have correctly understood his argument he submits that as in an action for malicious prosecution the plaintiff must allege and prove the successful termination of the prosecution prior to instituting his action; so too, in present circumstances the plaintiff must prove that the criminal charge of murder was terminated by plaintiff's acquittal before an action for damages for publication of the libel will lie. I do not appreciate the analogy. In an action of libel the law presumes in the plaintiff's favour that the words were published falsely and maliciously. The cause of action for libel arises immediately upon the publication. I know of no rule of law which forbids the institution of an action in circumstances such as are found here. It is said that "suspension" of a cause of action is a thing nearly unknown to our law—*per* Lord Bramwell in *Ex parte Ball. In re Shepherd* (1879), 10 Ch. D. 667.

It may well be that the civil action will be stayed pending the termination of the criminal proceedings, as in fact was done in this action—[59 B.C. 449]; [1943] 3 W.W.R. 496—but that is not to say that such an action cannot be instituted or maintained pending the termination of the criminal charge.

The defendant claims privilege both at common law and under the statute, Libel and Slander Act, R.S.B.C. 1936, Cap. 153, Sec. 3.

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The common-law principle is as stated by Duff, J. (now C.J.) in *Gazette Printing Co.* v. *Shallow* (1909), 41 S.C.R. 339, at p. 361, wherein he quotes Lord Esher as follows:

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged.

The defendant's plea of privilege is founded upon the article being a fair and accurate report of the proceedings before magistrate Hall held June 17th, 1943, a transcript of which is in evidence here, and to which I have referred before.

That proceeding was such as is described in the principle quoted, *i.e.,* it was a properly-constituted judicial proceeding held in open Court.. Now, referring for a moment to the statute, I consider that the publication of the article on 19th June of the proceedings held on 17th June was a contemporaneous publication. The question is then for consideration, is the article a fair and accurate report of those proceedings?

The report omits any reference to the accused's statement before the magistrate—"I am not guilty of the charge."

> It is not enough to report part of the proceedings correctly if, by leaving out other parts, you thereby create a false impression:

per Hawke, J., Gatley on Libel and Slander, 3rd Ed., 337.

The article is not confined to the proceedings before the magistrate but contains other statements to which no reference was made before the magistrate and which I take to be set up as statements of fact, *i.e.,* particularly the two final sentences of the article.

Counsel for defendant concedes that the statements in the first of these sentences are untrue. Sergeant Elwell who laid the charge against Mitchell says the arrest on the boy-sex charge did not lead to uncover the Justice murder facts.

> . . . it is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings:

per Tindal, C.J. in *Delegal* v. *Highley* (1837), 3 Bing. (N.C.) 950, at p. 960. Although if an article contains a report and comment which is separable from it, the report may be defended

as a fair and accurate report and the comment may be defended as fair comment on such report.

Fair and reasonable latitude should be given to newspapers in reporting Court proceedings, otherwise there would be no safety for them in publishing any such reports. However, I do not consider that the privilege to which newspapers are entitled under the law extends to cover such an article as that under consideration here, one which, as I interpret the article, assumes the guilt of the person accused, and includes untrue statements set up as statements of fact to which no reference was made in the course of the proceedings.

A report of proceedings before a magistrate which assumes the truth of the depositions and guilt of the accused has been held not to be a fair report—*Rex* v. *Fisher and Others* (1811), 2 Camp. 563.

There remains for consideration the plea raised by paragraph 10 of the statement of defence which has come to be known as the rolled up plea, which reads:

> If the plaintiff published the said words and figures which is denied, then in so far as they consist of allegations of fact they are true in substance and in fact, and in so far as they are expressions of opinion they are fair comments made in good faith and without malice upon the said facts which are matters of public interest.

I have no doubt upon the evidence that the subject of the Justice murder was a matter of wide public interest in Victoria during the year 1943. I have already made reference to certain statements of fact in the article which were untrue, and have referred to the interpretation which I consider a reasonable man would have placed upon the article. In these circumstances is the defence of fair comment available to protect the defendant?

In *Price* v. *Chicoutimi Pulp Co.* (1915), 51 S.C.R. 179, at p. 200 Duff, J. said:

> The defence of fair comment fails unless the jury find that the imputation, although defamatory and not proved to be true, was made fairly and *bona fide* as the honest expression of the opinion held by the defendant and is in the opinion of the jury warranted by the facts in the sense that a fair-minded man might, on those facts, hold that opinion. It is also essential to this defence (as regards imputations which the defendant fails to prove to be warranted in fact) that he must have stated them not as facts but as inferences from other facts.

The article, as I have said before, is a combination of com-

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ment and statements of fact, and I have experienced difficulty in determining which was intended as comment and which as statement of fact. I have no doubt that the reasonable man to whom reference is constantly made in actions of this nature would have as great difficulty. The defendant must take the consequences of the editor's failure so to frame the article as to show clearly what was intended as comment and what as statement of fact. Since I have found that the article bears the imputation that by the arrest of Mitchell the Justice murder mystery was solved, and even though I find that that imputation was not stated as a fact, which would in my view be leaning more strongly in favour of the defence than the article warrants, nevertheless, I would find that that imputation was not an inference which could properly be drawn from the proven facts. Furthermore, I do not consider that the imputation was warranted by the facts in the sense that a fair-minded man might on those facts hold that opinion. In my view the defence of fair comment does not extend to protect the defendant against liability for publication of this defamatory article.

Counsel for the plaintiff who also appeared as counsel in the proceedings in the police court, took exception to the publication of this article, in open court before the magistrate upon the resumption of the preliminary inquiry on the murder charge, and intimated (though he did not say so in so many words) that the publication of the article was in contempt of Court. Counsel did not press the matter at that time, nor did the magistrate elect to act. A representative of the defendant was present in court on that occasion, although he says that he did not report the incident to his superiors. Subsequently counsel for the plaintiff caused a letter to be written to the defendant complaining of the publication of the article. That letter was not acknowledged, nor did the defendant otherwise act upon it.

All of these factors I consider should be taken into consideration in assessment of damages. There is also one further factor which I consider should not be left without comment, namely, the conduct of the defendant's editor, the author of the article complained of, in the course of his examination upon the trial. The statements then made by him in the course of cross-exam-

ination both in relation to the plaintiff and the plaintiff's counsel might well be said to show express malice.

Since it is abundantly clear that the editor knew no more of the plaintiff than he had learned in connection with the prosecution of the murder charge, one must conclude that his attitude and remarks on the trial should be taken rather as made in defence of himself as the author of the article than as showing malice toward the plaintiff.

I do not propose to allow this incident to weigh in the assessment of damages, more particularly since counsel for the defendant during the course of his argument stated that the defendant dissociated itself from the remarks then made by the editor and expressed regret therefor. I feel that it is regrettable that the defendant did not much earlier make similar amends for the publication of the article which I consider might well (though happily did not do so) have adversely affected the plaintiff in the conduct of his defence of the murder charge.

Having in mind that the plaintiff has been honourably acquitted of the criminal charge to which reference is made in the article, and that due publicity was given to the fact of his acquittal, not only by the defendant's publication but also by the press of the Province, I consider that an award of damages in the sum of $1,000 will adequately compensate the plaintiff for such damage as he has suffered by the publication of the article. Costs will follow the event.

Judgment for plaintiff.

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JENNIE STOPFORTH, ADMINISTRATRIX OF THE ESTATE OF MARGARET STOPFORTH, DECEASED v. FRANK ARNOLD BERGWALL AND CARRIE BERGWALL.

Real property—Lease—Option to purchase—Terms and conditions to be complied with—Condition precedent—Failure to comply with terms.

Margaret Stopforth, deceased, by agreement in writing of December 4th, 1939, made in pursuance of the Leaseholds Act, leased a house to the defendants on terms. In the lease the defendants were granted an option to purchase the property and, if exercised, all payments made would apply on the purchase price which was fixed in the agreement. The plaintiff sues for possession and defendants counterclaim for a declaration that they are entitled to exercise the option. The lease provided that the option was to be exercised on or before the 4th of December, 1941, and there was no claim by the defendants that it was so exercised. The privilege only existed provided the defendants had performed all the covenants and conditions in the lease, including payment of rents on the due dates and payment of a sum sufficient to reduce the purchase price by $700. It was found on the evidence that these conditions were not fulfilled.

Held, that the defendants' failure to perform the conditions disentitles them to any declaration of the Court, as asked in the counterclaim and the plaintiff was given judgment in the terms of the statement of claim, except as to the claim for damages which was disallowed.

ACTION by the administratrix of the estate of Margaret Stopforth, deceased, for possession of a house leased to the defendants in December, 1939, by Margaret Stopforth, for rent in arrears, for use and occupation, *mesne* profits and for damages. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 2nd of December, 1943.

Sedgwick, for plaintiff.
William Savage, for defendants.

Cur. adv. vult.

4th January, 1944.

COADY, J.: The plaintiff is the administratrix of the estate of her mother Margaret Stopforth who died on the 2nd of April, 1942. The deceased by agreement in writing dated December 4th, 1939, made in pursuance of the Leaseholds Act, leased to the defendants a house on terms and conditions therein set out.

In the lease the defendants were granted an option to purchase the property, and if exercised all payments made would apply on the purchase price which was fixed in the agreement. The option could only be exercised provided certain conditions precedent had been complied with by the defendants. The plaintiff submits that the conditions were not complied with and no notice given of the exercise of the option as called for by the agreement, and now sues for possession, for rent in arrears, for use and occupation, *mesne* profits, and for damages. The defendants contend that the agreement is uncertain in its terms, that the performance of the conditions was waived and that in any event the Court will in a proper case relieve as against forfeiture, and this is such case, and counterclaims for a declaration that the defendants are entitled to exercise the option to purchase, and that the plaintiff be compelled to deliver up the agreement for sale held in escrow.

Mr. *Savage,* counsel for the defendants relies strongly on the judgment of GREGORY, J. in *B.C. Orchard Lands, Limited* v. *Kilmer* (1911-12), 17 B.C. 230, affirmed on appeal, [1913] A.C. 319; 82 L.J.P.C. 77. That case, however, in my opinion does not help him. That is a case of an agreement for sale of lands where the relationship was that of vendor and purchaser. It seems clear on the authorities that relief will be granted in such case, dependent upon the circumstances, even if time is stated as of the essence of the contract. But in the case at Bar we are dealing with an option to purchase included in a lease, the lessees having the privilege of exercising the option provided they have complied with certain conditions precedent and provided the option be exercised within a certain time, and time is stated as of the essence. On this matter of relief there is a clear distinction between cases where the relationship is that of vendor and purchaser and optioner and an optionee. (See *Forbes* v. *Connolly* (1857), 5 Gr. 657; *Ball* v. *Canada Company* (1876), 24 Gr. 281; *Dibbins* v. *Dibbins,* [1896] 2 Ch. 348; *Pierce* v. *Empey,* [1939] S.C.R. 247. As pointed out by Blake, V.-C. in *Ball* v. *Canada Company, supra,* p. 286:

> In this case there was no contract as to the purchase of the premises; there was an option given which could be enforced on certain terms. The parties chose to define the terms on which this right to purchase should

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arise, and not having fulfilled them, this Court cannot now vary the agreement of the parties and say on entirely different terms the defendants shall be compelled to convey the premises to the plaintiff. It is not a case of penalty or forfeiture.

In *Forbes* v. *Connolly, supra,* Spragge, V.-C., said (pp. 661-2):

> . . . —the plaintiff had a privilege and was not bound to purchase, but he did not observe the terms upon which alone he could exercise his privilege, and the law is that in such case his privilege is gone.

In *Pierce* v. *Empey, supra,* the Chief Justice said (p. 252):

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as a result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them.

Here the privilege of an option which the defendant held under the lease was to be exercised, if at all, on or before the 4th of December, 1941, and it is not contended by the defendants it was. The privilege too only then existed provided the defendants (lessees) had performed all the covenants and conditions in the lease to be observed and performed by them, including payment of the rents on the due dates, and payment of a sum sufficient to reduce the purchase price by $700. I must find on the evidence that the two last-named conditions were not fulfilled by the defendants. It is the defendants' failure which disentitles them to any declaration of the Court as asked in the counterclaim, which in effect would force the plaintiff into a contract of sale and purchase which the parties to the lease had agreed should only become operative under conditions which the defendants have failed to fulfil.

As a further defence the defendant Frank Arnold Bergwall says that he did not understand that there was a lease. He thought he was purchasing under an agreement for sale, although the agreement itself was not to be registered until he had reduced the principal sum by $700. The burden of establishing that as a defence even if it constituted a good defence is upon the defendants. This in my opinion they have failed to do.

As further defence advanced by the defendants is that the performance of the conditions required be performed by them before the exercise of the option was waived by Jennie Stop-

forth, and the time for the exercise of the option extended, the burden of establishing that defence is also upon the defendants, and the evidence falls far short of establishing it, in my opinion.

There will be judgment therefore for the plaintiff with costs in the terms of the statement of claim except as to the claim for damages, which I would disallow. *Mesne* profits can be calculated on the basis of $30 per month. The counterclaim is dismissed with costs.

Judgment for plaintiff.

McCARTHY AND CUNLIFFE v. VICTOR C. FAWCETT: A. C. BULLER, NANCY BULLER AND IRENE BULLER AND R. HAMP, INTERVENERS.

Wills—Whether will revoked by later will—Revocatory clause—Principles as to—Onus—Intention of testator.

By his will of the 5th of September, 1929, the testator P. H. Buller bequeathed all his estate to his wife Annie Buller and in the event of her predeceasing him, the trustees were to pay the income to her sister Alice H. Palmer and after her death, the whole of the estate was to be given to her daughter Elizabeth Palmer. Later in 1929 the testator's mother died, giving him power of appointment over a certain estate and on January 3rd, 1930, he executed a codicil to the will of the 5th of September, 1929, appointing his wife to receive the benefit of the will of his mother and confirming the will of September 5th, 1929. The testator died on November 10th, 1939, his wife having predeceased him on November 1st, 1939. Upon the death of the testator, it was found that he had made another will in 1931 whereby he bequeathed all his estate to his wife together with all benefits received by him under the will of his mother. In an action by the executors for probate of the will of September 5th, 1929, and codicil of January 3rd, 1930:—

Held, that the will of the testator of 1931 is in proper form, duly executed and is the last will and testament of the testator. As his wife predeceased him, the testator is left intestate and letters of administration *cum testamento annexo* of the said estate is granted to the defendant V. C. Fawcett, official administrator for part of the county of Nanaimo.

ACTION for probate of the will and codicil of Percy Hutchinson Buller, deceased. The facts are set out in the reasons for

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judgment. Tried by FARRIS, C.J.S.C. at Vancouver on the 18th of October, 1943.

J. G. A. Hutcheson, for plaintiffs.
Arthur Leighton, for interveners.

Cur. adv. vult.

7th January, 1944.

FARRIS, C.J.S.C.: This was an action brought before me for the probate in solemn form of the will and codicil of the late Percy Hutchinson Buller of Qualicum Beach, British Columbia, the will being dated September 5th, 1929, and the codicil thereto dated the 3rd of January, 1930, and a counterclaim by the defendant and interveners to declare the said will of September 5th, 1929, and codicil dated January 3rd, 1930, was revoked by a will made by the testator Buller in 1931, and for the admission of the will of the testator bearing date of 1931 in solemn form, and that letters of administration *cum testamento annexo* of the said estate be granted to the defendant Victor C. Fawcett, official administrator for part of the county of Nanaimo.

The facts are briefly as follows: Some time in the late summer of 1929 the deceased testator who was a real-estate broker, insurance agent and Notary Public at Qualicum Beach, communicated with his solicitor Mr. *Cunliffe* of Nanaimo in respect to wills to be made by himself and his wife. He forwarded to Mr. *Cunliffe* a draft will on printed form, in which draft form appeared the following words:

> I GIVE, DEVISE AND BEQUEATH all my Real and Personal Estate of which I may die possessed in the manner following, that is to say: Everything of which I may die possessed to my wife Annie Buller, and in the case of her not surviving me, to her sister, Alice Helena Palmer, wife of Dr. Palmer, of Church St., Mansfield Woodhouse, Nottinghamshire, England, in trust for her daughter Elizabeth.

At the conclusion of this draft form he says:

> I nominate and appoint *Frank S. Cunliffe,* Esq., Barrister, Nanaimo, and Frank McCarthy, Esq., Manager, Royal Bank of Canada, Nanaimo (or if better, the Manager for time being) to be Executors of this my last Will and Testament.

Following the receipt of the draft will Mr. *Cunliffe* had several conferences with the late Mr. Buller, with the result that the will of the late Mr. Buller was put into legal form and is produced

as Exhibit "A" in this action. It was duly executed on the 5th of September, 1929. Under the provisions of this will all of the estate was left to his wife Annie Buller, and in the event of her predeceasing him the trustees were to pay the income to Alice Helena Palmer, and after her death the whole of the estate to be given to her daughter Elizabeth Palmer. This was in conformity with the draft will prepared by the testator, only putting the same into legal verbiage.

Sometime during the fall of 1929 the testator's mother died giving him power of appointment over a certain estate. This was discussed by the testator with Mr. *Cunliffe,* and as a result a codicil to the will of September 5th was executed on the 3rd of January, 1930, appointing the wife to receive the benefit of the will of the testator's mother and confirming the will bearing date the 5th of September, 1929. At the time of the preparing of the will of September 5th Mr. *Cunliffe* fully explained to the testator his rights, and suggested to him that it would be more economical to leave the estate to his wife, Mrs. Buller, without the intervention of executors and trustees, and intimating that it would be only necessary to have the executors and trustees in case Mrs. Buller should predecease the testator. To this the testator replied according to the evidence of Mr. *Cunliffe,* which I accept, and I quote the words of Mr. *Cunliffe* in that regard:

> He gave some consideration to the matter, and I cannot recall whether he told me then or later, but in any event finally he told me that his wife and he agreed with this way of dealing with the matter, by having Mr. McCarthy and I act as executors of both wills and he would rather not open the subject by going back to her again.

I might point out here that at the same time as the testator prepared his will a will was prepared by Mrs. Buller in which she provided as follows:

> I GIVE, DEVISE AND BEQUEATH unto my said Executors and Trustees all my real and personal estate of which I may die seized or possessed or to which I may be entitled either in expectancy or remainder or otherwise howsoever, upon the following trusts, that is to say:—to pay to my husband, Percy Hutchinson Buller for and during his lifetime, the income to be derived from my shares, valued at £625 sterling in J. W. Tearle & Co. Ltd., Drapers, of Leighton Buzzard, Bedfordshire, England, together with the income from the sum of $8,000.00, which sum I hereby direct my Executors and Trustees to invest in such manner and in such securities as they in their discretion shall think fit for the purposes of producing such income, and after the death of my said husband, to pay the income from such shares and from the invest-

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ment of the said sum of $8,000.00, to my sister, Alice Helena Palmer, wife of Dr. Charles Palmer, Church St., Mansfield Woodhouse, Nottinghamshire, England, for and during her lifetime and after the death of my said sister, the said shares and the said sum of $8,000.00 shall be paid over absolutely to Elizabeth Palmer, the daughter of my said sister, Alice Helena Palmer.

Both wills were apparently placed at the same time in a safety-deposit box in The Royal Bank of Canada.

About the year 1936 the testator Buller was taken ill with a paralytic stroke and remained more or less of an invalid until he died on the 10th of November, 1939, his wife having predeceased him on the 1st of November, 1939, or nine days prior to his death.

Upon the death of his wife the testator Buller communicated with Mr. *Cunliffe,* instructing him to go to the bank and get the will of Mrs. Buller. On going to the bank and opening the safety-deposit box *Cunliffe* found the will which he had drawn for Mrs. Buller on September 5th, 1929, but in addition thereto a will drawn by Mrs. Buller on a printed form duly completed in every respect in 1931 revoking any previous will made by her, and leaving all of her estate to her husband, the testator Buller, without any reservation, and appointing her husband the executor to the will.

Mr. *Cunliffe* thereupon wrote Mr. Buller asking for certain particulars in order to take steps to probate the will of Mrs. Buller. Buller did not give these particulars but communicated through his nurse to *Cunliffe,* asking *Cunliffe* to come to Qualicum Beach and see him. Mr. *Cunliffe* was unable to go to Qualicum Beach prior to the death of the testator Buller on November 10th, 1939.

Evidence was given that Mr. Buller was very anxious concerning the delay of Mr. *Cunliffe's* arrival. Sometime during the period between the death of Mrs. Buller and the death of the testator Buller he was visited by a friend, one Arthur Wellens who testified on the hearing. I quote part of his testimony:

Did Mr. Buller ever mention to you Mr. *Cunliffe?* I am speaking now in close proximity to the date of his death? The evening, the second night before he died, I visited Mr. Buller as usual. During the conversation in the evening he remarked to me that he had sent word for Mr. *Cunliffe* to come up and that he wished that he would come, that he wanted to—I cannot remember the words, but it was something pertaining to his will.

That is all.

Cross-examined by Mr. *Leighton*:

I suppose it probably would be that he wanted Mr. *Cunliffe* to come up and make a will? That is what I gathered from his conversation.

Upon the testator's death Mr. *Cunliffe* again attended the safety-deposit box of the testator, and there found in an envelope the will of the testator as drawn by Mr. *Cunliffe* on 5th September, 1929, and the codicil as drawn on the 3rd of January, 1930, but with an additional will drawn on a printed form and filled in by the testator Buller. This will is dated 1931, being properly executed, the day and the month of the year being left in blank. Otherwise the will is in proper form. Under this will the testator says:

> I GIVE, DEVISE AND BEQUEATH all my Real and Personal Estate of which I may die possessed in the manner following, that is to say: to my wife Annie Buller, unconditionally, together with all benefits that may accrue from the Percy Hutchinson Buller Settled Legacy under the will of my mother, Mary Rebecca Buller.

It is here to be noted that the testator not only devised his own property but exercised in the favour of his wife the appointment of which he had power in respect to his mother's estate. He nominates and appoints his wife the sole executrix of his estate. This will, which is marked Exhibit 8, was found interleaved with the will of September 5th, 1929, and in a sealed envelope.

I have been asked by the plaintiffs to draw the conclusion from the facts that inasmuch as the will of 1931 had the effect of leaving the testator intestate in that his wife had predeceased him, and that taking all of the circumstances into consideration the will of 1931 was only a conditional will to become effective in the event of his wife Mrs. Buller not predeceasing him but otherwise the will of November 5th, 1929, and the codicil of January, 1930, should be given effect to. In support of this, testimony was given showing that over a period of years Mr. *Cunliffe* had apparently not lost the confidence of the testator and that as a result of the depression which followed the financial catastrophe of 1929 Mr. Buller was worried about his financial position and it was urged that he had only drawn the will of 1931 to save the executor's costs in case his wife did not predecease him. The evidence is silent as to what occurred or what motivated the testator in 1931 to make the new will.

General evidence was given that the testator was very fond of his wife's family and had little or no use for members of his own family, although it was shown at the time Mrs. Buller was taken

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ill about a month before her death that the testator had instructed the nurse to write his sister that owing to his wife's illness that he could no longer contribute to his sister's support, thereby indicating that at least in 1939 he had been on friendly terms with his sister and contributing to her support.

The entire estate of the testator amounted to approximately $30,000, of which 90 per cent. came to him by way of his wife's will, and 10 per cent. only was that which might be considered his own personal estate. There can be no doubt that he was extremely friendly with his wife's relations, and I am quite satisfied that had he lived long enough for Mr. *Cunliffe* to arrive, that he would have made provision that at least a large bulk of his estate which he had received from his wife would go to his wife's people. But I must in this matter not be guided by surmise but by evidence.

I have been assisted in this case very greatly by the able argument of counsel for the plaintiff and of counsel for the defendant who both furnished me with long written arguments and reply and counter-reply. The plaintiff's counsel has relied on the cases of *In re Harrison. Turner* v. *Hellard* (1885), 30 Ch. D. 390; *In the Goods of Hope Brown,* [1942] P. 136; [1942] 2 All E.R. 176; *In the Estate of O'Connor,* [1942] 1 All E.R. 546; *Marklew* v. *Turner* (1900), 17 T.L.R. 10; *Gladstone* v. *Tempest and Others* (1840), 2 Curt. 650; *Doe dem. Murch* v. *Marchant* (1843), 6 Man. & G. 813; *Lemage* v. *Goodban* (1865), L.R. 1 P. 57; *Powell* v. *Powell* (1866), *ib.* 209; 35 L.J. P. 100; *Dancer* v. *Crabb* (1873), L.R. 3 P. 98; 42 L.J. P. 53; *Dempsey* v. *Lawson* (1877), 2 P.D. 98; 46 L.J. P. 23; *In re Bernard's Settlement. Bernard* v. *Jones,* [1916] 1 Ch. 552; *In re Pemberton and Lewis* (1917), 25 B.C. 118; *Re Erskine Estate,* [1918] 1 W.W.R. 249; *Ward* v. *Van der Loeff,* [1924] A.C. 653; *Re Colville Estate* (1931), 44 B.C. 331; *In re Snow Estate,* [1932] 1 W.W.R. 473; *In re Hawksley's Settlement. Black* v. *Tidy,* [1934] Ch. 384; Halsbury's Laws of England, 2nd Ed., Vol. 34, paragraphs 110 to 126.

The defendant's counsel relied on the cases of *Collins* v. *Elstone,* [1893] P. 1, or (1892), 9 T.L.R. 16; *In re Kingdon. Wilkins* v. *Pryer* (1886), 32 Ch. D. 604; *Lowthorpe-Lutwidge*

v. *Lowthorpe-Lutwidge,* [1935] P. 151; *In the Estate of Thomas,* [1939] 2 All E.R. 567; Wigram's Rules of Law respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills, 5th Ed., 110; Halsbury's Laws of England, 1st Ed., Vol. 28, p. 510.

In the case of *Wilson* v. *Wilson et al.,* decided by me on the 3rd of November, 1943, but not yet reported*, after careful consideration of the authorities referred to in that judgment I said [*ante,* p. 33]:

> From a perusal of all of these authorities one general principle is established, namely: "It is the duty of the judge to determine the construction of the particular will before him, and not to rely on the construction of other wills, although similar in nature, by any other judge." There has been, however, laid down two principles of law to assist the judge in the construction of a will: First, "if the general intention of the testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected, as introduced by mistake or ignorance, on the part of the testator, as to the force of the words used"; secondly, "where the latter part of the will is inconsistent with a prior part, the latter part must prevail."

Counsel for the plaintiffs contends that the present case is not one of construction of a will, but to decide what document or documents separately or together cover the deceased's testamentary wishes, and that a very different situation exists in receiving evidence where the construction of a will is involved and one in which it is necessary to decide what document or documents separately or together cover the deceased's testamentary wishes. While this may be true, it would seem to me that the general principles that I have quoted from in the *Wilson* case, *supra,* are, nevertheless, a guide and assistance in the present case. From a careful examination of the cases quoted *supra* by counsel for the plaintiffs and counsel for the defendant, it would appear to me that the following principles have been clearly laid down:

1. That a revocatory clause in a will may under particular circumstances be held not to be the intention of the testator and therefore ignored or eliminated in the granting of probate of the testamentary documents. 2. That a man making a testamentary document, and those who take after him are bound by his expressed intention and not by what he actually intends. 3. That a mere mistake on the part of a testator in inserting a revocatory

* See *ante,* p. 31.

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clause in a testamentary document is not sufficient in itself in the granting of probate to ignore or eliminate such revocatory clause. 4. That where a testamentary document on its face is complete and contains a revocatory clause there is a heavy burden cast upon a plaintiff who comes into court to say that the revocatory clause was not intended to be operative, and the submission of the plaintiff in such connection will only be given effect to on the most cogent evidence in support. 5. That if evidence is admissible as to the circumstances under which the testamentary document containing the revocatory clause was made, such evidence must relate to or about the time such document was executed.

I think the words of Sir Gorell Barnes, President, in *Simpson* v. *Foxon,* [1907] P. 54, at p. 57, are particularly helpful:

> But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail.

And again, the words of Langton, J. in *Lowthorpe-Lutwidge* v. *Lowthorpe-Lutwidge,* [1935] P. 151, at p. 156:

> . . . I have looked at it again and I think that it is as clear a statement as one could wish upon this matter. Sir Herbert Jenner said: [*Gladstone* v. *Tempest and Others* (1840), 2 Curt. 653] "But it has been over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocation clause provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit." That is quite concisely stated and exactly what has been pressed upon the Court here, namely that the Court should say it was not the intention of the testator to revoke the legacies and benefits contained in the earlier will of 1917 and the codicil of 1920. I think there is power to act in that way if the Court is satisfied that it was not the intention of the testator to so revoke. But the burden, in that case, is heavy. It is a heavy burden upon a plaintiff who comes into this Court to say: "I agree that the testator was in every way fit to make a will, I agree that the will which he has made is perfectly clear and unambiguous in its terms, I agree that it contains a revocatory clause in simple words: nevertheless I say that he did not really intend to revoke the earlier bequests in earlier wills." Quite obviously the burden must be heavy upon anybody who comes to assert a proposition of that kind.

Again at p. 157:

> . . . It really is a question in each case for the Court to decide: Is there evidence, and sufficient evidence, to establish that the testator did not

intend to revoke, I do not think really the law is more complicated than that.

It seems to me that the words of Langton, J. as above quoted might well have been written having in mind the facts in this case. In the present case the plaintiff admits, or, at least, does not contest the fact that the will made by the deceased Buller in 1931 was perfectly clear and unambiguous in its terms, and contains a revocatory clause in simple words. No evidence, however, is given by the plaintiff as to what took place in 1931 actuating the testator in making his will at that time. The only evidence given which might be considered to affect the will in question was the evidence of the nurse and of the witness Wellens who had conversations with the deceased shortly before his death in 1939. If this evidence is admissible (and, in my opinion, under the circumstances, it is not admissible) it, in my opinion, does not strengthen the plaintiffs' case. The substantial contention of plaintiffs' counsel is that inasmuch as the will made in 1929 and the codicil made in 1930 by the testator Buller were found interleaved in a sealed envelope with the will made in 1931, and inasmuch as the will of 1931 had the effect of leaving the deceased intestate in case of his wife predeceasing him, that the will of 1931 was only conditional upon Buller's wife being alive at the time of his death, and otherwise the will of 1929 and the codicil of 1930 should take effect. To my mind this is at most a surmise or guess. While it is my belief that had the deceased Buller been able to see Mr. *Cunliffe* prior to his (Buller's) death he would have undoubtedly made a new will probably leaving all of the property that he had received from his wife to his wife's relatives, nevertheless, it is not within my power to make a new will. It is therefore with regret that I find that the plaintiffs have not satisfied the *onus* of proof cast upon them to show that the testator did not by his will of 1931 really intend to revoke the bequest in the Buller will and codicil. The plaintiffs' action therefore must be dismissed, and I find that the will of the testator Buller bearing date of the year 1931 is in proper form, duly executed, and is the last will and testament of the testator Buller in accordance with the terms set out in the said will, and that letters of administration *cum testamento annexo*

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of the said estate be granted to the said defendant, Victor C. Fawcett, official administrator for part of the county of Nanaimo.

I think this was a case very properly brought before the Court, and under the circumstances I direct that the costs of all parties be paid out of the estate on a solicitor and client basis.

Action dismissed.

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CAPLE v. CAIRD.

Practice—Judgment—Lapse of over six years—Garnishee order—Necessity for leave before obtaining order nisi—County Court Rules, 1932, Order XII., r. 17—R.S.B.C. 1936, Cap. 17, Secs. 3 and 20.

On the 15th of October, 1930, the plaintiff obtained judgment in the county court against the defendant for $184.95. On December 8th, 1943, the judgment creditor caused to be issued out of the Court a garnishing order attaching all moneys to the amount of said judgment owing to the judgment debtor by Victoria Machinery Depot Company Limited and under the order $47.89 was paid into Court. Rule 17 of Order XII. of the County Court Rules, 1932, provides that where six years have elapsed since the date of the judgment, the leave of a judge must be obtained before execution may issue. The judgment creditor did not obtain any leave before the issue of the garnishee order. On the application of the judgment debtor to set aside the garnishing order on the ground that it is a form of execution, that said rule 17 applies and that it should not have been issued without leave.

Held, that the *ex parte* order issued by the registrar here is an order *nisi* and whatever may be the character of a garnishing order absolute, a garnishing order *nisi* is not a process of execution and if leave to proceed to execution must be obtained under rule 17 of Order XII., it is still open to the judgment creditor to apply for and obtain that leave.

Keats v. *Conolly*, [1915] W.N. 174, applied.

Held, further, that if the garnishing order *nisi* is a process of execution, section 20 of the Attachment of Debts Act would have the effect of making rule 17 of Order XII. inapplicable to proceedings under that Act. Said rule 17 would therefore have no application to the rights given without qualification by section 3 of the Act.

APPLICATION to set aside a garnishee order on the ground that it is a form of execution, that rule 17 of Order XII. of the County Court Rules, 1932, applies and that it should not have

been issued without leave. Heard by WILSON, Co. J. in Chambers at Vancouver on the 18th of January, 1944.

Caple, for plaintiff.
Paul D. Murphy, for defendant.

Cur. adv. vult.

20th January, 1944.

WILSON, Co. J.: The judgment creditor on October 15th, 1930, obtained judgment in this Court against the judgment debtor for $184.95. On this judgment there is now owing for principal and interest $285.43. On December 8th, 1943, the judgment creditor caused to be issued out of this Court a garnishing order attaching, to satisfy the said judgment, all moneys up to the amount of the said judgment owing to the judgment debtor by Victoria Machinery Depot Company Limited, and under this garnishing order the sum of $47.89 has been paid into Court.

The judgment creditor did not, before the issue of the said garnishing order, obtain leave to issue execution as provided for in rule 17 of Order XII., County Court Rules, 1932. This rule provides that where six years have elapsed since the date of the judgment the leave of a judge must be obtained before execution may issue. Admittedly more than six years have elapsed in the present case.

The judgment debtor now applies to set aside the garnishing order on the ground that it is a form of execution, that rule 17 applies and that it should not have been issued without leave. The pertinent parts of rule 17 read as follows:

(*a.*) Where six years have elapsed since the . . . order, or any change has taken place by death or otherwise in the parties entitled or liable to execution: . . .

the party alleging himself to be entitled to execution may apply to the Judge for leave to issue execution accordingly. And such Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways to which any question in an action may be tried.

In *Thakar Singh* v. *Pram Singh* (1942), 57 B.C. 372 our Court of Appeal considered this matter. In that case a garnishing order was objected to on two grounds, first, that the judgment debt which formed the basis for the order was statute-barred,

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second that no leave had been obtained under rule 17 of Order XII., to issue execution, it being contended that the garnishing order was a form of execution. The judgment of the majority of the Court was delivered by MCDONALD, C.J.B.C. and concurred in by SLOAN, J.A. The Chief Justice held that enforcement of the debt was barred by the Statute of Limitations but, following *Fellows* v. *Thornton* (1884), 14 Q.B.D. 335, he held that the failure to obtain leave to issue execution was not an irregularity. O'HALLORAN, J.A. delivered a minority judgment exactly opposite to that of the Chief Justice and Mr. Justice SLOAN. He found that the proceedings were not barred by the Statute of Limitations, but that they were defective because leave had not been obtained pursuant to rule 17 of Order XII. Although this dissenting judgment is not binding on me I have read it with some care and am constrained to think that the attention of the learned Justice of Appeal was not directed by counsel to all the cases bearing on the subject, or to section 20 of the Attachment of Debts Act.

O'HALLORAN, J.A. says with reason, that the judgment in *Fellows* v. *Thornton, supra,* is not altogether a satisfactory one. In that case a garnishing order *nisi* was issued in the High Court on a judgment debt more than six years old without leave having been obtained. Subsequently this order was made absolute by the registrar at a hearing where the judgment debtor raised the objection that the judgment was more than six years old. Pollock, B. set the order aside. On appeal Lord Coleridge, C.J. maintained the order on the ground that attachment of debts was not a form of execution, and that leave to issue execution was unnecessary. Stephen, J. also maintained the garnishing order, but on different grounds. He held that attachment of debts was a form of execution under the English Rules but that the registrar had, on making the order absolute, effectively given leave to issue execution. In holding that leave to issue execution could properly be given on the application to make the order absolute he must have considered that no such leave was necessary in issuing the garnishing order *nisi* and that a garnishing order *nisi* was not a form of execution. This distinction is also made by the English Court of Appeal in *Keats* v. *Conolly,* [1915]

W.N. 174. That case involved consideration of the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. (1) (*a*), which provided:

> . . . no person shall—(*a*) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court . . . for the payment or recovery of a sum of money to which this subsection applies, except after such application to such court and such notice as may be provided by rules or directions under this Act.

Subsection (2) of the Act provided that on the hearing of the application the Court might, in its discretion, stay the execution or defer the operation of the remedies aforesaid. Phillimore, L.J. said at p. 175:

> Merely to obtain a garnishee order *nisi*, especially having regard to sect. 1, sub-s. 2 of the Courts (Emergency Powers) Act, 1914, was not "to proceed to execution on, or otherwise to the enforcement of" a judgment within the meaning of sect. 1, sub-s. 1. The making of the order absolute was a proceeding to execution on or otherwise to the enforcement of the judgment,

I think there is no doubt that the *ex parte* order issued by the registrar here is an order *nisi* and that this reasoning would apply to it.

In *White, Son & Pill* v. *Stennings*, [1911] 2 K.B. 418 the Court of Appeal held that a garnishing order was, to quote Vaughan Williams, L.J. at p. 427:

> . . . a species of execution, and that a judgment creditor ought not to be allowed to take out a garnishee summons, or get an order thereon, . . , if the state of things is such that he cannot issue execution against the judgment debtor's chattels.

Curiously enough the distinction between a garnishing order *nisi* and a garnishing order absolute does not seem to have been argued in that case although Farwell, L.J. plainly holds at p. 428 that a garnishee summons issued out of a county court is an order *nisi*. In any event, I prefer the reasoning in the later case of *Keats* v. *Conolly, supra*. My own conclusion is that, whatever may be the character of a garnishing order absolute, a garnishing order *nisi* is not a process of execution and that, if leave to proceed to execution must be obtained under rule 17 of Order XII., it is still open to the judgment creditor to apply for and obtain that leave.

In arriving at this conclusion I have considered rules 3 and 8 of Order XII. I do not see anything in those rules to take this case out of the operation of the rule laid down in *Keats* v. *Conolly*.

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If the garnishing order *nisi* is a process of execution, it appears to me quite clear that section 20 of the Attachment of Debts Act would have the effect of making rule 17 of Order XII. inapplicable to proceedings under that Act. This section reads as follows:

> All matters referred to in sections 2 to 19 [of this Act] shall be governed by this Act, notwithstanding any Rules of Court upon the subject.

Having this provision in view I do not see that the rights given without qualification in section 3 of the Act can be held to be qualified by rule 17 of Order XII.

The application to strike out the garnishing order is dismissed with costs to the judgment creditor.

Application dismissed.

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REX v. HAWKEN.

Criminal law—Charge of murder—Application for bail after accused has been committed for trial—Examination of evidence taken on preliminary hearing.

It is not only the right but the duty of the judge before whom an application for bail is made for a person committed for murder to examine the evidence taken on the preliminary hearing, and if the evidence does not justify a committal or the evidence is so weak that there is little chance of a conviction, and when the other circumstances are such there will be no chance of the accused failing to appear on his trial if bail is granted, then bail should be granted.

APPLICATION for bail for the prisoner who was committed for trial on a charge of murder. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 22nd of January, 1944.

Wismer, K.C., for accused.
O'Brian, K.C., for the Crown.

Cur. adv. vult.

25th January, 1944.

FARRIS, C.J.S.C.: In this case an application was made before Mr. Justice BIRD, the judge presiding at the present Assizes, for

bail for the accused. Mr. Justice BIRD had prior to the committal of the accused granted bail, and in view of this fact and the fact that the present application would involve hearing arguments that must of necessity be heard on the trial he requested me to hear the application which came before me on January 22nd when the propriety generally of granting bail to those accused of murder was ably discussed by counsel, and both counsel for the Crown and counsel for the accused drew my attention to the newspaper articles appearing in the daily press of Vancouver, which both counsel complained were prejudicial to a fair trial.

On the hearing I stated that I was a reader of the newspapers, and felt that although a judge I was entitled to read the news of the day. If such news should not be read by a judge as being prejudicial, then in my opinion it should not be published, as how much more would it affect the general public and possible jurors in the case who are not familiar with and cannot be expected to know the rules of evidence. The duty is upon the judge hearing the application, and upon him the sole responsibility for granting the bail and the amount must rest. Nevertheless, I could not close my eyes to the circumstances of this case, and of the publicity given the same, and felt that I should consult with my brothers of the Court with the idea of considering general principles which might be helpful to me, and might be a future guide, and with this in mind I consulted my brothers who were here available as to three matters:

First, the newspaper publicity; secondly, as to whether or not a judge under the decisions has a right to grant bail (a) on the accused being arrested for murder and before the preliminary hearing, and (b) whether he can exercise a discretion at all, or to what extent after the accused charged with murder has had his preliminary hearing and been committed for trial, and (3) the duty of a magistrate in committing an accused for trial.

I shall first refer to these matters, as upon them I have had the benefit, as before pointed out, of a conference with my brother judges.

In respect to newspaper publications, during the course of the proceedings no comment or news items can be published by a newspaper which may be prejudicial to a fair trial.

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The freedom of the press is a sacred right under our form of democracy, but that freedom does not extend to a licence to permit newspapers to publish articles which will result prejudicially to a fair trial, and in effect result in a trial by newspapers. I think I can do no better than quote the words used by the Court in the notorious *Crippen* trial found in *Rex* v. *Clarke and another; Ex parte Crippen* (1910), 103 L.T. 636. There the Court said (p. 640):

> . . . we are determined . . . to do nothing to substitute in this country trial by newspaper for trial by jury; and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it. Probably the proper punishment—and it is one which this court may yet have to award if the punishment we are about to award proves insufficient—will be imprisonment in cases of this kind. There is no question about that, because we cannot shut our eyes to the fact that newspapers are owned by wealthy people, and it may even happen that they may take the chances of the fine and pay it cheerfully and will not feel that they have paid too much for the advertisement. Therefore it may well be that if this process is not stopped, if this is not sufficient warning, the court may have to resort to a more peremptory method—that is, the imprisonment of the guilty person. We do not do so in this case. We have been told that the assistant editor, who is the person responsible for this act of contempt of court, sees how wrong he was, acknowledges his fault, and regrets it and apologises to the court. . . . When one does repent of a wrong we will not punish him as though he still persisted in his wrongdoing. . . . Notwithstanding that, this remains a very grave offence against the administration of justice. In the hope that what has been said in this court will be the means of stopping it and enforcing our opinion, as we must do, the order of the court is that the assistant editor, who has made himself responsible for this contempt of court, do pay to the court the sum of 200*l.* and also the costs of bringing this matter before the court, and that he be imprisoned until that sum is paid.

It is quite clear to this Court that newspapers in a case such as this are confined solely to publishing a reasonable and fair report of the proceedings which are public property, and without comment on any interlocutory orders that may be made in the proceedings. This does not mean that after a trial is over the press is not free to discuss the case. I again use the language found in 2 C.E.D. (Ont.) 809, in which these words have been used:

> In fact it has been said by the Judicial Committee of the Privy Council that committals for contempt of the court by scandalizing the court itself have become obsolete in England, the courts preferring to leave such matters to public opinion. This power of the court is not to be used to vindicate the judge, whose dignity is subordinate to that of the court. He must resort to

action for libel or criminal information. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism; for the public and press then have the undoubted right to criticize in a fair and candid spirit all the incidents of the trial and the judgment and in the same spirit to dissect the public conduct of all concerned in the trial, including the judges themselves.

In the present case it cannot be open to question that all three daily papers in Vancouver have been to a greater or less degree offenders. I am sure, however, that nevertheless our newspapers have the highest interest of the community at heart, which must include the right of fair trial, and now that this matter has been brought to their attention there will be no need for further complaint in this or any similar cases.

This brings me to the next phase, as to whether or not a judge should exercise his discretion and grant bail to a person accused of murder. The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent, and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the judge is satisfied that the bail will ensure the accused appearing for his trial.

In considering bail all of the circumstances must be taken into consideration, and this Court cannot blind itself in the granting of bail to changing conditions, and not be entirely governed by past precedent. The Court must recognize and does recognize that at the present time we are in the midst of a war and that every citizen is registered, and the boundaries of foreign countries are closely guarded, so that an accused person who is at all well known has under the present circumstances little chance of escape.

Our Legislatures have recognized the fact that it is proper in certain cases where the accused is charged with a capital offence that bail may be granted, but in these cases authority has not been given to the magistrate, but the application for bail must be heard, in our Province, by a member of this Court.

Members of the Court have considered the circumstances under which my brother BIRD, J. granted bail to the accused prior to his being committed for trial, and it is referred to here only by

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way of illustrating one circumstance at least in which bail can properly be granted, on application to a judge, to a person accused of murder and before the preliminary hearing.

In this case the accused was taken into custody on or about the 13th of December. Statements were taken by the police of the witnesses available, and the accused himself voluntarily made a statement. After about a day's investigation the accused was allowed to go, no charge being preferred against him, but was asked to attend the coroner's inquest, which he did, and although again advised that he did not have to make any statement, gave evidence at that inquest.

Early in January, on the instructions of the Attorney-General the accused was placed under arrest and charged with murder, although there is nothing to indicate that any additional material evidence had been found other than that which the police had had, and which was before the coroner's jury. At this point I want to make it clear that there can be no criticism of the Attorney-General for so ordering. He had a perfect right to say

> under all the circumstances I think it is in the interest of the public that the facts should on sworn evidence be placed before a proper tribunal to determine whether the accused should go on trial or not.

Here I also desire to point out that a coroner's jury is not a proper tribunal to determine the criminal liability or innocence of any person who has done a killing. The sole purpose of the coroner's jury is to ascertain how the deceased came to his death.

Upon the accused being charged and arrested his counsel made application for bail, and notice was given to the Attorney-General who preferred not to attend, as he stated it was then still in the hands of the city prosecutor. Counsel for the accused appeared, although the city prosecutor did not, owing to his illness, but authorized counsel for the defence to state that he was satisfied with $5,000 bail. The learned judge was not then even satisfied but had summoned before him the two detectives who were in charge of this case for the prosecution. These two detectives were closely examined by his Lordship, and as a result he granted bail to the accused in the amount of $5,000.

It would seem that under the facts as recited that this is a clear case where bail should have been granted and as contemplated by the Legislature, and that the judge properly exercised

his discretion in fixing the bail at that, as recommended by both counsel for the Crown represented by the city prosecutor and counsel for the accused.

Now comes the question of whether or not bail should be granted the accused after he has been committed on the charge of murder. The authorities seem to distinguish between the granting of bail before the preliminary hearing and after committal, and the general rule has been that when a person has been properly committed for trial that bail will not be granted. See *Rex* v. *Monvoisin* (1911), 18 Can. C.C. 122, and *Rex* v. *Gentile* (a British Columbia case) (1915), 8 W.W.R. 1091. In the case of *Rex* v. *Monvoisin* it appears quite clear that the learned judge examined the depositions taken at the preliminary hearing to ascertain whether or not the accused had been properly committed for trial.

MACDONALD, J., in the case of *Rex* v. *Gentile* did not consider it advisable to deal with the evidence. He does not make it clear, however, whether he examined the evidence or not.

In any case it is the view of this Court that it is not only the right but the duty of the judge before whom an application for bail is made for a person committed for murder to examine the evidence taken on the preliminary hearing, and if the evidence does not justify a committal, or the evidence is so weak that there is little chance of a conviction, and when the other circumstances are such (particularly under present day conditions) that there will be no chance of the accused failing to appear on his trial if bail is granted, then bail should be granted.

Having thus dealt with the general principles of granting bail as discussed with my brother judges, I must now deal with the granting of bail in the present case, which, having in mind the general principles outlined, is in my sole discretion and my responsibility.

I have carefully reviewed the evidence taken on the preliminary hearing, but in view of the fact that this case will be coming on so shortly for trial I think I should not at this time comment upon the same or make any remarks which might be embarrassing to the trial judge. But I shall probably at the conclusion of the trial deal with the same so that my reasoning may be available for future cases.

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I cannot, however, fail to take notice that the learned magistrate announced that he was going to commit the accused for trial, but at the request of accused's counsel did not make his formal committal until two days later, thereby in effect allowing the accused to remain on $5,000 bail for two days, and that the accused knowing that he would be committed, did attend and was committed.

In view of the evidence and in view of all the surrounding circumstances I am satisfied that the accused would in all probability attend his trial even although he were allowed out on his own recognizances. Having reached this conclusion, it is therefore my duty to grant bail; otherwise I would be constituting myself a higher authority than the Legislature. There is clearly, however, a distinction between granting bail prior to a preliminary hearing and granting bail after the accused has been committed for trial. As I, however, am not commenting on the evidence, as before pointed out, nor am I dealing with the magistrate's duty to commit, I feel nevertheless that as this is the most serious charge and the magistrate has seen fit to commit, that the bail to be granted should be in excess of that which was properly granted prior to the preliminary hearing. Taking into consideration all of the evidence adduced at the preliminary hearing and the fact that one witness who refused to testify at such preliminary hearing may be a witness on the trial, and all other circumstances connected with this case, I think the ends of justice will be properly served by admitting the accused to bail in the sum of $15,000 with two sureties.

Application granted.

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Housing—War Measures Act—Administration order No. A-891—The Wartime Leasehold Regulations, Sec. 3, Subsec. (1) (o)—Order in council P.C. 9029—Section 15 of order in council P.C. 8528—Validity of—Injunction — Notice of motion — Not served in time — Irregularity—Order LII., r. 5.

On demand for possession of certain property of the plaintiff in Victoria by the director of housing of the department of finance made pursuant to administration order No. A-891 of September 21st, 1943, the plaintiff brought action for a declaration that the use of the premises do continue in the plaintiff and for an injunction restraining the defendants from taking possession. On the granting of an *interim* injunction, the defendants applied for an order that the *interim* injunction be vacated and submitted that under subsection (2) of section 15 of order in council P.C. 8528 no action would lie against the defendants.

Held, that requisitioning the use of the property for supplying a deficiency in housing accommodation is made under subsection (1) (*o*) of section 3 of The Wartime Leasehold Regulations contained in order in council P.C. 9029. Here no compensation has been agreed upon and the administrator by order A-891 purports to fix the compensation at a minimum rental fixed or to be fixed under the authority of the Board. On a proper construction of the terms of subsection (1) (*o*) that power is not given him. The order then is *ultra vires* and if this construction of subsection (1) (*o*) is wrong, then the subclause itself is *ultra vires*, being in conflict with section 7 of the War Measures Act. Both the order A-891 and subclause (*o*) derive their legal force from the War Measures Act and the Act prescribes a means of fixing the compensation to be paid and that means must be followed.

Held, further, that subsection (2) of section 15 of order in council P.C. 8528 is not in its terms applicable to the facts here and does not take away the power of the Court in such circumstances to grant an injunction.

On the motion for judgment in default of delivering a defence, objection was taken that two days' notice was not given as required by Order LII., r. 5 of the Supreme Court Rules, 1943.

Held, that a summons served less than two clear days before the return thereof is not a nullity but an irregularity which is waived by an appearance on the application at the time fixed by the defective summons.

APPLICATIONS, one by summons for an order that an *interim* injunction be vacated and that the action be dismissed as being frivolous and vexatious and showing no reasonable cause of action and another by notice of motion for judgment in default

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of defence. The facts are set out in the reasons for judgment. Heard by MACFARLANE, J. in Chambers at Victoria on the 29th of December, 1943.

McKenna, for plaintiff.
Clearihue, K.C., for defendants.

Cur. adv. vult.

14th February, 1944.

MACFARLANE, J.: An application was made before me in Chambers on the 22nd of December, 1943, by summons, for an order that the *interim* injunction herein granted on the 14th of October, 1943, be vacated and that the action be dismissed as being vexatious and frivolous and showing no reasonable cause of action. On the hearing, counsel for the defendants submitted that by reason of the provisions of section 15 of order in council, P.C. 8528, no action would lie against the defendants. After argument adjournment was taken until December 29th, 1943, counsel agreeing as I understood it that a decision on this point would determine the rights of the parties and dispose of the action. During the adjournment, counsel for the plaintiff filed a motion returnable on the day fixed for the adjourned hearing for judgment in default of defence. After further argument counsel for the defendants said he did not understand that the decision on the point he had raised would determine his right to defend the action. So I have no other course open to me than to deal with the two applications, one by summons and the other by notice of motion.

The action was commenced by writ, issued on the 14th of October, 1943, claiming a declaration that certain premises formerly known as the James Bay Hotel and 356 Simcoe Street, both in the city of Victoria, and now known as St. Mary's Priory and the use thereof may continue to be wholly enjoyed by the plaintiffs and for an injunction restraining the defendants from taking possession thereof, from dispossessing the plaintiff and from interfering with its use and enjoyment of the premises. On the day on which the writ was issued, COADY, J. granted the plaintiffs an injunction until further order, with liberty to the defendants to apply to vacate the injunction on one day's notice.

Appearance was entered for the defendants on the 16th of November, 1943, and statement of claim delivered on the 4th of December, 1943. No defence has been filed or delivered, but the Chamber summons first mentioned was issued on the 7th of December, 1943, and to suit convenience of counsel stood until the 22nd.

The proceeding which precipitated this action was a demand for possession of the premises, by the defendant Nicolls who is director of housing of the department of finance, made pursuant to Administration Order No. A-891, dated 23rd September, 1943, signed by the defendant Smart, who is real property administrator, and approved by D. Gordon, chairman of the Wartime Prices and Trade Board. This order required possession of the property during His Majesty's pleasure

> at a rental not in excess of the maximum rental in effect therefor or in the absence of such maximum rental, at the maximum rental that shall be fixed under the authority of the Board.

The order stipulated that it should come into force on the 27th of September, 1943.

There does not appear to be any doubt that the power to requisition the use of the property for the purpose of supplying a deficiency in the housing accommodation is authorized by the first part of subclause (*o*) of subsection (1) of section 3 of The Wartime Leasehold Regulations contained in order in council P.C. 9029. Subclause (*o*) reads as follows:

> (*o*) to require any person to offer to let any real property, or to let any real property to such person and on such terms and conditions as the Board may designate, and to give to any such designated person possession of such real property accordingly.

That subclause, however, contemplates the exercise of two different powers, one, the requisition of the use of property and the other the letting and giving possession of such property. The question for decision is whether the former as well as the latter power may be exercised on such terms and conditions as the Board may designate. What the plaintiff says is that the power to fix the terms and conditions when the administrator requires any person to offer or let any real property is not given the administrator or the Board by subclause (*o*) and that if it were, the subclause itself would be *ultra vires* as being in conflict with section 7 of the War Measures Act, R.S.C. 1927, Cap. 206.

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Under the provisions of said section 7 where property is appropriated to the use of His Majesty and the compensation for its use is not agreed upon, the compensation must be determined by the Exchequer Court of Canada on reference thereto by the Minister of Munitions and Supply. Since the decision of the Supreme Court of Canada, in the *Reference as to the Validity of the Regulations in relation to Chemicals* case, [1943] S.C.R. 1, I do not think there can be any doubt about the correctness of this position. Here no compensation has been agreed upon. The administrator by order A-891 purports to fix the compensation at a minimum rental fixed or to be fixed under the authority of the Board. I do not think on a proper construction of the terms of subclause (*o*) that that power is given him. I think, therefore, in so fixing the compensation by the order, he is attempting to do something in excess of his powers. The order, then, is *ultra vires,* and if, as I have said, the construction I put on the wording of subclause (*o*) is wrong, then the subclause itself is *ultra vires,* being in conflict with section 7. Both the order A-891 and subclause (*o*) derive their legal force from the War Measures Act and the Act prescribes a means of fixing the compensation to be paid and that means must be followed. It was long ago laid down in *Regina* v. *London Justices* (1898), 67 L.J.Q.B. 618, at p. 619, that:

> No rule or by-law is good which overrides a statutory right or imposes fresh conditions as to the exercise of such right.

Counsel, however, submits that the provisions of subsection (2) of section 15 of the order in council P.C. 8528 remove the matter from the jurisdiction of the Court. That subsection reads as follows:

> (2) No proceedings by way of injunction, mandatory order, *mandamus*, prohibition, *certiorari* or otherwise shall be instituted against any member of the Board, administrator or other person for or in respect of any act or omission of himself or any other person in the exercise or purported exercise of any power, discretion or authority or in the performance or purported performance of any duty conferred or imposed by or under these regulations or any regulations for which these regulations are substituted or otherwise conferred or imposed by the Governor in Council.

Mr. *Clearihue* contends that the language of this subsection is wide enough to cover in its sweep anything done or purported to be done by any member of the Board, administrator or other person notwithstanding that the acts done are in excess of their lawful authority, if only they claim to act under the regulations.

The implications of such a position are very far reaching. That such legislation could be enacted is clear from the case of *Vacher & Sons, Lim.* v. *London Society of Compositors* (1912), 82 L.J.K.B. 232, which is instructive on the point as well as on the principles of interpretation to be applied. Here, however, I do not think the provision goes as far as Mr. *Clearihue* contends. I think the plain meaning of the language, as set out in the subsection, is met by the construction which requires the power, which the administrator exercises or purports to exercise, or the duty which he performs or purports to perform, to be conferred or imposed by or under the regulations. I have already held that the regulations do not confer the power to requisition the use of property on terms to be fixed by the Board. I therefore hold that the subsection is not in its terms applicable to the facts here and does not take away the power of the Court in such circumstances to grant an injunction.

I would therefore refuse the application to dismiss as being vexatious and frivolous or as showing no reasonable cause of action.

On the hearing counsel for the defendants abandoned that part of his application to vacate the injunction and I therefore do not deal with it other than to say that in my opinion such a motion should have been made, if at all, by motion and not by summons in Chambers. This would apply whether that motion was to set it aside or dissolve it.

I will deal with the costs of the summons, later when disposing of the motion for judgment.

The motion on the part of the plaintiff, on the default of the defendants delivering a defence, for such judgment as upon the plaintiff's statement of claim in this action the Court may consider the plaintiff entitled to and for costs was filed and argued before me. Counsel for the defendants appeared and objected that the two days' notice of the motion required by Order LII., r. 5 had not been given. Counsel for the plaintiff had presented his argument on this motion at some length before concluding his address. In his reply counsel for the plaintiff dealt with the principal argument of counsel for the defendants and then submitted that the motion for judgment was out of order.

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It must be said that the argument of Mr. *McKenna* (counsel for the plaintiff) was exhaustive and much of it was as relevant by way of reply to the original submissions of Mr. *Clearihue* (counsel for the defendants) as in support of his own motion.

In *Philip Bond & Co., Ltd.* v. *Conkey* (1921), 29 B.C. 240, it was held as stated in the head-note that a summons served less than one clear day before the return thereof is not a nullity but is merely affected with an irregularity which is waived by an appearance on the application at the time fixed by the defective summons.

In the face of the fact that this practice has prevailed in this Court for upwards of 20 years, I propose to follow it and hold that the defect is cured.

On this motion Mr. *McKenna* for the plaintiff abandoned for the purpose of the motion any claim for damages. That leaves only three questions, whether the action is competent at all against the defendants, whether the taking of possession was wrongful and should be enjoined and whether the defendants are liable for costs.

I have already held that section 15 subsection (2) does not remove the matter from the jurisdiction of the Courts. The action is therefore competent.

The demand for possession is based on the administrator's order A-891. I have held this order to be *ultra vires* as being in conflict with section 7 of the War Measures Act. The taking of possession under it is therefore wrongful. I think the injunction should stand as against the defendants, limited, of course, to their actions under order A-891. I do not hold that there is anything to prevent the defendants taking possession under a proper order.

As to costs, I think there should be an order for costs of the action including the costs both of the motion to dismiss and of the motion for judgment to be paid by the defendants.

Order accordingly.

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1944
Jan. 14;
Feb. 10.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* ESTATE OF SAMUEL GEORGE FOXE, DECEASED.

Testator's Family Maintenance Act—Petition by widow of deceased—No provision for widow in will—Disagreement as to terms upon which they would live together—Separation agreement—Substantial estate left to four sisters.

The applicant and deceased were married in 1927. They lived together for six months when, owing to ill health, she went to live with her mother. She returned in six weeks when disagreement arose between them and she went away for two weeks. On her return there followed interviews with failure to agree. A few days later she received a letter from her husband's solicitor in which he stated the husband was willing to take her back, provided she was willing to fulfil all her duties as his wife, but he was not willing to take her back merely in the capacity of a housekeeper and in the event of further disagreement, an action for judicial separation would be commenced. In August, 1928, a separation agreement was entered into. He then paid her $500 and nothing thereafter. The deceased's net estate amounts to about $69,000 all left to his four sisters with the exception of a $1,000 legacy to the executor. The applicant had two children by a former marriage and denies that she ever made it a condition of her return that she was merely to act as his housekeeper. On application by the wife for maintenance under the Testator's Family Maintenance Act:—

Held, that the testator has not made adequate provision for the proper maintenance and support of his widow. That $20,000 would be a proper sum to allow her and that pursuant to section 6 of the Act, the incidence of payment ordered shall fall rateably upon the whole of the estate, but not to affect the legacy to the executor.

APPLICATION by the widow of Samuel George Foxe, deceased, under the Testator's Family Maintenance Act. The facts are set out in the head-note and reasons for judgment. Heard by COADY, J. in Chambers at Vancouver on the 14th of January, 1944.

Crux, for petitioner.
G. Roy Long, for beneficiaries.
Eades, for executor of estate.

Cur. adv. vult.

10th February, 1944.

COADY, J.: This is an application under the Testator's Family Maintenance Act. The petitioner is the widow for

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whom no provision was made in the will of the deceased. The net estate after deductions for probate and succession duties amounts to approximately $69,000. By the will the whole of the estate, with the exception of $1,000 legacy to the executor, goes to four sisters of the deceased. The petitioner is now 51 years of age and is practically without any property or means whatsoever.

The parties were married in 1927 and lived together for about six months. The petitioner's health had then become impaired and the parties consulted a doctor in Calgary who ordered her to take a complete rest for about a month. With the consent of her husband she went on a visit to her mother. She returned to Calgary at the end of six weeks where her husband was then residing, met her husband, and a disagreement arose between them. She took a further two weeks' holiday at Banff, Alberta, with her daughter, and while there was visited by the deceased. At the expiration of the two weeks she returned to Calgary, and there followed further interviews with her husband and failure to agree. A few days thereafter she received a letter from his solicitors with respect to their domestic difficulties. In that letter they say:

> Mr. Foxe is quite willing to take you back as his wife, providing you are willing to fulfil all your duties as his wife, but he is not willing to take you back merely in the capacity of a housekeeper.

The letter further stated in effect that unless she was prepared to fulfil all her duties as his wife an action would be commenced for restitution of conjugal rights, and in the event of that action being successful and the petitioner refusing to return to her husband, that an action for judicial separation would then be commenced. This letter was dated August 6th, 1928. The outcome was that a separation agreement was entered into on August 10th, 1928. Thereafter the parties lived separate and apart from each other. The deceased paid the petitioner $500 on the separation, and nothing thereafter. At a later date when she was in straitened financial circumstances she did appeal to him for some assistance which he apparently refused.

Most of the evidence before me was directed to a review of the causes of and the circumstances surrounding the separation, the beneficiaries and the executor endeavouring to establish that

the separation was wholly due to the unreasonable and unjustifiable attitude of the petitioner in refusing to live with her husband, in fact, deserting him, and contending therefore under the circumstances that she was not entitled to any share in the estate, relying on section 4 of the Testator's Family Maintenance Act. This section is as follows:

> 4. The Court may attach such conditions to the order as it may think 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.

The evidence of the petitioner is that the separation was not of her choosing, but was in fact forced upon her by the unreasonable attitude adopted by her husband on a matter of an intimate and personal nature on which she sought some understanding before she returned to live with him, and which she says gave rise to the disagreement between them. It is unnecessary for me to go into the details of this. I certainly do not think that there was any desertion on her part or refusal without proper cause to live with her husband. He acted impulsively—perhaps they both did; certainly I am convinced his conduct was unreasonable and hasty. In that connection it should be noted too that the will of the deceased is dated the 23rd of August, 1928, a very few days after the separation agreement was entered into. The whole series of events from the time of their disagreement, including the letter from the solicitors, the signing of the separation agreement and the making of the will, all occupied but a few weeks. The deceased moreover does not seem to have made any serious effort at any future date to re-establish himself in her favour, or attempt to effect a reconciliation.

The language of the letter of August 6th from his solicitors, in my opinion, gives some support to the evidence of the petitioner as to the cause of the separation. She denies implicitly that she at any time made it a condition of her return that she was merely to act as his housekeeper and not as his wife, as the letter suggests, and this I accept. It is unreasonable to suggest that this woman who had the experience of supporting by her own unaided efforts, not without some difficulty, the two infant children of her former marriage and who knew full well that a separation from her husband would mean a resumption of that burden, which as to one child at least would continue for some years, would without some good cause give up the prospects of a

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good home, and separate from her husband whom she described as a good, generous, kind man. I am not overlooking the force of the submission made that her evidence must be scrutinized with the greatest care, even with suspicion, because the deceased is not here to give his version as to what brought about this separation. There is, however, no evidence before me to show that the separation was in any way due to the conduct of the petitioner, and the cross-examination of the petitioner was most thorough on that point. As said by Viscount Simon, L.C. in the case of *Dillon* v. *Public Trustee of New Zealand,* [1941] A.C. 294, at p. 301; [1941] 3 W.W.R. 865, at p. 868, quoting the words of Northcroft, J. who heard that case in the first instance:

> At the same time he assumed responsibility for his wife when he married her, and was under an obligation imposed upon him by the statute to make adequate testamentary provision for her proper maintenance and support, and this, I think, he has failed to do.

The separation agreement is no bar to this application. (*In re Testator's Family Maintenance Act and In re McNamara Estate* (1943), 59 B.C. 70. In my view, upon the evidence the testator has not made adequate provision for the proper maintenance and support of his widow, in fact, has made none. The question therefore is what provision, "adequate, just and reasonable," in the words of the statute, should now be made by the Court. The deceased, no doubt, felt that his sisters, to whom he left almost the whole of his estate, which is substantial, had some moral claim upon him; but his wife had a claim for prior consideration, unless her character or conduct was such as to disentitle her to any share in the estate, and I cannot find that it was.

Bearing in mind then the rules laid down in the many cases decided under this Act, and particularly the leading case of *Walker* v. *McDermott,* [1931] S.C.R. 94, I am of the opinion that $20,000 would be a proper sum to allow to the widow.

Pursuant to section 6 of the Act the incidence of payment ordered shall fall rateably upon the whole of the estate unless the Court otherwise determines. Here, however, I think that the order now made should not affect the legacy to the executor, an old friend of the deceased, to whom $1,000 was left as, presumably, an additional compensation for his handling the estate.

Costs of all parties out of the estate.

Application granted.

GALT v. FRANK WATERHOUSE & COMPANY OF CANADA LIMITED.

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Nov. 17, 18, 19, 22, 23, 24.
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Ship—Agreement to take over and operate—Sharing of expenses and profits—Annual government inspection—Decay and dry rot discovered—Extensive repairs required—Annual "overhaul"—Abandonment of contract—Warranty of seaworthiness—Action for damages.

On the 11th of September, 1940, the plaintiff, 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 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 contended 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." It was held on the trial that "annual overhaul" includes 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 and does not include the renewal of part of the structure of the ship, that the agreement was in the nature of a charterparty and subject to an implied warranty of fitness at the commencement of the charter, and there was non-compliance with this warranty, that 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.

Held, on appeal, varying the decision of SIDNEY SMITH, J. (SLOAN, J.A. dissenting, and would dismiss the appeal), that the "Salvor" was tied up by the respondent in Victoria Harbour in September, 1941, where it remained in the sole possession of the respondent until the expiration of the agreement on April 1st, 1942. The respondent did not take reasonable care of the vessel and is liable for the vessel's deterioration in value due to that neglect. Seven thousand five hundred dollars represents the sum which would place the appellant in the approximate position she would have been in if she had not sustained the loss the respondent

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caused her by its neglect. The appeal is dismissed in all respects, save and excepting the award of $7,500 damages arising from the respondent omitting to take reasonable care of the vessel.

APPEAL by plaintiff from the decision of SIDNEY SMITH, J. of the 18th of May, 1943 (reported, 59 B.C. 152), in an action for damages for alleged breach of a written agreement entered into between the parties on the 11th of September, 1940, in relation to the operation of the steamship "Salvor." The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 17th to the 24th of November, 1943, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Locke, K.C. (*G. Roy Long,* with him), for appellant: The learned judge erred in holding that the words "annual overhaul" meant "only such work as is necessary to bring the vessel back to the condition in which she was after completion of the previous annual overhaul" and that this is in harmony with common sense and with the language of the agreement. He erred in not holding that the contract sued on was a partnership agreement, and erred in holding that the contract in question was "in the nature of a time charter of the vessel" and erred in holding "that the agreement was subject to an implied warranty of fitness at the commencement of the charter" and that there was non-compliance with this warranty. It is submitted the contract sued on is no charter at all, but a partnership agreement. Profits of the "joint venture" to be shared equally and losses to be shared equally. There are no words of chartering or apt to a charter. In the contract there is none of the clauses that one expects to see in a charterparty. It bears all the hall-marks of a partnership agreement. That one of the partners is to have control is not inconsistent with partnership: see Lindley on Partnership, 10th Ed., 377. Even if the contract amounts to a time charter, it does not follow that there is an implied warranty of fitness: see *Schuster* v. *M'Kellar* (1857), 7 El. & Bl. 704, at p. 724; *Robertson* v. *Amazon Tug and Lighterage Company* (1881), 7 Q.B.D. 598, at p. 605; *The West Cock*, [1911] P. 208; *Point Anne Quarries, Limited* v. *The Ship M. F. Whalen* (1922), 39

T.L.R. 37; Scrutton on Charterparties, 14th Ed., 104; *Giertsen* v. *Turnbull & Co.*, [1908] S.C. 1101; Carver's Carriage by Sea, 8th Ed., 32; *The Vortigern*, [1899] P. 140, at p. 152. The case of *Giertsen* v. *Turnbull & Co.* is not an authority in the circumstances of the case at Bar. The learned judge referred to the judgment of Brett, J. in *Tully* v. *Howling* (1877), 2 Q.B.D. 182, but that judgment was not the judgment of the majority of the Court. Next there was error in finding that the "Salvor" was unseaworthy at the time the contract was entered into and that that was ground for defendant's repudiation. The vessel functioned for nine months without complaint. It was not open to the defendant to repudiate: see Halsbury's Laws of England, 2nd Ed., Vol. 30, p. 375; *Behn* v. *Burness* (1863), 3 B. & S. 751, at p. 755; *Elliot* v. *Von Glehn* (1849), 13 Q.B. 632, at p. 641; *Ollive* v. *Booker* (1847), 1 Ex. 416, at p. 423. Next, there was error in holding that there was a frustration entitling the defendant to refuse to carry out the contract further. The doctrine has been held applicable only where there has been such intervention by the government or interruption by war as destroys the foundation of the contract and the doctrine has not been extended: see *F. A. Tamplin S.S. Co.* v. *Anglo-Mexican Petroleum Co.* (1916), 85 L.J.K.B. 1389, at p. 1406; *Bank Line, Lim.* v. *A. Capel & Co.* (1918), 88 L.J.K.B. 211, at p. 221. There was error in not ordering an account. He never rendered a statement either before or after the expiry of the period covered by the contract and the account has not yet been settled. He should have awarded damages for breach of the contract (a) by reason of failure to put the vessel through annual overhaul: see *Wertheim* v. *Chicoutimi Pulp Company*, [1911] A.C. 301; *Morse* v. *Mac & Mac Cedar Co.* (1918), 25 B.C. 417, at p. 426; *Wilson* v. *Northampton and Banbury Junction Ry. Co.* (1874), 43 L.J. Ch. 503, at p. 505; (b) by reason of failure to overhaul, the plaintiff lost profits for the balance of the period; (c) the evidence shows there was undue discrimination against the "Salvor" in the matter of profitable cargo, resulting in small profits to the partnership: see Halsbury's Laws of England, 2nd Ed., Vol. 24, p. 449; (d) improper care of the ship when it was tied up, resulting in damage.

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Farris, K.C., for respondent: As to operating expenses, it is submitted that the structural repairs to the ship found to be necessary because of her condition of "senile decay" were not operating expenses within the meaning of the contract—they were neither repairs nor annual overhaul, the words used in the contract. The learned judge found the value of the ship in June, 1941, was not more than $20,000. The ship was sold in 1942 for $5,000. The learned judge found that the cost of repairs in June, 1941, was $20,000 on the evidence and there was no evidence to the contrary. It appeared at the time that the cost might be greatly in excess of $20,000. The cost of repairs exceeded the value of the ship. On the meaning of "repairs," it means repairs as part of the operating expenses and is not a capital investment by the owner: see *Torrens* v. *Walker* (1906), 75 L.J. Ch. 645. Annual overhaul: the proper meaning of annual overhaul is the work necessary to bring the ship into the condition she was after the previous annual overhaul or depreciation which carries on from inspection by the government inspector to the next annual inspection. Annual overhaul must be considered in two ways: first, as annual, secondly, as an operating expense. As to annual, this presupposes a previous overhaul and if each is complete, there would never be 30 years of dry rot. Secondly, the annual overhaul is considered as an annual expense for the period of the joint venture. The agreement was in the nature of a time charter and was subject to an implied warranty of fitness at the commencement of the charter. There was non-compliance with this warranty. The agreement constitutes a time charter. Such a charter contains an implied warranty of fitness and the evidence is clear that the ship was unseaworthy and unfit to go to sea. It was found below that the ship was not fit for the purposes of the contract and the doctrine of frustration applies to this case. Whether the agreement is termed a partnership or a joint venture, the principle is the same: see *Jennings* v. *Baddeley* (1856), 3 K. & J. 78, at p. 89. The condition of the ship was not the result of six months' operation, but of the 30 years' prior disintegration. The condition of the ship was not discovered until the annual inspection after the contract was entered into.

Damage to machinery: it is alleged the damage was due to exposure to weather due to removal of flooring and leakage permitting the water to enter the engine-room. The removal of the planking and flooring was necessary under orders from the government inspector and a reputable company of shipbuilders was engaged to overhaul the ship. As to discrimination in freight, this was abandoned in the Court below.

Locke, in reply: As to "overhaul" and the admissibility of evidence as to the facts that parties had in mind see *Lewis* v. *Marshall* (1844), 7 Man. & G. 729; Phipson on Evidence, 8th Ed., 387; *Clark* v. *Adie (No. 2)* (1877), 2 App. Cas. 423; *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182, at pp. 187-8; *River Weir Commissioners* v. *Adamson* (1877), 47 L.J.Q.B. 193, at p. 202. The agreement was to run one and one-half years: see *Heffield* v. *Meadows* (1869), L.R. 4 C.P. 595; *The Curfew*, [1891] P. 131; *Atkyns* v. *Baldwyn* (1816), 1 Stark. 209; *In re Rayner. Rayner* v. *Rayner*, [1904] 1 Ch. 176. On the rule as to ambiguity see Leake on Contracts, 8th Ed., 158; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 195; *Confederation Life Association* v. *Miller* (1887), 14 S.C.R. 330, at p. 344; *Don Ingram Ltd.* v. *General Securities Ltd.* (1939), 54 B.C. 123 and 414. As to implied warranty of fitness see *Schuster* v. *M'Kellar* (1857), 7 El. & Bl. 704, at p. 710. There was a distinct covenant to pay "overhaul": see *Handyside* v. *Campbell* (1901), 17 T.L.R. 623.

Cur. adv. vult.

25th January, 1944.

SLOAN, J.A.: This is an appeal from a judgment of SIDNEY SMITH, J. dismissing the plaintiff's action for damages. The agreement out of which the controversy arose concerned the operation by the respondent of the appellant's ship "Salvor." The main discussion before us turned upon the meaning to be attached to the words "annual overhaul" contained in paragraph 3 of the said agreement which reads in part as follows:

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

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annual overhaul, and all other costs, including claims contracted under this agreement, and expenses incidental to the use and operation of the said steamer.

"Annual overhaul" in a general sense means the work required to be done annually in order to put the vessel in a state of repair satisfactory to the government inspector making his annual inspection under the provisions of Part VII. of the Canada Shipping Act. His satisfaction is evidenced by his annual certificate without which the vessel may not be operated for the carrying of passengers and freight.

In this particular case the repairs directed to be carried out by the inspector were estimated to cost approximately $20,000 for the reason that structural replacements were necessitated by dry rot in the frames and other integral parts of the ship. This sum about equalled her value.

The respondents refused to advance the money necessary to carry out the said work. In consequence the ship could not obtain her certificate of fitness and thus could not be operated under the term of the agreement.

The respondent justified its position by maintaining that "annual overhaul" in the contract means the work necessary "to repair the preceding year's disrepair" and does not embrace those unusual and costly repairs extending to a renewal of a great part of the ship's structure necessitated by an undiscovered condition of dry rot which slowly but continuously over a period of years caused those structures to deteriorate to the point of decay.

The appellant contended that annual overhaul included all work, no matter how extensive or expensive, required to put the vessel in a state of repair sufficient to qualify for the annual certificate of fitness.

The contention of the respondent, it seems to me, would compress the meaning of the disputed phrase into a rigid formula while the definition contended for by the appellant would expand its meaning without limit.

In my opinion the term in question is elastic enough to permit its meaning to expand or contract within limits controlled by the facts of each case. Where to draw the line between what repairs constitute "annual overhaul" within the ambit of a contract of this nature and what repairs are of such a character that they are

not "annual overhaul" but are irregularly recurrent structural replacements is, it seems to me, a question of interpretation to be decided in the light of all the surrounding circumstances. From its very nature the question is one concerning which the law can afford no rule of general application. It is a question of degree.

In this case the learned trial judge reached the conclusion that the work required to be done exceeded in extent the definition he thought proper to apply to the disputed phrase. It may be his interpretation thereof is narrower than need be, but I cannot say, even granting the phrase a more comprehensive meaning, that, in estimating the degree of the work required to be done, it is, under the circumstances herein, "annual overhaul" within the meaning of the agreement and as contemplated by the parties to it.

It follows then that the appellant fails on this branch of the case.

With deference to my brothers who take a contrary view, in my opinion, the appellant also fails in her contention that the trial judge erred in not awarding her damages for deterioration of the "Salvor" caused by rain and the intrusion of the sea. It seems to me that the appellant cannot successfully seek to be indemnified by the respondent for damage suffered by the ship when, as I view it, such damage was not consequent upon any breach of said paragraph 3 of the agreement nor upon any negligent breach of duty of the respondent but on the contrary resulted from a state of affairs outside the agreement and in the direct creation of which she herself willingly participated.

In consequence I would dismiss the appeal.

O'HALLORAN, J.A.: The "Salvor," a wooden vessel of 267 tons gross, built at Victoria in 1908, was owned and operated as a coastal cargo steamer since 1924 by the Galt Steamship Company of which the appellant Isabella Galt was latterly the sole proprietor. By written agreement of 11th September, 1940, the respondent company chartered the ship for the 18-month period expiring 1st April, 1942. In paragraph 3 thereof (later cited), "cost of annual overhaul" was one of several specified items included in the term "operating expenses" therein directed to

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be paid in the first instance by the respondent, and then charged back against operation to ascertain the net profits which were to be divided equally between the parties.

The respondent operated the vessel under that agreement. On 20th June, 1941, the "Salvor" was dry-docked in Vancouver for the annual government inspection necessary to obtain her annual inspection certificate, *viz.*, her licence to operate for the ensuing 12 months. The inspection disclosed a serious situation. About one half of the frames or ribs of the wooden ship were found to be in an advanced stage of dry rot. They would have to be replaced to enable the ship to pass inspection. Further examinations left no doubt that the ship was in such a bad condition, that a major reconstruction job was required, if she were to secure the necessary certificate to operate during the remaining nine months of the contract period. It was then estimated this work would cost at least $20,000 instead of the usual $3,000 to $5,000 incurred in annual inspections of previous years.

The respondent refused to acknowledge more than $5,000 of this amount as an operating expense under the agreement, and insisted that the appellant provide for the balance. This the appellant declined to do, contending the full amount of $20,000 (this estimate was increased to $22,800 by later revised check), was "cost of annual overhaul" and thus an operating expense for which the agreement provided. It appears the respondent was prepared to spend $20,000 on the reconditioning of the ship at Victoria, provided its existing agreement with the appellant was replaced by a new agreement giving it an interest in the vessel. This was confirmed by an entry in the diary of the witness Alex. Wood, who was a representative of the appellant during the negotiations, and testified on her behalf.

These negotiations and further examinations of the ship extended over two and a half months, but the parties were unable to come to a new agreement, and no work was done on the ship as required by the government inspector. In September, 1941, the vessel was tied up to a wharf in Victoria under the control of the respondent, and remained idle until the agreement expired by effluxion of time on 1st April, 1942. The appellant sued the respondent for damages and an accounting. The learned trial

judge dismissed the action on the main ground that the meaning of "cost of annual overhaul" as used in the agreement was governed by its description therein as an operating expense, and it could not reasonably be expanded to include virtual reconstruction of the ship as the appellant in effect claimed.

As I have come to view this case, the principal issues for decision are: (1) The appropriate meaning of the expression "cost of annual overhaul" as used in the written agreement; this also includes the admissibility of evidence concerning the meaning of that expression; and (2) the liability of the respondent for damages suffered by the ship while it was tied up in Victoria harbour and the *quantum* thereof. In addition several other questions such as accounting, discriminatory operation of the vessel and frustration are also touched on. The first issue concerns the meaning of "cost of annual overhaul" considered as an operating expense in paragraph 3 of the agreement, which reads in material part: [already set out in the head-note and in the judgment of SLOAN, J.A.].

The agreement does not define "cost of annual overhaul." The standard dictionaries, to which we were referred, do not recognize the expression by mentioning it, and confine the meaning of "overhaul" to examination with a view to correction or repairs. We were not referred to any text-book, shipping manual or professional writing to establish that the expression includes the cost of the work which the annual inspection requires to be done. But the agreement conveys the undeniable implication that both parties intended it to mean something more than the mere cost of the annual government examination of the vessel. It is common ground that some of the work at least which the annual inspection required, was included in "cost of annual overhaul." The plaintiff-appellant contended it included the cost of all work demanded by the annual inspection.

But the defendant-respondent submitted that it could not reasonably mean the virtual reconstruction of the ship, and that in any event, its designation as an operating expense in an 18-month agreement, carried the convincing implication that it could not reasonably include repairs or renewals which did not originate within the 12 months elapsing since the last govern-

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ment inspection. Before he could construe the agreement the learned judge had to know the permissible meanings of words and expressions used in the agreement. In the governing circumstances, the learned trial judge sought the meaning of "cost of annual overhaul" from living dictionaries, if I may so describe testimony of the informed experience and professional opinion tendered by witnesses for many years engaged in or associated with shipping on this coast.

He learned from them that the expression was not a term of art, but one of popular parlance and of loose and inexact meaning. Some 12 witnesses gave evidence on the point. That testimony was for the most part the opinion of skilled witnesses who had acquired competency to speak authoritatively by special study and experience or both combined. They were not asked to construe the agreement, but to testify within their knowledge as founded on experience and professional skill, what meaning or meanings "cost of annual overhaul" had acquired in common practice. The witnesses did not all agree, but generally speaking, they supported the meaning favoured by the side which called them. The learned judge adjudicated upon the weight of that testimony in the light of the language and purpose of the agreement.

He accepted as most appropriate the meaning given by W. D. McLaren, whose training and experience in Great Britain as well as his experience on this coast, leaves no room for doubt regarding his competency to give an authoritative professional opinion as to its appropriate meaning. It is to be noted the expression under review is "cost of annual overhaul" and not "cost of overhaul." The two are not to be confused. The meaning accepted in the Court below supports itself, unless the qualification "annual" as applied to "overhaul," is to be deprived of certainty, and to become wholly dependent for its meaning upon accident of circumstance or the whim of a government inspector. Moreover, the meaning now approved is revealed to be the only one consistent with its inclusion as an "operating expense" in the agreement.

The cost of the work to obtain the annual inspection certificate was finally estimated at $22,800, whereas the value of the ship

was reflected in its option for $23,000 shortly before the agreement of 11th September, 1940, was entered into, and almost one year before the government inspection disclosed the advanced stage of dry rot. The vessel was regarded as an average $10,000 annual net profit producer after providing for an annual overhaul expense seldom exceeding $3,000 although on one occasion it reached $5,000. Assuming an estimated $15,000 net profit over an 18-month operation period, common sense must reject as a likely probability, that the respondent would have included as an operating expense in an 18-month agreement, a cost of reconditioning the vessel equal to, if not more than its own value, and which not only would have destroyed all net profit but would have imposed a substantial operating loss.

It is to be observed moreover, that the appellant's leading witness W. N. Kelly in defining "cost of annual overhaul" generally as the cost of all work called for by the government inspector at an inspection period, explained in cross-examination, that he was not relating that definition to operation, and was not familiar with the terms of the operating agreement between the parties. In my view, whatever meanings may be ascribed in the abstract to "cost of annual overhaul," the key to its meaning in this case, is its designation in the agreement as an operating expense. That master provision and overriding consideration definitely rules out any substantial expense of a capital nature which might perhaps be included in other circumstances. We need not in this case mark the line between what is, and what is not a substantial expense of a capital nature. It suffices that here, the expense involved is unquestionably of a substantial capital nature, since it equalled the most optimistic estimate of the ship's value.

The short life of the agreement had an important bearing on the question of operating expense. If, for example, the agreement had had a life of ten years, the prospect of profit and ability to lay aside essential reserves for capital outgoings over the ten-year period, might easily have prompted the acceptance of capital expenditures which could not be entertained in an 18-month agreement. Again, if the respondent had itself owned the ship, other considerations would appear which do not

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now exist. In the latter event, the respondent as owner would receive full capital benefit in the appreciation of its assets, by doing the most thorough overhaul at an annual inspection, even if such work should in fact exceed any legitimate charge to operation. The considerations in this paragraph are mentioned to illustrate that "cost of annual overhaul" as used in the agreement, cannot escape the limitations which by necessary implication circumscribe an operating expense in a contract for a short period such as 18 months.

But counsel for the appellant advanced four grounds upon which he asked us to hold that the respondent did contemplate the meaning of "cost of annual overhaul" which he supported, *viz.*, (1) it knew the "Salvor" was an old wooden ship; (2) in a prior agreement as well as in a prior proposed agreement with the appellant, the respondent had refused to assume any annual overhaul expense; (3) that C. Halterman the managing director of the Union Steamships Ltd., of which the respondent company in 1939 became a wholly-owned subsidiary, who directed the negotiations resulting in the agreement of 11th September, 1940, had been warned by E. B. Clark at that time treasurer of the respondent company, that the "Salvor" might face an annual inspection cost of $20,000 to $25,000, and that he had then said he would take a chance upon one annual overhaul; (4) the respondent had applied the appellant's meaning to the expression, in the case of several of its own vessels.

As to the first ground, undoubtedly Halterman the managing director of the Union Steamships Ltd., and R. L. Solloway the manager of the respondent company its wholly-owned subsidiary, both knew the "Salvor" was an old ship. As to the second ground Exhibits 12 and 32 bear out the respondent did then exclude expense of annual overhaul. As to the third ground, Halterman testified he did not recollect the particular conversation with Clark. In the case of a somewhat similar conversation Clark testified he had with Solloway, the learned trial judge did not think a great deal of weight should be attributed to what may have been casual conversations when no one actually knew of the defective conditions of the "Salvor" frames. But the learned judge omitted all reference to the Halterman-Clark conversation.

However, in my view, a conclusive answer to the first three grounds, as well as to the Solloway conversation, lies in this, that there is no reason to doubt that Halterman, as the controlling responsible official in each instance, then placed the same meaning upon "cost of annual overhaul" as he did on 27th June, 1941, when he interviewed the appellant, and which he maintained consistently thereafter. That understanding of "cost of annual overhaul" which is now approved as correct, would naturally impregnate his replies to the questions raised by Clark. And Halterman's remark, if he did make that remark, that he would take a chance upon one annual overhaul, would naturally refer to "cost of annual overhaul" in the sense he understood it. Clark had severed his connection with the respondent company in 1941 after 24 years' service, under circumstances which might make it difficult for him to be an entirely distinterested witness. But this observation is not to be interpreted as reflecting upon him or upon the company.

Nor is it without some significance that W. D. McLaren whose evidence as to the meaning of "cost of annual overhaul" has been previously considered, had testified, "I have acted as consultant" for Halterman's company. R. M. Logan, Halterman's subordinate technical officer as superintendent engineer for both the respondent company and Union Steamships Ltd., also supported McLaren's evidence. If Halterman had understood the expression in any other sense, it is fair to assume that the monthly reserves set aside for cost of annual overhaul would have totalled much more than the sum of $2,090, shown in the monthly statements (Exhibit 11). There was some suggestion by Clark that these reserves covered something else, but Exhibit 24 plainly indicates the appellant did not dispute that they were in fact reserves for the cost of annual overhaul. It is also in point that the "Salvor" possessed only a limited certificate, from which I think it follows that there was no occasion for her to be in as good condition as if she were the holder of a certificate enabling her to engage in voyages to Alaska and the West Coast of Vancouver Island.

Furthermore, we cannot take it for granted that Halterman bared the whole of his mind to his subordinates. Certainly it is

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no part of a managing-director's duties to tell all he knows to his subordinate officers. To illustrate, Clark testified of another conversation in which Solloway told him "We are going to repair the Salvor." That would lead one to believe the respondent company had then accepted the appellant's construction of "cost of annual overhaul" and had changed its mind later. If Solloway said that, he told only half the story to his subordinate Clark. For Halterman's testimony that they would repair the "Salvor" only if they obtained an equity in the ship, received the strongest confirmation from an entry in the diary of Alex. Wood, a witness for the appellant, to whom I have already referred in this respect.

Turning now to the fourth ground that the respondent had applied the appellant's construction of "cost of annual overhaul" to several vessels it had purchased and reconditioned. The respondent gave two answers. First it was done before the respondent company was absorbed by the Union Steamships Ltd. in 1939, and Halterman who directed the negotiations leading to the agreement of 11th September, 1940, testified he was not aware of the prior practice of the respondent in that respect. Secondly, even if he did know it, it was done in the case of the respondent's own ships, and the company benefited by their appreciation in capital value. No such benefit could accrue if it were done in the case of a ship the company had chartered for a short period of 12 or 18 months. On the contrary a substantial loss would result. In the case of its own ships the company would benefit by savings in income tax payments, if it were allowed to charge up to revenue as operating expenses, costs of annual overhaul which were in fact capital expenditures.

That was purely a matter of income-tax practice at the time (the evidence suggested it was not permitted in June, 1941), and can have no relation to the meaning of the expression in shipping parlance. But this benefit, even if it were permitted in June, 1941, could apply only to the company's own ships and could not therefore apply to the "Salvor." Any capital expenditures it made upon the "Salvor," even if made in the guise of operating expenses, would be a very real loss, and not merely a book-keeping loss. G. F. Gyles of Price Waterhouse & Co. the

respondent's auditing accountants was tendered in evidence by the respondent to explain the respondent's practice upon which the appellant relied, but counsel for the appellant successfully objected to him being called. If evidence of the respondent's practice respecting its own ships was admissible when tendered by the appellant, then surely the respondent's explanation was equally admissible, and one of the best qualified witnesses to give that explanation was its auditing accountant.

In reaching the foregoing conclusion regarding the appropriate meaning of "cost of annual overhaul" in the agreement, I have felt myself free, as the learned trial judge did, to consider all the testimony tendered by the parties. But it is said that the learned judge ought not to have looked beyond the agreement itself for the meaning of "cost of annual overhaul," and therefore ought to have excluded all extrinsic evidence bearing upon the meaning of that expression. That would have ruled out a great part of the 600-page testimony, and most of the evidence I have examined previously. First, it was urged that the testimony of McLaren, Kelly and the other witnesses who gave evidence on both sides as to the meaning of "cost of annual overhaul," was evidence of a custom or trade usage in shipping circles on this coast, and was not admissible because it was not pleaded.

Counsel for the appellant repudiated the proposition that he had to rely upon a custom or trade usage in order to give extrinsic evidence of the appropriate meaning of "cost of annual overhaul." He submitted, and I hold correctly, that it is an ambiguous expression of loose and inexact meaning, and accordingly evidence *dehors* the written agreement was essential to explain the meaning or meanings of which it is capable in relation to the subject-matter respecting which it was used. *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.*, [1929] S.C.R. 630 is not in point. The expression "overhaul" was there in question, but in a totally different sense as a term of railroad engineering. The plaintiffs had pleaded that by custom or usage of railroad practice, the term in railway construction contracts had acquired a meaning quite different from its recognized meaning in engineering text-books, manuals and professional writings.

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The Supreme Court of Canada held the practice was not established with sufficient universality to displace its recognized professional meaning. Here "cost of annual overhaul" has no recognized professional meaning. In the *Georgia Construction* case "overhaul" was a term of art in railroad engineering. Here "cost of annual overhaul" is not a term of art but a popular expression of loose and inexact meaning. It is one of a great many expressions which are constantly creeping into our language with meanings not yet to be found in dictionaries or in standard works. The prevalence of slang, slogans, crisp commercial phraseology and other modern tendencies, accelerates this condition. It is the growth of a language. In *Shore* v. *Wilson* (1842), 9 Cl. & F. 355; 8 E.R. 450, Lord Lyndhurst said at p. 504:

> The fashion in words, as in dress and other matters, is subject to frequent change.

In the same case in his opinion to the Lords, Coleridge, J. said at p. 519:

> The rules of evidence must expand with the necessities of the case, or the end for which they are established would be sacrificed to the means.

But it is said that "cost of annual overhaul" is an expression composed of plain English words, and therefore no extrinsic evidence is admissible to explain it. To my mind, with respect, it is self-evident, "cost of annual overhaul" is not an expression of plain meaning. The divergence in viewpoint of the parties and the absence of a definition in the agreement or in any statute, make it necessary to turn to a standard dictionary—*cf. In re Rayner. Rayner* v. *Rayner,* [1904] 1 Ch. 176, Vaughan Williams, L.J. at p. 188. In Murray's New English Dictionary, it is noted that in the Labour Commission Glossary, "overhaul" is defined as "the survey made by the Board of Trade inspector or other Government official when a ship is about to undergo repairs." If we look at Webster's New International Dictionary (one referred to authoritatively by Lord Atkinson in *Victoria City (Corporation)* v. *Vancouver (Bishop)* (1921), 90 L.J.P.C. 213, at p. 217), we find that the verb "overhaul" has more than one nautical meaning but none of them applicable in the present agreement. The noun "overhaul" refers us to the verbal noun "overhauling," which is defined as "A strict examination with a view to correction or repairs."

If we obeyed the "plain-meaning" rule we would then be forced to reject explanatory oral testimony and to conclude that "cost of annual overhaul" ought to mean the cost of the annual government inspection, but not the cost of doing work such inspection calls for.

But turning back to the agreement we find that both parties contend their declared intent meant something more than that, and indeed the context makes it plain the expression was not used in the sense of any dictionary meaning. How much more than that, seems to be the real difference between them. It follows inevitably, that the "plain-meaning" rule cannot be applied to an expression of such admittedly loose and inexact meaning, which is inherently ambiguous because it is susceptible of more than one exclusive meaning. As I see it, the learned judge had two connected problems. First, he had to ascertain as a question of fact, what relevant meaning or meanings "cost of annual overhaul" could bear in the circumstances. Having done so, he had to determine secondly as a question of law, the meaning most appropriate to the language and purpose of the contract, and perhaps also how that meaning ought to be shaded or bent (if at all) to correctly reflect the language and purpose of the agreement as a whole.

If the foregoing reasoning is correct, it follows that the learned judge could not determine its meaning as a question of law, until he had first found its appropriate meaning or meanings as a question of fact. In the circumstances prevailing here, it is demonstrably clear there was but one way to inform himself of its meaning as a question of fact, *viz.*, by testimony such as was presented to him, and which he admitted. That testimony is not to be regarded as the private views of individuals, but as the competent opinion and verified experience of professional and business men occupying responsible advisory and executive posts in shipping circles. To my mind, such qualified persons are the only ones capable of intelligibly and authoritatively reducing this loose expression to any semblance of meaning appropriate to the circumstances of its use. They constitute, so far as I can see, the one authentic source of knowledge.

That testimony disclosed two likely meanings. The learned

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judge as a matter of law, then studied those two meanings in the light of the language and purpose of the contract. He came to the conclusion that the meaning most in harmony with the description of "cost of annual overhaul" as an operating expense, was the one, in all the circumstances in evidence, which the parties as reasonable people ought to have intended. In *Shore* v. *Wilson* (1842), 9 Cl. & F. 355; (8 E.R. 450), Tindal, C.J. said in part at p. 566 in his opinion to the Lords:

> . . . where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. . . .

In my opinion the testimony received in this case comes within that description. This view is confirmed by Baron Parke's observations in his opinion to the Lords in the same case at p. 556, and as the agreement before us is a mercantile contract, by this extract from Mr. Justice Erskine's opinion at p. 511:

> . . . , if the instrument be a mercantile contract, the meaning of the terms must be ascertained by the jury according to their acceptation amongst merchants.

Shore v. *Wilson* concerned the meaning of the expressions "godly persons" and "godly preachers of Christ's holy gospel." All simple and common English words. But four out of six judges advised the Lords that extrinsic oral evidence was admissible to explain their meaning in a deed. A great deal of the evidence consisted of the opinions of learned men based upon deductions from their historical and controversial reading (p. 481).

In *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, the question was whether "no St. Lawrence" in a marine-insurance policy referred to the gulf or the river of that name, or included both. Both parties alleged a different custom and equally failed in proof. The extrinsic evidence adduced was criticized by the Earl of Selborne, L.C., not because it was inadmissible, but for the reason stated by Lord Blackburn at p. 351, that the witnesses had "no better means of judging than the Court" had. That is borne out by Lord Watson's observation 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. . . .

"Cost of annual overhaul" must be construed according to the circumstances in which it was used, *per* Lord Blackburn in *River Weir Commissioners* v. *Adamson* (1877), 47 L.J.Q.B. 193, at p. 203. For as it was said in *Stradling* v. *Morgan* (1560), 1 Plowd. 199; 75 E.R. 305, at p. 314:

. . . though the words have comprehended all, yet in effect they have not reached to all.

Where the description of the subject-matter is susceptible of more than one interpretation, the Court is entitled to be so far instructed by evidence, as to be able to place itself in thought in the same position as the parties were when they made the contract—*cf. Charrington & Co.* v. *Wooder* (1913), 83 L.J.K.B. 220, Lord Dunedin at pp. 224-5. The appropriate meanings which popular or common expressions may have, is necessarily one of the surrounding circumstances influencing the minds of contracting parties.

The present case illustrates the danger of over-emphasizing the "plain-meaning" rule. In *Morgan* v. *Jones* (1773), Lofft 160; 98 E.R. 587, at p. 596, Lord Mansfield said most of the disputes in the world arise from words. Professor Carleton Kemp Allen comments on the "plain-meaning" rule in "Law in the Making," 3rd Ed., 417, that

. . . no words are so plain and unambiguous that they do not need interpretation in relation to a context of language or circumstances. Words mean nothing in themselves. The very conception of interpretation connotes the introduction of elements which are necessarily extrinsic to the words themselves. There has been too much tendency to regard words as self-contained self-sufficient things instead of vehicles of meaning.

In *Bank of New Zealand* v. *Simpson* (1900), 69 L.J.P.C. 22 for example, on appeal the verdict had been set aside on the ground of improper admission of extrinsic evidence to explain the expression "the total cost of the works" in a contract contained in a letter verbally accepted and admittedly expressing all the terms of the agreement between the parties. The Court had added they could not understand any person receiving the letter being misled by its contents. The Judicial Committee disagreed with this view and held extrinsic evidence was admis-

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sible to explain expressions in the contract. Lord Davey added at p. 24 that:

> Extrinsic evidence is always admissible not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about.

I am driven to the conclusion neither party contemplated that "cost of annual overhaul" was to include virtual reconstruction of the ship as an operating expense. The parties did not express that qualification, and if their conduct is any guide (Mrs. Galt was shocked, her son was surprised and the respondent refused to undertake such an expense), they did not think of the possibility of its occurrence. In *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38, at p. 59, Lord Watson said:

> . . . , when the parties to a mercantile contract . . . have not expressed their intentions in a particular event, but have left these to implication, a Court . . . , in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. . . .

In *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.*, [1942] A.C. 154, Lord Wright at p. 185 said of the passage of which the above extract forms a part:

> In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended, [my note; for they had neither thought nor intention regarding it] but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man.

I am satisfied the Court could not personify the "reasonable man" in this case, if it were deprived of the testimony regarding the meaning of "cost of annual overhaul" which was admitted in the Court below.

There remains the second effective issue for decision, *viz.*, the liability of the respondent company for damages to the "Salvor" while it was tied up in Victoria Harbour from September, 1941. With that is joined the *quantum* of such damages. The learned judge found the vessel was left neglected in the harbour until the agreement expired on 1st April, 1942. The respondent had not terminated the contract. It did not notify the appellant to take back the "Salvor" when she finally insisted upon an interpretation of the contract which it could not accept. It did not elect to treat her conduct as sufficient in

itself to constitute termination of the contract. The respondent remained in possession and control of the vessel until the end of the contract on 1st April, 1942. It paid the insurance on the vessel up to that date, and incurred other expenditures shown in its account of 17th December, 1941 (Exhibit 14), consistent only with the subsistence of the contract. Such items (and see also Exhibit 33) were charged as operating expenses under the agreement, and in the case of Exhibit 14 were in effect expressly accepted by the appellant in the statement produced in Court by Alex. Wood and filed as Exhibit 24.

They were upheld as such in the Court below, and are confirmed as such in this judgment when the accounting question is discussed later. It might be argued perhaps that issuance of the writ on the 3rd of January, 1942, was a repudiation of the contract by the appellant before its expiration. But mere repudiation by one party does not terminate the contract unless it is accepted by the other party—*cf. Heyman* v. *Darwins, Ld.*, [1942] A.C. 356. But neither the writ nor the statement of claim demanded return of the "Salvor." The whole tenor of the appellant's claim in that aspect of damages relating to neglect to proceed with the annual overhaul and failure to keep the ship in operation, was based upon the contract remaining in full force until its expiration by effluxion of time on 1st April, 1942, and *cf. Australian Dispatch Line* v. *Anglo-Canadian Shipping Co. Ltd.* (1939), 55 B.C. 177, at p. 187.

The vessel was in its sole possession and control but the respondent did not take reasonable care of it. It is therefore liable for the vessel's deterioration in value due to that neglect. Its legal responsibility does not necessarily depend upon the existence of the contract, nor is it affected by the appellant's breach of contract. It retained the appellant's vessel in its control and neglected it. In *Welden* v. *Smith*, [1924] A.C. 484, Viscount Cave, L.C. speaking for the whole House said at p. 493:

> A person who undertakes to perform an act as the mandatary of another, whether as bailee, agent, or otherwise, and whether for reward or gratuitously, is bound, without express words, to act in a reasonable and prudent manner having regard to the circumstances of the case. It matters not whether his obligation is regarded as a common law obligation the breach of which gives rise to an action of tort, or as an implied condition of his con-

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tract; in either case, the obligation arises without express words unless it is excluded by the terms of the contract.

When the appellant resumed control of the ship in April, 1942, at Victoria the hatches were open, the side of the vessel was temporarily boarded up where planking had been removed, the boiler-room, engines, machinery and equipment were dismantled and lying around, while some of it was still at the Union Steamships Ltd. warehouse in Vancouver where it had been removed in June, 1941, by the respondent while the engine-room was being overhauled. The engine-room had been flooded to a depth of some five feet. The engine and other machinery and equipment were damaged by rain water and salt water which had been allowed to accumulate in the vessel's interior. Generally illustrative of the vessel's neglected condition was the telegram sent by the manager of the Victoria Machinery Depot, Victoria, to the respondent on 21st January, 1942, advising the "Salvor" then had five feet of water in her hold and would not float much longer (Exhibit 31). The damage to the vessel appears under two heads (a) damage to machinery and equipment and (b) deterioration in value due to general depreciation in her condition and appearance from neglectful exposure to the elements.

The damage to the engine and boiler-room was estimated at around $3,000 by W. N. Kelly, a marine surveyor and superintendent engineer; at around $4,000 by H. H. Hitchon a surveyor with the San Francisco Board of Marine Underwriters; and around $4,500 by E. B. Clark, who ought to be in the best position to know, since he bought the vessel in that condition in April, 1942, and had her completely reconditioned. No estimate was given regarding the damage to equipment, fixtures, woodwork and otherwise to the interior of the vessel, but it is self-evident that months of exposure of the interior of the vessel to rain and salt water would leave it in a sorry-looking state. Hitchon testified the decks had been leaking, and the woodwork was mouldy and rusty.

Evidence was not available as to the precise cost of cleaning, repairing, and renewing the vessel and its machinery and equipment to the state she was in immediately prior to examination for annual inspection in June, 1941, or at the time she was tied

up in September at Victoria. That was so, because when Clark bought the "Salvor" in April, 1942, he did not restrict the work on the ship to the cleaning up, repairs and renewals occasioned by the respondent's neglect, let alone to the work which was required by the government inspector, but he completely reconditioned the vessel, spending 40 per cent. more than the government inspection had required the year before. It is true the witness Hitchon examined the accounts Clark paid, and identified some $2,350 as chargeable to water damage to machinery and equipment and also some $600 to water damage to woodwork, a total of approximately $3,000. But it was obviously impossible to trace the charges in those accounts for all work directly and indirectly due to water damage, because of the complete nature of reconditioning and improvements to the ship. Hence I accept Clark's figure of $4,500 for damage to machinery and electrical and other equipment, since he bought the ship and had to pay the bills.

Then as to damage to the interior of the ship in addition to machinery and electrical and other equipment just referred to. The nature of the improvements and reconditioning obviously eliminated as separate charges much of the cleaning up and repairs which the rain, salt water and exposure rendered necessary to the interior of the ship. In my view it would mark a notable departure from reality if we failed to recognize that the necessity for expenditures of that character coupled with the vessel's neglected condition and abandoned appearance, did in fact cause a deterioration in her value amounting to several thousands of dollars. In *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800 Lord Watson observed at pp. 803-4, that the extent of damage often depends upon data which cannot be ascertained with certainty and must necessarily be a matter of estimate and it may be partly of conjecture. In *Toronto Hockey Club, Ltd.* v. *Arena Gardens of Toronto, Ltd.*, [1926] 3 W.W.R. 26, Warrington, L.J. speaking for the Judicial Committee pointed out the amount of damages may be "more or less guess work" where they cannot be ascertained by any precise means and *cf. McHugh* v. *Union Bank of Canada,* [1913] A.C. 299, at p. 309 and *Kinkel et al.* v. *Hyman,* [1939] S.C.R. 364, at pp. 380-1.

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With these considerations in mind together with the damage to machinery and equipment already referred to, in my judgment the sum of $7,500 represents the sum of money which would place the appellant in the approximate position she would have been in, if she had not sustained the loss the respondent caused her by its neglect of the "Salvor," *cf. Livingstone* v. *Rawyards Coal Company* (1880), 5 App. Cas. 25, Lord Blackburn at p. 39. In my view no reasonable disproportion can be said to exist between the sum of $7,500 damages and any sum based upon a true appreciation of the peculiar circumstances of this case—*cf. M'Grath* v. *Bourne* (1876), Ir. R. 10 C.L. 160 *in banco* Lord Chief Baron Palles at pp. 164-5 applied in *Katsumi Hanada* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 118, at p. 121.

While I base my judgment on the foregoing, the award of $7,500 damages is justified also by the fact, that owing to the good market in ships due to war conditions, the "Salvor" ought certainly to have fetched a much better figure in April, 1942, than the sum Clark paid, had it not been for the damage to the ship and her condition of neglect both brought about by the respondent. The damage to her engines, machinery and equipment and her neglected condition placed her in the category of an abandoned or a "condemned" ship as she was actually described in a letter written by the respondent's solicitors (Exhibit 4). Those conditions combined to substantially depreciate her saleable value.

It was objected that the damages under this heading occurred after the issuance of the writ. The ship was tied up in September, 1941, the writ issued on 3rd January, 1942, and the contract expired 1st April, 1942. The trial took place in May, 1943. I do not consider the objection is well founded. The statement of claim bearing date 29th January, 1942, was amended at the trial, *inter alia,* in this particular respect. Paragraph 12 alleges damage "by reason of the gross neglect of the ship during the period of June, 1941, to April 1st, 1942," and paragraph 8 is to the same effect. The pleadings unquestionably relate to damages caused during the currency of the contract expiring on 1st April, 1942.

In any event the evidence supports the conclusion that the cause of the damage was operative before the issuance of the writ, although all its effects may not have taken place or have been perceptible, until after its issuance or perhaps in some instances until after the expiration of the contract. A similar objection to admissibility of evidence of damages was disallowed in *M'Grath* v. *Bourne, supra,* Lord Chief Baron Palles observing that the value of the chattel on its return is the material element, applying Baron Parke's judgment in *Williams* v. *Archer* (1847), 5 C.B. 318. Although the action here was not one of detinue in the old sense, as those cases were, nevertheless the circumstances affecting its decision come within the same reasoned principle. In any event the objection seems to be answered fully by our rule 482 and the observation of Lord Hanworth, M.R. thereon in *In re Keystone Knitting Mills' Trade Mark,* [1929] 1 Ch. 92, at p. 104.

It may be advisable to add, that ample grounds exist for assessing the damages in this Court as counsel for the appellant asked us to do. This aspect of the case regarding damages was fought out *in extenso* at the trial. The learned judge dismissed this claim for damages, even if he made no specific reference thereto in his reasons for judgment. As it appears that all the available evidence on this phase of damages was presented to the Court below, little purpose can now be served to incur the additional expense of a reference back to assess damages. The evidence before us enables this Court to assess the *quantum* of damages as effectually as the trial judge could have done, if he had held the appellant entitled to damages. Nor does it appear that the personality of witnesses is an essential element in coming to that decision. Our jurisdiction to do so is not in question, and no ground was asserted to deny it was a proper case to so exercise our discretion, for example *cf.* in principle *Ritchie* v. *Gale and Board of School Trustees of Vancouver* (1934), 49 B.C. 251, at pp. 259 and 271 and *Canada Rice Mills, Ltd.* v. *Union Marine and General Insurance Co.* (1940), 110 L.J.P.C. 1, Lord Wright at p. 5.

The appellant also claimed an accounting, but the learned trial judge denied it. He held that no proper demand has been

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made for an accounting of the several items complained of. It is true that until the trial the respondent had not accounted for the expenses incurred during the inspections and examinations of the vessel, nor for the insurance premium refunds due to the change over from operating to port insurance, and a few other smaller items. But after study of the oral testimony and analysis of the exhibits filed, I remain satisfied that the examination into the accounts which took place at the trial, does not justify further claim or investigation by the appellant.

In saying this, I make it clear that in my opinion, the expenses incurred during the inspections, examinations and maintenance of the vessel until the expiration of the agreement (for the agreement was not determined until its due date), were properly charged to operating expenses in the sense that term is used in the agreement. Among the items properly chargeable as such are the following accounts: Crane's Shipyards Ltd. $2,482.38 (Exhibit 26), Georgia Engineering Co. Ltd. $352.79 (Exhibit 35), General account $1,803.24 (Exhibit 14) and Victoria Machinery Depot Co. Ltd. $543.45 (Exhibit 33). Alternatively such accounts were incurred for the benefit of and with the concurrence of both parties, and whether done for purposes of the existing agreement, or during negotiations for a new agreement. The respondent made no cross-claim for an accounting, or for payment of any amount on the accounts as settled at the trial.

Several other matters need mention. The appellant alleged the respondent had operated the "Salvor" in a discriminatory manner by assigning it to the least profitable voyages and cargo, to the advantage of its other ships. The learned judge dismissed this claim, but did not deal with it specifically in his reasons for judgment. While there was some evidence to support the allegation, I am of the view that the respondent's answers given in evidence read with the cross-examination thereon throws the balance of weight against its acceptance.

The learned trial judge found alternatively, that the agreement was in the nature of a time charter and thereby subject to an implied warranty that the "Salvor" was fit for the purposes of the agreement at its commencement, which he held she was

not. In the view of this case which this judgment reflects, it is not necessary to decide that question, but I do not think it should be left without pointing out, that at the date of the agreement the "Salvor" held her current annual inspection certificate issued by the government steamship inspector (Exhibit 37).

The learned judge further found alternatively that the "Salvor" could not have been made fit for the purposes of the contract within any time or at any cost which would not have frustrated the object of the venture. The ship had been operating without complaint during the currency of her 1940-41 annual inspection certificate. It was not until she was dry-docked for annual overhaul in June, 1941, that the dispute arose as to the meaning of the agreement. I take it therefore that the learned judge must have been referring to that occasion as the time frustration took place. *Tully* v. *Howling* (1877), 46 L.J.Q.B. 388, does not support the proposition for which it was the only authority cited in the reasons for judgment.

That decision turned upon breach of contract and not upon frustration. The majority of the Court of Appeal (Kelly, C.B., Mellish, L.J., and Amphlett, J.A.) expressly decided the case on the one point (p. 390) that a person who has agreed to charter a vessel for 12 months, commencing from the 9th of April is not bound to take her if he has to wait until 17th June to obtain possession of her, and then to have her for a period of less than ten months. The learned trial judge appears to have adopted the language of the minority judgment of Brett, L.J. in *Tully* v. *Howland.* But Brett, L.J. limited the general application of his language by the introductory, "in the circumstances proved at the trial." However, accepting the proposition of law enunciated by that eminent judge, it can have no application here, since annual overhaul of the ship with its consequent removal from operation for an indefinite period during the currency of the agreement, was an incident of the agreement expressly contemplated by both parties.

In my judgment, the doctrine of frustration has no application in a case of this kind, *cf. Australian Dispatch Line* v. *Anglo-Canadian Shipping Co. Ltd.* (1939), 55 B.C. 177; *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corpora-*

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tion, Ld., [1942] A.C. 154 and *Heyman* v. *Darwins, Ld., ib.* 356. If we had found the contract included virtual reconstruction of the ship, it would have been, because we concluded that was the declared intent of the parties in the agreement. But such a conclusion would necessarily negative and exclude a finding, that there was an implied term that the agreement would be commercially impracticable within the meaning of *Horlock* v. *Beal*, [1916] 1 A.C. 486, at p. 513, if an event arose which required the doing of that very thing which the Court found both parties had agreed they would do. As was said in *Australian Dispatch Line* v. *Anglo-Canadian Shipping Co. Ltd., supra*, at p. 184, and as also appears from the *Constantine* case and *Heyman* v. *Darwins, Ld., supra*, the doctrine of frustration is not to be extended for the purpose of enabling a party to escape from a bad bargain.

For the foregoing reasons, I would dismiss the appeal in all respects, save and excepting the award of $7,500 damages arising from the respondent omitting to take reasonable care of the vessel. The appeal is allowed according to that extent.

ROBERTSON, J.A.: The parties entered into an agreement in writing under seal dated the 11th of September, 1940, whereby the respondent was from the 15th of September, 1940, until the 1st of April, 1941, to have full and complete charge and control of the operation of the appellant's ship "Salvor" as a cargo steamer plying between the British Columbia ports and on Puget Sound. The appellant's master was to be retained as master, but the entire crew, including the chief engineer, were to be selected by the respondent. The respondent operated the ship until June, 1941, when she was taken to Cranes' wharf for her annual overhaul and inspection under the Canada Shipping Act. Part of her planking was removed, and it was then discovered, as the learned judge puts it, that owing to dry rot a major job in structural replacement of frames was necessary; that this would mean new planking, as old planks could not usefully be replaced on new frames; that this would cost at least $20,000, while the normal annual overhaul should not exceed $5,000. He found her value in June, 1941, when taken to Cranes', to be not more than $20,000, so that the work necessary to be done to

obtain a certificate would equal the then value of the ship. The respondent refused to have the work done, claiming that the contract did not cover this work. The appellant then sued for damages for breach of contract and for deterioration of the ship under the circumstances later referred to, and for an account. The main dispute is as to the meaning of the words "annual overhaul" contained in paragraph 3 of the agreement, reading as follows: [already set out in the head-note and the judgment of SLOAN, J.A.].

Both sides called witnesses to express their opinion as to the meaning of these words. The learned trial judge found that these words only included such work as was necessary to bring the vessel back to the condition in which she was after completion of the previous annual overhaul; that it was the repair of the preceding year's disrepair and did not include the renewal of part of the structure of the ship in which there was a silent and unseen deterioration from year to year. In coming to this conclusion the learned judge adopted the opinion of the meaning of these words given by McLaren, a witness for the defendant, which he said agreed with the views of other witnesses. With respect, I do not think any of this evidence was admissible. The construction or meaning of the words was for the Court, having in mind the surrounding circumstances which prevailed when the contract was made, unless there was something peculiar to the words by reason of the custom of the trade, or otherwise; and there was no evidence that such was the case. The Lord Chancellor in his speech in *Bowes* v. *Shand* (1877), 2 App. Cas. 455 said at p. 462:

> My Lords, so far as the construction of the contract expressed in those words is concerned, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, the construction of the contract is for the Court. That has been said so often that I need not refer your Lordships to any authority upon the subject. The Court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade, to any of the words of that contract, has to place the construction upon the contract.

In *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182, at p. 188, the Judicial Committee approved of what Blackburn, J. had said as follows:

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"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."

See also *Charrington & Co., Limited* v. *Wooder,* [1914] A.C. 71, at p. 77 where Viscount Haldane, L.C. said:

. . . [where] the description of the subject-matter is susceptible of more than one interpretation, evidence is admissible to show what were the facts to which the contract relates. If there are circumstances which the parties must be taken to have had in view when entering into the contract, it is necessary that the Court which construes the contract should have these circumstances before it.

These cases were applied in *The Canada Law Book Co.* v. *Boston Book Co.* (1922), 64 S.C.R. 182.

Lord Blanesburgh in delivering the judgment of their Lordships of the Judicial Committee in *Tsang Chuen* v. *Li Po Kwai,* [1932] A.C. 715 said in part at pp. 727-8, as follows:

Tindal, C.J.'s statement of the law on this subject in *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, 565 has never been departed from. It may be useful to recall his words: "The general rule," he says, "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

After the above statement Tindal, C.J. continued—see *Shore* v. *Wilson* (1842), 9 Cl. & F. 353, at pp. 566-7—as follows:

The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no

other means can the language of the intrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect.

Even if the evidence of the witnesses as to the meaning of the words "annual overhaul" had been admissible, in my opinion they fell short of showing a usage "so all prevailing and so reasonable and so well known that everybody must be assumed to know that these words mean certain things." See *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.*, [1929] S.C.R. 630. I also refer to what the Lord Chancellor said in his speech in *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, at p. 346, as follows:

Many witnesses were examined on both sides to show in what sense they understood these words, and thought that others ought to understand them; but none of those witnesses proved that they bore either the one sense or the other, according to any local or general usage; nor were they able to refer to any instances in which the question had practically arisen, and had been practically determined. Conflicting opinions of individuals, as to the proper interpretation of words in a written contract, would be entitled to no weight, even if it were clear that they were admissible.

There are two rules for the construction of contracts laid down by Newcombe, J. in delivering the judgment of the majority of the Court in *A. R. Williams Machinery Co. Ltd.* v. *Moore*, [1926] S.C.R. 692, at p. 705, *viz.*:

. . . 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, supra,* at p. 353:

. . . , I apprehend that it is perfectly legitimate to take into account

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such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract.

Now, what were the circumstances when the contract was made? Both parties knew that the "Salvor" was an old wooden ship, and therefore it was reasonable to expect that upon the examination to be made at the time of the overhaul in 1941, necessary repairs might be disclosed.

On the other hand, they knew an inspection of the ship had been held, pursuant to section 387 of the Canada Shipping Act, three months before, and a certificate had or was about to be obtained. This certificate could only have been given after the hull and machinery had been inspected and found "sufficient for the service intended and in good condition." Both parties knew that the ship's earning capacity was not very great, and they also knew that she could not continue to operate after June, 1941, unless she was inspected and received a new certificate under the section mentioned. They also knew the ship would only operate for from eight to nine months after the new certificate was obtained.

While the language employed may be wide enough to include the work required to be done in June, 1941, to get a certificate, yet, as set out *supra,* the language is to be construed in accordance with the surrounding circumstances and the sense in which it would be reasonably understood by the parties.

It is submitted by the appellant that the word "repairs" includes renewal of a subordinate part. See *Lurcott* v. *Wakely & Wheeler,* [1911] 1 K.B. 905, at pp. 923-4, and that therefore the words "cost of annual overhaul" must have a wider and more extended meaning. For the respondent it is said that the word "repairs" refers to the necessary work to be done not only during the operation of the ship, but such subordinate repairs as are found necessary when the overhaul takes place, and that the annual overhaul only includes the expenses of taking down and replacing the machinery, tackle and equipment and renewal of such subordinate parts as may be found necessary.

In view of all these circumstances, not without some doubt, I have come to the conclusion that the words "annual overhaul"

did not include the extra and unusual work required to be done in June, 1941.

In the summer of 1941 respondent took the position that under the contract it was not bound to spend $20,000 on the annual overhaul. Nevertheless, it continued to negotiate with the appellant. As a result the "Salvor" was sent to Victoria. Prior to this time part of the machinery had been dismantled and portions of planking and other parts of the ship taken away and the ship was opened up for inspection purposes. Finally, as the learned trial judge finds, the ship was "tied up to a wharf, and left there, neglected" in Victoria, until the expiry of the contract on April 1st, 1942, all the time in the possession and under the control of the respondent. At one time there was five feet of water in her hold. In my opinion no proper steps were taken by the respondent to protect the ship and machinery, boiler and other equipment from the weather and water, with the result that the ship was greatly depreciated in value when she was returned to the appellant in April, 1942.

My brother O'HALLORAN, whose judgment I have had the advantage of reading, has gone fully into all the facts in connection with this matter. I agree with him that the "Salvor" was damaged to the extent of $7,500 and that the appellant is entitled to recover that amount against the respondent. There is no sufficient evidence to support the claim for discrimination. Each party alleged that the agreement between them constituted a partnership in the business. The partnership is now dissolved by effluxion of time. The appellant asks for an account. The learned trial judge refused an accounting because he said that accounts had been rendered and no proper demand had ever been made on the respondent for further accounts, and that in any event the respondent was at all times and still was ready and willing to give any accounting that might be required. While a number of accounts were considered on the trial, the learned trial judge made no finding in regard to these. In my opinion the appellant is entitled to an account of the partnership business for the reasons set out in *Meyer & Co.* v. *Faber (No. 2)*, [1923] 2 Ch. 421. Lord Sterndale, M.R. said at p. 434 in part as follows:

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. . . It is difficult to see how these Acts of Parliament give a right, which did not exist before, to members of a partnership in the firm name, or in their own name as individuals, to sue another member of the partnership, even after the dissolution, for sums which he happens to have in his hands, without taking the partnership account, in order to ascertain how much is in fact held by him for other persons, and not for himself to satisfy his own share of the partnership assets and profits.

And Warrington, L.J. said in part at p. 439 as follows:

. . . A partner cannot be a creditor of or a debtor to his firm or sue his firm or be sued by it, inasmuch as the English law does not recognize the existence of a firm as distinct from the members of it; and further, in an action by one or more partners, whether using the name of the firm under Order XLVIII. A, r. 10, or not, against a co-partner alleging that money is due from the defendant to the plaintiffs in connection with the affairs of the firm, whether the claim arises in respect of transactions during the continuance of the partnership, or in the course of the winding up of its affairs after dissolution, the only relief which the plaintiff could obtain would be an account of the dealings and transactions of the partners.

The appeal should be allowed to the extent which I have mentioned.

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

Solicitor for appellant: *G. Roy Long.*
Solicitor for respondent: *R. S. Stultz.*

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In Chambers
1944

Jan. 24;
Feb. 2.

INLAND COLLIERIES LIMITED v. COAL CONSUMERS CO-OPERATIVE ASSOCIATION. CANADIAN BANK OF COMMERCE, GARNISHEE.

Practice—Garnishee—Order—Affidavit in support—Stating that the defendant is "justly indebted"—Sufficiency—R.S.B.C. 1936, Cap. 17, Secs. 3 and 6.

The defendant applied to set aside a garnishee order on the ground that the affidavit in support is insufficient in that the affidavit states that the defendant is "justly indebted" to the plaintiff, whereas section 3 of the Attachment of Debts Act requires the affidavit to state that the "amount of the debt, claim or demand," is "justly due and owing."

Held, that an affidavit in support of a garnishing order, if it follows the form supplied in the Schedule, is sufficient as determined by section 6 of the Act. The affidavit follows the Form C and the application is dismissed.

APPLICATION to set aside a garnishee order. The facts are set out in the head-note and reasons for judgment. Heard by COADY, J. in Chambers at Vancouver on the 24th of January, 1944.

H. M. Drost, for the application.
Sharp, contra.

Cur. adv. vult.

2nd February, 1944.

COADY, J.: This is an application by the defendant to set aside the garnishee order issued herein. Counsel for the defendant submits that the affidavit in support of the garnishee order is insufficient. He points out that section 3 of the Attachment for Debts Act requires the affidavit to state that the "amount of the debt, claim, or demand," is "justly due and owing," whereas the affidavit of John Granger sworn herein states that the defendant is "justly indebted" to the plaintiff.

Two cases were cited to me on the argument, a decision of the Appeal Court of British Columbia in the case of *North American Loan Co.* v. *Mah Ten* (1922), 31 B.C. 133, and a decision of my brother MANSON in *McDonald* v. *Yanchuk et al.* (1941), 56 B.C. 441. In the case of *North American Loan Co.* v. *Mah Ten* the Court found that the affidavit was defective as the affiant had merely sworn as to his belief, which was not a compliance with the statute, which required the affidavit to be sworn on information and belief. The garnishee order was set aside. In that case, after so deciding, MACDONALD, C.J.A. went on to say (p. 135):

> Where a statute requires certain things to be done, I think the Court having supervision over the doing of these things should be somewhat strict in seeing they are done. In other words, we must assume that the Legislature intends what it says; intends that the parties shall do what it says they shall do in order to get relief. The Legislature has said that in order to get the relief which the plaintiff sought for in this case he must make an affidavit of a certain character. I do not think the Court has a right to fritter away what the Legislature says shall be done. It is easy enough for practitioners to follow the form. The Legislature has been emphatic enough to supply a form, and if that form is complied with, that is sufficient; and this the Court has upheld even where the form has varied from the substance of the Act.

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Coady, J.

In the *McDonald* v. *Yanchuk* case my brother MANSON found (pp. 442-3):

> Paragraph 3 of the plaintiff's affidavit in that portion which reads "and $1,153.19, being one-third of the defendants' net profits from July 1st, 1940, to time of sale of defendants' business" does not disclose the nature of the cause of action as required by section 3 of the statute. There must be strict compliance with the statute. The affidavit in support is insufficient by reason of the omission mentioned.

My brother MANSON therefore set aside the garnishee proceedings. Then he went on to say, apparently by way of *dicta*:

> It was submitted, and rightly, I think, that section 6 must be read in the light of the specific requirements of section 3. Clause 4 of the affidavit in Form C in the Schedule does not include words to the effect that the debt is "justly due and owing." Nevertheless, I think words to that effect are necessary. That was the view taken by LENNOX, Co. J. in *Brown* v. *Strickland* (1938), 1 W.W.R. 399 and, I am told, by HARPER, Co. J. in a later and unreported case. MACDONALD, C.J.A. (later C.J.B.C.) in *North American Loan Co.* v. *Mah Ten* (1922), 31 B.C. 133, at 135, used language which seemed to indicate that mere compliance with the form in the Schedule would suffice, but regard must be had to the particular facts with which the learned Chief Justice was dealing. He also observed:
>
> "I do not think the Court has a right to fritter away what the Legislature says shall be done." With that observation I am, with respect, entirely in accord.

It is quite apparent that my brother MANSON treated the words of the Chief Justice in the *North American Loan Co.* case respecting the sufficiency of the affidavit if the form of affidavit, as provided by the statute is complied with as merely *dicta,* in that it was not necessary to the decision in that case. It is obvious, to say the least, that the Attachment of Debts Act is loosely drawn in that while section 3 provides, *inter alia,* that the deponent shall in his affidavit swear

> the actual amount of the debt, claim, or demand, and that the same is justly due and owing, after making all just discounts

section 6 of the Act says:

> Affidavits and orders in the forms in the Schedule, or to the like effect, shall be held to be sufficient.

And the form supplied in the Schedule says

> the intended defendant is justly and truly indebted to the intended plaintiff in the sum of after making all just discounts,

and does not specifically follow the words set out in section 3 as above quoted.

In order that there might be a uniformity of practice, and in view of what might appear to be a conflict in the decisions in

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the two above mentioned cases, I have consulted with my brother judges who were available. Without further comment upon these cases I may say that it is the view of this Court that regardless of any practice that might have heretofore been followed, that an affidavit in support of a garnishing order, if it follows the form supplied in the Schedule, is sufficient, as determined by section 6 of the Act. In the present case the affidavit follows the Form C.

The application, therefore, must be dismissed with costs.

Application dismissed.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF CHARLES HENRY HITCHEN, DECEASED.

S. C.
In Chambers
1943
Sept. 20;
Dec. 22.

Practice — Discovery — Examination for — Parties subject to—Rules 370c, 370d (1) and 1041—Testator's Family Maintenance Act, R.S.B.C. 1936, Cap. 285.

Discovery is obtainable only from parties between whom and the applicant there is an issue defined by the pleadings. Where, therefore, on a petition under the Testator's Family Maintenance Act, there were no pleadings filed on behalf of the parties served with notice of the proceedings, an order cannot be made for the obtaining of discovery from them. The purpose of rule 370d is to declare that a person who comes within its terms and who is not otherwise a party, shall be regarded as such for the purpose of examination. It has no application to persons who are themselves parties to the proceedings.

APPLICATION by the petitioner for leave to examine on discovery the persons served with notice of the proceedings herein and appearing pursuant to such notice. The facts are set out in the reasons for judgment. Heard by MACFARLANE, J. in Chambers at Vancouver on the 20th of September, 1943.

Tysoe, and *Mayall,* for applicant.

G. Roy Long, for the executors and beneficiaries Witherspoon and Marler.

Hunter, for beneficiary Rayner.

Percy A. White, for beneficiaries Hoedt and Reid.

Cur. adv. vult.

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IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF CHARLES HITCHEN, DECEASED

22nd December, 1943.

MACFARLANE, J.: This is an application by the petitioner (a) for directions as to the mode and date of trial; (b) for discovery of documents by all the parties; and (c) for leave to examine on discovery the parties, *i.e.*, the persons served with notice of the proceedings herein and appearing pursuant to such notice.

There is no dispute as to (a) and (b). It is agreed that the evidence on the trial be taken *viva voce* and that the date of trial be fixed for such date as the registrar may set, subject to disposal of the application for leave to examine on discovery. The parties agree to make discovery of documents. The only question remaining is whether or not the parties are parties subject to examination for discovery in accordance with the provisions of the rules.

In *Testator's Family Maintenance Act and the Estate of Thomas Daniel Lewis* (unreported), ROBERTSON, J. ordered cross-examination of the petitioner on his affidavit. In the same case MURPHY, J. ordered the petitioner to answer questions as to matters relevant to though not specifically referred to in his affidavit or in the petition. With reference to the extent of the examination he said:

> Affidavits filed in support of any application are evidence and once cross-examination thereon has been directed this rule [504] in my opinion becomes applicable. It contains no such qualification as is contended for here, *viz.*, that such cross-examination must be confined to matters dealt with in the affidavit.

The relevant rules are rules 370c and 370d (1) found in Order XXXIA., which are as follows:

> 370c. A party to an action or issue, whether the plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, . . .
>
> 370d (1). A person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination.

With these rules rule 1041 (Order LXXI., r. 2) must be read:

> 2. Subject to other Rules provided in special matters, these Rules shall apply to all causes, matters, and proceedings of whatever nature in the Supreme Court, and in cases not provided for the practice shall, so far as may be, be regulated by analogy thereto.

It would appear, therefore, that the rules 370c and 370d (1) would, subject to what I shall say hereafter, apply to proceedings under this Act.

It was submitted to me in argument by counsel for the beneficiaries that rule 370c cannot apply here as against the beneficiaries because the parties are not "adverse in interest" and that rule 370d (1) cannot apply because they are not parties for "whose immediate benefit" the action is prosecuted or defended.

Rule 370c as it then stood was discussed by the Full Court in *Hopper* v. *Dunsmuir,* 10 B.C. 23, in 1903. At the time the rule contained a clause, later deleted, which HUNTER, C.J. said had been tacked on to the rule (then rule 703) in June, 1900. This clause read:

> And such examination shall be in the nature of a cross-examination, limited, however, to the issues raised by the pleadings.

Dealing with this clause the learned Chief Justice said at p. 27:

> So far as I can see, this amendment really effected nothing, as it merely emphasizes the fact that the examination is to be a cross-examination, which was already provided for by r. 712, and interprets the expression "matters in question in the action" to mean "issues raised by the pleadings."

In *McInnes* v. *B.C. Electric Ry. Co.* (1908), 13 B.C. 465, it was held by MARTIN, J., as he then was, that the omission of this clause had not changed the nature of the examination for discovery. This decision in the *Hopper* case was discussed by the Court of Appeal in *Whieldon* v. *Morrison* (1934), 48 B.C. 492, where MACDONALD, C.J.B.C. restricted the scope of the examination further and (p. 496)

> would confine discovery to those issues between the applicant and the party examined.

In that case the learned Chief Justice distinguished between parties on the opposite sides of the record and parties who were adverse in interest only to the extent pleaded.

The case of *Menzies* v. *McLeod* (1915), 34 O.L.R. 572, was considered at length by the Court of Appeal in *Whieldon* v. *Morrison, supra.* In that case MARTIN, J.A., later C.J.B.C., said that he had no doubt the learned Chancellor Boyd in that case took the correct view in holding that the parties were "adverse in interest" and proceeded to say (p. 500)

> with every respect, as that adverseness was disclosed by the pleadings I do not see the necessity for his proceeding to make further observations which do not appear to have a sound basis.

The learned Chancellor had declared that an actual issue in tangible form spread upon the record is not essential so long as

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there is a manifest adverse interest in one defendant as against another defendant. Having referred to this, however, the learned judge followed by a reference to *Bank of B.C.* v. *Trapp* (1900), 7 B.C. 354, 358, where he held following *Mack* v. *Dobie* (1892), 14 Pr. 465 that "questions must be confined to matters raised by the pleadings."

MACDONALD, J.A., later C.J.B.C., in the same case said at p. 502, that he was not prepared to agree with Chancellor Boyd in saying that "adverse interest" may mean "pecuniary interest, or any other substantial interest in the subject-matter of the litigation," unless the learned judge means as defined by the pleadings in accordance with the decisions in our own Courts.

ROBERTSON, J. in *Peters* v. *Yorkshire Insurance Co.*, [1937] 2 W.W.R. 303, dealing with rule 370c, the general rule as to discovery, says that:

> The rule applies only where there is an issue in the pleadings between parties who are adverse in interest.

In accordance with these cases, I would hold that discovery is obtainable only from parties between whom and the applicant there is an issue defined by the pleadings. As in this case there are no pleadings filed on behalf of the parties served with notice of the proceedings, I do not see how discovery can be obtained from them. Without pleadings, discovery could not be restricted and in the words of MACDONALD, J.A. in *Whieldon* v. *Morrison, supra,* I think it manifestly unjust and bad practice likely to lead to abuse to permit the plaintiffs to go on a fishing expedition, *vide* also Middleton, J. in *Somers* v. *Kingsbury* (1923), 54 O.L.R. 166, at p. 171.

I do not understand this application to go so far as to ask for any directions such as might be made in actions under rule 161 or some comparable rule but until the issues between the parties are in some way defined on the pleadings, I do not see how it would be possible to confine discovery within any reasonable limits. I would therefore not order an examination for discovery at this stage.

I think the conclusion reached disposes of any need to deal with the second submission, *viz.*, that the persons served with notice of the proceedings are not parties for whose immediate benefit the action is prosecuted or defended, because they, as

beneficiaries, take mediately through the executors and not immediately.

However, I think the purpose of rule 370d (1) is to declare that a person who comes within its terms and who is not otherwise a party shall be regarded as such for the purpose of examination. I do not think it has any application to persons who are themselves parties to the proceedings. I do not think there is any doubt that the persons served with notice of the proceedings under rule 2 of the Rules of Court made under the Act are parties. My attention has been called to the fact that these parties are variously described in proceedings under the Act. The description of the parties as plaintiff and defendant seems to be in accord with the definition under the Supreme Court Act where a plaintiff includes any person asking for relief against any other person by any form of proceeding and a defendant any person served with notice or entitled to attend any proceeding. As I regard this application, however, it is disposed of by the decision of the first point in respect of which I have had the advantage of conferring with the other judges of the Court who agree with my finding.

There will be costs to all parties out of the estate.

Order accordingly.

YUE SHAN SOCIETY v. CHINESE WORKERS PROTECTIVE ASSOCIATION.

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Dec. 2.

Practice—Appeal—Preliminary objection to jurisdiction of Court—Time for giving notice of—"The appeal comes to be heard"—Court of Appeal Rule 9—"The time set for the hearing of the appeal," in section 21 of the Court of Appeal Act distinguished.

Rule 9 of the Court of Appeal Rules recites: "Where a respondent intends to take objection to the jurisdiction of the Court to hear the appeal, he shall give to the appellant at least one clear day's notice thereof before the appeal comes to be heard." The Court commenced its sittings on the 2nd of November, 1943. The respondent gave notice of his intention to take objection to the jurisdiction of the Court on the 18th of November, 1943, and the case came to be heard on the 2nd of December, 1943.

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Held, that one clear day's notice was given for the 2nd of December, being the day when the appeal came to be heard.

McGuire v. *Miller* (1902), 9 B.C. 1, distinguished.

APPEAL by defendant from the order of BOYD, Co. J. of the 9th of August, 1943, whereby he directed the issue of a writ of possession, commanding the sheriff of the county of Vancouver to place the Yue Shan Society in possession of the top floor of the building at 37 Pender Street East, in the city of Vancouver.

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

McAlpine, K.C., for appellant.

W. W. B. McInnes, for respondent, raised the preliminary objection that there is no jurisdiction to hear the appeal. Leave was given to appeal by the learned county court judge under section 119 of the County Courts Act. There is no appeal as a matter of right. The Landlord and Tenant Act is a code in itself and his proper remedy is under section 23 of that Act if not satisfied with the order below.

McAlpine: Proper notice to take objection to the jurisdiction of the Court was not given pursuant to rule 9 of the Court of Appeal Rules. The first day of this sitting was the 2nd of November, 1943, and the notice was not served until the 18th of November following: see *McGuire* v. *Miller* (1902), 9 B.C. 1. The notice must be given for the first day of the sittings.

McInnes, in reply: The question of jurisdiction can be raised at any time.

The judgment of the Court was delivered by

ROBERTSON, J.A.: This Court commenced its sittings on the 2nd of November, 1943. On the 18th of November, 1943, the respondent gave notice, pursuant to Court of Appeal Rule 9, of his intention to take objection to the jurisdiction of the Court to hear this appeal. Rule 9 is as follows:

> Where a respondent intends to take objection to the jurisdiction of the Court to hear the appeal, he shall give to the appellant at least one clear day's notice thereof before the appeal comes to be heard, and if he shall fail to do so the Court shall be at liberty to make such order as to costs of the objection as to it may seem meet.

The appeal was on the peremptory list for the 2nd of December, 1943. Counsel for the appellant objected that the notice was not effective because it had not been given one clear day "before the 2nd of November, 1943." He submitted that the "appeal comes to be heard" on the first day of the Court's sittings. He relied upon *McGuire* v. *Miller* (1902), 9 B.C. 1. That decision is one on section 21 of the Court of Appeal Act, which provides that:

> No notice to quash or dismiss an appeal and no preliminary objection thereto shall be heard by the Court of Appeal unless notice specifying the ground thereof has been served upon the opposite party at least one clear day before the time set for the hearing of the appeal.

Section 21 is the same as in 1901, except the words "Court of Appeal" replace the words "Full Court."

There is a clear distinction between section 21 and rule 9; the first provides for a notice of one clear day "before the time set for the hearing of the appeal," which is the first day of the sittings, as all appeals on the list are set for hearing that day; whereas rule 9 provides for one clear day's notice "before the appeal comes to be heard." It is clear that one clear day's notice was given for this date, which is the day when the appeal came to be heard.

The objection cannot be sustained.

Preliminary objection overruled.

ATTORNEY-GENERAL OF CANADA v. WESTERN HIGBIE AND ALBION INVESTMENTS LTD.

Constitutional law—"Public harbour"—Foreshore—Right to—Crown grant of waterfront lot "with appurtenances"—Whether foreshore included—British North America Act, 1867 (30 & 31 Vict., c. 3), Sec. 108.

By section 108 of the British North America Act, 1867, "The public works and property of each Province, enumerated in the Third Schedule to this Act, shall be the property of Canada." The Schedule includes "public harbours." The action involves the title to the foreshore adjoining lot 6, block 64, of district lot 185 of the city of Vancouver on Coal Harbour, an indentation of Burrard Inlet at its south-west corner. The Dominion claims title to the foreshore as against the owner of the lot fronting

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thereon. It was held on the trial that Coal Harbour is a part of Burrard Inlet, a "public harbour," and as such the foreshore is the property of the Dominion by virtue of section 108 of the British North America Act, 1867, and further that the Dominion and Provincial orders in council passed in May and June, 1924, were effective to vest title to Burrard Inlet and the foreshore thereof in the Crown in the right of the Dominion.

Held, on appeal, reversing the decision of MANSON, J., that the matter must be considered reasonably and it is not unreasonable to question whether the indentation known as Coal Harbour was in fact a part of the main harbour. It must be judged on its own characteristics and conditions and so considered it was not in 1871 a public harbour or a part of one.

Held, further (SLOAN, J.A. dissenting), that the objection that the Executive Council could not dispose of Provincial lands to the Dominion unless the order in council is supported by Provincial legislation is well founded and there being no such legislation, the Provincial order in council is of no effect. Neither the Dominion nor the Province can divest itself of the ownership of such land without some statutory authority of the Legislature or Parliament as the case may be.

APPEAL by defendants from the decision of MANSON, J. of the 31st of December, 1941 (reported, 57 B.C. 274), in an action whereby the plaintiff claims to be the legal and beneficial owner of the foreshore in front of lot 6, block 64, district lot 185, group 1, New Westminster District, plan 92 and to be entitled to possession thereof. The aforementioned lot originally abutted on Coal Harbour, lot 185 extended across the peninsula leading from what is now known as the down-town part of the city of Vancouver to Stanley Park. It was bounded on the north by Coal Harbour and on the south by English Bay. The defendants concede that in 1792 the then King of Great Britain and Ireland acquired title by right of conquest. The plaintiff maintains that a conveyance of district lot 185 in 1867 from the Crown to Messrs. Brighouse, Hailstone and Morton did not include the foreshore in front of the said lot and that the title to the foreshore remained in His Majesty in right of Great Britain and Ireland during the colonial days of what is now the mainland of British Columbia and thereafter passed to Her Majesty in right of Canada by virtue of the British North America Act, 1867, Sec. 108 when British Columbia entered Canada as a Province on July 20th, 1871, or alternatively, to Her Majesty in right of British Columbia where, in the latter event, it remained until by

the combined effect of Provincial and Dominion orders in council passed in May and June, 1924, respectively, it passed to His Majesty in right of the Dominion.

The appeal was argued at Vancouver on the 8th, 9th, 10th, 20th and 21st of December, 1943, and at Victoria on the 11th to the 14th of January, 1944, before McDONALD, C.J.B.C., SLOAN and ROBERTSON, JJ.A.

Locke, K.C. (*McLelan,* with him), for appellants: The Dominion has no title by the British North America Act, 1867. The Schedule to the Act comprised only public harbours used as such in 1867 and there is no evidence that said foreshore was either a harbour in its natural state, a public harbour or used as a public harbour prior to said Act: see *Attorney-General for the Dominion of Canada* v. *Ritchie Contracting and Supply Company,* [1919] A.C. 999; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia,* [1898] A.C. 700; *Jalbert* v. *The King,* [1937] S.C.R. 51; *Foster* v. *Warblington Urban Council* (1906), 75 L.J.K.B. 514; *Hadden* v. *City of North Vancouver* (1922), 30 B.C. 497. The order in council of May 6th, 1924, completely fails to pass the title. The title to the public lands in British Columbia has all along been and still is vested in the Crown Provincial. It was transferred to the Province before federation. Later the Province conveyed lands along the railway to the Dominion which proves their ownership. Burrard Inlet is a harbour, but it is submitted the water west of Deadman's Island, upon which the property in question fronts, was not, on the facts, proven a harbour in 1867 and consequently did not pass to the Dominion. What is not harbour at all cannot fall within the words of paragraph 4 of the order in council of the 6th of May, 1924. The defendants by the grant of land with appurtenances to their predecessors in title made in 1867 and by subsequent deeds thereof, either expressed to be "with appurtenances" or covered by the Short Form of Deeds Act, acquired and Albion Investments Ltd. holds the fee simple in the foreshore being the land between high and low-water mark. We have a grant of land with appurtenances for 60 years: see Halsbury's

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Laws of England, 2nd Ed., Vol. 33, p. 529, pars. 866-7; *Beaufort* v. *Mayor of Swansea* (1849), 3 Ex. 413; *Healy* v. *Thorne* (1870), I.R. 4 C.L. 495; *Attorney-General for Ireland* v. *Vandeleur*, [1907] A.C. 369; *Booth* v. *Ratte* (1890), 15 App. Cas. 188. The clear intent of the Province in making the grant was to pass title to the land to low-water mark and that subsequent conveyances carrying with them "appurtenances" did convey the lands of the foreshore: see *Chad* v. *Tilsed* (1821), 2 Br. & B. 403. There are no words of reservation in the original grant or subsequent ones. Alternatively, ownership was acquired by prescription. There was uninterrupted user for more than 60 years. To establish prescription by evidence of user see *Tweedie* v. *The King* (1915), 52 S.C.R. 197, at pp. 199 and 218-9. Alternatively, the defendants and their predecessors in title by their respective purchases acquired "water rights" or "riparian rights" over the foreshore adjacent to their upland property as rights parcel of the upland. By the Vancouver Harbour Board Act, the Dominion recognized that there existed "riparian or littoral rights" of frontage owners. A riparian owner on tidal waters and navigable waters has the same rights as on non-tidal, non-navigable waters, but subject to the rights of navigation in the public: see *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662; *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; *Attorney-General of the Straits Settlement* v. *Wemyss* (1888), 13 App. Cas. 192; *United States* v. *River Rouge Co.* (1926), 269 U.S. 411; *Ratte* v. *Booth* (1886), 11 Ont. 491; (1890), 15 App. Cas. 188; *Attorney-General for Nigeria* v. *Holt & Co.* (1915), 84 L.J.P.C. 98. There was never any interference with public rights of navigation. There was error in holding that lot 6 had ceased to be a riparian lot and in holding that artificial fill was responsible for the recession from the old high-water mark. There is no clear or satisfactory evidence of the exact position of the old high-water mark: see *Brighton, &c. Gas Co.* v. *Hove Bungalows, Lim.* (1924), 93 L.J. Ch. 197, at p. 200. Even if it is shown that a certain amount of foreign material is present on the foreshore, there is no evidence that it came there by any act of the owner or with intent to advance the property line seaward. The owners have erected

wharves, walks, floats and shipways on the foreshore: see *The King* v. *Yarborough (Lord)* (1824), 2 L.J.K.B. (o.s.) 196; affirmed (1828), 2 Bli. (N.S.) 147; *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited,* [1915] A.C. 599; *Montreal City* v. *Montreal Harbour Commissioners* (1925), 95 L.J.P.C. 60, at p. 68.

A. M. Russell (*Prenter,* with him), for respondent: The Supreme Court of British Columbia has jurisdiction to try this case: see *The King* v. *The Vancouver Lumber Co.* (1924), 33 B.C. 468; *The King* v. *Swanstrom,* [1925] 3 D.L.R. 79; *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221; *Rex* v. *Gooderham & Worts Ltd.* (1928), 62 O.L.R. 218; *Attorney-General* v. *Walker* (1877), 25 Gr. 233. The Court will take judicial notice of the root of the Crown's title, namely, the conquest of British Columbia on behalf of Her Majesty by Captain Vancouver in 1792: see *Schnell v. B.C. Electric Ry. Co.* (1910), 15 B.C. 378, at p. 382; *Regina* v. *Dowling* (1849), 7 St. Tri. (N.S.) 381, at p. 390; *Regina* v. *Duffy* (1849), *ib.* 795, at p. 917; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 609; *Attorney-General for British Honduras* v. *Bristowe* (1880), 6 App. Cas. 143. The original Crown grant extended only to high-water mark and the Crown still owns all land whether covered by water or not below that point. *Prima-facie* title to the foreshore is in the Crown: see *Holman* v. *Green* (1881), 6 S.C.R. 707; *Mayor of Penryn* v. *Holm* (1877), 2 Ex. D. 328, at p. 332; Coulson & Forbes on Waters, 5th Ed., 41; *Attorney-General* v. *Chambers* (1859), 4 De G. & J. 55; *The Queen* v. *Musson* (1858), 8 El. & Bl. 900; *Noel* v. *The King* (1917), 38 D.L.R. 664; Williams on Vendor & Purchaser, 2nd Ed., 420; *Gann* v. *Free Fishers of Whitstable* (1865), 11 H.L. Cas. 192; *Attorney-General* v. *Parmeter* (1822), 10 Price 378; *Smith* v. *Her Majesty's Officers of State for Scotland* (1849), 13 Jur. 713; *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; *Bagott* v. *Orr* (1801), 2 Bos. & P. 472; *Attorney-General* v. *Emerson,* [1891] A.C. 649; *The Attorney-General* v. *The Mayor, &c., of Portsmouth* (1877), 25 W.R. 559; *The Earl of Ilchester* v. *Rashleigh* (1889), 5 T.L.R. 739; *Esson* v. *Mayberry* (1841), 1 N.S.R. 186. The original grant to Brighouse must be taken

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to go only to high-water mark: see Chitty's Prerogatives of the Crown, 391; *Rorison* v. *Kolosoff* (1910), 15 B.C. 26, and on appeal at p. 419; *Lister* v. *Pickford* (1865), 34 Beav. 576; *Cuthbert* v. *Robinson* (1882), 51 L.J. Ch. 238; *Calladay* v. *Pilkington* (1701), 2 Mod. 513; *Neaverson* v. *Peterborough Rural Council,* [1902] 1 Ch. 557; *Fader* v. *Smith* (1885), 18 N.S.R. 433; *Wood* v. *Esson* (1884), 9 S.C.R. 239; *Cunard* v. *The King* (1910), 43 S.C.R. 88. No person as a member of the public can claim a common-law right to appropriate a part of the foreshore for his own purposes: see *The Mayor, &c. of Maldon* v. *Woolvet* (1840), 12 A. & E. 13; *Mayor of Colchester* v. *Brooke* (1845), 7 Q.B. 339; *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135; *The Duke of Somerset* v. *Fogwell* (1826), 5 B. & C. 875; *Attorney-General* v. *Emerson,* [1891] A.C. 649; *Corporation of Hastings* v. *Ivall* (1874), L.R. 19 Eq. 558; *State* v. *Taylor* (1858), 27 N.J.L. 117. Alternatively, if the land claimed by the plaintiff was not part of the public harbour in 1871, it became the property of the Dominion as the result of reciprocal orders in council of the Province and the Dominion in 1924. The transfer of land from the Dominion to the Province or *vice versa* is totally unlike a transfer of land from the Crown to a subject: see *Wood* v. *Esson* (1884), 9 S.C.R. 239; *Cunard* v. *The King* (1910), 43 S.C.R. 88; *Mersereau* v. *Swim* (1914), 42 N.B.R. 497; *Doe dem. Sheldon* v. *Ramsay et al.* (1852), 9 U.C.Q.B. 105; *The King* v. *New England Company for the propagation of the Gospel* (1922), 21 Ex. C.R. 245; *Hudson's Bay Co.* v. *Attorney-General for Canada,* [1929] A.C. 285; *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178; *Esquimalt & Nanaimo Ry. Co.* v. *Wilson* (1921), 29 B.C. 333; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1887), 14 S.C.R. 345 and on appeal (1889), 14 App. Cas. 295; *Reference re Saskatchewan Natural Resources,* [1931] S.C.R. 263; *Burrard Power Company, Limited* v. *Rex,* [1911] A.C. 87; *Esquimalt and Nanaimo Ry. Co.* v. *Treat* (1918), 26 B.C. 275. On the executive power in Canada in general see Holdsworth's History of English Law, Vol. X., pp. 339 and 469; Dicey's Law of the Constitution, 8th Ed., 421; *The Maritime*

Bank v. *The Queen* (1889), 17 S.C.R. 657; *In re De Keyser's Royal Hotel Ld. De Keyser's Royal Hotel, Ld.* v. *The King*, [1919] 2 Ch. 197; *Regina* v. *Amer et al.* (1878), 42 U.C.Q.B. 391; 1 Cart. 722; *The Queen* v. *Farwell* (1887), 14 S.C.R. 392, at p. 417; *East India Co.* v. *Sandys* (1684), Skin. 165; 90 E.R. 76. The *onus* of establishing title by adverse possession lies upon the person asserting such possession: see *Secretary of State for India* v. *Chelikani Rama Rao* (1916), 85 L.J.P.C. 222. Time does not run against the King except by virtue of a statute: see *Montreal Trust Co.* v. *South Shore Lumber Co.* (1924), 33 B.C. 280, affirming (1923), 32 B.C. 354; *Gauthier* v. *The King* (1918), 56 S.C.R. 176. The Crown is not bound by a statute unless named in it: see *The King ex rel. Attorney-General of Canada* v. *Sanford,* [1939] 1 D.L.R. 374. As to applicability of the Nullum Tempus Act see *Hamilton* v. *The King* (1917), 54 S.C.R. 331; *Kennedy* v. *Husband; Kennedy* v. *Ellison,* [1923] 1 D.L.R. 1069. Neither the Prescription Act nor the Statute of Limitations affect the Dominion Crown title. They claim uninterrupted possession for 60 years prior to 1939. Johnson's payment of rent is a recognition of title. Offers "without prejudice" are admissible if the offer has been accepted: see *In re River Steamer Company* (1871), 6 Chy. App. 822; *Walker* v. *Wilsher* (1889), 23 Q.B.D. 335; *Re Leite; Leite* v. *Ferreira* (1881), 72 L.T. Jo. 97; *Omnium Securities Co.* v. *Richardson* (1884), 7 Ont. 182; *Holdsworth* v. *Dimsdale* (1871), 24 L.T. 360; *La Roche* v. *Armstrong,* [1922] 1 K.B. 485; *Richards* v. *Morgan* (1863), 4 B. & S. 641. As to riparian rights see *Cedars Rapids Manufacturing and Power Company* v. *Lacoste,* [1914] A.C. 569; *Arsenault* v. *The King* (1916), 32 D.L.R. 622; *Fitzhardinge (Lord)* v. *Purcell,* [1908] 2 Ch. 139. The buildings and fill-in are fixtures and the property of the King: see *Elwes* v. *Maw* (1802), 3 East 28; *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174. The strip between defendant's land and the sea cuts him off from all riparian rights: see *Merritt* v. *City of Toronto* (1912), 27 O.L.R. 1; *Mellor* v. *Walmesley,* [1905] 2 Ch. 164; *North Shore Railway Co.* v. *Pion* (1889), 14 App. Cas. 612; *Woods* v. *Opsal,* [1918] 1 W.W.R. 985. As to the rights of the Crown see *The Attorney-*

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General v. *Harris* (1872), 33 U.C.Q.B. 94; *Attorney-General v. E. & N. Ry. Co.* (1900), 7 B.C. 221; *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia,* [1898] A.C. 700; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295; *Attorney-General for Quebec* v. *Nipissing Central Ry. Co. and Attorney-General for Canada,* [1926] A.C. 715; *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46. The Crown Costs Act does not apply: see *Montreal Trust Co.* v. *South Shore Lumber Co.* (1924), 33 B.C. 280; *Re Imperial Canadian Trust Co.*, [1942] 2 D.L.R. 96.

Locke, replied.

Cur. adv. vult.

7th March, 1944.

MCDONALD, C.J.B.C.: This action involves the title to the foreshore of lot 6, block 64, of district lot 185, which lot 6 fronts on an indentation of Burrard Inlet, known for many years as Coal Harbour. The appellation "Coal Harbour" signifies nothing more than "a local habitation and a name." It affords no aid in solving the question whether the area in question ever was a harbour. The Dominion claims title to the foreshore as against the owner of the lot fronting thereon and as a result the right to collect rent for its occupancy.

There are some matters involved in the action, which are no longer open to dispute. Prior to 1871, when British Columbia became a part of the Dominion, the area with which we are concerned was property belonging to the Province. It follows that, unless by some legal process it has since passed to the Dominion, this action cannot succeed. The first contention is that Coal Harbour was a "public harbour" in 1871, and so passed from the Province to the Dominion by the British North America Act, under the Terms of Union. This contention can only prevail if, in truth and in fact, Coal Harbour was, at that date, not only a sheltered place for ships, but a place actually used by vessels engaged in commerce, for loading and unloading passengers or cargo. Since the decision in *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.* (1915), 52 S.C.R. 78

(affirmed [1919] A.C. 999) these propositions are no longer arguable. On the trial, counsel for the respondent recognized the situation, and, in opening, frankly said that he expected to have difficulty in proving the matters mentioned; later in the course of the trial he expressed his doubts as to whether he had established his point on this branch of the case. However, these doubts in the mind of counsel created no difficulty in the mind of the learned trial judge, who, in a sweeping judgment in which every point in controversy was decided for the plaintiff, decided that the area in question was a public harbour in 1871. With all respect, and yet without hesitation, I hold that there was no evidence to support this finding, and that such evidence as we have goes quite the other way.

But it is said that admittedly Burrard Inlet was a public harbour in 1871, and that it must hence follow that every indentation or place of shelter on its shoreline must also be such. I think this is not so. I have examined with some care the arguments and opinions in the *Ritchie* case, and find that it was recognized throughout that the inquiry must be directed to the very area whose title was in dispute. The area in question there is known as the Spanish Banks, located in English Bay. The contention was that English Bay was a part of the harbour of Vancouver, and that hence the Banks were a part of that harbour. The decision was that English Bay was not a part of the harbour, but it is clear, I think, that, even if it had been, it was still necessary to ascertain whether the Banks in themselves formed a part of the harbour. Mr. Newcombe in his argument (pp. 81, 82) refers to "a public harbour or part of a public harbour," and "a public harbour or part of one." Mr. *McPhillips* at p. 87 refers to the "foreshore at the points in question." The learned judges of the Supreme Court approached the inquiry in the same way. Idington, J. at p. 97 says:

> . . . There had not been any such use made of any part of said bay [*i.e.*, English Bay] as to constitute it or any part of it a public harbour or part thereof.

Duff, J. (as he then was), at p. 102 refers to part of a "public harbour" and directs his inquiry to the Dominion's contention that Spanish Banks was part of that harbour. I think it is clear that, given an area of land covered by water, constituting a

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public harbour, the inquiry must be pursued further to ascertain whether the area in question in itself constitutes an essential or useful part of the harbour. This is not to say that such inquiry would arise in respect of every yard of the shoreline of the harbour. The matter must be considered reasonably, and it is not unreasonable to question whether the indentation known as Coal Harbour was in fact a part of the main harbour. I am satisfied that it must be judged on its own characteristics and conditions, and that so considered, it was not, in 1871, a public harbour or a part of one. These conclusions, I think, are in line with what was said by Lord Herschell in *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (1898), 67 L.J.P.C. 90, at p. 92; by Sir Arthur Wilson in *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1906), 75 L.J.P.C. 38, at p. 40; by the majority of the members of this Court in *Hadden* v. *City of North Vancouver* (1922), 30 B.C. 497, where the dissenting judgment of MCPHILLIPS, J.A. brings out the cleavage in judicial opinion on this very point; and by Davis, J. speaking for the Court in *Jalbert* v. *The King*, [1937] S.C.R. 51, at p. 56.

But perhaps respondent's chief reliance is placed on another ground, *viz.*, that even if there had been some doubts on the matter, such doubts were removed by the reciprocal orders in council passed by the Dominion and the Province in 1924. Briefly, the intent of these orders in council was to get rid of the very sort of dispute which we now have before us. They recite the fact that doubts have arisen with regard to the ownership of the foreshore in various named harbours in British Columbia and the Executive Council of the Province purports by way of admission to forego any claim to Provincial ownership of such foreshore, and, so far as necessary, to effectuate that intention, to transfer the title in such land to the Dominion. It is objected that the Executive Council could not so dispose of Provincial lands to the Dominion or to any other grantee, unless its order in council was supported by Provincial legislation. I have reached the conclusion that the objection is well founded and that, there being no such legislation, the Provincial order in council is of no effect. Much of the ground which one would be called upon to

cover in a discussion of this question has been already gone over, and I shall endeavour not to repeat unnecessarily what has been already said in judgments which bind us.

The judgment below gave full effect to the order in council and is founded upon the judgment of Newcombe, J., who spoke for the Court in *Reference re Saskatchewan Natural Resources,* [1931] S.C.R. 263. The learned trial judge quotes a paragraph from that judgment which appears at p. 275 of the report, and obviously relies for the most part on the following sentences:

> It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by order in council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

Reading these words just as they stand, one might easily conclude that Newcombe, J. intended to say, and without qualification, that such transfers could be validly made by order in council unsupported by legislation. I am satisfied that the learned judge did not intend to make that broad statement, but that he meant his readers to understand that he was dealing only with the form of the conveyance rather than with the authority to convey. I think what was said must be taken to mean that an order in council or a despatch is quite sufficient to effectuate the purpose intended, but always provided that there is legislative authority upon which His Majesty's Ministers may act.

I think it can be no longer fairly argued that the lands in question belong to the Crown by any prerogative right, or that such lands may be granted by the Crown in exercise of its prerogative. As pointed out by Lord Watson in *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46, at p. 57:

> The enactments of sec. 109 [of the British North America Act] are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, . . .

See also the judgment of Lord Davey in *Ontario Mining Company* v. *Seybold,* [1903] A.C. 73, at p. 79. I think the lands we are now considering can be disposed of by the Legislature of

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British Columbia, and in no other manner. After all, there is nothing very mysterious about this. The Executive Council is just what its name implies. I am satisfied it was never intended, and I am sure it has never been the practice that lands which are the property of the Province should be disposed of without the authority of the members of the Legislature who are trustees for the inhabitants of the Province.

One need only refer to our own Land Act for an indication of the practice that has always been followed in this Province with regard to what are known as Crown lands, but which, nevertheless, belong in fact to the inhabitants of the Province. See also the Railway Belt Re-transfer Agreement Act, B.C. Stats. 1930, Cap. 60.

I think a glance at the Imperial statute, 1874, Cap. 92, to which counsel referred us, is enlightening. If the words above quoted from Newcombe, J. are to be taken absolutely at their face value and without qualification or necessary intendment, it would seem strange that such a statute should ever have been passed. It was an Act to provide for the transfer to the Admiralty and the Secretary of State for the War Department, of Alderney Harbour and certain lands near it. If lands held by the Crown in a certain right were capable of transfer by a mere order in council, I am unable to understand why it was necessary to pass a statute authorizing

> Her Majesty from time to time by order in council to transfer, . . . , to the Admiralty, or to the Secretary of State for the War Department, . . . , Alderney Harbour, . . . , and the ground and soil thereof, . . . , so far as at the time of the transfer taking effect, the harbour, . . . are vested in or imposed on the Board of Trade, or the Admiralty, or the Treasury, or are vested in Her Majesty, and are not under the management of the Commissioner of Woods, . . .

So far as I can see, this was a transfer of public land from one Department of Government to another, and yet it was thought necessary that a statute be passed to support any order in council effecting a transfer.

Of course the appellant in the present case need not go nearly so far as that, for under the system set up by the British North America Act, where the title and property in certain land is vested in the Dominion, and that in other lands is vested in a Province, I am of opinion that neither the Dominion nor the

Province can divest itself of the ownership of such land without some statutory authority of the Legislature or Parliament, as the case may be.

From a perusal of the report in *Reference re Saskatchewan Natural Resources, supra,* I am satisfied that Newcombe, J. was dealing only with the question of the transfer of Rupert's Land to the Dominion of Canada by order in council, and I find that such order in council was expressly authorized by the Rupert's Land Act, 1868, being 31 & 32 Vict., Cap. 105. Hence it would appear that an order in council declaring that Prince Rupert's Land should henceforth be held, not in right of Great Britain, but in right of Canada, was thought to be without validity unless supported by legislation. When we find that pursuant to the Terms of Union, which constituted the basis of our Federal union, the lands in any Province are declared by the federating statute to be the "property" of that Province, I am satisfied that this means that such "property" falls under the control of the Legislature of the Province and cannot be alienated by a simple executive order, either to the Dominion or to any other grantee. Counsel for the plaintiff recognized that he must go so far as to contend that a Provincial Executive Council could by order in council, without legislative authority or confirmation, transfer all Provincial "property" to the Dominion. To that proposition I cannot subscribe, nor do I believe that there is any authority binding me to do so. In this connection one should also note that by The British North America Act, 1871, being 34 Vict., Cap. 28, Sec. 3, it was provided that:

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, . . .

Plaintiff's argument carries the implication that any such diminution in Provincial limits might be effected by a Provincial order in council. This, I am satisfied, was never intended.

Having reached the above conclusions, it is not necessary to consider, nor is there anything to be gained by my discussing the other defences ably and forcibly argued before us.

I would allow the appeal and dismiss the action.

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

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herein falls short of establishing the area in question in the action was, prior to 1871, a harbour and in use as such by vessels engaged in commerce.

With deference I take a different view than that held by him with respect to the effect of the Provincial order in council of 1924. In my opinion the agreement and its ratification by the Lieutenant-Governor in Council effectively secured the intended object of transferring from the Crown Provincial to the Crown Dominion the beneficial use of and the right to administer the foreshore of Burrard Inlet. I am also of the opinion the disputed area is within the description of Burrard Inlet set forth in the Schedule to the said order in council.

To record the reasons which impel me to this view it becomes necessary to take a short glance at the relevant historical and constitutional aspects involved in order to ascertain the position of the Crown in its relation to the land of the Colony of British Columbia prior to Confederation in 1871. Probably the best place to start is at the beginning of our legislative history, so I reproduce some of the sections from "An Act to Provide for the Government of British Columbia" (1858), 21 & 22 Vict., Cap. 99:

> Whereas divers of Her Majesty's subjects and others have, by the licence and consent of Her Majesty, resorted to and settled on certain wild and unoccupied territories on the North-west Coast on North America, commonly known by the designation of New Caledonia, and from and after the passing of this Act to be named British Columbia, and the islands adjacent, for mining and other purposes; and it is desirable to make some temporary provision for the civil government of such territories, until permanent settlements shall be thereupon established, and the number of colonists increased: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:
>
> . . . . .
>
> II. It shall be lawful for Her Majesty, by any order or orders to be by Her from time to time made, with the advice of Her Privy-Council, to make, ordain, and establish, and (subject to such conditions or restrictions as to Her shall seem meet) to authorize and empower such officer as She may from time to time appoint as Governor of British Columbia, to make provision for the administration of justice therein, and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Her Majesty's Subjects and others therein; provided that all such orders in council, and all laws and

ordinances so to be made as aforesaid, shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.

III. Provided always, that it shall be lawful for Her Majesty, so soon as She may deem it convenient, by any such order in council as aforesaid, to constitute or to authorize and empower such officer to constitute a Legislature to make laws for the peace, order, and good government of British Columbia, such Legislature to consist of the Governor and a Council, or Council and Assembly, to be composed of such and so many persons, and to be appointed or elected in such manner and in for such periods, and subject to such regulations, as to Her Majesty may seem expedient.

Pursuant to the powers conferred by the statute a Commission bearing date the 2nd of September, 1858, was issued under the Great Seal appointing James Douglas Governor of the Colony. The instructions issued to him contained the following paragraphs:

Instructions to Our trusty and well-beloved James Douglas, Esquire, Our Governor and Commander-in-Chief in and over Our Colony of British Columbia and its Dependencies, or in his absence to our Lieutenant-Governor or Officer administering the Government of Our said Colony and its Dependencies for the time being.

Given at Our Court at Osborne House, Isle of Wight, the 2d day of September, 1858, in the twenty-second year of Our Reign.

VIII. You are not to make any law whereby any person may be impeded in establishing the worship of Almighty God in a peaceable and orderly manner, although such worship may not be conducted according to the rites and ceremonies of the Church of England;

XVIII. Nor any law, of an extraordinary nature and importance, whereby Our Prerogative, or the rights and property of Our subjects residing in Our said Colony, or the trade and shipping of Our United Kingdom and its Dependencies, may be prejudiced;

On the 2nd of December, 1858, Governor Douglas issued a proclamation in the following form:

Whereas, by virtue of an Act of Parliament made and passed in the 21st and 22nd years of the Reign of Her Most Gracious Majesty the Queen by a Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, in conformity therewith, I, James Douglas, Governor of the Colony of British Columbia, have been authorized by proclamation issued under the Public Seal of the said Colony, to make Laws, Institutions and Ordinances for the peace, order and good government of the same:

Now, therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, ordain, and enact, that on and after the day of the date of this proclamation, it shall be lawful for the Governor, for the time being of the said Colony, by any instrument in print, or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonginig to the Crown in the said Colony; and every such instrument shall be valid as against Her Majesty,

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Her heirs and successors for all the state and interest expressed to be conveyed by such instrument in the lands therein described.

On the 14th of February, 1859, Governor Douglas issued a further proclamation which reads in part as follows:

Whereas, it is expedient to publish for general information, the method to be pursued with respect to the alienation and possession of agricultural lands, and of lands proposed for the sites of towns in British Columbia, and with reference also to the places for levying shipping and customs duties, and for establishing a capital and port of entry in the said Colony.

Now, therefore I, James Douglas, Governor of the said Colony, do proclaim and declare as follows, *viz.*:

1.—All the lands in British Columbia, and all the mines and minerals therein, belong to the Crown in fee.

(Then follows other sections elaborating the method of alienation of these Crown lands, not in point here.)

In 1865 an ordinance was enacted reading in part as follows:

Whereas it is expedient to amend and consolidate the laws affecting lands in British Columbia, and for that purpose to repeal, alter, and re-enact certain portions of the existing laws affecting the same:

Be it enacted by the Governor of British Columbia, by and with the advice and consent of the Legislative Council thereof, as follows:—

. . . .

3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated, belong to the Crown in fee.

In 1866 the ordinance of 1865 was amended and section 4 of this ordinance is as follows:

4. Nothing herein contained shall be construed to affect the prerogative rights of Her Majesty, Her heirs and successors, over the crown lands of the Colony.

In my view the foregoing excerpts from the quoted proclamations and ordinances (collected in the Appendix to the Revised Statutes of British Columbia, 1871) render it quite clear that prior to 1871 it was settled with the certainty of the Governor's proclamation and the ordinances of the Legislative Council that title to the public lands of the Province was vested in the Crown. It follows that the prerogative of the Crown in relation thereto were in full effect. An additional factor of interest herein is that *prima-facie* title of foreshore is at common law vested in the Crown. *Holman* v. *Green* (1881), 6 S.C.R. 707; Coulson & Forbes on the Law of Waters, 5th Ed., 24.

Land vested in the Crown, that is to say in the King in his politic capacity may, in the absence of restrictive statutory provisions binding the Crown, be alienated by the King by virtue of

the Royal prerogative and, according to conventional constitutional custom, through his delegate, and upon the advice of his Ministers.

I turn now to a consideration of the relevant sections of the British North America Act, 1867, in order to discover if that Act invaded the titles of the Crown and the Royal prerogatives in respect to those matters I have been discussing. By section 146 of the said Act it was declared:

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those Colonies or Provinces, or any of them, into the union, and on address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

By the Imperial order in council dated the 16th day of May, 1871, the Colony of British Columbia entered, from the 29th of July following, in union with the Dominion of Canada. By section 10 of the Terms of Union the provisions of the British North America Act, with certain exceptions, were declared applicable to British Columbia. Section 109 of the said Act in the words of Lord Watson

must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration, it enacts that "all lands, mines, minerals, and royalties," which belonged to British Columbia at the time of the union, shall for the future belong to that Province and not to the Dominion:

Attorney-General of British Columbia v. *Attorney-General of Canada* (1889), 14 App. Cas. 295, at p. 304.

It was argued by the appellant that by virtue of said section 109 "all lands of British Columbia became the property of the Province." I do not understand what is meant by saying that lands "became the property of the Province" unless the phrase contemplates some sort of constitutional theory by which lands vested in the Crown Provincial in 1871 became divested by the British North America Act, and revested in the Provincial Legislature as some sort of trustee for the citizens of the Province. If

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that is the theory advanced it can find no support from the authorities. In truth the precedents hold to the contrary. As Lord Watson said in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437, at p. 444:

> . . . , in *Attorney-General of Ontario* v. *Mercer*, [(1883)] 8 App. Cas. 767; *St. Catherine's Milling and Lumber Company* v. *The Queen*, [(1888)] 14 App. Cas. 46; and *Attorney-General of British Columbia* v. *Attorney-General of Canada* [(1889), *ib.*] 295, their Lordships expressly held that all the subjects described in sect. 109, and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each province.

That the British North America Act not only preserved to the Crown in the right of the Province the ownership of Provincial Crown lands but also did not derogate from any Crown prerogative is, it seems to me, settled beyond argument. In *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick, supra,* Lord Watson said at p. 441:

> Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces.

And as Strong, J. said in *The Queen* v. *Bank of Nova Scotia* (1885), 11 S.C.R. 1, at pp. 18-19:

> The most careful scrutiny of that statute will not, however, lead to the discovery of a single word expressly interfering with those rights, and it is a well settled axiom of statutory interpretation, that the rights of the Crown cannot be altered to its prejudice by implication, a point which will have to be considered a little more fully hereafter, but which, it may be said at present, affords a conclusive answer to any argument founded on the British North America Act. Putting aside this rule altogether, I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of confederation, in any province becoming a member of the dominion, were intended to be in the slightest degree affected by the statute; it is true, that the prerogative rights of the Crown were by the statute apportioned between the provinces and the dominion, but this apportionment in no sense implies the extinguishment of any of them, and they therefore continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law.

If I am right in my understanding of the matter up to this point it would seem that after 1871 and notwithstanding the Act of 1867 all Crown lands in the Province and all revenues derived therefrom remained vested in His Majesty the King in the right

of the Province and that his Royal prerogative to deal therewith remained unaltered subject however to any Provincial statutory provisions binding the Crown.

Before examination of the effect of the relevant Provincial statutes a further word may be required as to nature of the Crown prerogative. As Viscount Haldane pointed out in *Theodore* v. *Duncan,* [1919] A.C. 696, at p. 706:

> The Crown is one and indivisible throughout the Empire, and its acts in self-governing States on the initiative and advice of its own Ministers in these States.

Strong, J. in *The Queen* v. *Bank of Nova Scotia, supra,* expresses the same conception (at pp. 19-20) in the following passage:

> That, for the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the Empire, and is not to be considered as a *quasi*-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the government of the United Kingdom from those of the Crown as head of the government of the dominion, and, again, distinguishing it in its relations to the Dominion and to the several provinces of the Dominion) is a point so settled by authority as to be beyond controversy.

And later when Chief Justice in *The Attorney-General for Canada* v. *The Attorney-General of the Province of Ontario* (1894), 23 S.C.R. 458, at p. 469, he said:

> That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be well recognized constitutional canon.

The Royal authority of the Crown in the right of the Province is delegated to and vested in the Lieutenant-Governor. As Lord Watson puts it in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick, supra* (at p. 443):

> . . . a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.

In my understanding of the matter the Governor-General and Lieutenant-Governor in their own respective spheres and acting under delegable powers of His Majesty possess

"the full constitutional powers which [His] Majesty, if [he] were ruling personally instead of through his agency, could exercise":

Todd's Parliamentary Government in the British Colonies, 2nd Ed., 118.

Turning back then to an examination of the effect of the relevant Provincial statutes upon the Crown prerogative it must be

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at once noted that it is well settled the prerogative of the Crown cannot be affected except by clear legislative enactment. In this Province the rule has statutory sanction for by section 35 of the Interpretation Act it is enacted:

> No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

Upon an examination of the Land Act of the Province (R.S.B.C. 1936, Cap. 144) which appears the only Provincial statute in point, whatever effective restrictive limitations the Legislature imposes thereby upon alienations by the Crown of Crown lands to subjects I can find nothing therein which in any degree restricts the Crown in the right of the Province from transferring Crown land to the Crown in the right of the Dominion. The distinction lies, I think, in the fact that in the case of alienation of land to a subject the Crown parts with its rights of enjoyment of the land and the revenues derived therefrom, whereas when land is transferred from the Province to the Dominion the Crown has parted with no rights whatever. All that takes place is that administration of the land with its attendant revenue has passed from the control of the executive government of the Province to the executive government of the Dominion.

It seems to me that a transfer of this character instead of requiring statutory sanction to validate it requires statutory restriction binding upon the Crown to invalidate it and I know of none. The authority for the exercise of this power by competent authority flows from a *residuum* of the Royal prerogative remaining, as yet, unaffected by any invading statute.

The mechanism necessary to carry out effectually a transfer of this nature, while perhaps unnecessary to the decision therein, is mentioned by Newcombe, J. in *Reference re Saskatchewan Natural Resources,* [1931] S.C.R. 263, at p. 275, as follows:

> It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by order in council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

In the case on appeal to the Privy Council Lord Atkin said ([1932] A.C. 28, at p. 40):

> Their Lordships entirely agree with the reasoning of the judgment of Newcombe, J. in the Supreme Court.

An example of a transfer of Crown property by despatch is found in the Deadman's Island case, *i.e., Attorney-General of British Columbia* v. *Attorney-General of Canada,* [1906] A.C. 552, and for instances of cession of land by the Crown Imperial—the Government in Council—without the previous assent or subsequent confirmation by Parliament see *Damodhar Gordhan* v. *Deoram Kanji* (1876), 1 App. Cas. 332, at p. 356 *et seq.*

It was argued by the appellant that the recognition of the power of the Crown to transfer land from one right of the Crown to another in the manner contended for here by the respondent might lead to great abuse. That to my mind is not a proper test to apply to determine whether or not the power exists. We cannot assume a capricious exercise of the Crown prerogative by the executive government through which that power is made manifest and effective. If it is so abused the remedy lies in the powerful hands of the Legislature to which the Ministers of the Crown are responsible.

Having reached the conclusion that the agreement and order in council operated as an effective instrument of transfer of the lands in question it becomes necessary for me to consider what might be termed the incidental submissions of the appellant.

An alternative argument advanced was that even if the order in council was effective without legislative approval nevertheless it was subject to any prior existing grants from the Province and that the grant from the Crown Provincial to the appellants' predecessors in title carried with it a grant of the foreshore in question. This contention is based upon the assumption that a grant of an upland lot "with appurtenances" carried with it the adjoining foreshore. With deference I think not. And for two reasons. The first: that "appurtenances" standing alone does not inlude land for as Romilly, M.R. said in *Lister* v. *Pickford* (1865), 34 L.J. Ch. 582, at p. 584:

> It is settled by the earliest authority, and acted upon and confirmed without contradiction down to the latest, that land cannot be appurtenant to land, and that the word "appurtenances" includes incorporeal hereditaments,

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such as rights of way, of common, of piscary, and the like, but does not include land to be added to that which was granted.

And see *Cuthbert* v. *Robinson* (1882), 51 L.J. Ch. 238, at pp. 240-41.

Secondly: the foreshore is, by the Royal prerogative, vested in the King and as no express words were used in the grant of the adjoining lands which would pass title of the foreshore to the appellants' predecessors they never acquired any rights of ownership therein

"Because general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative, for such ought to be expressly mentioned":

Chitty's Prerogatives of the Crown, 392.

The appellant in the further alternative set up a title by prescription and called evidence of user to establish his claim. This question seems to me to depend largely on the determination of factual issues and I am unable to say that the learned trial judge reached an erroneous conclusion thereon. It seems to me, too, that the user relied upon might well be attributable to the use of the foreshore by a riparian owner and thus because consistent with two inconsistent theories supports neither. Whether or not the appellants are entitled to the continued enjoyment of riparian rights on the foreshore is not, I think, a bar to the determination of the real question herein: the right of the Dominion to administer the foreshore land and to enjoy the benefits accruing therefrom.

In the result I would dismiss the appeal.

ROBERTSON, J.A. agreed with MCDONALD, C.J.B.C.

Appeal allowed, Sloan, J.A. dissenting.

Solicitor for appellant Western Higbie: *T. G. McLelan.*
Solicitor for appellant Albion Investments Ltd.: *Ian A. Shaw.*
Solicitor for respondent: *A. M. Russell.*

IN RE ESTATE OF THOMAS FREDERIC YOUNG, DECEASED.

S. C.
In Chambers
1943
Nov. 24, 25.

Will—Conditional codicil—Probate—Probate Rules, 1943, r. 39.

The deceased made a will on the 25th of March, 1938, by which he left all his property to one daughter and made her sole executrix. On the 1st of April, 1939, he made a codicil by which in the event of the daughter mentioned in the will predeceasing him, he left all his property to another daughter and made her sole executrix. The codicil contained a clause that it should have effect only in the event of the daughter mentioned in the will predeceasing the testator. The daughter mentioned in the will survived the testator. On reference by the registrar on application for probate:—

Held, that both the will and the codicil be admitted to probate for although the codicil is conditional and would not affect the disposition by the will of the property, it has the effect of republishing the will and under the Probate Rules it has the effect, by reason of its date, of excluding the application of Probate Rule 39.

APPLICATION for probate of a will and reference as to whether the will only or the will and codicil both should be admitted to probate. Heard by MACFARLANE, J. in Chambers at Victoria on the 24th of November, 1943.

Copeman, for the applicant.

Cur. adv. vult.

25th November, 1943.

MACFARLANE, J.: The deceased made his last will on the 25th day of March, 1938, in which he devised and bequeathed all his property to one daughter and appointed her the sole executrix. On the 1st of April, 1939, he made a codicil to his said will by which in the event of the daughter mentioned in his will predeceasing him he devised and bequeathed all his property to another daughter and appointed her the sole executrix.

The daughter mentioned in the will survived the testator so that the codicil did not affect the disposition by the will of the property. The codicil contained a clause declaring that it should have effect only in the event of the daughter mentioned in the will predeceasing the testator. In other respects it confirms the will.

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The application is now made for probate of the will and the registrar has referred to me the question as to whether the will only or the will and codicil both should be admitted to probate. I would direct that both the will and codicil be admitted to probate for although the codicil is conditional and would not affect the disposition by the will of the property it has the effect of republishing the will. Under our Probate Rules also it has the effect by reason of its date of excluding the application of rule 39.

It is different, however, with respect to a conditional will which is inoperative; such a will is not entitled to probate.

The distinction between the decision of Lord Chancellor Hardwicke in *Parsons* v. *Lanoe* (1748), 1 Ves. Sen. 189, at p. 190, which deals with a conditional will, and that of Sir Charles Cresswell which deals with a codicil such as this in *In the Goods of Solomon Mendes da Silva* (1861), 2 Sw. & Tr. 315, is clear, and is approved by Sir James Hannan in *In the Goods of Hugo* (1877), 2 P.D. 73, at p. 74. See also *In re Colley* (1879), 3 L.R. Ir. 243.

Order accordingly.

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Dec. 14, 23.

IN RE ESTATE OF MARY ANN HUMFREY, DECEASED, AND *IN RE* THE ADMINISTRATION ACT AND *IN RE* THE TRUSTEE ACT.

Will—Interpretation—Bequest to "Royal Protestant Orphange for Children, New Westminster, B.C."—No such institution—One in New Westminster called "Loyal Protestant Home for Children, New Westminster, B.C."—Whether bequest is void for uncertainty—"The money left in the bank"—What it consists of.

The testatrix made a bequest in her will to the "Royal Protestant Orphange for Children, New Westminster, B.C." There is no such institution, but there is one in New Westminster known as "Loyal Protestant Home for Children, New Westminster, B.C." which was at the date of the will and still is in operation.

Held, that the "Loyal Protestant Home for Children, New Westminster, B.C." is the institution meant and intended by the testatrix when she used the expression "Royal Protestant Orphange for Children, New Westminster, B.C." The bequest is not void for uncertainty.

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IN RE ESTATE OF MARY ANN HUMFREY, DECEASED

ORIGINATING summons for the determination of certain questions by the executrices of the will of Mary Ann Humfrey, deceased. Heard by MACFARLANE, J. in Chambers at Victoria on the 14th of December, 1943.

Moresby, K.C., for executrices.
Maunsell, for Loyal Protestant Home for Children.

23rd December, 1943.

MACFARLANE, J.: The executrices of the will of Mary Ann Humfrey, deceased, apply by originating summons for the determination of the following questions:

(1) What person or institution is meant and intended by the expression "Royal Protestant Orphange for Children, New Westminster, B.C." appearing in the will of the said deceased?

(2) Is the bequest to such "Royal Protestant Orphange for Children, New Westminster, B.C." void for uncertainty?

(3) What is the true intent and meaning of the expression "the money left in the bank" appearing in said will; and does it apply only to moneys in the bank accounts of the deceased at the date of the death of the deceased; or does it apply to moneys realized by the executors; or to what other moneys or assets?

(4) Has the bequest of said "money left in the bank" any preference or priority over the bequests and legacies following same in said will; or have they any preference or priority over it; and if so what in each case?

(5) To whom the executrices should pay and transfer the existing assets of the estate not specifically bequeathed?

(6) The furnishing and vouching of the executrices' accounts, and the ascertainment and allowance of their remuneration.

The deceased lived prior to her death at 457 East 6th Avenue, Vancouver, B.C. Her will dated July 16th, 1942, was written on a blank form and is in her own handwriting. She left several specific legacies, all of which in as far as they consist of money except one for $100, preceding in position in the will the gift of "the money left in the bank."

On the hearing the executrices submitted an affidavit that there is no such institution as the "Royal Protestant Orphange for Children, New Westminster, B.C.," but that an institution known as "Loyal Protestant Home for Children, New Westminster, B.C." was at the date of the will of the deceased and is still owned and operated by "Loyal Protestant Association" a duly incorporated society incorporated on September 15th, 1925.

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Macfarlane, J.

The originating summons was served on this association and an appearance was entered for it by Mr. *D. P. W. Maunsell,* who also appeared on the hearing.

I have no hesitation in answering question (1) by saying that the "Loyal Protestant Home for Children, New Westminster, B.C." is the institution meant and intended by the testatrix when she used the expression "Royal Protestant Orphange for Children, New Westminster, B.C." Apart from the affidavits of the executrices, to both of whom the deceased had communicated her intention of leaving money to the Protestant Orphanage in New Westminster and from the fact that there is no orphanage other than this home for children that nearly meets the description, I think the principle applied over 300 years ago in *The Case of The Mayor and Burgesses of Lynne* (1612), 5 Co. Rep. 471 could well be applied to variances in wills as immaterial as this. It was there held that the name of a corporation in grants or conveyances, need not be *idem syllabis seu verbis*: it is sufficient if it be *idem re et sensu.* One can hardly complain at an elderly lady confusing the words "Loyal" and "Royal" when applied to anything in the city of New Westminster. The historic sobriquet applied to that city added only the idea of grace and beauty to that of the loyalty of its pioneers to make it the Royal City. The general use of that sobriquet minimizes the variance herein.

I would answer question (2) in the negative.

Answering questions (3) and (4), and (5), I understand that the moneys arising from the sale of the personal property, together with the moneys handed to the executrices for special purposes will not be quite sufficient to pay the testamentary expenses, debts and the several specific legacies of money. I understand also that the Loyal Protestant Association agrees to the payment, if necessary, out of the moneys in the bank accounts at the date of death of the specific legacy following its bequest in the will. All the existing assets not specifically bequeathed should be applied toward the payment of the testamentary expenses and costs, debts and the pecuniary legacies and the expression moneys left in the bank should be taken to mean the balance in the bank accounts after all these are paid. I think this was clearly the intention of the testatrix.

In an estate such as this I would fix the remuneration of the executrices at 5 per cent. of the gross value of the personal estate to be divided equally between them.

In order to avoid the necessity of taxation, I fix the costs of the executrices on this motion at $125 and of the Loyal Protestant Association at $115. These amounts are less than what could be taxed but counsel have agreed that this is fair and I approve. These costs will be paid out of the estate as part of the expenses of administration.

Order accordingly.

COYLE v. McPHERSON.

Contract—Oral agreement to make will in plaintiff's favour—Action against executor for specific performance—Statute of Frauds—Part performance—Sufficiency—Evidence.

In an action against the executor for specific performance of an oral agreement between the plaintiff and the testatrix whereby she was to make a will leaving him a life interest in her home property in consideration of his continuing to board with her and look after her and do what was needed about the place, the evidence discloses that from 1934 until the death of the testatrix in 1943, the plaintiff resided with deceased, paid $40 per month board and as she became less able to look after herself, cooked for her, looked after her and the house and made improvements on the property. He paid another woman for assistance when he was away at work; in his spare time he planted fruit trees in the garden; put in new sills beneath the house; installed a furnace, paying for the material and for redecoration. The evidence of the plaintiff is corroborated by a sister of deceased and three neighbours.

Held, that the acts above mentioned are sufficient evidence of the fact that the plaintiff was acting in pursuance of the arrangement alleged with the deceased. Equities have arisen in favour of the plaintiff resulting from acts done in execution of the contract and deceased did not assume that he was doing them otherwise. The doctrine of part performance should be given effect to and judgment given for specific performance of the contract.

ACTION for specific performance of an oral agreement between the plaintiff and the late Mrs. McPherson (mother of the defendant) whereby she agreed that if he would continue to live with

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her, paying his board, look after her and do what is needed about the place, she would make her will, leaving him a life interest in the house. The further necessary facts are set out in the reasons for judgment. Tried by MACFARLANE, J. at Victoria on the 15th and 16th of December, 1943.

Higgins, K.C., for plaintiff.
Beckwith, for defendant.

Cur. adv. vult.

15th February, 1944.

MACFARLANE, J.: In 1934, the plaintiff who had lived with the McPherson family as a boarder for 40 years, first in Scotland and afterwards in Nova Scotia, wished to go back to Nova Scotia where he had worked in the mines with the father of the McPherson family until the latter had died following an accident. After the death of Mr. McPherson, the plaintiff had come to Victoria with Mrs. McPherson and those of the family who had not preceded them, but by 1934 all the children had married and established homes here of their own. He, then, suggested to Mrs. McPherson that she should go and live with one of her children. She wished to keep her own home and proposed that he should abandon his purpose to go back to Nova Scotia, and continue to live with her, paying his board as theretofore, look after her and do what was needed about the place and she would make her will, leaving him a life interest in the home. The plaintiff agreed. He could neither read nor write. In January, 1934, she took him to her solicitor, Mr. *Sedger* and in his presence, instructed *Sedger* to draw the will. *Sedger* says "the occasion was to put in writing the agreement she had made with Coyle." *Sedger* drew a will which left the plaintiff the life interest but made no mention of an agreement. On the 5th of January, 1939, in order to effect a change requested by the defendant as to the disposition of a cedar chest, she made another will in which the provisions as to the life interest were repeated. Coyle was again present. The executors were Coyle, the husband of a daughter Mrs. Muir, and the defendant. In June, 1940, the plaintiff had to go to Vancouver to appear before a Pension Board and Mrs. McPherson who was ageing and with her increasing age becoming very

dependent on Coyle and a little querulous complained to the defendant about his absence, and expressed a fear that Coyle would not take care of the property, or after her death would bring another woman into the house and the defendant then took her to his own solicitor who drew still another will revoking the will of 1939, appointing the defendant her executor and permitting Coyle to have the use of the premises for a period of six weeks only from her decease. In the month following Mrs. McPherson realized that she was becoming unduly forgetful of what she had done. The particular incident which disturbed her arose out of her forgetting that she had contracted for the purchase of $2,000 of Victory Bonds. As a result, in December, 1942, fearing her memory was failing, she went to Mr. *Sedger,* in the company of the plaintiff and of her daughter Mrs. Muir. The immediate purpose of this visit was to have a committee appointed to look after her affairs. While there she asked to have her will read over and Mr. *Sedger* in ignorance of the existence of the will of 1940, produced the will of 1939, and read it over when she said "That's my will. That's the way I want it." Knowing nothing of the will of 1940, Mr. *Sedger* advised her that the will was good as it stood. I think Mrs. McPherson had entirely forgotten the will of 1940 and do not at all think that in doing what she did there, she intended any duplicity whatever. A difference of opinion arose among the members of the family as to whether the plaintiff and Mrs. Muir should be the committee, to which Mrs. McPherson was apparently agreeable, or whether the defendant and some others, objection being made by the defendant to Coyle because he was illiterate. No decision was made and in the summer of 1943 Mrs. McPherson died.

During the years 1934 up to the time of her death, the plaintiff continued to reside with Mrs. McPherson, paid her $40 a month for his board and in addition as she became progressively less able to look after herself, cooked for her, looked after her and the house, and made improvements to the property. He paid a neighbour woman certain money for her assistance when he was away at work; in his spare time he planted trees in the garden, put new sills underneath the house and installed a furnace, paying one of the sons for material used. On her death he continued

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in possession, but at the end of the six weeks, the executor demanded possession and threatened proceedings to evict him.

The plaintiff now brings this action for specific performance of the agreement. His counsel submits that the case is governed by *Bligh* v. *Gallagher* (1921), 29 B.C. 241. While the facts in *Bligh* v. *Gallagher* reflect a situation which is similar to the converse of that found here, in *Bligh* v. *Gallagher* the defence of the Statute of Frauds which was pleaded, was abandoned and not pressed in argument before the Court of Appeal, although the judgment of the trial judge, reversed on appeal, is given on that basis. The Court of Appeal considered then that it was not necessary for it to determine the effect of the statute. Here the statute is not only pleaded but vigorously pressed as a defence to the action by the defendant who also counterclaims for possession.

The Court of Appeal in *Bligh v. Gallagher,* freed from need to consider the effect of the statute, found that the contract alleged was established and corroborated as required by section 11 of the Evidence Act. A reference made by MACDONALD, C.J.A., later C.J.B.C., to *Hammersley* v. *Baron de Biel* (1845), 12 Cl. & F. 45, but the case to me does not appear to be of assistance here. The Earl of Selborne in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, at p. 473 said:

> *Hammersley* v. *de Beil* was a case of contract for valuable consideration, duly signed so as to fulfil the requirements of the Statute of Frauds, in the view both of Lords Langdale and Cottenham in Chancery, and of Lord Campbell in the House of Lords.

Neither in *Bligh* v. *Gallagher* nor here is there any duly-signed contract. I think there is no question that the rights of the parties here are not conclusively determined by the judgment in *Bligh* v. *Gallagher.*

The argument of counsel for the defendant was based almost wholly on *Maddison* v. *Alderson.* In that case the doctrines of equity relating to the part performance of a parol contract concerning an interest in land are fully examined. The Earl of Selborne, L.C., at p. 745 says:

> In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract

itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow.

After supposing a simple contract to sell land completely performed on both sides as to everything except conveyance, he further says:

> . . . when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, . . .

Here it is pleaded that the contract on the part of the plaintiff has been fully performed. In reply the defendant says that the acts done by the plaintiff do not unequivocally relate to the contract alleged. I shall, therefore, direct my attention to those acts which in my opinion are consistent only with the assumption by both the plaintiff and Mrs. McPherson, that she was to devise him a life interest in the property; or otherwise with her agreement that the place was to be his home, during such time as he should survive her. I think the acts of the plaintiff, in putting in new sills and studs on the house, in paying for redecoration, in paying James McPherson for a furnace which he installed, in planting of fruit trees and in asserting his right to object to the disposal of one of the lots to or through the defendant and the acceptance by Mrs. McPherson of these acts and of his right to object are all acts consistent only with this common assumption. No real attempt is made to dispute the contention of the plaintiff that he did this work subsequent to the time of the alleged contract and the fact that he objected to Mrs. McPherson disposing of the lot is in effect confirmed by the defendant who said as I have it in my notes:

> I figure Coyle objected to selling the vacant lots. I did not know what right Coyle had to object. I asked her [his mother] by what right she allowed him to object to her business. She said she couldn't help it.

What acts are referable unequivocally to an alleged contract seems to have been the subject of a great many opinions. The facts and illustrations used, considered as they are in relation to contracts and circumstances that vary, may well appear difficult to reconcile. I do not attempt here to reconcile them. In cases

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of this kind, it has been held that in the mere continuance of service there is no such unequivocal act. But this case goes farther than *Maddison* v. *Alderson, supra,* and farther than cases such as *Briese* v. *Dugard (No. 2),* [1936] 1 W.W.R. 193, at p. 201, where specific performance was ordered. I refer to that case on the basis of the reasoning of Richards, J.A. with which I agree.

Here there is something more than a mere continuance by Coyle in the house and the payment of board. There is more than the personal service tendered to Mrs. McPherson. On the faith of the contract, there was a series of acts on the part of the plaintiff known to and permitted by Mrs. McPherson to take place on the faith of the contract. These acts were subsequent to the arrangement or contract made between Mrs. McPherson and the plaintiff. I think here that the acts above mentioned are sufficient evidence of the fact that the plaintiff was acting in pursuance of the arrangement alleged, with the deceased. I think they were unequivocally referable to the contract and productive of an alteration of circumstances existing as between the plaintiff and Mrs. McPherson. I think also, as a result of these acts, that "equities have arisen in favour of the plaintiff resulting from acts done in execution of the contract." I think that the evidence here carries an irresistible conviction not only that Coyle was doing these things on the faith of and in pursuance of the agreement alleged but that Mrs. McPherson did not assume that he was doing them otherwise. She did not assume that he was doing them out of sympathy for her. She was in no need of his bounty. The only conclusion I can form is that she accepted the benefits of the work that Coyle did because she understood it was part of his obligation under the agreement made between them to perform the work.

I think when Coyle returned after his visit to Vancouver that her displeasure vanished and she quite forgot that she had made the change in her will and that on the occasion of her final visit to *Sedger's* office, she honestly thought the will he produced was her last will. Were that not so, the language of Kay, J. in *McManus* v. *Cooke* (1887), 35 Ch. D. 681, at p. 698, a case often cited as setting out well the principles on which the doctrine of part performance is given effect, would be very apt:

The defendant having obtained all the advantages which this agreement was intended to give him, it would be a fraud on his part to refuse to carry out his part of the agreement, and to resist an attempt to compel him to do so by insisting on the Statute of Frauds.

As to what the arrangement was, I think that there can be no doubt. The evidence of the plaintiff is corroborated by Mrs. Muir, a daughter of Mrs. McPherson who had knowledge of the arrangement throughout, by the solicitor, Mr. *Sedger,* and by the neighbours Mesdames Cuthbertson, Staples, Snider, and Thorpe, to all of whom Mrs. McPherson confirmed the essential features of her arrangement with the plaintiff.

As to the plaintiff's fulfilment of his contract to take care of Mrs. McPherson I have to choose between the evidence of Mrs. Muir and the neighbours on the one hand, to all of whom Mrs. McPherson talked freely and that of James McPherson and the defendant on the other hand. Without further observation I accept the evidence of the distinterested witnesses on behalf of the plaintiff as fully in respect of the performance of the contract as to its existence.

I have not referred to the fact that there is in the will as probated a direction that the plaintiff be permitted to live in the house for six weeks. That fact, itself, in that will, has to my mind some bearing on the question of an obligation on the part of the deceased, of which she could not entirely rid herself. I look in the same way on the evidence produced with that will as to the disposition of the automobile.

As I place my decision on the ground that equities have arisen as a result of acts done in execution of the contract, these facts do not call for the consideration they otherwise might.

In the reasoning I have adopted, I have attempted to follow the construction of the language in *Maddison* v. *Alderson, supra,* most favourable to the defendants, but I might add that in doing so, I do not hold that it is necessary that the acts of part performance must be referable to the agreement alleged and that I would be satisfied with the principle that

"the act done must be of such a nature, that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted; to show what the agreement is":

vide Meredith, C.J.O. in *Wilson* v. *Cameron* (1914), 30 O.L.R. 486, at p. 492.

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Macfarlane, J.

I would direct the entry of judgment for the plaintiff against the defendant (executor) for specific performance of the contract and dismiss the counterclaim for possession.

As to costs, I find that the defendant knew of the arrangement with Coyle and was aware that his mother had made provision for Coyle to the extent that Coyle would have the right to live in the house after she died. The reasons given by him and his wife for the mother changing the will in 1940—that she feared the house would burn down through his carelessness or that another woman might be brought in, indicate strongly that he knew. He took his mother to a solicitor of his own choice and when after her death all of them went to *Sedger's* office he took a circuitous course to let the others know of the existence of the later will. I accept his evidence that he did not know its contents with the reservation that I think he had a general knowledge of what his mother was doing when she altered the will and the general effect of the changes. He was advised by his sister Mrs. Muir that Coyle had been acting under a contract with his mother and not to contest Coyle's claim. On the other hand, he had the concurrence of James McPherson and the other brother. Again if Coyle's claim were not admitted, he would benefit by its rejection. The plaintiff will have his costs both of claim and counterclaim against the defendant, and in the circumstances I think the defendant should be entitled in respect of the sum he is called upon to pay to be indemnified out of the funds of the estate only after providing for the legacies and the share or shares of the estate passing under the will to others than himself and the two brothers who concurred in his action.

Judgment for plaintiff.

CRAIG v. SINCLAIR.

S. C.
1944
Feb. 23;
March 7.

Motor-vehicles—Collision—Negligence—Damages—Intersection of streets—Right of way—Liability—R.S.B.C. 1936, Cap. 116, Sec. 21.

Blenheim Street, running north and south, intersects 31st Avenue running east and west, Blenheim being the principal thoroughfare of the two streets. Immediately west of the intersection there is a sharp down grade from west to east averaging ten per cent. and there is a grade of 4.7 per cent. from south to north on Blenheim Street at and south of the intersection. The surfaces on both streets are substantially lower than the level of the residential property at the south-west corner of the intersection, thereby obstructing the view from one street to the other. On the afternoon of the 8th of September, 1943, when the weather was clear and the road surfaces dry, the plaintiff was proceeding east on 31st Avenue in an Austin coach at about 15 miles an hour and the defendant was proceeding north on Blenheim Street driving a Studebaker at about 25 miles an hour. The cars collided about the centre line of 31st Avenue and slightly east of the centre line of Blenheim Street. The left side of the front bumper of defendant's car came in contact with the rear right wheel of plaintiff's car. The plaintiff's car had greater momentum than the defendant's car at the time of the impact, the defendant's car having been brought to a full stop at about the point of impact.

Held, that the plaintiff failed to keep a proper look-out. The two cars entered the intersection almost simultaneously and the plaintiff failed to give the right of way to the defendant as it was his duty to do. His failure to do so was the sole cause of the accident.

ACTION for damages resulting from a collision between the plaintiff's Austin coach and the defendant's Studebaker car at the intersection where 31st Avenue crosses Blenheim Street in the city of Vancouver. The facts are set out in the reasons for judgment. Tried by BIRD, J. at Vancouver on the 23rd of February, 1944.

Denis Murphy, Jr., for plaintiff.
Tysoe, for defendant.

Cur. adv. vult.

7th March, 1944.

BIRD, J.: This action arises out of a motor accident which occurred on September 8th, 1943, at about 4.30 p.m. in a residential area of Vancouver, B.C., at the intersection of 31st Avenue and Blenheim Street.

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Thirty-first Avenue runs east and west and intersects Blenheim Street which runs north and south. Blenheim is the principal thoroughfare of the two streets, and has a surface of black top pavement. Thirty-first Avenue is a gravelled roadway. At the time of the accident the weather was clear and road surfaces dry. Immediately west of the intersection there is a sharp down-grade from west to east on 31st Avenue, which averages ten per cent. for several hundred feet west of the intersection. There is a grade of 4.7 per cent. from south to north on Blenheim Street at and south of the intersection.

At the request of counsel I took a view of the *locus* on the last day of the trial. I found that the road surfaces on both streets are substantially lower than the level of the residential property on the south-west corner of the intersection. Consequently the field of vision of the drivers of both cars of traffic approaching the intersection on the other street will have been limited respectively to short distances from the centre of the intersection. It is an unusually bad corner.

The statements as to field of vision made in the course of his evidence by the surveyor Roberts, a witness called by defendant, were substantially confirmed by my observations on the ground, *i.e.*, that the driver of an east-bound car on 31st Avenue is unable to see north-bound traffic approaching the intersection on Blenheim Street until the east-bound car is within 60 feet of the centre of the intersection. I further observed that the north-bound car on Blenheim Street is not able to see a car proceeding east towards this intersection until the east-bound car passes the westerly property line on Blenheim Street, *i.e.*, is within about 40 feet of the centre of intersection.

At the time of the accident the plaintiff was proceeding east on 31st Avenue, driving a 1940 model Austin coach, and the defendant was proceeding north on Blenheim Street driving a Studebaker. The cars collided about the centre line of 31st Avenue and slightly east of the centre line of Blenheim Street. The tyre marks of defendant's car which indicated a severe application of the brakes, were found immediately after the accident in the east traffic lane of Blenheim Street and extended in a straight line from south to north for 31 feet south of the

apparent point of impact. The tyre marks of the plaintiff's car were also found extending from west to east, but did not indicate on the pavement any application of brakes. The damage to the cars shows that the left side of the front bumper of defendant's car came in contact with the rear right wheel of plaintiff's car at a time when I conclude that plaintiff's car had substantially greater momentum than defendant's car, since the left and middle bumper guards of defendant's car were moved from left to right by the impact.

As is usual in actions of this nature, there is a very considerable conflict of evidence between plaintiff and defendant as to what happened at and immediately prior to the accident. The plaintiff's explanation of the accident made at the trial is difficult to reconcile with that made by him on discovery, and neither of these can be reconciled with P.C. Rossiter's evidence as to the plaintiff's statement to him which Rossiter says was made in the hospital within a few days after the accident. If the latter explanation were accepted, then one would have no difficulty in determining where the fault lay, namely, at the door of the plaintiff. But I am inclined to give the plaintiff the benefit of the doubt raised by the opinion expressed by Dr. Thomas as to the plaintiff's mental condition in the few days after the accident. I therefore proceed on the assumption that the plaintiff was not at that time able to give a reliable account of the incident, and for that reason disregard the evidence of P.C. Rossiter relative to the plaintiff's explanation made to him in the hospital.

The statements made by plaintiff on discovery and on the trial are not convincing and lead me to the conclusion that the plaintiff on both occasions was endeavouring to reconstruct the incidents which led up to the collision, and that he was not clear in his own mind as to times and distances.

I accept the evidence of the defendant and of his wife Elizabeth Sinclair that the speed of the defendant's car prior to entering the intersection was about 25 miles per hour, and that defendant's car was brought to a full stop at about the point of impact. I am not satisfied that plaintiff's speed was much, if any, greater than the speed which he admits, *viz.*, 15 miles per hour.

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Bird, J.

I do not consider that either driver was able to determine the speed of the other car with any degree of accuracy. In any event speed does not appear to me to have been a causative factor in this accident.

Upon all of the evidence it appears to me, and I so find, that the two cars entered the intersection, *i.e.*, crossed the respective property lines at approximately the same time, the plaintiff entering slightly ahead of defendant, that the plaintiff although, on his own statement, aware that defendant's car was approaching, did nothing to prevent an accident. I consider that the several estimates made by the plaintiff of the distance of defendant's car from the centre of intersection when plaintiff first observed it, were inaccurate, and that actually the defendant at that time was probably closer to the intersection than the plaintiff estimated. In these circumstances the plaintiff owed a duty to keep a proper look-out for traffic approaching from his right and to make way for any such traffic. This case, in my judgment, falls within the principles laid down in *Swartz Bros. Ltd.* v. *Wills*, [1935] 3 D.L.R. 277.

The recent decision of the Court of Appeal in *Fewster* v. *Milholm and Vallieries and McAndless* (1943), 59 B.C. 244, was urged upon me by counsel for the plaintiff, but I do not consider that the plaintiff has brought himself within the *Fewster* case. He had not, in my judgment, made a substantial prior entry into the intersection.

In my judgment the plaintiff failed to keep a proper look-out. The two cars entered the intersection almost simultaneously and the plaintiff failed to give the right of way to the defendant as it was his duty to do. His failure to do so was the sole cause of the accident. In my opinion the defendant could not have done in the circumstances more than was done by him, namely, to apply his brakes.

The action is therefore dismissed. The defendant is entitled to recover the sum of $10.75 on the counterclaim, being for repairs occasioned to his motor-car by the accident.

The defendant will recover his costs of the action against the plaintiff which have not been increased by reason of the counterclaim.

Action dismissed.

IN RE ESTATE OF HILDA CLARICE STOKES, AND *IN RE* THE ADMINISTRATION ACT AND *IN RE* THE TRUSTEE ACT. MONTREAL TRUST COMPANY v. HELEN MARIS *ET AL.*

S. C.
In Chambers
1944
Feb. 2;
March 2.

Will—Construction—"Any residue"—Portion of estate to which it applies.

Upon the death of the testatrix, her nearest surviving relatives were one aunt and certain cousins. In the first clause of her will was the direction that all her debts and funeral expenses be paid from proceeds of the sale of her £1,250 Canadian Railway Company 4 per cent. non-cumulative preferred sterling stock. The first bequest was a small one to her late husband's brother and a ring to his wife. The next bequest was a life interest in £1,000 security to a cousin Mrs. Martin and on her death the securities were to go to Mrs. Martin's daughter Edna Madigan and her heirs. Then after certain bequests to other parties as outright bequests, a bequest of £1,400 Canadian Pacific Railway $4 debentures followed to a sister of her late husband for life and after her death to go to Edna Madigan for her life and after her death to her children. Then follows a bequest to Mrs. Madigan of five different lots of securities for life with remainder to her children. The will concludes with the following: "My furniture, at present stored with Messrs. White (of 74 Kensington Park Road, London W. 11, England) to be sold to defray expenses incidental to settling the estate. Any residue to go to Mrs. Edna Madigan who should examine the contents of the boxes in store." The value of the whole estate was slightly in excess of $40,000 and the value of the furniture stored in England was approximately $800. Of this sum, after paying sale costs and expenses involved in settling the estate, a very small amount would be left over. In a careful allocating of specific bequests, only about $22,000 out of the estate of $40,000 was specifically dealt with in the will. As to the balance of about $18,000, if the word "residue" be confined to the balance of the proceeds from the sale of the furniture, there is no testacy. In determining the question as to whether or not such residue so referred to is the residue of the entire estate or is only the residue from the sale of the testatrix's furniture after paying the expenses incidental to settling the estate:—

Held, that the testatrix intended by the use of the words "Any residue" to refer not to the infinitesimal amount left from the disposal of the furniture, but applies to the residue of the whole estate.

APPLICATION for the determination of certain questions arising out of the distribution of the estate of Hilda Clarice Stokes, deceased, pursuant to the terms of her will of the 6th of January, 1940, and codicil of the 17th of October, 1941. The facts are set out in the reasons for judgment. Heard by FARRIS,

S. C.
In Chambers
1944

IN RE ESTATE OF HILDA CLARICE STOKES.

MONTREAL TRUST CO. v. MARIS ET AL.

C.J.S.C. in Chambers at Vancouver on the 2nd of February, 1944.

W. S. Lane, for Montreal Trust Company.
Hossie, K.C., for Helen Maris and Pamela A. Webbe.
Montgomery, for John C. Earnshaw *et al.*
Bull, K.C., for Edna Madigan.

Cur. adv. vult.

2nd March, 1944.

FARRIS, C.J.S.C.: The testatrix Hilda Clarice Stokes died on or about the 5th day of August, 1941. Her will dated the 6th day of January, 1940, and codicil dated the 16th day of May, 1941, were admitted to probate on the 17th day of October, 1941. I am now asked to determine the following questions arising out of the distribution of the estate pursuant to the terms of the said will:

(1) Whether the residue of the estate should be distributed to Edna Madigan either absolutely or as tenant for life, or at all.

(2) If the answer to question (1) is in the negative whether the residue of the estate should be distributed solely to the estate of Anne Laura Caroline Roberts, the paternal aunt of the deceased, said deceased having died a widow without having had any issue leaving her surviving no father, mother, brother or sister and no children of any deceased brother or sister, and no uncle or aunt other than the said aunt Anne Laura Caroline Roberts, or whether the said residue should be distributed amongst the estate of the said aunt Anne Laura Caroline Roberts and the following first cousins of the deceased, namely, John Christian Earnshaw, Louis Nell, Christian Thomas Kohlhoff, Regina Hessing Dale, and Alice Beatrice Bridge, and if so, in what proportions.

(3) Whether the bequest of 20 shares of The Royal Bank of Canada to Alice Beatrice Bridge lapses.

(4) Whether the bequest of the 16 Bank of Montreal shares to Edna Madigan for life and then to her children lapses.

For convenience sake I shall first deal with questions (3) and (4). Both The Royal Bank of Canada shares referred to in question (3), and the Bank of Montreal shares referred to in question (4) had been sold by the testatrix prior to her death. I find, therefore, that the bequest of the 20 shares of The Royal Bank to Alice Beatrice Bridge referred to in question (3) lapsed, and similarly I find that the bequest of the Bank of Montreal shares to Edna Madigan for life and then to her children lapsed (*In re Slater. Slater* v. *Slater,* [1906] 2 Ch. 480, and [1907]

1 Ch. 665; *In re Gibson. Mathews* v. *Foulsham* (1866), 35 L.J. Ch. 596).

In respect to question (2) I find that if the residue of the estate should not be distributed to Edna Madigan as set out in question (1), such residue should be distributed solely to the estate of Anne Laura Caroline Roberts, deceased. In this all counsel concurred.

In respect of question (1), this question is not aptly drawn. The question really should be:

(1) (a) Should the residue referred to in the will be distributed to Edna Madigan absolutely or as tenant for life;

(b) whether or not such residue so referred to is the residue of the entire estate or only the residue resulting from the sale of the testatrix's furniture after paying the expenses incidental to settling the estate?

In answer to question (1) (a) I have no hesitation in finding that the residue referred to, whether applicable to the whole estate or to the balance left from the sale of the furniture, should be distributed to Edna Madigan absolutely, and not as a life interest.

The real difficulty in answering the questions, to my mind, is confined to (1) (b), that is, whether or not the residue referred to in the testatrix's will deals with the whole estate or only that portion of the estate left from the sale of the furniture. In proceeding to determine the correct answer to what I refer to as question (1) (b) I have proceeded upon the following principles: First:

"It is the duty of the judge to determine the construction of the particular will before him, and not to rely on the construction of other wills, although similar in nature, by any other judge":

Wilson v. *Wilson,* [(1943), *ante,* 31, at p. 33]; [1944] 1 W.W.R. 223, at p. 226.

Secondly:

There is one rule of construction, which to my mind is a golden rule, *viz.*, that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule:

Per Lord Esher, M.R. in *In re Harrison. Turner* v. *Hellard* (1885), 30 Ch. D. 390, at pp. 393-4.

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MONTREAL TRUST CO. v. MARIS ET AL.

Farris, C.J.S.C.

Thirdly:

> . . . [an] endeavour must be [made] to give effect to the testator's intention. And the only safe method of determining what was the real intention of [the] testator is to give the fair and literal meaning to the actual language of the will:

In re Browne, [1934] S.C.R. 324, at p. 328; *Re Messenger's Estate*, [1937] 1 All E. R. 355.

In the present case it is extremely important that the original will itself should be examined. The will is drawn upon a printed form and is filled in by handwriting. It is quite obvious by comparison of the signature of the testatrix with the writing in the body of the will that the writing in the body of the will is not the writing of the testatrix. It is also equally clear from the wording of the will, which I will refer to later, that the person actually drafting the will was not an expert in the drafting of wills. Both of these facts must be clearly kept in mind when endeavouring to interpret the intention of the will.

The first clause of the will is the usual revocation clause and the appointment of the executor, but contains also this paragraph:

> I direct that all my debts and funeral expenses shall be paid as soon as conveniently may be after my decease, from the proceeds of the sale of my £1,250 Canadian Railway Company 4% non-cumulative preferred sterling stock.

It here is to be noted at the very outset the testatrix desired certain security to be disposed of for the particular purpose of paying her debts. It would also seem quite obvious that this particular security would not be the identical amount required to pay such debts, and that in all probability there would be a residue after the payment of such debts.

The first bequest is a comparatively small bequest to the testatrix's late husband's brother, and a ring as a sentimental bequest to the wife of her husband's brother.

Her next bequest is to her cousin, one Mrs. May Martin, of Sydney, Australia, of £1,000. It is here to be noted that the life interest only in such £1,000 security was to Mrs. Martin, and on her death those particular securities were to go to the daughter of Mrs. Martin, the defendant Edna Madigan, and her heirs. This follows with certain bequests to other parties as outright bequests. Then follows a substantial bequest of £1,400 Canadian Pacific Railway $4 debentures to the sister of the testatrix's

late husband, but such sister to receive only the life interest of such securities, and such securities at her death to go to the defendant Edna Madigan, for her life, and at her death for her children. This then follows with the first direct bequest to Mrs. Madigan of five different lots of securities, each specifically mentioned, together with her jewellery, with the exception of her ring previously dealt with in the will, and with her boxes and trunks stored in England. Such boxes, it appeared, contained linen and knick-knacks of a household nature. In all of these special bequests Mrs. Madigan was only given a life interest, and the remainder was to go to her children.

Now, we come to what might be termed the conclusion of the will, and it says:

(a) My furniture, at present stored with Messrs. White (of 74 Kensington Park Road, London W 11, England) to be sold to defray expenses incidental to settling the estate. Any residue to go to Mrs. Edna Madigan who should examine the contents of the boxes in store.

I wish to be cremated and my ashes scattered.

Now, at this stage it must be noted that the total estate as shown in the affidavit of value and relationship was slightly in excess of $40,000, and the value of the furniture stored in England was shown to be valued at approximately $800, or, in other words, after paying the sale costs of the same there would be out of this fund less than one-fifth of one per cent. available for paying the expenses involved in the settling of the estate. The residue of any such fund, if any, would be infinitesimal as compared with the whole estate.

It also is to be noted that in a careful allocating of specific bequests only approximately $22,000 out of an estate of $40,000 was specifically dealt with.

It is interesting to note that the balance of the estate of approximately $18,000 consisted of such securities as Montreal Light Heat & Power, Dominion Tar, Ford Motor, and Coast Breweries, etc., and for which portion of the estate, if the word residue is to be confined to the balance of the proceeds from the sale of the furniture, there is no testacy.

It is also to be noted that the defendant Mrs. Madigan's name appears largely throughout the will, but that she is given no outright bequest except the "residue," whatever that may apply to:

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In other words, there are three classes of bequests made to Mrs. Madigan. The first in the life bequest of Mrs. Martin where on her death that particular bequest went to Mrs. Madigan or her heirs, and the second class of bequest to Mrs. Madigan where she was left the life interest, and the remainder to go to her children, and the third the "residue" which goes absolutely to Mrs. Madigan.

It would seem to me that the particular paragraphing of the will was the paragraphing of the draftsman, and that too much attention should therefore not be paid to the same. It also seems to me that the testatrix had in mind the value of her furniture and the realization that the same was situated in England while Mrs. Madigan lived in Australia, and that when she was practically finished dictating her will or expressing her thoughts to the draftsman, her idea was that there was bound to be some expenses in settling the estate, and that this furniture was of small value and should be sold, and could be of little or no use to Mrs. Madigan, as she was in Australia and the furniture was in England, and any funds coming from the sale could be used to defray or help defray the expenses of settling the estate.

Having thus dealt with the estate there was some approximately $18,000 to be dealt with, and as to this she must have had in mind the particular disposal that she had made of certain matters of the estate, and she said in effect, "Now having disposed of these other matters, I will dispose of the balance by giving the same outright to Mrs. Madigan," and she said to the draftsman, "Any residue to go to Mrs. Madigan." Now, coupled with this is a suggestion to Mrs. Madigan that she should examine the contents of the boxes in store. In other words, "You, Mrs. Madigan, have all of the estate, but in respect to these particular boxes which may or may not be valuable, you better examine them to see what there is in them, if anything, that is worth sending to you in Australia." As a matter of fact, it appears that upon the examination of the boxes that they contained certain linen and other household incidentals which were not worth the cost of shipping to Australia.

It appeared to me that in construing the whole will, that the testatrix would have had in mind the large value of the residue

of the estate, and that if she had not intended to dispose of such large residue she would not have gone to the trouble of disposing of a particular residue when it only applied to, at most, a very few dollars that might possibly be left over from the sale of furniture after the payment of expenses in settling the estate. It would seem most improbable that she would be so meticulous in specifically disposing of a few dollars and at the same time ignoring the disposition of a large bulk of her estate valued at many thousand dollars and invested in readily marketable securities.

It is true that the sentence starting, "Any residue" follows in the same line, but after a full stop, as is the provision for the selling of furniture. But it must also be noted that about the last 17 lines of that written part of the will in which the reference to the "residue" is made are all run together. It must also be noted that the words, "Any residue" is the commencement of a new sentence and that the word "Any" commences after a full stop, and the letter "A" is a capital letter.

It would seem to me going to a ridiculous extreme, considering how the will was written, that because this particular sentence did not start with a new line that it must not be considered a separate paragraph, or that the failure to start this sentence on a new line should result in an intestacy to such a large portion of the estate.

It also must be noted this whole paragraph, "Any residue to go to Mrs. Edna Madigan who should examine the contents of the boxes in store." The boxes in store mentioned are not "furniture" but boxes referred to in the bequest set out prior to the mention of the "furniture," thus clearly indicating that this sentence or paragraph taken as a whole cannot be limited to the reference to the "furniture." That being so, how, therefore, can it be successfully argued that the word "residue" appearing in such paragraph or sentence be limited to the word "furniture" in the preceding paragraph or sentence?

It would seem inconceivable that if the testatrix did not intend the word "residue" to apply to the whole estate that she would give the boxes which were situated in England and of little or no value to a person living in Australia while the undisposed part

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of her estate which consisted largely of marketable securities would go to her heirs in England. In other words, if she had intended to create an intestacy as to a large portion of her estate, which in fact would have the effect of leaving such portion of the estate to her heirs living in England, why would she have not have left the boxes in a similar manner as the contents of such boxes would have in all probability been most useful and valuable to the heirs in England but of no use or little value to her devisees in Australia?

To my mind the reference to the boxes is of great importance in determining what the testatrix meant, and there can be only one reasonable meaning taken therefrom, and that is in her own mind she had disposed of the whole estate, and realizing that the contents of the boxes might not be worth the expense of sending to Australia she simply tells Mrs. Madigan before incurring this expense "examine the boxes to see if there is anything in them which you consider worth while retaining."

I have already referred to the fact that it is the duty of the judge not to rely on the construction of other wills, although of a similar nature, by any other judge. *Jull* v. *Jacobs* (1876), 3 Ch. D. 703, was principally relied upon by counsel for the heirs of the estate of Anne Laura Caroline Roberts. To my mind this case is quite distinguishable from the present case, in that in that case the bulk of the estate was specifically devised, and apparently the will itself was clearly paragraphed. After making a special bequest this paragraph followed:

> I also desire that all my just debts, funeral and testamentary expenses be paid by my executors, Charles Arthur Jacobs and Anne Marie Jull from money or promissory notes or bills due at the time of my decease at the bank and elsewhere, The remainder to be divided equally to my surviving children.

It is here to be noted that the remainder referred to is contained in this one paragraph. It is also to be noted that paragraph provides for the payment of his funeral and testamentary expenses, while it is to be noted that in the will in question that the first direction is not for the payment of testamentary expenses but for debts and funeral expenses. It is also to be noted that the learned judge finds that the letter "T" in the word "The" commencing the sentence as to remainder, is the type of letter used throughout the whole whether it was necessary to use it as a

capital letter or not, and therefore meant nothing. After the word "elsewhere" a comma is used. In the present will after the word "estate" there is a full stop, and the capital letter "A" used in the word "Any" where the residue is dealt with is not used except as a capital letter throughout the will. It is also to be noted again that the residue or remainder in that will was not left unprovided for (as in this case) but was created by the lapsing of certain special bequests, as a result of certain of the legatees being attesting witnesses.

I am of the opinion that the testatrix intended by the use of the words "Any residue" to refer not to the infinitesimal amount left from the disposal of the furniture, but applies to the residue of the whole estate, and I accordingly answer question (1) (b).

There will be costs to all parties on a solicitor and client basis out of the estate.

Order accordingly.

AMANDA P. YULE v. J. R. PARMLEY AND T. F. PARMLEY.

Practice — Third-party proceedings — Claim for indemnity — Directions— Right of third party to appear and cross-examine witnesses—Right of third party to appeal judgment against defendant.

On settling the directions as to a third-party claim, the third party (J. R. Parmley) should have the right to appear on the trial and cross-examine with the proviso that the cross-examination of one defendant or his witnesses by the other defendant shall be in the discretion of the trial judge.

In the event of a judgment for the plaintiff against T. F. Parmley (the original defendant) and a judgment for indemnity or contribution for T. F. Parmley against J. R. Parmley and the failure of T. F. Parmley to appeal, J. R. Parmley should have the right to appeal in the name of T. F. Parmley on giving security to T. F. Parmley for all costs which might be incurred on the appeal or which T. F. Parmley might become liable for or ordered to pay.

APPLICATION by defendant T. F. Parmley to settle the terms for directions of a third-party claim for indemnity against

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the defendant J. R. Parmley. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 11th of January, 1944.

McAlpine, K.C., for plaintiff.
Yule, for defendant J. R. Parmley.
Tysoe, for defendant T. F. Parmley.

Cur. adv. vult.

27th January, 1944.

FARRIS, C.J.S.C.: In this case an application was made before me to settle the terms for directions of a third-party claim of the defendant T. F. Parmley for indemnity against the defendant J. R. Parmley.

1. It was submitted that the defendant J. R. Parmley should be given the right in such directions to, *inter alia,* appear on the trial and cross-examine all witnesses.

2. In the event of a judgment against the said J. R. Parmley in the third-party action, that the defendant T. F. Parmley is entitled to indemnity against J. R. Parmley, the defendant J. R. Parmley to have the right to appeal in his own name any judgment that might be obtained by the plaintiff against the defendant T. F. Parmley.

Dealing with (1). In my opinion the order for cross-examination should go with the provision that the cross-examination of one defendant or his witnesses by the other defendant shall be in the discretion of the trial judge.

Dealing with (2). It is my opinion that in the event of a judgment being obtained by the plaintiff against the said T. F. Parmley and an indemnity for such judgment or contribution towards such judgment being awarded to the defendant T. F. Parmley as against the defendant J. R. Parmley, and the defendant T. F. Parmley not appealing from the judgment obtained by the plaintiff, that the defendant J. R. Parmley should be entitled to appeal such judgment in the name of the defendant T. F. Parmley upon the defendant J. R. Parmley giving security to the defendant T. F. Parmley for all costs which may be incurred on such appeal, or which the defendant T. F. Parmley may become liable for or ordered to pay, such security to be to the

satisfaction of the district registrar of this Honourable Court at Vancouver, B.C., in case the parties differ about the same.

There should be no right given to the defendant J. R. Parmley to appeal in his own name against a judgment recovered by the plaintiff against the defendant T. F. Parmley.

In my opinion there is no right in the Court to substitute a party as an appellant other than that against whom the plaintiff brought action and has obtained judgment. The plaintiff knows whom he is suing. On appeal to the Court of Appeal, if the defendant has been found liable he is only required, as I understand it, to put up security in the sum of $200. The costs of such appeal, if the defendant (appellant) were unsuccessful might far exceed this amount, and while the defendant might be good for any costs that were awarded against him, nevertheless the substituted party might not be good for such costs and it would seem even if the Court has power to substitute parties that such power should not be exercised, as it would be most unequitable that the plaintiff should be deprived of his right for costs in the appeal as against the person that he had sued.

On the other hand, it would seem most unequitable that if a judgment had been obtained against a defendant who in turn had received a judgment for indemnity against the third party, and the defendant being satisfied that he could hold the declaration of indemnity against the third party, should decide not to bother with an appeal as against the main judgment, and the third party who would really be the person concerned should be deprived of the right to appeal.

Mr. *McAlpine* in his argument has suggested that in this case the right of the third party to appeal in the name of the other defendant should not be allowed, as both defendant and third party are defendants. To me this is not sound. On the trial it might very easily develop that there exist no contractual relations between the plaintiff and the defendant who is also a third party, and the action would be dismissed against the defendant who is the third party, but judgment will be given against the other defendant, and it would then develop that contractual relations existed between the defendant against whom the judgment was obtained which would entitle him to indemnity against the third

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party. In such case surely the third party should have the same right of appeal as if he had not originally been made a defendant in the action.

Costs in the cause.

Order accordingly.

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THE SOCIETY OF THE LOVE OF JESUS v. SMART AND NICOLLS. (No. 2).

Practice—Motion for judgment in default of defence—Injunction—Scope of —Statement of claim—Court not bound by wording of prayer of relief—Order XXVII., r. 11—Administrator's order A-891.

On motion by the plaintiff, on default of the defendants delivering a defence for such judgment as upon the statement of claim in the action the Court may consider the plaintiff entitled to, it was held that the injunction should stand as against the defendants, limited to their actions under administrator's order A-891, and not holding that there is anything to prevent the defendants taking possession of the premises in question under a proper order. On motion, by way of appeal from the settlement of the order by the registrar, counsel for the plaintiff asserted that the Court was bound by the wording of the prayer for relief in his statement of claim and that the injunction must be general in form and not limited to the taking of possession pursuant to administrator's order A-891.

Held, that it is the duty of the judge to apply to the admitted facts the law which is applicable. If the law so applied requires a limitation of the relief asked in the prayer, the judge should limit the relief and definitely state his limitation in the order. It is true that he may not go beyond the prayer but the Court refuses to accept the proposal that the right to the relief in the exact language or to the full extent of the prayer must be decreed.

MOTION by way of appeal from the settlement of the judgment of the 14th of February, 1944, by the registrar. Heard by MACFARLANE, J. in Chambers at Victoria on the 2nd of March, 1944.

McKenna, for plaintiff.
Clearihue, K.C., for defendants.

Cur. adv. vult.

3rd March, 1944.

MACFARLANE, J.: This matter now comes before me on appeal from the settlement of the judgment by the registrar. In my reasons already delivered I have indicated clearly the scope of the injunction I am prepared to give. I have also set out fully the circumstances under which the matter came before me for disposition.

Counsel for the plaintiff now asserts that I am bound by the wording of the prayer for relief in his statement of claim and that the injunction must be general in form and not limited to the taking of possession pursuant to administrator's order A-891.

Order XXVII., r. 11, says that in the circumstances here

> such judgment shall be given on the statement of claim as the Court or a Judge shall consider the plaintiff to be entitled to.

I have read all the cases submitted, namely, *Burdett* v. *Hay* (1863), 4 De G. J. & S. 41; *Low* v. *Innes* (1864), *ib.* 286, at p. 296; *Parker* v. *First Avenue Hotel Company* (1883), 24 Ch. D. 282, at p. 286; *Smith* v. *Buchan* (1888), 58 L.T. 710; *Young* v. *Thomas,* [1892] 2 Ch. 134; *Dykes et al.* v. *Thomson,* [1909] W.N. 104, and *Brennan* v. *Arcadia Coal Co.,* [1929] 3 W.W.R. 446.

The effect of these cases can be summarized in a number of propositions:

(1) The statement of claim is alone to be looked at and the facts in it must be taken to be admitted. (2) An injunction should not travel out of the terms of the prayer, that is beyond the relief asked. (3) The injunction should contain an adjudication on the particular thing in issue and restrain the defendant from doing that particular thing and in that way may limit the generality of the injunction. (4) The Court in granting an injunction should see that the language of its order is such as to render quite plain what it permits and what it prohibits.

It is the duty of the judge in my opinion to apply to the admitted facts the law which is applicable. If the law so applied requires a limitation of the relief asked in the prayer, the judge should limit the relief and definitely state his limitation in the order. He is not a mere automaton to write only the language of the prayer in the form of an injunction. It is true that he may not go beyond it but I refuse to accept the proposal that the

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right to the relief in the exact language or to the full extent of the prayer must be decreed. It is the relief which the judge on these facts considers the plaintiff entitled to that he decrees and this consideration by him involves the application to the admitted facts of the law.

Counsel for the plaintiff on the hearing of this application referred to an order in council P.C. 7575, which I find on examination of the statement of claim is not referred to in any way. As his own contention was, and it was a proper contention, that on a motion of this kind, I can look at the statement of claim and nothing else, I cannot give effect to his submission that I am in any way concerned with order in council P.C. 7575.

The order should be amended by inserting after the words taking possession, the words "under administrator's order No. A-891 dated September 22nd, 1943."

The defendants will have the costs of this motion.

The application was made on the hearing to amend the style of cause correcting the name of the first defendant Russell B. Smart to read Russell S. Smart. I would make this order.

Order accordingly.

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Jan. 17, 18, 19, 20; *March* 7.

BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JUNIOR, *ET AL.*

Company law—Allotment of shares to person now deceased—Payment secured by promissory notes and by delivery of stock certificate of shares duly endorsed — Liability for payment — Action for declaration of deceased's debt, that shares were pledged and plaintiff had lien on shares —Omission of personal representative of deceased—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 timber lands in this Province. This 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 the 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 the 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. It was held on the trial that at the time of his death, deceased was indebted to the plaintiff in the sum of $120,865.98 and that prior thereto he had deposited with the plaintiff by way of pledge share certificate for 753 shares of the capital stock of the plaintiff issued in his name to secure repayment of the debt, that the indebtedness has not been paid and the plaintiff holds said shares as security by way of pledge for repayment of the debt.

Held, on appeal, varying the decision of BIRD, J. (ROBERTSON, J.A. dissenting, who would allow the appeal and dismiss the action), that there are two essential conclusions, which are not as clearly implicit in the judgment appealed from as they ought to be: first, the sum of $120,865.98 evidenced by the promissory notes is not in the true legal sense an indebtedness of the Ray W. Jones, Sr. estate to the respondent company. Its collectibility is governed entirely by the agreement of June 1st, 1917. It is not enforceable by suit against Jones or his personal representative in person. In the second place, while the shares are pledged by way of collateral security, that pledge is not enforceable by sale of the shares. The pledge continues until payment by either of the two methods specified in the agreement of June, 1917.

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APPEAL by defendant Jones from the decision of BIRD, J. of the 2nd of August, 1943 (reported, 59 B.C. 270), in an action 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 6 per cent. per annum from June 17th, 1917. For a declaration that the late Ray W. Jones 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. 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. For an order declaring that the defendants National Bank of Commerce of Seattle and Ryan Hibberson Timber Company Limited have no interest, equitable, legal or otherwise, in the said 753 shares. The British American Timber Company (hereinafter called the Dakota company) incorporated under the laws of the State of South Dakota in January, 1907, owned certain timber lands in British Columbia, said company having been registered as an extra-provincial company in British Columbia. The British American Timber Company Limited was incorporated in British Columbia in December, 1917, for the purpose of acquiring and taking over the timber lands and assets of the Dakota company. By agreement of June 1st, 1917, between Ray W. Jones (called Jones, Sr.), who died in 1919, and the Dakota company, said company agreed to allot him and issue to him certain of its shares and said Jones, Sr. was to give his notes payable on demand covering the par value of the shares to be held by the Dakota company until paid for by Jones, Sr. or until such time as dividends declared and paid by the Dakota company should pay the principal and interest, and it was agreed that the stock, when issued, should be endorsed by Jones, Sr. in blank and be held by the company as collateral security to the said notes. By agreement of December 17th, 1917, between the two companies the Dakota company

transferred its timber lands to the British Columbia company in consideration for 9,276 fully paid up shares of the British Columbia company and the shares were directed and nominated to be distributed among the shareholders of the Dakota company in accordance with the number of shares they held in that company, including 1,038 fully paid up shares to the said Jones, Sr. and in January, 1918, the British Columbia company made a return of allotment of the said shares, showing 1,038 shares of the British Columbia company as having been duly allotted as fully paid up to the said Jones, Sr. Share certificate No. 75 issued to Jones, Sr. for 753 shares was endorsed by Jones, Sr. and was held by the British Columbia company, the balance of the 1,038 shares having been previously disposed of by Jones, Sr. The British Columbia company has in its possession share certificate No. 75 and the promissory notes. No payment was ever made on the purchase price of the notes. It was held on the trial that the plaintiff company is entitled to a declaration that 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 appeal was argued at Victoria on the 17th to the 20th of January, 1944, before McDONALD, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

Bull, K.C. (*Carmichael,* with him), for appellant: The action is not properly constituted. The late Ray W. Jones was sole owner of the shares in question. His estate is not represented in the action. Deceased died intestate, leaving property in British Columbia. The heirs' claim, if any, must be through a personal representative. No administration was applied for here. No judgment can be given prejudicially affecting the estate of deceased unless the personal representative is a party to the action: see *Fonseca* v. *Jones* (1911), 21 Man. L.R. 168. Objection was taken at the opening of the case. He relied on rule 168 as authorizing him to proceed: see *Abbott* v. *Browns,* [1921] 1 W.W.R. 1188, at p. 1191. The defendant submits the rule has

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no application in this case: see Seton's Judgments and Orders, 7th Ed., 122; Daniell's Chancery Practice, 7th Ed., 177; *Silver* v. *Stein* (1852), 1 Drew. 295; *Rowlands* v. *Evans* (1863), 33 Beav. 202; *Bruiton* v. *Birch* (1853), 22 L.J. Ch. 911; *Cox* v. *Stephens* (1863), 11 W.R. 929; *Fowler* v. *Bayldon* (1853), 9 Hare, App. II. lxxviii.; 68 E.R. 802; *Joint Stock Discount Co.* v. *Brown* (1869), L.R. 8 Eq. 376; *Crossley* v. *City of Glasgow Life Assurance Company* (1876), 4 Ch. D. 421; *Webster* v. *British Empire Mutual Life Assurance Company* (1880), 15 Ch. D. 169; Annual Practice, 1942, p. 297; *Aylward* v. *Lewis,* [1891] 2 Ch. 81; *Griffith* v. *Pound* (1890), 45 Ch. D. 553; *Evans* v. *Playter et al.,* [1935] O.W.N. 505; *Ballard* v. *Milner,* [1895] W.N. 14; *In re Curtis and Betts,* [1887] W.N. 126; *In re Richardson. Scales* v. *Heyhoe (No. 2),* [1893] 3 Ch. 146. The learned judge should have held that the late Ray W. Jones was not indebted to the plaintiff in any sum whatsoever. The statutory report of the plaintiff of January, 1918, shows the properties transferred by the Dakota company to the plaintiff in consideration for the shares. The debt from Jones, Sr. to the Dakota company was not included in the transfer. There was no evidence of any assignment of the debt from the Dakota company to the plaintiff nor any finding by the trial judge to that effect. There was no assignment sufficient to transfer the chose in action so as to enable the plaintiff to maintain an action thereon: see *Dell* v. *Saunders* (1914), 19 B.C. 500; Leake on Contracts, 6th Ed., 8. The case of *In re Thomas. Ex parte Poppleton* (1884), 14 Q.B.D. 379, at p. 384 has no application: see also Anson on Contracts, 18th Ed., 272. The learned judge should have held that the alleged mortgage or charge taken by the plaintiff company from the late Jones, Sr. on his shares in the capital of the plaintiff company was illegal and void and *ultra vires* the plaintiff company because it might lead to (a) a reduction of the capital of the plaintiff or (b) a trafficking by the plaintiff in its own shares. As to reduction of capital see *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; *Alberta Rolling Mills Co.* v. *Christie* (1919), 58 S.C.R. 208; *Guinness* v. *Land Corporation of Ireland* (1882), 22 Ch. D. 349, at p. 375; *Bellerby* v. *Rowland & Marwood's Steamship Company, Limited,* [1902]

2 Ch. 14; *British and American Trustee and Finance Corporation* v. *Couper,* [1894] A.C. 399, at p. 403; *Hopkinson* v. *Mortimer, Harley & Co., Limited,* [1917] 1 Ch. 646, at p. 649. In the alternative, the learned trial judge erred in holding that the depositing of shares was a pledge and on the assumption that there was a debt due from Jones to the plaintiff and a deposit of shares to secure the same, he should have held that the transaction was an equitable mortgage: see *London and Midland Bank* v. *Mitchell,* [1899] 2 Ch. 161; *Harrold* v. *Plenty,* [1901] 2 Ch. 314; *Stubbs v. Slater,* [1910] 1 Ch. 632. There was error in allowing plaintiff's counsel to withdraw from the position which he took on the trial when he abandoned any claim for judgment against the estate of the late Ray W. Jones. There was error in awarding costs against Ray W. Jones, Jr. As a defendant joined merely for the purpose of a representative order, he should not be liable for costs: see Fisher on Mortgages, 7th Ed., 753-4; *Ex parte Fewings. In re Sneyd* (1883), 25 Ch. D. 338. There was error in pronouncing a purely declaratory judgment: see Order XXV., r. 5. The authorities are discussed in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.,* [1921] 2 A.C. 438.

Farris, K.C. (*G. L. Murray,* with him), for respondent: The learned judge properly found that the late Ray W. Jones was indebted to the plaintiff company in the sum of $120,865.98, evidenced by the two promissory notes held by the plaintiff company. The omission of his debt from the transfer agreement between the Dakota company and the plaintiff company was corrected by subsequent agreement and action by the parties and the notes endorsed by him are in the possession of the new company. Jones' indebtedness formerly owing to the Dakota company is recorded by Jones as vice-president as being an indebtedness to the new company by way of "bills receivable." There was a novation. Novation may be inferred from the acts and the conduct of the parties and the facts relied on to show a novation must be such as to establish a new contract: see *Norton-Palmer Hotel* v. *Windsor Utilities Com'n,* [1942] 4 D.L.R. 309, at pp. 317-8; *Attorney-General of British Columbia* v. *Salter* (1938), 53 B.C. 338; *Polson* v. *Wulffsohn* (1890), 2 B.C. 39,

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at p. 43; *In re Thomas. Ex parte Poppleton* (1884), 14 Q.B.D. 379, at p. 384; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, at p. 351; *Harris* v. *Robertson* (1866), 11 N.B.R. 496, at p. 502; *Johnson* v. *Thompson* (1914), 19 B.C. 105, at p. 107. Novation may be by parol either as preliminary to or collateral to, or subsequent to the written agreement of December 17th, 1917. As preliminary see *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351, at p. 357; *Ticehurst* v. *Moore* (1907), 7 S.R. (N.S.W.) 202; *Gillespie Brothers & Co.* v. *Cheney, Edgar & Co.*, [1896] 2 Q.B. 59. As collateral see Phipson on Evidence, 7th Ed., p. 556; *Eaton* v. *Crooks* (1910), 3 Alta. L.R. 1, at p. 7; *Brocklebank* v. *Barter* (1914), 7 W.W.R. 775, at pp. 778-9; *Re The Barnstaple Second Annuitant Society* (1884), 50 L.T. 424, at p. 426; *Marsh* v. *Hunt* (1884), 9 A.R. 595; Phipson on Evidence, 7th Ed., 563-4. As subsequent see *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, at p. 64. An oral equitable assignment is valid: see *Todd* v. *Phœnix & United Fire Ins. Co.* (1894), 3 B.C. 302; *Curtis* v. *Langrock*, [1922] 1 W.W.R. 316. They say that because the notes were not endorsed, we could only sue in the name of the Dakota company, but this is not an action on the notes but for a declaration as to the plaintiff's rights. There is novation which constitutes a new agreement. The Dakota company is non-existent and no longer a necessary party: see *Tolhurst* v. *Associated Portland Cement Manufacturers (1900)*, [1903] A.C. 414, at p. 420; *William Brandt's Sons & Co.* v. *Dunlop Rubber Company*, [1905] A.C. 454, at p. 462. They say a pledge to a company of shares in the company is illegal and void because enforcement of the pledge may effect reduction in capital: see *Gill* v. *Arizona Copper Co., Limited* (1900), 2 F. 843. No question of reduction in capital arises: see *B.C. Red Cedar Shingle Co. Ltd.* v. *Stoltze Manufacturing Co. Ltd.* (1931), 44 B.C. 458, at pp. 469-71. As to declaratory judgments and rule 285 see *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.*, [1921] 2 A.C. 438; *Spelman* v. *Spelman* (1943), 59 B.C. 120; *Hanson* v. *Radcliffe Urban Council*, [1922] 2 Ch. 490. The appellant objected that the action was one of foreclosure and a personal representative of Jones, Sr. should be joined as a party defendant. The objection

has no application because the collateral security here is not a mortgage but a pledge. As to the kinds of property that may be pledged see *Lockwood* v. *Ewer* (1742), 2 Atk. 303; 88 E.R. 450; *Halliday* v. *Holgate* (1868), 37 L.J. Ex. 174; *Burdick* v. *Sewell* (1883), 52 L.J.Q.B. 428; *Young* v. *Croteau*, [1926] 1 D.L.R. 62, at p. 64; *Donald* v. *Suckling* (1866), L.R. 1 Q.B. 585; *Langton* v. *Waite* (1868), L.R. 6 Eq. 165; *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309. Secondly, Ray W. Jones, Jr. is the only person beneficially interested in this case and as Jones, Sr. died in 1919 creditors need not be considered. Thirdly, even if the transaction is an equitable mortgage, it is immaterial as the action is not one for foreclosure, but a declaratory judgment only. It is submitted that Jones, Sr.'s heirs are now estopped from claiming that the arrangement to transfer all the assets of the old company to the new company was not carried out.

Bull, in reply, referred to *Meir* v. *Wilson* (1889), 13 Pr. 33; *McDougall* v. *Gagnon* (1906), 16 Man. L.R. 232, at p. 235; *In re Jackson Estates. Houston* v. *Western Trust Co.*, [1939] 3 W.W.R. 155, at p. 157; *Performing Right Society* v. *Theatre of Varieties* (1923), 93 L.J.K.B. 33, at p. 37; *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, at p. 438; *In re Douglas and Powell's Contract*, [1902] 2 Ch. 296, at p. 302; *McLeod* v. *Curry*, [1923] 4 D.L.R. 100.

Cur. adv. vult.

7th March, 1944.

MCDONALD, C.J.B.C.: In this case there are some gaps in the evidence, due to the lapse of more than 20 years and to the deaths of material witnesses. However, the evidence is all one way, and I find no ground for questioning the trial judge's findings.

Appellant's counsel has directed most of his attention to legal points, all technical, but some raising questions of importance.

Appellant argues first a defect as to parties. Jones, Sr., the former owner of the shares in dispute, died intestate in 1919. A son, Munroe F. Jones, the appellant's brother, took out administration in Washington, but eventually passed his accounts and was discharged. He and the appellant are the only surviving heirs and next of kin. FISHER, J., then on the Supreme Court Bench, made an order before the writ was issued, appointing the

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appellant to represent "himself and the heirs and next of kin of the late Ray W. Jones." Appellant argues that this is far from his being made representative of the estate of Jones, Sr., and that such a representative was essential.

There has been much dispute as to whether this order was made under rule 9 or rule 32 (*b*) of Order XVI., but it seems reasonably clear that it was made under 32 (*b*), from which the language was borrowed.

I think neither of these rules is applicable to the situation here, but that the appropriate rule is rule 46 of Order XVI. Of course, if the order made can be brought under that rule, it is not material under what rule FISHER, J. purported to act.

Appellant takes the point that the whole order is misconceived, that a plaintiff can obtain no judgment affecting the property of a dead man by proceeding against his heirs or next of kin, who can only acquire rights through the deceased's personal representatives. The authorities satisfy me that this point is well taken. FISHER, J.'s order, whether justifiable or not, simply is ineffective and brings the wrong party before the Court. It cannot be regarded as an order made under rule 46, because its terms do not bring it under that rule, and in any event an order can only be made under rule 46 with the consent of the appointee, which was never obtained. The estate of the deceased, then, was never represented, and representation of the heirs and next of kin is no substitute.

That, however, does not end the matter. It is difficult to see what *locus standi* the appellant has to question a judgment against the estate; in order to obtain a *locus standi* he ought to obtain an appointment from a competent Court of this Province as personal representative, and then apply to intervene as such. In any other capacity he can only complain of wrong to the estate as informant of the Court's conscience. However, it may save further litigation and costs if we pass over the point, and deal fully with his argument.

He contends that the only proper course was for the plaintiff to have a representative of the estate appointed under rule 46. Such a representative can only be appointed with the consent of the appointee, according to the authorities, and where there is no

estate except shares charged beyond their value, it is quite clear that the plaintiff would have to remunerate any appointee out of its own pocket in order to secure his consent, with little hope of being reimbursed.

However, rule 46 offers another alternative which the trial judge at the eleventh hour adopted when pressed with the objection that the appellant did not represent the estate. That is, he dispensed altogether with any representative of the deceased.

Appellant argues strenuously that this was an improper course here, particularly because this is a foreclosure action. A number of cases have been cited, the nearest in point being North, J.'s decision in *Aylward* v. *Lewis,* [1891] 2 Ch. 81. There, in a foreclosure action, the next of kin had been appointed to represent the estate of a dead mortgagor, and North, J. refused to let the action go on, stating that the defendant should be the personal representative, because he alone might have the funds to redeem with. But dispensation with representation altogether was not raised.

The most authoritative decision on rule 46 is the appellate decision in *Curtius* v. *Caledonian Fire and Life Insurance Co.* (1881), 19 Ch. D. 534, wherein the Court dispensed with representation of a deceased mortgagor's estate. The action there, though not for foreclosure, was analogous, since the judgment given wiped out the deceased's equity of redemption in an insurance policy. There, as here, the charge on the property exceeded its value, which is undoubtedly a strong element to consider in dispensing with representation. See also *In re Silber's Settlement. Public Trustee* v. *Silber,* [1920] W.N. 77.

The *Curtius* case established that the Court has a wide discretion as to dispensing with representation. I cannot but think that appellant's insistence that there should have been a personal representative comes with peculiarly bad grace from him. He has to gloss over the fact that he was entitled for 25 years to get himself appointed and did not concern himself with the shares at all. I do not think this can be glossed over.

No doubt dispensing with representation is a course to be followed with caution, and probably in most cases only after notice to interested parties available, that failure to obtain representa-

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tion might have that result. But I do not think it more objectionable in foreclosure actions than in others; indeed there, dispensation might well be granted more readily than, say, in a damage action. Heirs and next of kin can be presumed to know of the deceased's equities of redemption, and failure to obtain probate or administration may commonly be taken to indicate indifference; but heirs or next of kin can hardly be presumed to know of the possibilities of damage suits, which might be quite unfounded.

However, the present case was eminently one in which the Court was justified in exercising the power of dispensation. One of the only two parties beneficially interested was before the Courts; limitations might well be presumed to have disposed of creditors, and there was every reason to believe that the appellant's brother was fully apprised of the action. Shortly before, the shares had been the subject of other proceedings in the same Court and the solicitor now acting for the appellant had claimed to represent the Jones family, including Munroe F. Jones. After the delay in that family's applying for administration, it would be difficult, I think, to find a more apt case for dispensing with representation, especially when it was clear that the equity of redemption was worthless, and had been so described by an inventory filed by Munroe F. Jones in a Surrogate Court in Washington.

Appellant, however, cited the Alberta decision in *Abbott* v. *Browns,* [1921] 1 W.W.R. 1188 as showing that the trial judge should not have dispensed with representation after the trial was over. That case, however, is distinguishable. There what the judge did after the trial was to appoint a representative, and to do this at that stage made it a mere form. Stuart, J.A., it is true, said that this amounted to dispensing with representation altogether, thus implying that he would have disapproved that solution. But the nature of the case there was quite different, and each case must stand on its own merits, where discretion is in question.

I have assumed above that respondent's charge is a mortgage; but I am not deciding the point; I do not think it material.

Appellant complains that when he objected that the action was

wrongly constituted, the trial judge allowed respondent's counsel to drop the claim for foreclosure and merely to ask for a declaration that it had a valid charge on the shares. He objects that a plaintiff cannot meet a good defence to the action as framed, by such a sidestep, and that it is an abuse of the power to make a declaratory judgment to resort to it in such a case.

I would see a good deal in these objections if I could accept the appellant's premise that respondent could not have succeeded in its action as framed. As I think it could have succeeded if it had stood to its guns the substance of these objections disappears. Now, it may be that because of the course taken, a second action will be needed to enforce the charge; but that will be a matter to be considered in awarding costs in that action.

The appellant's next objection is that the promissory notes were never endorsed to the appellant, but remained payable to the Dakota company, and that if the debt represented by them was assigned to the appellant, no notice of assignment was given before action. That would no doubt be a formidable argument if the respondent was suing for a personal judgment, though even then the case cited by the trial judge, *viz.*, *Tolhurst* v. *Associated Portland Cement Manufacturers (1900)*, [1903] A.C. 414 might well get the respondent over the difficulty. The situation here, however, is quite different. The action turns on a charge over property, and the authorities show that the rule as to notice of assignment of debts does not apply to assignment of charges: see *Taylor* v. *London and County Banking Company. London County Banking Company* v. *Nixon*, [1901] 2 Ch. 231, at p. 254. This case refers in terms only to assignment of a charge on land; but I think the same principles apply to all charges where the property in the security passes. A right to foreclose is not a chose in action at all. Foreclosure is not an active remedy; it is merely a calling on the mortgagee to exercise his power of redemption now or never: *Cummins* v. *Fletcher* (1880), 14 Ch. D. 699, at p. 708; *Colyer* v. *Finch* (1856), 5 H.L. Cas. 905, at pp. 915, 921. The right to foreclose follows the legal estate, and the only risk the mortgagee takes in not giving notice where the estate lies, is that if he does not the

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mortgagor must be credited with *bona fide* payments made to the original mortgagee.

But the appellant disputes that there was any assignment of the charge. The trial judge held that there was a novation, but appellant argues that he was wrong, and that novation only applies to transfer of a liability and not of an asset, citing passages from text-books, that refer only to liability. I do not think there is anything in this point, or that novation can be so limited; in my view these passages are so worded because ordinarily novation is quite unnecessary to transfer creditors' rights, since a simple assignment, without the debtor's concurrence, is enough. But where there is no formal assignment, novation can be relied on.

Here I see no need for the respondent to rely on novation. Jones, Sr. endorsed the shares over to it, in a form sufficient to transfer to it the whole legal estate. Respondent admits that it is not absolute owner; but it is entitled to assert dominion over the shares to any extent justified by the actual bargain intended. The bargain was that respondent could hold the shares until paid a certain sum, and whether it had any right to sue for that sum is, I think, irrelevant. Securities that give no personal right of action for debt are well known, *e.g.*, Welsh mortgages, and if there never was any personal obligation it is no more material than that the debt would now be statute-barred, a fact that no one has even suggested creates any difficulty.

Even had this security been given without consideration, that would not matter; a voluntary mortgage is enforceable just like any other, once the legal estate passes.

Next appellant objects that it was *ultra vires* of the respondent company to acquire an interest in the shares, since this was trafficking in its shares and in effect might result in a reduction of capital. No doubt this would have been a good point if respondent had advanced funds to acquire the interest, but it clearly did not advance a dollar. The original transaction between the Dakota company and Jones, Sr. evidenced by Exhibit 10, was a curious one, but I do not think we are concerned with its validity, which would in any event be governed by Dakota law. The shares in question were issued by respondent pursuant

to an arrangement between it and the Dakota company, and Exhibits 52 and 53 make it clear that the endorsing of the shares and their deposit with respondent was actually effected through the Dakota company, which would not part with the old share certificates till the new ones, endorsed over to the respondent, were handed to its officers, for delivery to the respondent.

In order to hold this transaction invalid, we should have to hold that a company cannot take an assignment of a debt for which any of its own shares are held as collateral security, even though it parts with none of its funds or property in acquiring the debt. I do not see why it should not, and no case has been cited to us that goes so far. The strongest case cited for appellant is *Hopkinson* v. *Mortimer, Harley & Co., Limited,* [1917] 1 Ch. 646, but it is readily distinguishable. Some *dicta* indeed can be found to the effect that a surrender of shares, even fully paid up shares, for which the company pays nothing, is a reduction of capital; but these *dicta,* which seem to have nothing in their favour, are more than outweighed by the contrary decisions in *Rowell* v. *John Rowell & Sons, Limited,* [1912] 2 Ch. 609 and *Kirby* v. *Wilkins,* [1929] 2 Ch. 444. I think it is altogether fanciful to suggest that the transaction here did or could in any way decrease respondent's capital. Appellant's argument on this point assumes that the company will become the absolute owner of the shares and will then cancel them, thus reducing its nominal capital. I do not see how we can assume this at all; but even if it were to do so, I am far from satisfied that this would not be authorized by section 54 of the Companies Act, though it is unnecessary to decide. Even had respondent paid out money to acquire the shares, it is not at all clear that this would enable the Jones estate to regain them without payment. Compare *Stavert* v. *McMillan* (1911), 24 O.L.R. 456, at p. 461.

I agree with my brother O'HALLORAN that the judgment below ought to be varied, as set out in his judgment.

The next question is whether the trial judge was justified in giving costs against the appellant. Objection to this is based on the action's being for foreclosure, and it is argued that costs should not be given in a foreclosure action. No such general principle can however be laid down. Costs are not given when

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the mortgagor merely looks on and lets matters take their course; but he makes himself liable as soon as he makes any untenable defence. Appellant's strongest argument is that the judge finally treats him as if his being before the Court was immaterial, yet gives costs against him. However, this is not necessarily inconsistent. We have to consider appellant's conduct. He was served with an order which he says was ineffective, brought immaterial parties before the Court, and could not affect the Jones estate. If the appellant wanted to take that attitude he should not have appeared at all; he had no interest. If he had not appeared and costs had been given against him, they could not have been collected against him in the United States where he lived, under the principle of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote,* [1894] A.C. 670. However, the appellant did appear and took an active part, raising many objections which, on his own showing, were only of academic interest. Undoubtedly, too, he contested the action on the merits. Can he escape the consequences? If he had been an executor or trustee he could not, unless it appeared that he had not unreasonably resisted the proceedings. I do not think it can be said that his resistance was reasonable. The mere fact that for 25 years he made no claim to the shares is inconsistent with any real belief in his having any right to them. He must have been aware that his brother, in the inventory of the estate filed in Washington, had recognized that the shares were charged to an extent that left no equity. If he had made reasonable enquiry, he must have satisfied himself, if not already convinced, that he had no reasonable claim. In view of these circumstances I would not have been disposed to interfere with the award of costs against appellant below, were it not for the fact that respondent had abandoned at the trial its claims as to equitable mortgage and foreclosure (see judgment below (1943), 59 B.C. 270, at p. 280), and asked only for a declaratory judgment. On the whole case I agree with the disposition of costs set out in the judgment of my brother O'HALLORAN.

O'HALLORAN, J.A.: In January, 1907, a group of Minnesota residents including Ray W. Jones, deceased, who had been Lieutenant-Governor of that State, incorporated the British American

Timber Company in the State of South Dakota to hold timber limits and licences situate in British Columbia, and registered it as an extraprovincial company in this Province.

Pursuant to a resolution of 8th June, 1908, the directors of the company arranged that shares to the amount of 14 per cent. of the capital stock of the company issued in each year, would be issued to Ray W. Jones as fully paid, on condition that he endorsed the share certificates therefor in blank and deposited them with the company, and that he would give promissory notes to the company in payment thereof, payable upon demand, but to be held by the company until paid for by him, or until paid out of dividends declared and paid on such shares. The aforesaid arrangement was confirmed in writing by an agreement of 1st June, 1917, between Jones and the company (Exhibit 10). On 1st July, 1917, Jones had 753 shares on deposit with the company and had given it promissory notes totalling $120,865.98 (Exhibits 11-A and 78).

The respondent company was incorporated in British Columbia in December, 1917, to take over the assets of the Dakota company (Exhibit 4). By an agreement in writing between the two companies dated 17th December, 1917 (Exhibit 41-A), the timber limits and licences of the Dakota company were transferred to the respondent company in expressed consideration of the allotment to it or "to whomsoever it may direct" of 9,276 fully paid up shares. By a resolution of the Dakota company of the same date (Exhibit 41-C) the respondent company was directed to issue the said 9,276 shares to the shareholders of the Dakota company as therein detailed. It provided also that the allotment thereof to such persons should "be deemed and accepted as the allotment of the said . . . 9,276 shares to this company." The respondent company complied with that direction (Exhibits 30-A and 41-B). This included 1,038 fully paid up shares allotted to Ray W. Jones, of which 753 are now involved under certificate No. 75.

Jones endorsed the said certificate in blank and deposited it with the respondent company. The promissory notes were never endorsed over to the respondent company by the Dakota company, nor was the obligation they represented ever assigned by it in

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writing to the respondent company. However, they came into its possession in due course. The Dakota company was dissolved by an order of the South Dakota Court on 19th April, 1918 (Exhibits 38-A and 38-B). Ray W. Jones died intestate in Seattle on 1st August, 1919. Administration to his estate was taken out in the State of Washington in October, 1919 (Exhibit 66-A), by his son Munroe F. Jones, who, with the widow (who died in 1939, without remarrying) and another son Ray W. Jones, Jr., the present appellant, were the only heirs at law. The deceased's 1,038 shares in the respondent company were then valued by his Washington administrator at "nil," being described as "1,038 shares British American Timber Co. Ltd. @ $175.67, less liability on above."

The estate was finally distributed by order of the Superior Court of the State of Washington on 6th May, 1920 (Exhibit 66-B), and the administrator discharged. No effort was made to administer the estate in this Province, nor is it disclosed that any claim was ever made upon the respondent company, or that any attempt was made to register the shares in the names of those entitled. Matters seem to have remained in that state until March, 1941, when the respondent company obtained an order of Court under section 78 of the Companies Act to rectify its share register by cancelling the issue of the said 753 shares to Ray W. Jones, deceased. This Court allowed the appeal, and directed a new hearing on the ground there were not enough essential facts disclosed in the record to enable a Court to decide whether the company was or was not entitled to an order for rectification—*vide* (1941), 57 B.C. 1, at pp. 6 and 7.

The respondent company then issued a writ against "Ray W. Jones, Jr. for himself and the heirs and next of kin of the late Ray W. Jones, deceased," having on 14th January, 1942, first obtained an *ex parte* order in Chambers granting it leave to issue a writ "against the heirs and next of kin of the late Ray W. Jones, deceased," and to serve notice thereof *ex juris* upon Ray W. Jones, Jr. son of the late Ray W. Jones, in the city of Oakland, California, "on behalf of himself and the heirs and next of kin of the late Ray W. Jones deceased." The order also authorized Ray W. Jones, Jr. to defend the action on behalf of

himself and the heirs and next of kin of Ray W. Jones, deceased. Ray W. Jones, Jr. entered an appearance, pursuant to the terms of the said order, on 26th January, 1942. The action as framed claimed declarations carrying consequential relief, that the shares were subject to an equitable mortgage, or in the alternative a lien in favour of the plaintiff company, or in the further alternative were pledged to it as security for payment of the amounts evidenced by the promissory notes.

The learned trial judge stated in his reasons for judgment that during the trial the plaintiff company abandoned its claim to an equitable mortgage and consequent foreclosure. Judgment was given declaring the shares were pledged as security for the amount evidenced by the promissory notes, but no consequential relief was expressly given. *Vide* (1943), 59 B.C. 270, at p. 281. When it appeared during the course of the litigation that Munroe F. Jones, the other son of the deceased, had assigned all his interest in the said shares to the National Bank of Commerce of Seattle and Ryan Hibberson Timber Company Limited on 8th December, 1926, and 7th April, 1930, respectively, they were added as party defendants. They filed defences expressing willingness to abide by any order the Court might make in the action. The judgment appealed from declared the respondent company "holds the aforesaid 753 shares of its capital stock as security by way of pledge for the repayment to it of the said indebtedness of $120,865.98."

That judgment is now assailed on the main grounds, (1) the action was improperly constituted, in that the personal representative of the deceased was not a party defendant; (2) the judgment was purely declaratory; (3) that the deceased's obligation of $120,865.98 to the Dakota company never was assigned to or vested in the respondent company and expired with the dissolution of the Dakota company in 1918; and (4) if that obligation was assigned to or vested in the respondent company, the transaction was void and *ultra vires* in that it might lead to an unauthorized reduction of capital, or to trafficking by the company in its own shares; (5) if that obligation was assigned to or vested in the respondent company the latter had no right of

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action in the absence of an assignment in writing within section 2 (25) of the Laws Declaratory Act, Cap. 148, R.S.B.C. 1936.

The first ground of appeal, that the action was improperly constituted, because the personal representative of Ray W. Jones, deceased, was not added as a party defendant, arises in a peculiar way. The appellant does not attack the representative *ex parte* order of 14th January, 1942 (*vide* Order XVI., r. 32 (*b*) and Order XVI., r. 9), already referred to. He submitted to the jurisdiction by entering an appearance in the terms thereof. He did not move to set aside that order under rule 100 or question it otherwise. He filed a statement of defence in the representative capacity conferred upon him by that order, and did not raise any question therein as to the competency of the action by reason of the absence of a personal representative. In paragraph 31 thereof he did ask for an order directing that the shares be delivered to the administrator of his father's estate.

The appellant did not raise the question of the personal representative until the trial opened on 1st June, 1943. It was fully argued during the course of trial and was reserved. Subsequently counsel for the plaintiff respondent abandoned its claims to equitable mortgage and foreclosure. Counsel for the defendant appellant contended his submission applied equally to a purely declaratory judgment. The learned judge decided that in the special circumstances it was a proper case under rule 168 to proceed in the absence of a personal representative; *vide* 59 B.C. at pp. 280-2. Counsel for the appellant submitted that rule does not apply in a case of this kind. He contended that it is limited to an action or proceeding in which there are proper parties. And he submitted that despite the representative order of 14th January, 1942, Ray W. Jones, Jr. could not individually or representatively be a proper party within rule 168 because the estate is not vested in him or them.

Order XVI., r. 46 reads as follows:

If in any cause, matter, or other proceeding it shall appear to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or Judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding on such notice to such persons

(if any) as the Court or Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.

It is a repetition in closely similar language of section 11 of the Administration Act, Cap. 44, R.S.B.C. 1936, but the object of the rule is more clearly defined by the statute's concluding words, and had appeared and submitted his interests to the protection of the Court.

The scope of this section and rule was the subject of extended argument and many of the early English decisions were cited. No decision has been brought to our attention in which it has been considered by this Court. The section and rule appear to be the same as in England, where they found first or early expression in section 44 of the Chancery Procedure Act, 1852, as a substitute for administration in certain cases of dispute in property. But the Judicature Act widened their scope and application. Compare *Pratt* v. *London Passenger Transport Board,* [1937] 1 All E.R. 473, Slesser, L.J. at p. 478. Many of the cases cited by the appellant were decided prior to the Judicature Act.

The decision of the Court of Appeal (Lord Coleridge, C.J., Baggallay and Lindley, L.JJ.) in *Curtius* v. *Caledonian Fire and Life Insurance Co.* (1881), 51 L.J. Ch. 80; 19 Ch. D. 534, would appear to be the leading decision upon the section and the rule in respect to any principle of general application to be extracted from it. It was not questioned by the Court of Appeal (Greer, Slesser, and Scott, L.JJ.) in *Pratt* v. *London Passenger Transport Board, supra.* Before examining the *Curtius* case, it may be observed that among the decisions referred to in argument, were included the following, which were also cited to us by counsel for the appellant, *viz., Silver* v. *Stein* (1852), 1 Drew. 295; *Fowler* v. *Bayldon* (1853), 9 Hare, App. II., lxxviii.; 68 E.R. 802; *Bruiton* v. *Birch* (1853), 22 L.J. Ch. 911; *Rowlands* v. *Evans* (1863), 33 Beav. 202; *Cox* v. *Stephens* (1863), 11 W.R. 929; *Joint Stock Discount Co.* v. *Brown* (1869), L.R. 8 Eq. 376; *Crossley* v. *City of Glasgow Life Assurance Company* (1876), 4 Ch. D. 421 and *Webster* v. *British Empire Mutual Life Assurance Company* (1880), 15 Ch. D. 169.

Objection to the application of rule 168, as it was invoked in

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the Court below, must be based either upon absence of jurisdiction or exercise of discretion. That is to say, either the Court below had no jurisdiction to invoke the rule, or, if it had jurisdiction, it erred in the exercise of its consequent discretion, or some injustice has resulted. Counsel for the appellant put his case forward as one of jurisdiction. His argument, for all practical present purposes, is the same as that advanced by Westlake, Q.C. in *Curtius* v. *Caledonian Fire and Life Insurance Co., supra,* at p. 81, that the rule

> was not intended to give discretion in every case to dispense with the appearance of the legal personal representative, any more than it can dispense with necessary parties, but it must apply to a case where there is no intention to ask for a decree against the estate, and where the power is to be exercised for a mere necessary incident of a decree. . . .

Lord Coleridge, C.J. said that argument raised the question of jurisdiction. His apt language now quoted is directly in point here, and makes it clear that the phraseology in which the rule is couched does not permit the introduction of jurisdictional limitations to its scope by reading into it, qualifications which it does not contain. Lord Coleridge said at p. 82:

> I cannot follow the points of the cases [my note: the very cases cited and relied upon here by appellant's counsel] which Mr. Westlake brought before us. I asked him whether he had any case in which any judge had said, even by way of an *obiter dictum,* that he had no jurisdiction to make the order.

And it appears that Westlake, Q.C. was not able to do so. Nor was counsel for the appellant in this case able to do so.

Lord Coleridge further emphasized the distinction between jurisdiction and discretion, which to my mind is decisive of this aspect of the present appeal:

> No doubt in certain cases several judges have said that they would not make such an order, . . . It is very possible that there may be cases in which, while the jurisdiction is admitted to exist, one judge may exercise his discretion in one way and another judge in another; but that is a different thing from saying that there is no jurisdiction.

Compare also *Pratt* v. *London Passenger Transport Board, supra,* Greer, L.J. at p. 477 and Slesser, L.J. at pp. 478-9.

In the *Curtius* case the mortgagee's claim was greatly in excess of the sum due the deceased. The presence of the personal representative was dispensed with, for as Lindley, L.J. remarked at p. 83, the estate of the deceased was insolvent, and no one had any interest in throwing good money after bad by taking out

administration. That situation is paralleled here. The estate's obligation in respect to the shares was $120,865.98, plus certain interest. The timber limits have been sold on a stumpage basis, and the most generous estimate of the per share return therefrom was $100, or $75,300 for the 753 shares now involved, thus leaving an apparent obligation of some $50,000. As Lord Lindley remarked in the *Curtius* case, no one in such circumstances would have any interest in throwing away good money after bad by taking out administration to the Ray W. Jones estate. No doubt that was a governing reason, inducing Ray W. Jones, Jr. and his brother not to take out letters of administration in this Province, or to make any effort to have the shares registered in their names.

It is not too much to conclude that it also prompted Ray W. Jones, Jr. to accept and act upon the representative capacity conferred on him by the order of 14th January, 1942, and to contest the action in that role. It could hardly be said there was any duty upon the respondent company to see that administration was taken out. Moreover section 5 of the Administration Act vests the personalty of a deceased intestate in the Court until the Court grants administration. And quite apart from section 11, *supra,* or rule 168, the Court was necessarily clothed with jurisdiction to make a representative order such as was made on 14th January, 1942 (and see rules 131 and 154). As that was a competent order of a competent Court—and whether or no it was accepted as such by counsel for the appellant as he did expressly —it could not be said at the trial that there were no proper party defendants.

For the Court had appointed Ray W. Jones, Jr. as such under the order of 14th January, 1942, and moreover the appellant had accepted that capacity under such appointment and had acted thereon. In such circumstances to say the "action had no framework" (whatever such a loose and ill-adapted expression may mean), or to say the defendant was not a proper or legal defendant, is to attack the validity of the order of 14th January, 1942, under the guise of accepting it as complete and valid. I would interpolate here, that in my judgment, when the *ex parte* application of 14th January, 1942, was made, it would have been better practice to have notified the official administrator under section

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47 of the Administration Act, and ascertain if the subject-matter came within that section.

In my judgment the question of the applicability of rule 168 is one of discretion and not of jurisdiction. I find no reason to hold that discretion has been improperly exercised, or that any injustice has resulted. The learned trial judge deliberated the question in his reasons for judgment. Whether the personal representative ought to be dispensed with, or whether some person ought to be appointed *ad litem*, depends upon the special circumstances of each case, *cf.* the *Curtius* case, *supra*, Baggallay, L.J. at p. 83, and the *Pratt* case, *supra*, p. 477. In assessing the correctness of his exercise of discretion we cannot ignore the realistic view that Ray W. Jones, Jr. shares responsibility for the situation which confronted the learned judge at the trial. Twenty years had been allowed to pass by those entitled to the estate without any attempt to have the shares appropriately re-registered in the company's books.

No objection was taken to the representative responsibility placed upon Ray W. Jones, Jr. by the order of 14th January, 1942, at the commencement of the proceedings. He submitted to the jurisdiction by entering an unconditional appearance, and was seemingly quite content to undertake the defence in that capacity—that is, until the trial opened a year and a half later. I am not convinced that any injustice has been done by dispensing with the personal representative. Rules of practice are the servants and not the masters of the Courts, whose duty it is to interpret the rules in the manner most likely to do justice between the parties. No doubt a rigid and inflexible interpretation is often useful to accomplish that purpose. But it is no part of the duty of the Courts to aid in the building of an outer wall of rigid technical rules, which may prevent all but the most adroit from penetrating to the real merits of the dispute between the parties.

Abbott v. *Browns*, [1921] 1 W.W.R. 1188, a decision of the Appellate Division of Alberta (Harvey, C.J.A., Stuart and Beck, JJ.A., the latter dissenting), concerned realty. But it was not disclosed that the Alberta Courts had the same jurisdiction over realty of an intestate that the Courts of this Province have over personalty under section 5 of our Administration Act.

In any event the question was treated as one of practice and not jurisdiction. An observation of Stuart, J.A. (with whom Harvey, C.J.A. agreed) at p. 1190, makes it appear that if the defendant had been a sole beneficiary, or there had been no creditors, or the estate had been insolvent, the Appellate Division would not have interfered. And see also *In re Jackson Estates. Houston* v. *Western Trust Co. (No. 2),* [1940] 1 W.W.R. 71, where the Saskatchewan Court of Appeal held the proceedings did not fail because of the absence of the personal representative.

In this case the Washington administration proceedings in 1920 would indicate there were no outstanding creditors. The only persons now entitled to share are the appellant and his brother Munroe. But the latter had assigned all his interest in the shares to the Seattle National Bank of Commerce and to Ryan Hibberson Timber Co. Ltd., who were both before the Court. Although the nature of the defence below and the argument of the appellant in this Court pointed to the contention that the respondent company had no authority to hold the shares, the tactics were purely defensive, and no effort was made to assert a right to, or to claim delivery, except paragraph 31, praying that the shares be delivered to the personal representative. There appeared to be no occasion for the presence of a personal representative. It is to be doubted that he could have withstood the company's claims with any greater determination, effectiveness or ability than has been displayed. The resulting declaratory order in the terms of the agreement of 1st June, 1917 (later discussed), does not require the appointment of a personal representative, nor his presence in these proceedings, any more than it was required in the *Curtius* case, *supra.*

The second main ground of appeal that the judgment is purely declaratory, is answered by rule 285. It provides that no action shall be open to objection on the ground that a merely declaratory judgment is sought, and it empowers the Court to make binding declarations of right, whether any consequential relief is or could be claimed. That rule was under consideration in *Cooper* v. *Wilson* (1937), 106 L.J.K.B. 728 (C.A.). Macnaghten, J. who dissented on grounds inapplicable here, nevertheless accepted the view put forward by Greer, L.J. at p. 734, that the power of the

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Court to make declarations as to the rights of parties is almost unlimited under rule 285 (p. 751). Compare *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.*, [1921] 2 A.C. 438.

Turning to the third main ground of appeal, I agree with the learned trial judge that the deceased's obligation to the Dakota company was vested in the respondent company by necessary implication, and that the deceased's rights and obligations continued with the new British Columbia company in the same manner and upon the same terms as with the Dakota company. It is true that the promissory notes were not endorsed to the respondent company, nor was the agreement of 1st June, 1917, assigned to it. And neither in the formal documents of transfer, nor in such letters as were produced is any express mention found of transferring the obligation of $120,865.98. But it is plain from the correspondence relating to the incorporation of the British Columbia company (Exhibits 12, 13, 18, 18-A, 20, 21, 44) and from the resolution of the Dakota company directors of 9th November, 1917 (Exhibit 4), that it was the intention to transfer all the assets of the Dakota company, including the promissory notes, to the British Columbia company, and then dissolve the Dakota company.

Ray W. Jones, deceased, was himself largely in charge of the business. He neglected to inform the company's solicitor in Victoria of the existence of the promissory notes, and that no doubt explains the omission. I am satisfied that Ray W. Jones, deceased, and the respondent company, as well as the Dakota company, all acted on the conventional hypothesis that the obligation had been transferred to the respondent company, and that he was carrying on with the new company in the same way he did with the old Dakota company. That conclusion is forced upon one, in the absence of any explanation why Jones endorsed the share certificate in blank and deposited it to be held by the new company, and why the new company accepted it as deposited. Jones was vice-president of the respondent company and as such signed its annual statement and report to shareholders for the year 1918. Under the head of "Bills Receivable," appears the

item $120,865.98, which was the total of Jones' obligations to the Dakota company as consolidated in June, 1917.

That report which was dated 2nd January, 1919, contained the following (Exhibit 58):

> 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. This will increase the capital stock to $967,500.00 and consequently the bills receivable account will be increased by $7,460."

That 1918 statement and report was adopted at the annual meeting of the respondent company on 15th April, 1919 (Exhibit 30-A). Ray W. Jones presided at that meeting as chairman. It is to be observed that Jones in the cited excerpt, speaking as vice-president of the respondent company, refers to 74 shares not yet issued in his name in accordance with "the agreement," that is to say, the agreement of 1st June, 1917 (Exhibit 10). The general meeting of the respondent company, which adopted that annual statement, at the same time necessarily adopted and accepted "the agreement," there so specifically referred to.

Ray W. Jones was a director and registered attorney in British Columbia of the Dakota company from its inception in 1907 until December 10th, 1917, when it ceased business in British Columbia. He was its vice-president in 1917. After the incorporation of the respondent company in December, 1917, he was a director and vice-president continuously from January 29th, 1918, until his death August 1st, 1919. From January, 1907, to December, 1917, the late Jones had much to do with the management of the Dakota company's affairs in British Columbia and later served the respondent in a similar capacity. From January, 1907, until his death in August, 1919, he was paid a salary of $300 per month, first by the Dakota company and subsequently by the respondent company after its formation.

This case comes rather close in principle to *In re Thomas. Ex parte Poppleton* (1884), 14 Q.B.D. 379. Thomas had borrowed £100 from an unincorporated loan society. Learning that it was operating illegally as an unincorporated society, the society became incorporated. Thomas made three payments to the incorporated society before his bankruptcy, evidently treating it as a continuation of the old illegal society. No assignment had

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been made to or any new agreement entered into with the incorporated society. On the bankruptcy of Thomas, its claim was rejected by the trustee in bankruptcy on the ground the original transaction was illegal, and hence the debt was not a legal debt. The county judge admitted the debt as did Cave, J. on appeal. The latter (p. 384) concluded that it was a proper inference that

> by express agreement or by acquiescence the parties did agree . . . , and that they would treat all engagements entered into by the old society as binding on the new society.

That seems to me to be the case here. The conduct of Jones and the respondent company to which I have referred, leaves no room for doubt that they both treated his engagements entered into with the Dakota company as binding upon the respondent company. *Ashpitel* v. *Bryan* (1863), 3 B. & S. 474; 122 E.R. 179, affirmed in the Exchequer Chamber (1864), 5 B. & S. 723; 122 E.R. 999, is instructive in this aspect, as is also *M'Cance* v. *London and North Western Ry. Co.* (1864), 3 H. & C. 343; 159 E.R. 563, where Williams, J. in giving the judgment of the Exchequer Chamber (Crompton, Willes, Byles, Blackburn and Shee, JJ.) said at p. 345:

> It is laid down in my brother Blackburn's Treatise on the Contract of Sale, p. 163, that "when parties have agreed to act upon an assumed state of facts their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth."

In my view the agreement between Jones and the respondent company is on the same footing as an agreement between two individuals. As GREGORY, J. said in *Johnson* v. *Thompson* (1914), 19 B.C. 105, at p. 107:

> In the case of an agreement between two individuals there is nothing that I know of to prevent them from ignoring any mutual mistake, and carrying it out as honest men according to their real intention.

The fourth ground of appeal was that assuming the obligation was vested in the respondent company (as I find it was), then it was submitted the transaction was void and *ultra vires* in that it might lead to an unauthorized reduction of capital or to trafficking by the company in its own shares. With all respect to the interesting and able argument addressed to that point, I remain unconvinced it has any decisive bearing on this appeal. The learned trial judge has found in effect, and I hold that the respondent company holds on deposit the shares of Ray W. Jones,

deceased, upon the same terms and conditions as the old Dakota company did in the agreement between them of 1st June, 1917.

The agreement reads:

WHEREAS: There is an agreement between Ray W. Jones and the British American Timber Company, whereby the said British American Timber Company is to issue to the said Ray W. Jones its capital stock to an amount equal to fourteen per cent. (14%) of the amount of such stock issued in any year; and the said Ray W. Jones is to give his note or notes covering the par value of such said stock, said notes to be payable on demand, and to draw interest at the rate of six per cent. (6%) per annum:

IT IS HEREBY AGREED, by and between the said Ray W. Jones and the said British American Timber Company, that the said notes shall be held until such time as paid by the said Ray W. Jones, or until such time as dividends declared and paid by the said British American Company shall pay the principal and interest on the same.

IT IS ALSO AGREED, by and between both parties hereto that such stock issued to the said Ray W. Jones shall be endorsed by him in blank and held as collateral security to the said notes.

That agreement makes it plain that under no circumstances may the company enforce payment of the obligation by selling or otherwise dealing with the shares. The company could not sue upon the promissory notes, obtain judgment and have the shares taken in execution. The company could obtain payment of the notes in two ways only: (a) By Jones paying the amount if he chose to do so, or (b) if dividends declared and paid by the company should pay the principal and interest. The whole purpose of the agreement was to free Jones from personal liability for a debt. That agreement therefore could not, even by referring to the deposited shares as collateral security, give the company any right of ownership in or to the said shares. Therefore no question of unauthorized reduction of capital by surrender of the shares could occur. For the same reason no question of the company trafficking in its shares could arise.

No doubt it was an unusual agreement. But it is the only basis upon which the respondent company has a right to hold the shares on behalf of the Ray W. Jones estate. It is to be observed also that under the agreement between the two companies (Exhibit 41-A) the shares were to be issued and allotted to the Dakota company as fully paid up, and that it was only upon the request of the latter that the shares were issued and allotted direct to Jones and the other shareholders. The agreement for the issue

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of the shares as fully paid up was made between the two companies. Jones was not a party thereto.

What has just been said, meets the objection raised in the fifth main ground of appeal that the respondent company had no right of action because there was no assignment in writing within the meaning of section 2 (25) of the Laws Declaratory Act, Cap. 148, R.S.B.C. 1936. *Dell* v. *Saunders* (1914), 19 B.C. 500 was cited to support that position, and it was said the action was incompetent because the person in the position of assignor, *viz.*, the Dakota company, was not joined as party. But that was quite a different kind of case. It related to a legal debt owing by a debtor to a creditor, payment whereof was enforceable by suit against the debtor. The characteristics of a debt as distinguished from obligation are touched on in *Stephen et al.* v. *Stewart et al.* (1943), 59 B.C. 297, at pp. 307-8.

Here there is no legal debt of that nature. The terms of the agreement (Exhibit 10) make it clear that payment could not be enforced against Jones *in personam* or against the shares *in rem.* But even if it were a debt as such, absence of notice of assignment in writing does not hinder the person in the position of assignee enforcing the debt by suit without adding the assignor as a party, if in the language 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 now any corporate existence at all.

The Dakota company ceased its corporate existence in 1918 when it was dissolved.

From the foregoing there appear two essential conclusions which are not clearly implicit in the judgment appealed from, as I think they ought to be. The first is that the sum of $120,-865.98 evidenced by the promissory notes, is not in the true legal sense, an indebtedness of the Ray W. Jones estate to the respondent company. Its collectibility is governed entirely by the agreement of 1st June, 1917. It is not enforceable by suit against Jones or his personal representative *in personam.* In the second place, while the shares are pledged by way of collateral security, that pledge is not enforceable by sale of the shares. The pledge

continues until payment by either of the two methods specified in the agreement of June, 1917.

The declaratory portion of the formal order for judgment should therefore be amended to read as follows:

THIS COURT DOTH ADJUDGE AND DECLARE that the agreement of 1st June, 1917, between Ray W. Jones, deceased, and British American Timber Company (of South Dakota) was accepted, adopted and acted upon by the plaintiff company and Ray W. Jones during his lifetime, and remains in full force and effect as binding upon the plaintiff company.

AND THIS COURT DOTH ADJUDGE AND DECLARE that pursuant to the said agreement of 1st June, 1917, the plaintiff company holds on deposit certificate No. 75 evidencing 753 shares of its capital stock registered in the name of the said Ray W. Jones, deceased.

AND THIS COURT DOTH ADJUDGE AND DECLARE that the sum of $120,865.98 has not been paid in whole or in part by the said Ray W. Jones or by anyone on his behalf.

AND THIS COURT DOTH FURTHER ADJUDGE AND DECLARE that the plaintiff company is entitled, in reduction and payment of the aforesaid sum of $120,865.98 to retain and apply all moneys which from time to time it may be authorized to pay in respect to the said shares by way of distribution of capital or otherwise as dividends within the meaning of the said agreement of 1st June, 1917.

There remains the question of costs. The order in the Court below directed costs of the action to be payable by Ray W. Jones, Jr. "personally and as representative of the heirs and next of kin of Ray W. Jones, deceased." Taking into consideration the course of the action and the trial to which I need not advert again, and the appellant's partial success on appeal, I think the appropriate order in the exceptional circumstances is, that the appellant do tax his costs of appeal as if wholly successful, that the respondent do tax his costs of action in the Court below as if wholly successful, and that each party be paid one half of the amount each shall respectively so tax. There will be a general set off.

I would allow the appeal to the extent indicated.

ROBERTSON, J.A.: The appellant first submits that the action is not properly constituted as no personal representative of the estate of Ray W. Jones, Sr. was a party to the action. Ray W. Jones, Sr. died in 1919. He left him surviving his wife and two sons, Munroe and Ray W. Jones, Jr. Munroe took out administration in the State of Washington, U.S.A., of his father's estate,

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administered the estate, and was discharged on the 6th of May, 1920. Administration has not been taken out in this Province and accordingly the personal estate in this Province vested and still vests in the Court, pursuant to section 5 of the Administration Act. Ray W. Jones, Sr. owned the shares in question in this action subject to an alleged indebtedness to the plaintiff. As the plaintiff desired to proceed against Ray W. Jones, Jr., who is resident in the State of California, it was necessary to obtain an order for the issuance and service of a writ *ex juris*. On the 14th of January, 1942, the plaintiff, in the matter of an intended action in which it was the intended plaintiff and Ray W. Jones, Jr., for himself and the heirs and next of kin of the late Ray W. Jones, was the intended defendant, obtained an order of FISHER, J., as he then was, (1) giving leave to

> issue a writ against the heirs and next of kin of the said Ray W. Jones, deceased, and to serve notice of the said writ *ex juris* upon Ray W. Jones, Jr. . . . on behalf of himself and the heirs and next of kin of the late Ray W. Jones;

(2) ordering that service of the notice should be deemed good and sufficient service of the writ upon the said Ray W. Jones, Jr. for himself and the heirs and next of kin of the late Ray W. Jones; (3) ordering that Ray W. Jones, Jr. be authorized to represent himself and the heirs and next of kin of the late Ray W. Jones in the intended action on behalf of himself and the heirs and next of kin of the late Ray W. Jones. From an examination of the material upon which the order was made and its language, it would appear that paragraph 3 of the order above mentioned was made under rules 131 and 154 (*b*). It may be questioned whether the Court had power to act under these rules prior to the commencement of the action. However, the defendant entered an appearance as follows:

> Enter an appearance for the above-named defendant pursuant to the terms of the order of the Honourable Mr. Justice Fisher, dated the 14th January, A.D. 1942 in this action.

No objection was taken before us to the order, the appellant taking the position that he was bound by it. The writ was issued on the same day as the order was made. The statement of claim asked, *inter alia,* for a declaration that the plaintiff had an equitable mortgage upon the shares in question, and for an account and foreclosure; alternatively, for a declaration that

the plaintiff had a lien on the shares for the moneys alleged to be due to it from the Jones estate, and for leave to sell the shares, and alternatively for a declaration that the plaintiff held the shares as a pledge for the moneys alleged to be owing to it by the Jones estate, and for leave to enforce such pledge by sale.

At the opening of the trial counsel for the appellant took the objection that the action was not properly constituted owing to there being no representative of the Jones estate, and maintained this position throughout the trial. During his concluding argument counsel for the respondent abandoned all claims except for a declaration that the late Ray W. Jones at the time of his death was indebted to the plaintiff company in the sum of $120,865.98, with interest from the 17th of June, 1917, and for a declaration that the said Jones pledged 753 shares of the capital stock of the plaintiff on or about the date of allotment of the said shares, and, in the alternative, for a declaration that the plaintiff had 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 such shares.

Judgment was reserved. Later on the plaintiff's solicitor submitted that the learned judge might proceed in the absence of a representative of the Jones estate, pursuant to the powers contained in section 11 of the Administration Act, which section is very similar to rule 168. The learned trial judge, applying rule 168, held that he might proceed to determine the remaining questions in the action, in the absence of any person representing the estate of Ray W. Jones, Sr. and he did so. The judgment declared, *inter alia,* that the late Ray W. Jones was at the date of death indebted to the plaintiff in the sum above mentioned, and that prior to his death he had deposited with the plaintiff by way of pledge the 753 shares to secure repayment to the plaintiff of the said indebtedness, and that the amount of the indebtedness had not been paid or discharged, and that the plaintiff held the said shares as security by way of a pledge for repayment to it of the said sum, and adjudged that the plaintiff should

recover from the defendants, Ray W. Jones, personally, and as representative of the heirs and next of kin of the late Ray W. Jones, deceased, its costs of this action after taxation thereof.

An order made under rule 168 and any order consequent

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thereon binds the estate of a deceased person in the same manner in every respect as if a duly constituted personal representative of the deceased had been a party to the cause, matter or proceedings. So that if the order stands the estate of the late Ray W. Jones is bound, and the question cannot be further litigated as between the legal personal representative of the plaintiff. In effect then the judgment is one against the legal personal representative. The plaintiff having obtained the declaration could proceed to apply all moneys recovered either by way of dividends or otherwise in respect of the shares on account of the indebtedness. This is by reason of the special agreement between the parties.

Turning now to a consideration of rule 168: This rule is the same as the English rule and reads as follows: [already set out in the judgment of O'HALLORAN, J.A.].

That rule is an adaptation from the Chancery Procedure Act, 15 & 16 Vict., Cap. 86, Sec. 44, which is almost the same as section 11, above referred to. In so far as the question in this action is involved, the English rule is practically the same as our rule; so that the decisions upon section 44 are applicable to our rule 168. The cases cited by counsel seem to establish:

1. The rule has no application to an action in which administration of the estate of a deceased party is asked. See *Silver* v. *Stein* (1852), 1 Drew, 295; *Hughes* v. *Hughes et al.* (1881), 6 A.R. 373; and *Fairfield* v. *Ross* (1902), 4 O.L.R. 534, or to actions for foreclosure—*Aylward* v. *Lewis,* [1891] 2 Ch. 81.

2. The rule does not apply where a direct judgment is sought against the estate, which I think is the result, in effect, in this case, as I have pointed out. In *Vacy* v. *Vacy* (1860), 1 L.T. 267, the facts were that the settlor of a deed died. A bill was filed to have the deed, which had been executed by the testator upon the same day upon which he made his will, which professed to confirm it, established and the trusts thereof carried into effect. The execution of the deed was disputed and the will had not been proved. An application was made under section 44 to appoint Mrs. Vacy the receiver in the suit, to appear and represent the estate of the settlor, her husband. Counsel for the trustees stated the application was unnecessary and that the Legislature had not intended any similar circumstances to those present to give juris-

diction to make such an appointment. The Vice-Chancellor said he had no power under the 44th section of the Act to make the appointment asked for. The meaning of that section was, that where a party interested in the subject-matter of the litigation died, and there was no legal personal representative, that there the Court might appoint someone to represent such interested party; but the party in the case before him sought to be represented was the very settlor of the deed upon which the litigation had arisen. Besides, the very person for whom it was asked was a party disputing this very deed.

In *Bruiton* v. *Birch* (1853), 22 L.J. Ch. 911 Kindersley, V.-C., said, in part, as follows:

The effect of the foreclosure clause in this suit would be to bind the estate of the first mortgagee, Hughes. Now, the description of case to which the 44th section of the Chancery Amendment Act was intended to apply was this: If, in administering an estate, it appeared that certain persons who were likely to have interests in the question were not all before the Court, as, for example, if one died and you could not find his representative, or if in any similar case you could not proceed without a representative, then the Court may authorize a person to appear in his stead, or may direct the suit to be prosecuted in his absence; but I do not think that section was ever intended to apply to a case where the decree is meant to be a decree against the party. That would be carrying the language of the section beyond the intention of the legislature. I think it is clear that the effect of that section is, that whatever might be the circumstances of the case, it should only be discretionary with the Court, and the Court must consider whether the thing can be done without danger to any one. When I am asked to bind the estate of Hughes without his representatives being present, I cannot, in that case, do so. I cannot say I will take away from those parties the right which they may have.

3. The Court will not allow the whole adverse interest to be represented, as it is not a case within the rule.

In *Gibson* v. *Wills* (1856), 21 Beav. 620 a question arose between the children who survived their parents and those who died in their lifetime. All the surviving children were parties to the cause, but no representative had been taken out to the two deceased daughters. One of them had died unmarried and the other left a husband surviving her. Pursuant to section 44, counsel asked that a representative be appointed to represent the two daughters. Sir John Romilly, M.R. said:

This does not appear to be a case within the statute. It is clear that there is a hostile question for discussion, and no representation having been taken out to either of the deceased daughters, the plaintiffs ask the Court to

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appoint a nominee of their own to represent their adversaries. If appointed, he may make a feeble defence, and a decree may be obtained which will be binding on those absent. The object of the statute was this:—where you have real litigating parties before the Court, but it happens that one of the class interested is not represented, then, if the Court sees that there are other persons present who *bona fide* represent the interest of those absent, it may allow that interest to be represented; but it will not allow the whole adverse interest to be represented.

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In *Sherwood* v. *Freeland* (1857), 6 Gr. 305 it was held that the then Ontario order which, as I shall later show, was practically the same as section 44, seemed "to be confined to cases of mere formal parties having no substantial or beneficial interest." Again the Court of Appeal in *In re Curtis and Betts,* [1887] W.N. 126, at p. 127 said

> it was wrong to appoint a person to represent the estate of a deceased person who was the only person liable.

Where, however, there are several defendants all having the same interest and one of the defendants dies and there is no legal representative, section 44 has been held to be applicable and an order made.

I refer to two cases on this point: The first is that of *The Dean and Chapter of Ely* v. *Gayford and Others* (1853), 16 Beav. 561. In that case it appears that a suit had been instituted against a number of tenants and occupiers to recover certain tithes. One of the defendants died and there was no legal personal representative. The plaintiff moved, pursuant to section 44, for an order appointing the widow to represent the estate of the deceased for all purposes of the suit. It was suggested, *amicus curiæ,* that the section did not apply to a case in which it was sought to make the deceased person's estate liable, but only where he was beneficially interested in the matter in question. Sir John Romilly, M.R., after consultation with the other judges of the Court, held the Act was applicable to the case, and the order was made.

The other case is *Joint Stock Discount Co.* v. *Brown* (1869), L.R. 8 Eq. 376. There a bill had been filed asking relief against a number of directors of a company in respect of an alleged breach of trust. One of the directors died abroad and the evidence showed that he was believed to have left a will, and to have named his widow executrix, but that she had not seen the will, and did not know its contents, and that his solicitors on the

record had not been instructed since his death. On the application of the plaintiffs the Court made an order for the appointment of the person named by plaintiffs, who consented to act, to represent the defendants for purposes of the suit.

4. The rule has also been held to apply where the deceased person had no beneficial interest in the matters in dispute, but it was sought to bind his estate.

Instances of this are to be found in the following cases: In *Ashmall* v. *Wood* (1855), 25 L.J. Ch. 23, the plaintiff filed a bill to recover a sum of money in respect of which one defendant was treated as primarily liable and the other two defendants as secondarily liable only. The defendant alleged to be primarily liable, after having, by his answer, admitted liability to answer the plaintiff's demand, died leaving assets altogether insufficient to meet the demand and having by his will appointed two persons to act as executors, both of whom declined to prove the will. The plaintiff then moved under section 44 for a direction that the suit be proceeded with in the absence of any representative of the estate of the deceased defendant, or of the appointment of some person to represent the estate for all purposes of the suit. The Court held the deceased defendant was a deceased person interested in the matters in question within the meaning of the section, and under the circumstances appointed the persons named in his will to represent his estate for the purposes of the suit. It appeared the plaintiff had deposited with one Bishop certain moneys for the purpose of their being applied by him in a particular way, but instead of that he had expended them, part in repairs of the ship of which he was master, and, which belonged to the other two defendants, and part in the purchase of a cargo of oil on their account. The plaintiff claimed a lien upon the cargo and in default of payment, a sale. In that case, after the death of the defendant primarily liable, the only defendants before the Court were (p. 24)

> persons against whom the bill makes a case of liability for the whole demand, but not a case of primary liability.

Further, as the deceased defendant had admitted his liability, his estate had no interest adverse to the plaintiff.

In *Crossley* v. *City of Glasgow Life Assurance Company* (1876), 4 Ch. D. 421 the holder of two insurance policies

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deposited them with the plaintiff as security for a debt. The insured died insolvent, having made a will appointing executors, but no representation was taken out to his estate. The plaintiff then gave the company notice in writing of the death and that he held the policy as security for his debt. The company was willing to pay so long as the assent of the insured's legal personal representatives was forthcoming. The plaintiff then sued. As appears at p. 427 and in the report of the case in 46 L.J. Ch. at p. 67, it was

> sufficiently proved by persons appointed executors, and otherwise, that the money is really due.

Under these circumstances the plaintiff was allowed to proceed in the absence of the legal personal representative.

In *Webster* v. *British Empire Mutual Life Assurance Company* (1880), 15 Ch. D. 169 the facts were that a policy-holder deposited his policy with one Brown, as security. Later the policy-holder died. Brown proved the policy-holder's death to the satisfaction of the company and demanded payment of the policy moneys, which were insufficient to pay his debt, but the company refused to pay him without the consent of the legal personal representative of the policy-holder. Brown died and an action was brought by his executors against the company, claiming a declaration that they were entitled to the policy moneys. The Master of the Rolls, following his decision in *Crossley* v. *City of Glasgow Life Assurance Company,* dispensed with the presence of a personal representative. The executrix of the policy-holder had refused to prove his will, but it does not appear that she had admitted liability. It appeared, however, that not only was the amount due on the policy far less than the amount of the debt, but the person Brown, to whom security had been given, had been compelled to pay the premiums for 26 years. The amount paid in premiums was £578, 10s., which alone was greater than the amount which had been advanced on the security of the policy.

In *Curtius* v. *Caledonian Fire and Life Insurance Co.* (1881), 19 Ch. D. 534 it was held that in an action by an equitable mortgagee of a policy of insurance against the insurance company for payment of the policy money the Court had jurisdiction under section 44 to dispense with a legal personal representative of the assured where none exists. In that case the mortgage debt

was larger than the policy money, and the estate of the assured was insolvent; the widow of the intestate and his father, brothers and sisters were unwilling to take out administration to his estate, and were willing that the policy moneys should be paid to the plaintiff, and they disclaimed all interest in the moneys.

As against this there is the decision of *Toronto Savings Bank* v. *Canada Life Assurance Co.* (1867), 13 Gr. 171. In that case apparently one Hallinan insured his life in the defendant company, and in the same year he assigned the policy to one Feehan, and notice of transfer was given to the defendants immediately afterwards. Feehan subsequently left the country. The plaintiff alleged that Feehan was their officer, and that this assignment was executed to him in trust to secure a debt owing to them by Hallinan and exceeding in amount the sum insured. The trust did not appear in the assignment. Hallinan, it was said, died intestate, insolvent, and without any known relations in this country. No one had taken out administration to his estate. Mowat, V.-C., said in part at p. 173 as follows:

> Having reference to all these circumstances, and to the decisions on the statutory enactment in England which corresponds with our General Order, I am of opinion that the case is not within the meaning of the General Order, and that the motion must therefore be refused, with costs.

The distinction between this last case and the four preceding cases would appear to be that in the *Ashmall, Crossley* and *Curtius* cases there was an admission of liability by the executors, and in the *Webster* case, although it is not mentioned, very likely there was the same type of evidence; so that in those four cases an order was made under the rule. In the *Toronto Savings* case there was no admission that the debt was owing. That is similar to this case, as the existence of the debt is disputed.

5. The rule does not apply where the interest of the deceased person is adverse to the plaintiff.

In *Moore* v. *Morris* (1871), L.R. 13 Eq. 139, Lord Romilly, M.R. referring to section 44, said at p. 140:

> I have frequently to consider that section in Chambers, and have always held that that section does not apply in the three following cases: first, where the estate of the deceased person is that which is being administered in the suit; secondly, where the interest of the deceased person is adverse to that of the plaintiff; thirdly, where the representative of the deceased person has active duties to perform.

See also Daniell's Chancery Practice, 8th Ed., Vol. 1, p. 158.

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6. The rule does not apply where there are no real defendants at the time the application is made. In this case there was clearly no right of action against Jones personally, or as representing the heirs at law or next of kin, for they had no legal title because, as I have pointed out, the shares in question vested in the Court. To allow this decision to stand would mean that a plaintiff could commence an action against a defendant against whom he had no cause of action, and then the Court might proceed in the absence of any person representing the estate of the deceased person.

In *Harris* v. *Sumner* (1910), 39 N.B.R. 456, Barker, C.J., delivering the judgment of the Court, consisting of six members, said at p. 465 (referring to section 44):

> It has never been held to apply to cases originally defective for want of parties.

In *Fairfield* v. *Ross* (1902), 4 O.L.R. 534 the only living issue and heir at law of an intestate who had brought the action to set aside on the ground of undue influence a transfer of the property made prior thereto by the intestate to the defendant, applied for an order under rule 194 (which is practically the same as our rule 168, and which is referred to in the case of *Hughes* v. *Hughes et al., supra*) appointing him administrator or administrator *ad litem* of the deceased. The application was refused. Boyd, C. said at pp. 536-7 in part as follows:

> The very frame of the rule, to my mind, indicates that it is not applicable to the case of a plaintiff who without right or title has commenced an action and then seeks to legalize his illegal act by an order of the Court.
>
> The rule applies to a case where "in an action," *i.e.*, an action validly begun by a competent plaintiff, "representation of an estate is required" as a condition for its effective prosecution, and then in a proper case an administrator *ad litem* may be appointed.

Again, in *Gibson* v. *Wills, supra,* it was pointed out that the rule applies where there are real litigating parties before the Court.

The history of the order in the Province of Ontario is described in an interesting article in 17 Can. Bar Rev. 677. There the order was changed so as to include cases to which it had been held in England and Ontario the order did not apply.

Prior to 1876 the Ontario Chancery order was practically the same as section 44, and as our rule 168. Prior to that date there had been decisions in Ontario which have been referred to above,

and of course a number of English decisions. Section 23 of chapter 7 of the Statutes of Ontario, 1876 (later section 9 of chapter 49 of R.S.O. 1877), enacted a new order which differs from the old order by the addition of the words

> and notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to perform by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate where representation is sought

after the words "public advertisement."

In *Hughes* v. *Hughes et al.* (1881), 6 A.R. 373 Burton, J.A. points out the difference between the previous order and the section of the Act. At p. 382 he points out that the Ontario Legislature

> in adopting a similar provision, has apparently sought to embrace a number of those cases to which it was held that the section of the English Act did not apply.

With respect, I have come to the conclusion that in the circumstances of this case the rule did not apply and the learned trial judge should not have allowed the action to proceed in the absence of a legal personal representative of the estate of Ray W. Jones, Sr.

The appeal should be allowed.

Decision of Bird, J. varied; Robertson, J.A. dissenting, who would allow the appeal.

Solicitor for appellant: *J. F. Downs.*

Solicitor for respondent: *Elmore Meredith.*

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March 7.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* ISABELLA CAROLINE DICKINSON, DECEASED.

Testator's Family Maintenance Act—Whole estate bequeathed to brother of petitioner by mother—Ill health of petitioner—Principles applied—R.S.B.C. 1936, Cap. 285, Sec. 3.

The petitioner has one brother and one sister. His father died in 1942 and by will left all his estate to his wife with remainder over to petitioner's brother Robert L. Dickinson. His mother died in 1943 and, with the exception of a few very minor legacies, left all her estate of about $15,000 to Robert L. Dickinson, who received approximately $22,000 from the two estates. The petitioner is 48 years old, married in 1940, has a house worth $3,500, paid for, less than $300 in the bank and earns about $2,000 a year. In 1926 he was taken ill with gall bladder trouble and from time to time was compelled to lay off from work up to the present time. He lived with his parents from 1926 to 1935, during which time they paid substantial medical bills on his behalf. On petition under the Testator's Family Maintenance Act, that adequate provision had not been made for the proper maintenance and support of the petitioner, the evidence disclosed that the petitioner was making a bare living and was subject to ill health and the testatrix had failed to take into consideration as a just parent these "special" circumstances.

Held, that in the circumstances an "adequate, just and equitable" provision for the petitioner to be made out of the estate of the testatrix is the sum of $3,000 to be paid in a lump sum to the petitioner.

PETITION for adequate provision from the estate of petitioner's late mother under the provisions of the Testator's Family Maintenance Act. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 29th of February, 1944.

G. F. McMaster, for executor and Robert L. Dickinson.
Guild, for George V. Dickinson.

Cur. adv. vult.

7th March, 1944.

FARRIS, C.J.S.C.: This is an application made before me by way of petition under the Testator's Family Maintenance Act by one George Vancouver Dickinson, a son of the late Isabella Caroline Dickinson who died on the 19th of October, 1943, leaving a will in which she left practically her entire estate to

another son, Robert Lester Dickinson, the estate having a net value of approximately $15,000.

The testatrix at the time of her death was 83 years of age, the will in question being made on the 18th of November, 1942. The testatrix lived with her husband William John Dickinson, in Vancouver, who died on the 23rd of September, 1942, at the age of 83 years, and who by a will dated the 8th of May, 1937, left to Mrs. Dickinson certain real property for her life, the residue of the estate being left to the son Robert Lester Dickinson, the principal legatee of the late Mrs. Dickinson.

The late Mr. and Mrs. Dickinson had three children, all being alive: one daughter Mrs. Bescoby, the petitioner George Vancouver Dickinson and the said Robert Lester Dickinson.

In both wills of the father and mother Mrs. Bescoby and the petitioner were left one dollar each, the son Robert Lester Dickinson receiving approximately $22,000 from the two estates, being the entire amount of such estates with the exception of a few very minor bequests.

Mrs. Bescoby makes no claim against the estate.

The petitioner George Vancouver Dickinson claims against the estate of his mother, Isabella Caroline Dickinson by virtue of the conditions of the Testator's Family Maintenance Act, R.S.B.C. 1936, Cap. 285 and amendments.

It was contended by counsel for the petitioner, relying upon *Walker* v. *McDermott,* [1931] S.C.R. 94: First, the petitioner being a son of the testatrix and standing in the same relation to the testatrix as the principal beneficiary his brother Robert Lester Dickinson, and he the petitioner being left only one dollar, and the brother being left the whole of the estate amounting to $15,000, that this automatically entitled the Court to draw the conclusion adequate provision had not been made for the proper maintenance and support of the petitioner as required by the Testator's Family Maintenance Act. Secondly, the evidence disclosed that the petitioner was making but a bare living and was subject to ill health, and that the testatrix had failed to take into consideration as a just parent these "special" circumstances.

Dealing with the first point, I cannot agree that the decision in *Walker* v. *McDermott, supra,* goes to that length. In that case

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Rinfret, J. (now Chief Justice) while giving a dissenting judgment on the particular facts in that case, I do not think he disagreed with the majority of the Court as to the principle which should be applied in construing the Act in question. He says at p. 99:

> But I cannot construe the Act to mean that in every case where no provision is made, the section above quoted is mandatory and the court must make an order. In my judgment, the intention of the Legislature was that the husband, the wife or the children should not be left without "proper maintenance and support," while the testator disposed of an estate sufficient to provide for it; and to that extent only, in order to carry out such intention, is the court permitted to interfere with the liberty of any person to bequeath his property as he pleases.

In other words, it would seem to me that the word "proper" is the governing word, and therefore the Court only can interfere when the circumstances are "special" and are such that the testator taking them into consideration has not made a "proper" provision for maintenance.

Now we look to what Duff, J. (afterwards Chief Justice) who delivered the majority judgment of the Court says (p. 96):

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

The learned justice, while stating that there is a variety of circumstances which a just father must take into consideration in regard to his child, and in respect thereto must make proper and adequate provision for the child, nevertheless indicates that these circumstances must be special circumstances, as shown by his words at p. 98:

> . . . , nor do I think that a father in the position of the testator, and justly appreciating the situation of his daughter, a young married woman, and the possibilities attaching to her situation, would, in the circumstances

which I have outlined above, have considered that adequate provision existed for her "proper maintenance and support."

It appeared in that case the daughter in question was a young married woman, and she and her husband were unable to save anything out of the husband's salary for contingency.

It would seem obvious to me that the learned justice had in mind the probability of children being born and that attendant upon this there would be bound to be considerable expense involved through medical fees and additional living expenses upon the family being increased; and as the parents were unable to save anything from the salary in supporting the family as then constituted, with the increased expenses by an addition to the family, they would not be able to meet such expenses, and a just father should under these special circumstances make proper and equitable provision for the daughter.

It would seem that upon this branch of the case only did Rinfret, J. (now Chief Justice) disagree with the majority of the Court, first, in that it was his opinion that such a contingency as foreseen by Duff, J. (afterwards Chief Justice) was not a "special" circumstance to be taken into consideration and, secondly, the evidence in that particular case indicated that the daughter and her husband were able to save something and that the probabilities were that their financial condition would improve so as to enable them to reasonably meet any contingencies that might arise even if the family should be increased.

It seems to me that the *Walker* v. *McDermott* case does not go farther than to say that when it is disclosed to the Court that the parent has failed to make proper and equitable provision therefor, then the Court should step in and do what the parent should have done. But then and only then should the Court intervene.

It was held s. 8 (1) of the Act sets out a condition as a basis for the jurisdiction which enables the court to intervene and that condition requires the court to be of the opinion that reasonable provision has not been made in the will for the dependant to whom the application relates; if the condition fails, the provisions for relief do not come into operation; . . .

. . . the *onus* is placed upon the appellant to satisfy the court that the will of her husband has not made reasonable provision for her maintenance and that this is a condition precedent to the court making an order for relief:

Shaw v. *Toronto General Trusts Corporation et al.*, [1942] S.C.R. 513, at pp. 514 and 516.

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I now come to the second contention of the petitioner. The petitioner is a man of 48 years of age, married, having his own home paid for, valued at about $3,500, and less than $300 in the bank, earning approximately $2,000 per year. In about 1926 he was taken ill with gall bladder trouble and as a result has from the date of the commencement of this trouble been from time to time compelled to lay off work up to the present date, and this illness hangs over him with the possibility and, in fact, the probability that sometimes it may very seriously interfere with his earning capacity. He lived with his parents from 1926 to 1935. They were familiar with his illness, and in fact paid substantial medical bills on his account during that time. In 1935 he left his parents' home and took up residence by himself.

It appeared that his parents did not approve of his friendly relations with a certain woman, which woman he married in 1940, the parents refusing to meet her, and in fact never did meet her, although the petitioner remained on friendly terms with his parents and visited them quite regularly up until their death.

It is obvious to me that while the parents both provided in their will that their reason for not giving him anything at their death was that during their lifetime he had been generously treated, that their real reason was their antipathy to the lady who became the wife of the petitioner. I am of the opinion that this antipathy on the part of the testatrix was so great as to prevent her from exercising her normal judgment as a just parent should have exercised.

Following the decision of the majority of the Court in *Walker* v. *McDermott,* it is my opinion that a just parent would have recognized the physical condition of the petitioner and realized that he was dependent for his living entirely upon his earnings, and that if he became ill and unable to work, his earnings would cease and he would be without funds, and that the testatrix should have left a reasonable amount from her estate to the petitioner which would enable the petitioner to take reasonable lay-offs as the result of his physical condition without being placed in dire want.

I recognize that the brother looked after the business of the

testatrix and of the father during their last year or two of life, and, unquestionably, had a closer family relationship with his parents over the last few years than did the petitioner, and that the testatrix was quite justified in giving the larger portion of her estate to this son, but at the same time should have made a proper and equitable provision for the petitioner.

It is my opinion that in the circumstances an "adequate, just and equitable" provision for the petitioner to be made out of the estate of the testatrix is the sum of $3,000, and in my discretion so order that this amount be paid out of the estate of the testatrix in a lump sum to the petitioner. Costs payable out of the estate.

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Petition granted.

HILBERT v. STREIGHT.

Agreement—Oral—Son to work on parents' farm—Son to have farm on parents' death—Action by son after parents' death for declaration of trust — Remuneration for services in alternative — Corroboration—Statute of Frauds—Statute of Limitations.

The plaintiff's father and mother owned as joint tenants the farm lands in question. The father died in 1941 and the mother in 1942. The plaintiff gave evidence to the effect that when he was 16 years old his father proposed to him that if he would remain at home and help his parents on the farm during their lifetime, the farm would be his on their death. He accepted this proposal and assisted in the operation of the farm until 1938 when he was 22 years old. His father then sold more than half his poultry and there being less work for him to do, he, with the consent of the parents, went to work in a logging-camp for two years and then took employment in a store. He continued to live in the parents' house and paid about $20 per month for board and lodging until the death of his mother. In an action for a declaration that the farm lands owned by his mother at the time of her death were held in trust by her for him; alternatively for damages equivalent to the value of said lands and in the further alternative, for remuneration for services rendered his parents during their lives, it was held that there was sufficient evidence in corroboration of the plaintiff's claim, but the contract, not being in writing and the Statute of Frauds being pleaded, in answer to which the plaintiff submitted that there was part performance sufficient to take the case out of the operation of the statute, it was held that

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part performance to be sufficient must be unequivocally and in its own nature referable to the contract and this situation cannot be said to arise from the mere fact that a son goes to live with his parents and works on the farm without wages. The plaintiff's claim, therefore, for a declaration of trust must fail. Likewise the first alternative claim for the value of the land in damages fails. On the further alternative claim for remuneration for services rendered, it was held that the plaintiff is under the circumstances here entitled to recover. The Statute of Limitations was pleaded and the claim could only extend to six years prior to the mother's death. The plaintiff was allowed $40 a month for two years and $15 a month for the next four years, being $1,680, to which was added $300 spent by him in repairs and alterations to the house in which he and his mother resided.

ACTION for a declaration that certain farm lands owned by the plaintiff's mother at the time of her death were held in trust by her for him. Alternatively for damages equivalent to the value of the farm lands and in the further alternative for remuneration for services rendered by the plaintiff to the deceased and his father during their lifetime. Tried by COADY, J., at Vancouver on the 24th and 25th of February, 1944.

Lewis, for plaintiff.
C. F. Campbell, for defendant.
Adam Smith Johnston, for Aidi H. Poulton.
G. R. McQuarrie, for T. H. Isaacson, Allen Hilbert and W. M. Hilbert.

Cur. adv. vult.

8th March, 1944.

COADY, J.: The defendant is the administrator of the estate of Anne Hilbert, deceased. The plaintiff is a son of the deceased. The plaintiff's chief claim is for a declaration that certain farm lands owned by the deceased at the time of her death were held in trust by her for him. Alternatively the claim is for damages equivalent to the value of the said farm lands, and in the further alternative for remuneration for services rendered by the plaintiff to the deceased, and to his father during their lifetime. There are two other small claims advanced by the plaintiff to which I shall refer later.

The deceased and her husband owned as joint tenants the farm lands referred to herein, on which they resided and made their

home. The plaintiff's father died in 1941, his mother in 1942. The deceased had previously been married and had four children by her first husband. These children lived with her at this farm home for a number of years. But in or about 1932 three of them went back to the Old Country. The fourth child had married prior thereto. The plaintiff is a son by the second marriage. The children of the first marriage were all represented by counsel on the trial.

The plaintiff gave evidence to the effect that when he was about 16 years of age his father proposed in effect to him that if he, the plaintiff, would remain at home and help his father and mother on the farm during their lifetime, the farm would be his on their death. He accepted this proposal and remained at home and assisted his parents in the operation and management of the farm from that date until sometime in 1938. He does not know whether the mother was present when this conversation with his father took place, but says she knew of it and sometime in 1935 referred to it, stating that the farm would be his on his remaining home and assisting his parents as he had done.

The farming activities were confined chiefly to poultry raising. In or about 1938 his father had sold more than half the poultry, and as consequently there was no great need for the plaintiff's full time services after that date, he went to work in a logging-camp. I think it is clear that this was with the consent and approval of his parents and was in no way a breach of the agreement on his part. The plaintiff would then be about 22 years of age. He continued to live at home and paid $20 a month or thereabouts for board and lodging. After working for about two years in the logging-camps he took employment in a store and continued to live at home until the death of his mother. From 1938 until the death of his mother he assisted to some extent with the work in and around the place.

I formed the opinion on the trial that the plaintiff is an honest, truthful witness, and on his evidence I am quite prepared to find that there was a contract such as he alleges. But that is not enough; there must be corroboration under section 11 of the Evidence Act.

I think that there is here corroboration that measures up to

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that standard laid down in the following cases: *McDonald* v. *McDonald* (1903), 33 S.C.R. 145; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261; *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213; *Bligh* v. *Gallagher* (1921), *ib.* 241; *Larson* v. *Montgomery* (1930), 43 B.C. 89.

The evidence shows that the mother after the death of the plaintiff's father, went with an interpreter to a real-estate agent in the early part of 1942 for the purpose of having a joint tenancy between herself and the plaintiff created in respect to these farm lands.

She was familiar with joint tenancy as she and her husband held the lands in that way, and she knew that on her husband's death she became entitled to the full ownership of the property. She was advised by the real-estate agent that before this joint tenancy could be created it was necessary for her to have the farm lands registered in her name in the Land Registry office, and that she should see her lawyer about this first and when this was done she could come back and he would have the necessary documents drawn. She saw her lawyer, gave instructions to have the title placed in her name, and this was done. On a subsequent occasion, in or about July, 1942, she requested the interpreter to accompany her to the real-estate agent again in order to have the papers prepared which she had originally spoken of, stating that the first deal had been finished, but as it was not convenient for the interpreter to go then, the matter was postponed.

Moreover, the evidence shows that when the plaintiff advised his mother in 1942 of his intention to marry, and likewise of his intention to build a house for himself, that the deceased said this was quite unnecessary, and that he should continue to reside in the home with her after his marriage, since pursuant to their agreement the property was to become his on her death. The building contractor who was sent by the plaintiff to check up on certain lumber on the property gave evidence to the effect that in his discussion with the deceased she stated practically the same thing to him and requested him to discuss the matter with the son, which he did. There is evidence of a similar statement made by her to a Mr. Hermanson.

All these acts done and statements made on her part are con-

sistent with the existence of the arrangement between the parties which the plaintiff now puts forward, although they are not referable directly to such arrangement, since she did not tell any of the parties that any such arrangement existed.

Counsel submits that inasmuch as these expressions of intention on her part are not referable to the arrangement, that this evidence is not corroborative. I do not think that is necessary under the authorities. But while I am satisfied that there was such a contract as the plaintiff alleges and that there is sufficient corroboration, that alone does not entitle the plaintiff to succeed. The contract is not in writing, and the Statute of Frauds is pleaded. In reply, counsel for the plaintiff submits there was part performance sufficient to take the case out of the operation of the statute. The leading authority on part performance is the case of *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, from which it appears that the part performance to be sufficient must be unequivocally and in its own nature referable to the contract. In *Meston* v. *Gray,* [1925] 3 W.W.R. 656, Turgeon, J.A., after referring to the *Maddison* case says (p. 658):

> In order to exclude the operation of the Statute of Frauds, the part performance relied upon must be unequivocally referable to the contract asserted. The acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land, and to nothing else. This situation cannot be said to arise from the mere fact that a son goes to live with his father and works upon the home farm for a period of ten years without drawing wages, as in this case. A son may do this simply on account of the relationship, considering the farm as his own home, or in expectation of inheriting the property, or of receiving a suitable reward at a future time. Such being the case, there is no evidence of a part performance of the contract which the plaintiff alleges, and on this branch of the case he must fail.

The plaintiff in that case was in a much stronger position than the plaintiff here. The plaintiff's claim therefore for a declaration of trust must fail.

This disposes likewise of the first alternative claim for the value of the lands as damages for non-fulfilment of the alleged contract.

I then come to consider the third alternative claim, the remuneration for services rendered. I am of the opinion that on this claim the plaintiff is under the circumstances here entitled

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to recover (*Meston* v. *Gray, supra*; *McGugan* v. *Smith* (1892), 21 S.C.R. 263; *Walker* v. *Boughner* (1889), 18 Ont. 448). The Statute of Limitations is pleaded and the claim can only extend therefore to a period six years prior to the death of the mother. She died on October 28th, 1942, so compensation can only be calculated from October of 1936. While the evidence is not very definite as to what time in 1938 the plaintiff went to work in the logging-camp, it is, I think, sufficient to entitle the plaintiff to recover for two years' full time employment, and he is entitled to some remuneration for the services rendered after that time. There is evidence that he could have earned $100 a month at the logging-camp before 1938. Considering, however, that this was a small poultry farm I think if the plaintiff is allowed the sum of $40 a month for the two years that would be a fair remuneration, a total of $960 and $15 a month for the next four years, a total of $720, making a grand total of $1,680.

The plaintiff also claims for a declaration of trust with respect to an indebtedness of $357.50 owing by the People's Store to the deceased. In my opinion the evidence is insufficient to establish this trusteeship, and I would dismiss that portion of the claim.

The plaintiff also claims to be remunerated for the sum of $300 spent by him in repairs and alterations to the house in which he and his mother resided. These repairs and alterations having been undertaken by him in order to make the place suitable for occupation by himself, his wife and his mother after his marriage, and this expenditure having been made on the understanding that the property was to be his on his mother's death, I think he is entitled to succeed on this claim. There will therefore be a judgment in his favour for the total sum of $1,980. The costs of all parties will be payable out of the estate.

I think I should refer to a matter of practice to which I directed the attention of counsel at the opening of the trial. None of the other children of the deceased, all of whom are entitled to share in the estate, was named as a defendant. The administrator is the only defendant, and properly so. Counsel had been appointed by the Court by special order to represent the three children who were out of the jurisdiction. Counsel

appeared on the trial for the other child and claimed that he was entitled to appear as a matter of right to represent his client to call witnesses and to cross-examine. None of the other counsel objected. That this is a proper case in which to grant leave I have no doubt, but counsel is only entitled to be heard on leave; and as a matter of record such leave is now given, though inferentially by hearing counsel on the trial leave was at that time given. I refer to this matter of practice to prevent any misunderstanding. There may be cases where leave would be denied, as there is always a question of costs involved, and usually in cases of this nature payable out of the estate, unless counsel is prepared to waive any claim for costs. Whether leave is granted or not, must depend in each case on the circumstances.

Judgment for plaintiff.

CAMPBELL v. PRUDENTIAL TRUST COMPANY LIMITED, AND THE SUPERINTENDENT OF BROKERS FOR THE PROVINCE OF BRITISH COLUMBIA.

Company—Petroleum—Temporary registration certificate—Power to sell shares—Money from sale of shares paid into trust company—No drilling until $30,000 realized—Only $7,000 realized from sales—Company goes into liquidation—Disposition of balance in hands of trust company—R.S.B.C. 1936, Caps. 42 and 254, Sec. 5.

Magic Key Petroleums Limited was incorporated under the Companies Act in April, 1937. A certificate of temporary registration was obtained from the superintendent of brokers under the Securities Act, giving it power, *inter alia*, to sell, allot and issue 660,000 treasury shares as fully paid up at 35 cents per share and, with the exception of a reasonable amount for preliminary expenses, the proceeds from the sale of the shares were to be deposited in a trust account in the Prudential Trust Company, Vancouver, to be held by it until the sum of $30,000 was accumulated and no contracts were to be entered into or drilling operations commenced until this sum had been obtained. On the 2nd of October, 1937, the sum of $7,000 had been received from sales and no sales were made after that date. The company went into voluntary liquidation in December, 1942. At this time, owing to authorized with-

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drawals, there remained in the hands of the trust company $2,113.29. On refusal to pay this sum to the liquidator of Magic Key Petroleums Limited, the liquidator brought action claiming that this sum belonged to his company. On June 25th, 1943, the trust company was ordered to pay this sum into Court and said liquidator was given liberty to apply for payment out upon giving notice to the superintendent of brokers, who claimed the moneys were held in trust for those who purchased shares. On the application for payment out, it was held that the subscriptions for shares were paid to the trust company upon trust for the subscribers *pro rata* in the event of the $30,000 not being accumulated and the application was dismissed.

Held, on appeal, reversing the decision of BIRD, J., that no understanding is valid unless contained in the certificate of the registrar and the certificate does not contain a trust in favour of the shareholders. Even if it did, as the shares were issued as fully paid up and delivered to the shareholders, any agreement to repay the moneys would be illegal as it would be a reduction of capital without the confirmation of the Court. The plaintiff is entitled to an order for payment out.

APPEAL by plaintiff from the order of BIRD, J. of the 26th of October, 1943, whereby it was ordered that the money paid into Court to the credit of this action be paid out to those shareholders of Magic Key Petroleums Limited, holding shares allotted for cash, in proportion to the number of shares held by each of such shareholders and that a reference be had to the district registrar at Vancouver in order to determine the names of such shareholders, the amount of cash paid for the shares held by each of them and the amount to be paid out of Court to each of them. Pursuant to the terms of temporary registration as a broker under the Securities Act, the proceeds from the sale of the company's shares were to be deposited in a trust account with the Prudential Trust Company Limited until $30,000 had been accumulated and no operations were to be commenced until said sum was accumulated. The proceeds from the sale of shares deposited with the Prudential Trust Company Limited only amounted to $7,000 and the company went into voluntary liquidation and Harold D. Campbell was appointed liquidator. At the time that the company went into liquidation there remained with the trustee from the sale of shares, after the addition of interest and less certain withdrawals authorized by the superintendent of brokers from time to time, a balance of $2,118.63. On June 9th, 1943, the liquidator brought action against the Prudential

Trust Company for $2,113.29 claiming that said moneys were funds of Magic Key Petroleums Limited. Upon the application of the defendant the said moneys were paid into Court.

The appeal was argued at Victoria on the 25th of January, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Williams, K.C., for appellant: Paragraph 3 of the temporary registration does not supply any evidence that the company created a trust, but provides that the account with the defendant is to be used exclusively for company purposes. The jurisdiction of the superintendent of brokers is conferred by the Securities Act and does not confer upon him the jurisdiction to impose upon an applicant any terms outside the scope of the Act. He has attempted to exercise jurisdiction over moneys deposited with the defendant. Attempts to overreach the Act are *ultra vires* and contrary to public policy: see *Stockton and Darlington Railway Company* v. *Brown* (1860), 9 H.L. Cas. 246; *Westminster Corporation* v. *London and North Western Railway,* [1905] A.C. 426. The learned judge held that failure to answer the superintendent's letter amounted to a concurrence by the company. They could not answer except by resolution of directors. Such failure could not constitute a binding concurrence by the company: see *Dooby* v. *Watson* (1888), 39 Ch. D. 178. The property of the company could not be used by the alleged trust. Such use would be *ultra vires* the company: see *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409. The company is a statutory corporation and its objects and powers are limited by statute: see Halsbury's Laws of England, 2nd Ed., Vol. 8, pp. 72-3, par. 125 and p. 96, par. 159. A corporation is never estopped from showing that it lacked power to do an act or to enter into a contract: see *York Corporation* v. *Henry Leetham & Sons, Ld.,* [1924] 1 Ch. 557.

A. R. MacDougall, for respondent Superintendent of Brokers: Under section 5 (2) of the Securities Act, the superintendent may vary, add or omit any terms, conditions or restrictions. Under the temporary registration granted, the superintendent did by paragraph 3 order certain terms and conditions and they have been maintained with respect to the proceeds from the sale

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of shares, although there is no provision as to what is to happen if the $30,000 is not realized. The inference is that the moneys are to be returned to the shareholders who paid the same. The Act is for protection to the investing public. The condition imposed by the superintendent was endorsed by resolution of the directors. They cannot be heard to say that the money is the property of the company. By letter of December 20th, 1938, the superintendent stated if the minimum amount was not forthcoming, the money must be returned to those who paid. As to the presumption of knowledge of documents open to public inspection see *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327. The stock was sold to subscribers on the understanding that it would be returned if the minimum was not reached. The shareholders were *cestui que trustents*. The fact that the shares were actually allotted as fully paid must not be allowed to frustrate the purpose of the condition imposed, namely, the protection of the cash subscribers. The reasons of the learned trial judge should be followed.

Williams, replied.

Cur. adv. vult.

10th March, 1944.

SLOAN, J.A.: I agree with my brother O'HALLORAN.

O'HALLORAN, J.A.: Magic Key Petroleums Limited (N.P.L.) obtained a certificate of temporary registration as a broker under the Securities Act, Cap. 254, R.S.B.C. 1936, in March, 1937. It has not been cancelled. The company was thereby authorized to allot and issue 250,000 vendor shares, to be held in escrow by Prudential Trust Company of Vancouver, until the superintendent of brokers should authorize their release.

The company was also authorized therein "to sell, allot and issue for cash," without escrow restriction, 660,000 treasury shares at a price of 35 cents a share. The company was, however, required to pay the proceeds of such share sales into a trust account in the name of Prudential Trust Company. No withdrawals from such account were permitted without the consent of the superintendent of brokers, until the sum of $30,000 was accumulated for purposes of the company there described. Some

$7,000 in all was paid in. After withdrawals permitted by the superintendent of brokers, $2,118.63 remained in the account when the company went into voluntary liquidation in December, 1942.

In June, 1942, the liquidator (the present plaintiff appellant) sued the Prudential Trust Company for payment of the balance in the account as company funds. Upon the application of the trust company the money was paid into Court and the liquidator given leave to apply for payment out upon ten days' notice to the superintendent of brokers. The liquidator's application in due course was resisted by the superintendent of brokers. The learned judge dismissed the application, but ordered payment out *pro rata* to the shareholders who had subscribed the money. A reference was directed to ascertain who they were and the amount to which each was entitled. In the formal order for judgment it was ordered in addition

> that, if requested so to do by the liquidator . . . , each of the aforesaid shareholders shall surrender the number of shares which the amount of money paid out of Court to such shareholder originally purchased.

The appeal to this Court taken by the liquidator was opposed by counsel for the superintendent of brokers, whereupon the Court ordered the latter to be added as a party respondent. With respect, I am unable to read into the certificate of registration, as the learned judge below did, a term that the moneys paid into the Prudential Trust Company from the sale of shares, were impressed with a trust in favour of the shareholders who had paid that money for the purchase and delivery of their shares. Realistically viewed, this case appears in substance, although not in form, as if it were a contest between the creditors of the company in liquidation on the one hand, and a certain number of ordinary shareholders who attempt to place themselves in the position of bondholders.

The certificate of registration does not expressly or by legitimate inference impress a trust upon the moneys the company received from the sale of its shares. It provides simply that the company may not expend moneys for the purposes for which the issue of 660,000 shares were released, until the sum of $30,000 had accumulated from sales of these shares. It did not provide for the event which has happened, *viz.*, the company going into

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liquidation and unable to sell sufficient of its shares to realize $30,000 and carry out those purposes. To interpret that regulatory provision as a trust in favour of certain ordinary shareholders, is to give them a priority over, not only the creditors, but the other ordinary shareholders, and thus ignore one of the fundamental characteristics of the Companies Act.

The legal basis of a company financed by sale of ordinary shares as distinguished from shares with special rights or bonds, is that an ordinary shareholder cannot withdraw his money from the company until it is wound up. Not only is the company under no obligation to return such capital during its existence, but it is actually prohibited by law from doing so, save under special circumstances and with somewhat elaborate safeguards. And see sections 54, 61, 62 and 112 of the Companies Act which do not apply on the facts presented to us, and were not relied on by counsel. And *vide* also article 6 of Table A. In this case the company sold and delivered these treasury shares for cash. There was no distinction in rights between the vendor shares and the treasury shares. They ranked equally as ordinary shares. The liquidator could not buy back those shares. Nor could he take them back and refund the purchasers' moneys without a Court order for reduction of its capital. Neither the shares thus allotted nor the money paid for them or both were held in escrow.

In *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, Lord Herschell at p. 414, and particularly at p. 419, approved the following extract from *Guinness* v. *Land Corporation of Ireland* (1882), 22 Ch. D. 349, 375, there referred to:

> . . . whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid.

And *cf. Alberta Rolling Mills Co.* v. *Christie* (1919), 58 S.C.R. 208. In my judgment the moneys are the property of the company. In no sense did these moneys belong to the persons who purchased shares from the company. They exchanged their money for company shares. The shares became theirs outright and the money became the company's money. That was the end

of the transaction. The certificate of registration authorized the company to sell its shares and to allot and issue them as fully paid. The result must be that the proceeds of sale became the property of the company.

That being so, sections 215 (*b*) and (*c*) and 219 (1) of the Companies Act entitled the appellant liquidator to payment out of moneys, and I would so order.

I would allow the appeal accordingly.

ROBERTSON, J.A.: Magic Key Petroleums Limited (N.P.L.) was incorporated under the Companies Act, on the 16th of April, 1937. It obtained from the then superintendent of brokers, H. G. Garrett, under the Securities Act, a certificate of temporary registration (which was afterwards renewed) from the 20th of March, 1937, until the 20th of September, 1938, giving it power, *inter alia,* to sell, allot and issue for cash 660,000 treasury shares as fully paid up, at the price of 35 cents per share, and to pay a commission of 20 per cent. on the sale price of the shares in respect of cash received by the company for said shares, subject to the following:

3. That (except a reasonable amount for preliminary expenses, and expenses of organization, advertising, and administration; and for charges in respect of escrowed shares and the registration of transfers of shares; the cost of the acquisition of surface rights, and the maintenance of the company's property in good standing; and the cost of the acquisition of 80,000 shares in Spindle Top Oils Limited at 12½ cents per share) the proceeds from the sale of the company's shares shall be deposited in a trust account in the Prudential Trust Company, Vancouver, B.C., to be held by it until the sum of $30,000.00 has been accumulated and no withdrawals shall be made from the said account or any drilling contracts entered into or drilling operations commenced until the said sum has been accumulated and the consent in writing of the superintendent of brokers has been first obtained, and a certified copy of a directors' resolution to that effect shall be filed with the said superintendent by not later than the 1st day of April, 1937.

The proceeds of shares deposited with the defendant amounted in all to $7,000, which, together with interest and less authorized withdrawals, amounted at the time of the application later mentioned, to $2,113.29. All these moneys were received in respect of shares sold before the 2nd of October, 1937. No shares were sold after that date. The company went into voluntary liquida-

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tion in December, 1942. The defendant refused to pay over the moneys in its hands to the liquidator, who commenced this action, claiming that such moneys were funds of the company.

On the 25th of June, 1943, the defendant was ordered to pay into Court to the credit of the action the sum of $2,113.29, together with interest accrued thereon, and upon such payment being made the order provided the defendant was to be discharged from all liability. The defendant paid into Court the sum of $2,118.63. The order further provided that the plaintiff should be at liberty to apply for payment out, upon giving notice of the application to the superintendent of brokers. Accordingly, the plaintiff applied. Counsel for the superintendent submitted that the moneys were held in trust for the shareholders, to be returned to them if $30,000 had not been accumulated as provided in the certificate. He said that the trust was shown (1) in the certificate, the terms of which had been approved by resolution of the company's directors on the 27th of March, 1937. As to this, unless the certificate contained the trust, the approval of the directors added nothing to the matter; and (2) by a letter dated 20th December, 1938, from the then superintendent of brokers, E. K. DeBeck to the company's solicitors, which reads in part as follows:

> It is now 1¾ years since the first authority was given by this office to sell securities and according to the statement submitted you have only $5,171.23 as of 31st October, 1938, accumulated in a fund which we fixed at the very low figure of $30,000. This money was subscribed on the understanding that if the minimum amount was not forthcoming the money was to be returned less commissions and such other amounts with my consent which might have been paid out.

Because no answer was sent to this letter, it was argued that the company must have agreed to it being a true statement of what had been agreed upon. The company's counsel contended there was no such understanding between the company and the superintendent, and pointed out there was no statement from the superintendent who issued the certificate, that any such understanding had existed.

BIRD, J. held that the subscriptions for shares were paid to the trust company upon trust for the subscribers *pro rata* in the event of the $30,000 not being accumulated. He dismissed the appli-

cation. The plaintiff appealed. Upon the hearing of the appeal the superintendent of brokers was added as a respondent.

I think no understanding was valid unless contained in the certificate, for section 5 of the Securities Act permits the superintendent

to attach to the registration such terms, conditions and restrictions as he thinks advisable, all of which shall be set out in the certificate of registration.

Then it is said alternatively that the letter was a variation of the certificate, pursuant to subsection (2) of section 5 of the Securities Act. Assuming this to be so, as it was made over a year after the shares were sold and the proceeds deposited in the trust account, it could not affect these moneys. In my opinion the certificate does not contain a trust in favour of the shareholders. If it did, as the shares were issued as fully paid up and delivered to the shareholders, any agreement to repay the moneys would be illegal, as it would be a reduction of capital without the confirmation of the Court. With respect, I think the plaintiff is entitled to the moneys.

The appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Williams & Rae.*
Solicitors for respondent: *MacDougall & Morrison.*

RUTTER v. McLEOD.

Practice—Appeal from county court—Ordinary judgment—Time runs from entry of judgment in plaint and procedure book—Giving notice of appeal is service on respondent—R.S.B.C. 1936, Cap. 57, Secs. 14 and 17—County Court Rules, 1932, Order IX., rr. 32 and 35.

On appeal from judgment in an action to determine the rights of the parties under a partnership agreement, the respondent raised the preliminary objection that the notice of appeal was not given within the time fixed by section 14 of the Court of Appeal Act and the appellant applied for an extension of time within which to give notice of appeal if the Court should be of opinion that the notice of appeal was not properly given. Judgment was handed down and entered in the plaint and procedure book on October 7th, 1943. Formal judgment was filed

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and served on October 18th, 1943. Notice of appeal was filed on January 17th, 1944, and served on the respondent on February 19th, 1944.

Held, that in the case of an ordinary judgment the time commences to run from the entry of the judgment in the plaint and procedure book and the giving of the notice of appeal is the service thereof on the respondent. The service in this case being more than three months after entry of the judgment, the appellant was out of time.

Held, further, that applying the decisions, extension of time in the circumstances should not be granted and the application should be dismissed.

APPEAL by defendant from the decision of HARPER, Co. J. of the 5th of October, 1943. The plaintiff's husband started a small confectionery business (known as the Beehive Confectionery) in Grandview district about 25 years before this action. On the death of the husband, the plaintiff continued the business with the assistance of her son. The son joined the Navy and the plaintiff employed the defendant as a salesman on a commission basis. In January, 1942, as a result of a suggestion by an official of the Minimum Wage Board, after the plaintiff had found it impossible to pay the regular minimum wage rate to the defendant, she agreed to admit the defendant into partnership, but expressly stipulated that his interest in the business was to be limited to a half share in the net profits. The defendant claims a half share of the capital and assets of the business. He admittedly did not contribute any capital to the business. The plaintiff recovered judgment in an action for a declaration that the defendant was only entitled to a one-half share in the net profits up to the time of dissolution and the counterclaim was dismissed. On the appeal the respondent raised the preliminary objection that the notice of appeal was not given within the time fixed by section 14 of the Court of Appeal Act and the appellant moved under section 24 of said Act for an extension of time within which to give notice should the Court be of opinion that the notice of appeal was not properly given.

The appeal was argued at Vancouver on the 8th of March, 1944, before MCDONALD, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

Tufts, for appellant.

Jeremy, for respondent, raised the preliminary objection that service of the notice of appeal was out of time. The judgment

of the Court below was entered in the plaint and procedure book on October 7th, 1943, and the respondent was not served until February 19th, 1944, well over the three months' period allowed under the rules: see *Frumento* v. *Shortt, Hill & Duncan, Ltd.* (1916), 22 B.C. 427, at p. 431; *Gold* v. *Evans* (1920), 29 B.C. 81; *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70.

Tufts, referred to *Romano* v. *Maggiora* (1936), 50 B.C. 362, at p. 364; *May* v. *Roberts* (1929), 41 B.C. 182; *Splan* v. *Barrett-Lennard* (1931), 44 B.C. 371; *Shipway* v. *Logan* (1916), 22 B.C. 410.

Jeremy, replied.

Cur. adv. vult.

On the 15th of March, 1944, the judgment of the Court was delivered by

ROBERTSON, J.A.: The respondent moves to quash the appeal from the final judgment in this county court action on the ground that the notice of appeal was not given within the time fixed by section 14 of the Court of Appeal Act. The appellant moves under section 24 of that Act for an extension of time within which to give notice of appeal, if the Court should be of opinion that the notice of appeal was not properly given.

The action was one between two partners. The plaintiff sought a declaration that the defendant was only entitled to a one-half share of the net profits in the business carried on by them, up to the time of dissolution; that he had no interest in the capital, goodwill or stock of the business; an accounting, and judgment against the defendant for any sum in excess of the one-half interest in the net profits. The learned county court judge reserved judgment on the 5th of October, 1943; handed down his reasons for judgment on the 7th of October, 1943; formal judgment was taken out, filed and served on the appellant on the 18th of October, 1943. On the 17th of January, 1944, the appellant filed his notice of appeal, but did not serve it upon the respondent until the 19th of February, 1944. The formal judgment merely adjudged, *inter alia,* that "there be judgment for the plaintiff with costs." It was not necessary to take any steps to have the judgment settled.

C. A.
1944

RUTTER
v.
MCLEOD

Section 6 of the Court of Appeal Act provides for an appeal from a final county court judgment in respect whereof an appeal will lie under the provisions of the County Courts Act. This is such an appeal. Section 14 provides that the appeal may be "brought" within three months, in the case of a final judgment. Subsection (5) of section 14 provides:

> The giving of notice of appeal shall be deemed to be the bringing of the appeal within the meaning of this Act.

Court of Appeal Rule 3, which has statutory force, says:

> All appeals to the Court shall be by way of rehearing and shall be brought by notice of appeal in a summary way. . . .

The result of these provisions is that an appeal may be brought within three months by a notice of appeal in a summary manner by giving notice of appeal. The only mention of filing the notice of appeal is contained in section 17 of the Act, to which reference will later be made.

The respondent relies upon *Shipway* v. *Logan* (1915), 21 B.C. 595, following *Kirkland* v. *Brown* (1908), 13 B.C. 350. The appellant submits that the judgment in this case is a special judgment, within the meaning of County Court Order IX., r. 35, and therefore the time should run from the 18th of October, 1943, and that the notice of appeal was filed in time. The respondent submits that the judgment is an ordinary one and that the time for giving the notice of appeal should commence from the entry of the judgment in the plaint and procedure book, as provided in rule 32 of Order IX., *viz.*, on 7th October, 1943.

As has been shown, there was nothing special about the judgment. However, the relevant County Court Rules and provisions of the Supreme Court Act in force when *Kirkland* v. *Brown* and *Shipway* v. *Logan* were decided, are almost identical, respectively, with those now appearing in the present County Court Rules and Court of Appeal Act.

The judgment in the *Shipway* action was for money; the judgment in the *Kirkland* action was for replevin. In the latter case judgment was delivered on the 11th of July, 1906. On the 29th of October, 1907, the defendant had the formal order drawn up and entered, and on the 18th of November, 1907, served notice of appeal upon the plaintiff's solicitor. The Court held that no further order or judgment was necessary, and therefore, as I

understand it, that the judgment was one which simply required entry in the plaint and procedure book, under the rule then in force, which is word for word the same as the present rule 32 of Order IX.; and, in effect, also held, as the head-note says, that the judgment in replevin was not a special judgment, and that all the successful party had to do was to apply for a warrant of possession.

In *Shipway* v. *Logan* the Court of Appeal followed *Kirkland* v. *Brown,* the learned Chief Justice stating that while he was not sure he would have agreed with *Kirkland* v. *Brown,* or, if the matter was still open, he would have come to the same opinion, that the very question then before the Court in all its phases appeared to have been fairly considered, argued and disposed of by the Court in *Kirkland* v. *Brown,* and that that had been the recognized law since the date of the judgment.

However, the filing of the notice of appeal is not the giving of the notice of appeal. Section 17 of the Act says that the notice of appeal shall be filed in the proper registry and shall be served not less than 14 clear days before the first day appointed for the sittings of the Court of Appeal. Where the filing of the notice of appeal is "the giving of notice of appeal" the statute so provides. For instance, in section 78 (*b*) of the Summary Convictions Act, it is provided that:

> The appellant shall give notice of his intention to appeal by filing in the office of the Registrar of the Court appealed to a notice in writing setting forth with reasonable certainty the conviction or order appealed against, and the notice shall be served upon the respondent and the Justice who tried the case, or in the alternative, upon such person or persons as a Judge of the Court appealed to shall direct, and such service and filing shall be within ten days of the making of the conviction. . . .

I had to consider this section in the case of *Rex* v. *Anderson,* [1941] 3 W.W.R. 769, to which case I refer, not as an authority, but to show the view which I took of this section. There, as it will be seen, I was of the opinion that the giving of the notice of appeal was by filing the same. Accordingly, even if the filing of the notice of appeal could be considered as giving notice of appeal, it was not in time. Under the Court of Appeal Act, in my opinion, as I have said, the giving of the notice of appeal is the service, and it was not served until long after the time had expired.

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v.
MCLEOD

As to the motion to extend the time, the authorities show that leave will not be granted unless under very special circumstances in which it must appear that the interests of justice require that course to be adopted. See *McEwan* v. *Hesson* (1914), 20 B.C. 94; *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70, at p. 76; *Splan* v. *Barrett-Lennard* (1931), 44 B.C. 371 and *Rex* v. *Safeway Stores, Ltd.* (1937), 52 B.C. 396.

The material before us shows that neither the respondent nor her solicitor had any intimation from anyone up to the 19th of February, 1944, that there was to be an appeal and that the respondent, believing the time for appeal had elapsed, had made various alterations in her business arrangements and entered into a contract with third parties, which would be impossible to carry out were she deprived of her vested rights.

Under these circumstances, and applying the decisions to which I have referred, I am of the opinion that the extension of time should not be granted and the application should be dismissed. The motion to quash should be granted.

The appellant must pay the costs of both applications.

Motion to quash appeal granted.

C. A.
1944
Mar. 13, 22.

REX *EX REL.* SPIERS v. GRIS.

Criminal law—Intoxicating liquors—Government Liquor Act—Keeping for sale—Evidence of frequenters purchasing liquor—Men seen under the influence of liquor coming from premises—On search no liquor found on premises—R.S.B.C. 1936, Cap. 160, Secs. 91 (2) and 95.

On appeal by accused to the county court from his conviction for keeping liquor for sale, a number of frequenters of the accused's premises testified that they had purchased liquor from the accused and two police officers testified that they had the premises under observation for six months and saw men coming and going from the premises, some of whom were partly under the influence of liquor. One of the officers further testified that he entered the premises on one occasion. He found no liquor, there being only a few empty beer bottles on the premises. It was held that the evidence goes far enough to bring the case within the ambit of subsection (2) of section 91 of the Government Liquor Act, but the further evidence is lacking to warrant a conviction of "keeping liquor for sale."

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Held, on appeal, reversing the decision of COLGAN, Co. J., that the case presented by the prosecution, in the absence of a satisfactory explanation by the respondent, compels practical certainty that the respondent was keeping liquor for sale as charged. There should be a new trial.

APPEAL by the Crown from the decision of COLGAN, Co. J. of the 10th of January, 1944, allowing the appeal of Silvio Gris from his conviction by Robert Winstanley, stipendiary magistrate in and for the county of Kootenay, on a charge of unlawfully keeping liquor for sale. The evidence consisted of a number of alleged frequenters of accused's quarters who testified that they either had purchased liquor from the appellant or in some cases had been given liquor without charge. Two policemen testified that they had the premises under observation for six months and saw men coming and going from the premises, some of whom were under the influence of liquor. One policeman entered the premises on one occasion when he found no liquor but saw some empty beer bottles about the place. It was held on the trial that the evidence goes far enough to bring the case within subsection (2) of section 91 of the Government Liquor Act, but further evidence is lacking to warrant a conviction of "keeping for sale," that the law-makers contemplated some evidence in addition to that of "sale" in order to convict on a charge of keeping for sale and the conviction was quashed.

The appeal was argued at Vancouver on the 13th of March, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

H. Alan Maclean, for the Crown, referred to *Rex* v. *Cramer* (1936), 51 B.C. 310; *Rex* v. *Hand* (1931), 55 Can. C.C. 65 and *Rex* v. *Mandell* (1939), 72 Can. C.C. 408.

No one, for respondent.

Cur. adv. vult.

On the 22nd of March, 1944, the judgment of the Court was delivered by

O'HALLORAN, J.A.: The respondent was charged and convicted of keeping liquor for sale contrary to the Government Liquor Act, Cap. 160, R.S.B.C. 1936. On an appeal under the Summary Convictions Act, Cap. 271, R.S.B.C. 1936, the learned county judge quashed the conviction without calling upon the

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defence. He held that while the prosecution had proven the appellant guilty of "selling" liquor, the charge of "keeping for sale" was not proven. The Crown now appeals.

The learned judge was guided by the construction which he placed upon sections 91 (2) and 95 of the Government Liquor Act, *supra*. Adopting the *dictum* of MARTIN, J.A. in *Rex* v. *Cramer* (1936), 51 B.C. 310, he concluded that the peculiar language of section 91 (2) does not go so far in legal effect as to make one sale or even several sales, evidence of keeping for sale. And no liquor having been found on the premises by the police or produced at the trial, the learned judge further concluded that section 95 was inapplicable. In my opinion he erred in law and there ought to be a new trial.

In my judgment, with respect, the decision of this case is not confined by sections 91 (2) and 95. There is ample evidence from frequenters of the respondent's place that he was keeping liquor for sale on his premises, that he sold liquor to them, and that people resorted to his place to buy liquor. That testimony is in addition to the police evidence of observation of his premises, disturbances occurring there, and the condition thereof. This is not a case in which the actual finding of liquor by the police or its production in Court is an essential to proof of guilt. There is abundant evidence without it.

In my opinion, the case presented by the prosecution, in the absence of a satisfactory explanation by the respondent, compels practical certainty that the respondent was keeping liquor for sale as charged (and *vide* also sections 91 (1), 92, 94, 96 and 97 (1). As the defence was not called upon by the learned judge, the respondent as yet has had no opportunity of answering the case for the prosecution. A new trial will permit him to do so.

I may add that the facts of this case do not bring it within the ratio of husband and wife or master and servant cases illustrated by such decisions as *Rex* v. *Cramer, supra, Rex* v. *Anderson* (1942), 58 B.C. 88 and *Rex* v. *Lawson*, [59 B.C. 536] decided on 11th January, 1944.

I would allow the appeal and remit the case to the learned county court judge for rehearing.

Appeal allowed; new trial ordered.

REX v. LAKUSTA.

C. A.
1944
March 10.

Criminal law—Theft—"Taking fraudulently and without colour of right"—Construction—Mens rea—Criminal Code, Secs. 347 and 386.

The accused was landlord of a rooming-house in Vancouver in which the complainant and his wife occupied a suite as tenants. The rooming-house was an old one and the electric wiring was old. The tenants had an electric heater in their suite of 660 watt power. The landlord, being afraid that the wiring would not hold this voltage and would dangerously increase the fire hazard, entered the suite when the wife was present and took the heater away under her protest, and told her he would return the heater when they left the premises. He was convicted on a charge of stealing an electric heater.

Held, on appeal, reversing the decision of deputy police magistrate Matheson, that theft did not take place. The evidence did not disclose the act of taking fraudulently and without colour of right within section 347 of the Criminal Code. The conviction was quashed.

APPEAL by accused from his conviction by Mackenzie Matheson, Esquire, deputy police magistrate, Vancouver, on a charge that on the 14th of January, 1944, he did unlawfully steal one electric heater of the value of under $25.

The appeal was argued at Vancouver on the 10th of March, 1944, before McDONALD, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

D. A. Freeman, for appellant: The accused, landlord of a rooming-house, took an electric heater away from the room of a tenant. It was a 660-watt heater and as it was an old house and old wiring he was afraid its use was a danger to the wiring and might start a fire. He told the tenants he would give it back when they left. He took it away in the presence of the wife. He had a colour of right and there was no *mens rea*. He was sentenced to pay $5. The learned magistrate misdirected himself: see Kenny's Outlines of Criminal Law, 14th Ed., 206-7; *Rex* v. *Nundah* (1916), 16 S.R.N.S.W. 482, at p. 488; Russell on Crimes, 9th Ed., 868; *Reg. v. Wade* (1869), 11 Cox, C.C. 549; *Rex* v. *Curtiss* (1925), 18 Cr. App. R. 174; *Merry* v. *Green* (1841), 7 M. & W. 623. There was a colour of right and no fraud in taking the heater.

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v.
LAKUSTA

Eades, for the Crown: He must have some proprietary interest. He had no right of possession. On colour of right see *Rex* v. *Johnson* (1904), 7 O.L.R. 525; *Rex* v. *Ripplinger* (1908), 14 Can. C.C. 111; *Rex* v. *Comeau* (1914), 25 Can. C.C. 165; *Rex* v. *Clayton* (1920), 15 Cr. App. R. 45; *Tremblay* v. *Regem* (1936), 65 Can. C.C. 387; *Rex* v. *Dymond* (1920), 15 Cr. App. R. 1, at p. 5. There was no colour of right. He took it under the protest of the wife.

MCDONALD, C.J.B.C.: I would allow the appeal, and would quash the conviction.

I see no difference between this case and one where the accused claims some natural priority or possessory right in the goods alleged to have been stolen.

O'HALLORAN, J.A.: I agree in quashing the conviction. In my judgment theft did not take place. The evidence does not disclose the act of taking fraudulently and without colour of right within section 347 of the Code. Compare the reasoning in *Rex* v. *Nundah* (1916), 16 S.R.N.S.W. 482 (C.A.); and also *Rex* v. *Wade* (1869), 11 Cox, C.C. 549 (Blackburn, J.).

ROBERTSON, J.A.: I agree.

Appeal allowed.

C. A.
1944

Mar. 22, 24.

GUENETTE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Practice—Appeal to the Supreme Court of Canada—$500 paid into Court as security—Application to the Court of Appeal to approve the security—Supreme Court Act, R.S.C. 1927, Cap. 35, Secs. 39 and 70.

In an action resulting from a street-car and automobile collision, the plaintiff claimed general damages and $712.82 special damages. The action was dismissed. On appeal by the plaintiff a new trial was ordered. The defendant company then applied to the Court of Appeal for special leave to appeal to the Supreme Court of Canada. The application was dismissed. The defendant then paid $500 into Court as security for the appeal and applied to the Court of Appeal to approve the security under section 70 of the Supreme Court Act.

Held, that in a case wherein special leave has been refused and it is not established to the satisfaction of this Court that the amount in controversy exceeds $2,000, the Court should not go through the motions of approving the form of security for an appeal to a Court which has no jurisdiction to hear it.

APPLICATION to the Court of Appeal under section 70 of the Supreme Court Act to approve the security of $500 paid into Court by the defendant on its appeal from the decision of the Court of Appeal of the 27th of January, 1944. Heard at Vancouver by McDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A. on the 22nd of March, 1944.

Farris, K.C., for the application.
Marsden, contra. *Cur. adv. vult.*

On the 24th of March, 1944, the judgment of the Court was delivered by

SLOAN, J.A.: The plaintiff's action against the defendant company was dismissed by the learned trial judge, and on appeal to us we directed a new trial. The defendant company then applied to this Court for special leave to appeal to the Supreme Court of Canada. Upon that application its counsel conceded that the case was not one which fell within any of the categories enumerated in *Doane* v. *Thomas* (1922), 31 B.C. 457, but submitted that, upon the material filed, the plaintiff, if successful upon the new trial, might recover damages in excess of $2,000, and therefore upon that ground he was entitled to an order granting him special leave to appeal. This Court considered his motion misconceived. Our view was that if the amount in controversy in the appeal was less than $2,000 and the case was, as it was conceded to be, one which did not involve matters of public interest or some important question of law, special leave could not be granted. On the other hand, if the amount involved exceeded $2,000 his appeal was of right and no special leave was required. In the result his motion was dismissed.

The matter now comes before us again upon an application under section 70 of the Supreme Court Act to allow the appeal by approving the security. No additional material as to the amount in controversy has been filed since the application for special leave to appeal.

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v.
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Upon questioning counsel for the defendant company in relation to the amount in controversy he took the position that on this application we are not concerned with that matter. In other words, he contended our function is limited to approval or disapproval of the form of security tendered, leaving to the Supreme Court of Canada the question of determining whether or not the proposed appeal is within the competence of that Court.

Counsel for the plaintiff in answer submitted in effect that, as the material fell far short of establishing with any practical certainty the amount in controversy exceeds $2,000, we should not approve the security, when it is clear under section 39 of the said Act the Supreme Court of Canada has no jurisdiction to entertain the appeal.

In my view the position taken by counsel for the plaintiff is the one which should prevail. I do not think that the jurisdiction conferred on this Court by said section 70 is to be so narrowly confined as counsel for the defendant contends. It seems to me that in a case wherein special leave has been refused and it is not established to the satisfaction of this Court that the amount in controversy exceeds $2,000 we ought not to go through the motions of approving the form of security for an appeal to a Court which has no jurisdiction to hear it.

Such a meaningless and mechanical proceeding does not appear to me to be contemplated by section 70, otherwise the "highest Court of final resort" in the Province is directed to perform a duty which could better be done by its registrar. It is not without significance on this aspect of the matter to note that the jurisdiction to approve the security is by the terms of the same section also vested in the Supreme Court of Canada itself.

Counsel did not refer us to any authorities on this subject and at the short time at my disposal I have not made an exhaustive search. Nevertheless, I believe the position I have taken is supported by two cases which I came upon. The first one is *The Ontario and Quebec Railway Company* v. *Marcheterre* (1890), 17 S.C.R. 141. In that case, on an appeal to the Supreme Court of Canada the appellant applied to a judge of the Court of Queen's Bench for an order to settle the case and approve the security. This application was refused and the appellant there-

upon applied to Strong, J. in Chambers for an order approving the security under the then section 46, now section 70. On that application Strong, J. did not consider his function to be merely that of approving the form of the security tendered but examined the record to determine whether the order appealed from was final or interlocutory, and whether under the then section 29 the amount in controversy amounted to the sum of $2,000. He granted the application but only on the special circumstances of the case which he outlined as follows (pp. 142-4):

Although I have determined to grant the application, I have great doubts as to the competence of the Supreme Court to entertain the appeal, and my object in making the order asked for is to give the parties an opportunity of having the question of jurisdiction decided by the full court. As the delay for appealing prescribed by the statute, and which I have no power to enlarge will elapse before the sitting of the court, this can only be done by allowing the security to be put in now, for otherwise, the appellant will be foreclosed by lapse of time before the court sits. I therefore, make the order asked for allowing the deposit of $500 in court as security pursuant to section 46 of the statute, and I would suggest to the parties that they should bring the case before the court as soon as possible and before incurring any expense in printing the record or factums. I may add that my doubt upon the point of jurisdiction is founded on the 29th section of the statute. It appears to me that at present it cannot be said that the matter in controversy in this action for damages amounts to the sum or value of $2,000 and it is not pretended that a question coming within any of the several categories specified in the sub-sections to section 29 is involved in the appeal. . . .

As both the points taken are worthy of consideration I think it better instead of taking it upon myself sitting alone in chambers to decide such important questions of jurisdiction relating to appeals from the province of Quebec, to give the parties an opportunity of obtaining the opinion of the court, and, therefore, for that reason, and for that reason alone, I allow the proposed security to be given.

The second case to which I wish to make reference is *Toronto Ry. Co.* v. *Milligan* (1908), 42 S.C.R. 238. This was an appeal from the Court of Appeal for Ontario and Maclaren, J. of that Court, before approving the security, considered whether or not the judgment on appeal was for an amount sufficient to establish the jurisdiction of the Supreme Court of Canada.

In this case it has not been shown that the amount in controversy exceeds $2,000, and in consequence I would refuse to allow this appeal to the Supreme Court of Canada by declining to approve the security.

Application refused.

S. C.
1944
March 21;
April 3.

BRUCE *ET AL.* v. BAKER *ET AL.*

Local union—Expulsion of members by parent body—Special meeting of local union called—Resolution passed reinstating members expelled—Further resolution expelling other members—Action attacking validity of meeting—Interim injunction.

The Amalgamated Shipwrights, Joiners, Boatbuilders and Caulkers, Local No. 2, Amalgamated Building Workers of Canada (called Local No. 2) is one of several branches of a national union known as Amalgamated Building Workers of Canada (called National Union) and is governed by the constitution and rules adopted by the National Union and by-laws adopted by Local No. 2. The parties to this action were members of Local No. 2. At the time of the events mentioned, the plaintiff Bruce was president and the plaintiff Bray was secretary-treasurer of Local No. 2 with three others holding minor offices. They were also members of the executive committee (consisting of ten members). On February 11th, 1944, the general executive board of the National Union ordered the expulsion from the union of the defendants Anderson and Smith. Certain members of the executive committee endeavoured to persuade the president Bruce to call a general meeting of Local No. 2 "to deal with the expulsion." Having failed in this, the vice-president (one Woolgar), assuming to act on the authority of the executive committee at an informal meeting attended by four members of the committee, caused a notice to be given to all members of Local No. 2 of a special meeting of the local to be held on Sunday, February 20th, 1944. The meeting was attended by 600 of a total membership of about 1,800. Resolutions were passed unanimously: (1) Reinstating Anderson and Smith as members; (2) expelling from membership and office the plaintiffs Bruce and Bray; (3) expelling certain other members who were active in relation to charges against Anderson and Smith and (4) electing Baker and Brown as president and secretary-treasurer respectively of Local No. 2. The plaintiffs attacked the validity of the notice calling the meeting of February 20th, 1944, and the proceedings thereat as unconstitutional and sought an injunction to restrain the defendants from assuming to act in the several offices to which they were elected. Upon an application for an *interim* injunction:—

Held, that upon the material filed, the plaintiffs had made out a *prima-facie* case in support of their attack upon the validity of the calling of and proceedings taken at the meeting of February 20th, 1944. The plaintiffs had the right to maintain this action. An *interim* injunction was granted in terms of the notice of motion upon the condition that the action be set down for trial for a date after April 15th, but not later than April 30th, 1944.

MOTION for an *interim* injunction to restrain the defendants until the trial of the action from acting and asserting the right

to act as officers or business agents of a labour union known as Amalgamated Shipwrights, Joiners, Boatbuilders and Caulkers, Local No. 2, Amalgamated Building Workers of Canada. The facts are set out in the reasons for judgment. Heard by BIRD, J. at Vancouver on the 21st of March, 1944.

J. A. MacInnes, and *Sedgwick,* for plaintiffs.
Farris, K.C., and *Stanton,* for defendants.

Cur. adv. vult.

3rd April, 1944.

BIRD, J.: This is a motion for an *interim* injunction to restrain the defendants until the trial of this action from acting and from asserting the right to act as officers or business agents of a labour union known as Amalgamated Shipwrights, Joiners, Boatbuilders and Caulkers, Local No. 2, Amalgamated Building Workers of Canada (herein referred to as Local No. 2).

Local No. 2 is one of several units or branches of a national union known as Amalgamated Building Workers of Canada (hereinafter referred to as the National Union) and operates under and is governed by the constitution and rules adopted by the members of the National Union and by-laws adopted by the members of Local No. 2.

At the time of the happening of the events hereafter mentioned, the individual parties to this action were members of Local No. 2, and held office therein as follows: Bruce, President; Bray, Secretary-Treasurer; Brown, Recording Secretary; Anderson, Business Agent; Smith, Business Agent. The same men were also members of the executive committee of Local No. 2, which consisted of ten members.

The action arises out of a controversy which has developed among the membership of Local No. 2 relative to the future policy of the union.

On February 11th, 1944, the general executive board of the National Union, assuming to act under powers conferred by the constitution and rules, ordered the expulsion from the union of the defendants Anderson and Smith. This action of the executive board was followed on February 14th, 1944, by an attempt on

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the part of certain members of the executive committee of Local No. 2 to induce the plaintiff Bruce in his capacity as president to call a general meeting of the local "to deal with the expulsion" of the defendants Anderson and Smith. Having failed in this the vice-president, one Stanley Woolgar, assuming to act by authority of the executive committee given at an informal meeting held February 13th, 1944, and attended by four members of that committee as well as by the defendants Anderson and Smith, caused notice to be given to all members of Local No. 2 of a special summoned meeting of the local to be held on Sunday, February 20th, 1944. A general meeting of members of the local was held on that date, attended by some 600 of a total of approximately 1,800 members which, as appears from the material filed, was the greatest attendance ever present at any unit meeting of the National Union. Resolutions were carried unanimously at this meeting: (1) Reinstating the defendants Anderson and Smith as members of and business agents for Local No. 2; (2) to expel from membership and office in Local No. 2 the plaintiffs Bruce and Bray; (3) to expel from membership and office in Local No. 2 certain other members of the local who had been active in connection with the charges upon which the executive board of the National Union had ordered the expulsion of defendants Anderson and Smith; (4) to elect the defendants Baker and Brown as president and secretary-treasurer respectively of Local No. 2 in the place of the plaintiffs Bruce and Bray.

The plaintiffs attack the validity of the notice convening the meeting of February 20th, 1944, and of all proceedings thereat as unconstitutional, and now seek an injunction to restrain the defendants from assuming to act in the several offices to which they were elected at the impugned meeting.

Upon a motion for an *interim* injunction, since the application is made to the discretion of the Court, the plaintiff is required to prove: (1) A strong *prima-facie* case that the plaintiff will succeed at the hearing. (2) That some wrong has been suffered or threatened not sufficiently or appropriately to be covered by a money payment. (3) That the preponderance of convenience is

in favour of the injunction. (*Jones* v. *Victoria* (1890), 2 B.C. 8).

The constitution and rules of the National Union read with the by-laws of Local No. 2 prescribe procedure to be adopted in the calling of summoned meetings of the local and machinery to be followed in the conduct of business of the nature of that dealt with at the meeting of February 24th, 1944.

Consideration of the material filed satisfies me that the plaintiffs have made out such a *prima-facie* case in support of their attack upon the validity of the calling of and the proceedings taken at the meeting of February 20th, 1944. I expressly refrain from any detail discussion of those matters so as to avoid any suggestion of anticipating the final determination of the rights of the parties.

The members of Local No. 2 elected the plaintiffs to their respective offices at its general meeting held in December, 1943. The validity of that election is not questioned. Until such time as it is shown that those officers have been removed from office and replaced by others in manner prescribed by the constitution and by-laws formally adopted by the union membership, the Court should and will lend its hand to assist those who seek to maintain in office those members who have been duly elected. Irreparable damage might well result to the union if another course were adopted, although the same cannot be said in regard to the individual plaintiffs.

The doctrine as to balance of convenience so strongly urged by counsel for defendants, is one to be invoked in my judgment in doubtful cases where the Court is not prepared to pass an opinion on the question of the legal rights of the parties, and not in a case such as that at Bar, where it appears upon the material filed that there is a strong probability that the plaintiffs will succeed on the trial (Kerr on Injunctions, 6th Ed., p. 24, and cases there cited).

The question raised by counsel for the defendants as to invalidity of the procedure adopted by the executive board in ordering the expulsion from the union of the defendants Anderson and Smith is not in my opinion a matter to be considered here. That proceeding, whether it be constitutional or otherwise, was one

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taken by the executive board of the National Union, and was not taken by the plaintiffs, nor were the plaintiffs members of that board. No doubt the action there taken did not meet with the approval of a very large number—perhaps a substantial majority of the members of Local No. 2. That is a matter which can better be determined upon the trial. Nevertheless, that does not justify or excuse an attempt by a group, however great in numerical strength, to take control of the local union by force of numbers and, as it now appears, in disregard of the provisions of the constitution, rules and by-laws of the local union.

The defendants further contend that the plaintiffs have not the right to bring this action nor to apply for an injunction. In my view the principles discussed in Wegenast on Companies, 326, apply to an organization such as a labour union. I consider that the plaintiffs have the right to maintain this action (*Howarth* v. *Dench*, [1942] 1 W.W.R. 260).

The motion for injunction is granted in terms of the notice of motion, but upon the condition that the action be set down for trial for a date after April 15th but not later than April 30th, 1944.

Costs in the cause.

Motion granted.

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REX v. LYONS.

Criminal law—Indecent assault—Evidence by accused—Previous conviction admitted on examination in chief—Cross-examination as to previous conviction—Admissibility.

The accused was convicted on a charge of indecent assault. His main defence was that of identity. He gave evidence and in his examination in chief admitted he had been previously convicted of indecent exposure. He was then cross-examined by Crown counsel as to the circumstances surrounding his conviction.

Held, on appeal, affirming the conviction by HARPER, Co. J., that where, as here, the defence set up was mistaken identity, evidence was admissible which tended to show the accused was a person with an abnormal criminal propensity of the nature disclosed by the offence with which he was charged.

Thompson v. *Director of Public Prosecutions*, 87 L.J.K.B. 478; [1918] A.C. 221, followed.

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APPEAL by accused from his conviction by HARPER, Co. J. on the 9th of December, 1943, on charges of indecent assault and theft with violence. On the 4th of October, 1943, at about 9.45 p.m. one Rose Young, 24 years old, was walking east from Granville Street on 13th Street to her apartment and when in the middle of the first block she was stopped by accused who asked her where a certain house was. After telling him, she proceeded to walk on when he grabbed the front of her coat and she slapped him. He then jumped behind her, poked something hard in her back and said it was a gun. He made her walk on for three blocks, she turning around on three occasions and looking at his face. He then forced her to go between two houses where it was dark and made her take hold of his privates, when he then masturbated himself and threw the discharge into her face. She then escaped from him and went to her apartment where her sister telephoned for the police. On October 6th Miss Young was taken to the police court where there were 60 or 70 persons and she had no difficulty in identifying Lyons as the man who attacked her. The defence was an *alibi*. Lyons claimed he was at home at the time of the assault. In examination in chief he admitted he had been previously convicted of indecent exposure. In cross-examination he further admitted that when he was picked up by the police on this charge, he was seated in an auto on Pender Street with his trousers undone and whilst he was about to pick up a girl. Lyons was a married man, but lived apart from his wife. His father and mother testified that their son was at home on the evening of the 4th of October, and a girl friend testified that she telephoned him at his home and he answered her at the time the alleged offence was committed.

The appeal was argued at Vancouver on the 20th of March, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Wismer, K.C., for appellant: The charges for theft with violence and indecent assault were tried together. Someone attacked the complainant on 13th Street just east of Granville Street at about 9.45 o'clock on the evening of October 4th, 1943. The sole question is one of identity. There was the evidence of the girl only. As they walked along she saw him three times under the

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street lights. At the time something hard was pushed into her back. The learned judge misdirected himself: see *Rex* v. *Goldhar* (1941), 76 Can. C.C. 270. On the issue of identity see *Thompson* v. *Director of Public Prosecutions,* 87 L.J.K.B. 478; [1918] A.C. 221; *Koufis* v. *Regem* (1941), 76 Can. C.C. 161, at p. 169; *Rex* v. *Green* (1943), 59 B.C. 16, at p. 20; *Maxwell* v. *The Director of Public Prosecutions,* [1935] A.C. 309. The Canada Evidence Act, section 12, gives the right to question the witness as to a previous offence, but does not give the right to cross-examine. The cross-examination here was prejudicial to a fair trial. He cannot be cross-examined to show he has a bad character.

Remnant, for the Crown: As to the evidence and extent of cross-examination of accused when he gives evidence on the trial see *Rex* v. *D'Aoust* (1902), 5 Can. C.C. 407, at p. 410; *Rex* v. *Mulvihill* (1914), 19 B.C. 197; *Rex* v. *Dalton* (1935), 64 Can. C.C. 140. The complainant picked the accused out in Court where there were 60 or 70 persons and did so promptly: see *Thompson* v. *Director of Public Prosecutions,* 87 L.J.K.B. 478, at p. 484; [1918] A.C. 221, at p. 233; *Rex* v. *Wurch* (1932), 58 Can. C.C. 204, at p. 212.

Cur. adv. vult.

11th April, 1944.

SLOAN, J.A.: In my view the evidence to which objection was taken is admissible under *Thompson* v. *Director of Public Prosecutions,* 87 L.J.K.B. 478; [1918] A.C. 221, and I would therefore dismiss the appeal.

I find it unnecessary to reach any conclusion upon the other points argued before us.

O'HALLORAN, J.A.: The appellant was charged with indecently assaulting a girl. The defence set up that he was not the person who committed the crime. He went into the witness box and testified that he was elsewhere on the day and at the time in question. He was convicted by HARPER, Co. J.

Counsel for the appellant objected to the admissibility of evidence elicited by counsel for the prosecution in the course of cross-examining the appellant upon a prior conviction for

indecent exposure. The appellant admitted in chief that he was then serving a three months' sentence for the previous conviction. Counsel for the prosecution cross-examined him upon the nature and circumstances thereof, reading to him questions and answers forming part of his evidence in the previous proceedings. Counsel for the appellant objected then as he did in this Court, that although section 12 of the Canada Evidence Act permits an accused person to be asked if he has been convicted of any offence, nevertheless, it does not permit cross-examination as to the nature and circumstances thereof.

Counsel for the appellant submitted that section 12 of the Canada Evidence Act gives no right of cross-examination whatever. It permits the accused to be "questioned" as to whether he has been previously convicted and prescribes the method of formal proof thereof if he denies the conviction. It was urged that the cross-examination which took place here was prejudicial to a fair trial of the accused, *cf. Makin* v. *Attorney-General of New South Wales* (1893), 63 L.J.P.C. 41, at p. 43; *Rex* v. *Bond* (1906), 75 L.J.K.B. 693 and *Maxwell* v. *Director of Public Prosecutions* (1934), 103 L.J.K.B. 501 (H.L.).

It was further submitted on behalf of the appellant that if observations of Taschereau, J. in *Koufis* v. *Regem,* [1941] S.C.R. 481, at p. 490, could be interpreted to justify the impugned cross-examination, then they were plainly *obiter dicta,* since the point for decision in the *Koufis* case, as Kerwin, J. made clear at p. 487, did not relate to a previous conviction as here, nor for that matter did it relate to other proven criminal acts of the accused for which he had not been convicted, *cf. Rex* v. *Barbour,* [1938] S.C.R. 465.

However, this is not such a case as *Rex* v. *Savory* (1942), 29 Cr. App. R. 1, and whatever force the foregoing submissions may have, they do not meet the main point of counsel for the Crown respondent, upon which I think this appeal must be decided. I have reached the conclusion that the conviction does not need to rest for support upon section 12 of the Canada Evidence Act. In my judgment *Thompson* v. *Director of Public Prosecutions* (1918), 87 L.J.K.B. 478 (H.L.) upon which the Crown relies, furnishes the proper approach to the decision of this case. That

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is to say, where, as here, the defence set up is mistaken identity, evidence is admissible which tends to show the accused is a person with an abnormal criminal propensity of the nature disclosed by the offence with which he is charged.

That in nowise conflicts with the principle of the *Makin* and *Maxwell* decisions which exclude its operation in cases where the previous conviction or criminal act tends to prove identity, intent, or system, or is relevant to any issue before the Court. Evidence of the previous conviction was introduced in the appellant's own evidence in chief. Cross-examination upon the nature and circumstances thereof which tended to show a recognizable abnormal propensity, was one of the *indicia* by which the identity of the accused could be established. The cross-examination in the present case was therefore admissible, quite apart from section 12 of the Canada Evidence Act, which has no statutory counterpart in England.

Lord Sumner remarked in the *Thompson* case, *supra,* at p. 485, that the kind of evidence disclosed in this perverted type of offence tends to attach to the accused an abnormal peculiarity, which, although not purely physical, may yet be recognized as properly bearing that description. This recognizable propensity made the nature and circumstances of the previous conviction relevant, and therefore admissible evidence, as to identification of the criminal in this case with the criminal in the former conviction. It provided a *nexus* in method and circumstance. The weight thereof, of course, was for the fact-finding judge who heard the case. In the case at Bar, it is noted also that the girl quickly picked out the accused and identified him among some 70 persons in a court room.

I would dismiss the appeal.

ROBERTSON, J.A.: I agree that the appeal should be dismissed. I am of the opinion the evidence objected to was admissible. See *Thompson* v. *Director of Public Prosecutions,* 87 L.J.K.B. 478; [1918] A.C. 221.

Appeal dismissed.

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March 29; *April* 11.

Criminal law—Incest—Plea of guilty—Sentenced to two years—Waiver of appeal—Appeal by Crown from sentence—On hearing counsel for accused asks leave to appeal from conviction—Ground that indictment "bad" in law.

On the 5th of February, 1944, the accused pleaded guilty to a charge "That he the said Herbert Wyatt between Friday, January 21st, 1944, and Monday, January 24th, 1944, A.D., at or near Alberni, county of Nanaimo, and at divers other times during the years 1944 and 1943 did unlawfully cohabit with and have sexual intercourse with one Doreen Wyatt knowing her to be the daughter of him the said Herbert Wyatt, and did thereby commit incest contrary to the form and statute in such case made and provided." He was convicted and sentenced to two years' imprisonment. On the 8th of February, 1944, he signed a waiver of appeal under section 44 of the Penitentiary Act, Cap. 154, R.S.C. 1927, and amending Acts, and was imprisoned. The Crown appealed on the ground that the sentence was inadequate. On the hearing of the appeal on the 29th of March, 1944, counsel for accused sought leave to appeal from his conviction on the ground that the indictment was "bad" in law and the conviction should be quashed.

Held, that the indictment, although inaptly drawn, if regarded in a purely verbal aspect, is not a nullity because it is couched in popular language. The severest criticism to which the indictment may be properly subjected is that it is defective because it lacks precise particularity in one circumstance, but that does not vitiate it. Since the present objection was not taken before plea when the defect could have been cured, section 898 of the Code does not permit it to be taken now. Moreover, a defect of this nature is cured by the verdict. Even if it could be held Wyatt was not properly convicted on the part of the indictment his counsel attacked, it is not in doubt he was properly convicted on the part not attacked. It has not appeared that the defect caused Wyatt to be misled or prejudiced. Nor does it appear that any miscarriage of justice has actually occurred. The conclusion is convincing that no exceptional circumstances have been disclosed such as would properly warrant granting leave to appeal from conviction.

Held, further, that imprisonment for a term of five years more adequately fits the crime.

APPEAL by the Crown from the sentence of two years imposed upon the accused who pleaded guilty to a charge That he the said Herbert Wyatt between Friday, January 21st, 1944, and Monday, January 24th, 1944, A.D., at or near Alberni, county of Nanaimo, and at divers other times during the years 1944 and 1943, did unlawfully cohabit with and have sexual intercourse with one Doreen Wyatt knowing

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her to be the daughter of him the said Herbert Wyatt, and did thereby commit incest contrary to the form and statute in such case made and provided.

The appeal was argued at Vancouver on the 29th of March, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

H. Alan Maclean, for the Crown.

Castillou, K.C., for accused, asked leave to appeal from the conviction on the ground that the indictment was "bad" in law and the conviction should be quashed.

Maclean: This is an appeal from sentence. Accused was convicted of incest and sentenced to two years' imprisonment. Accused had been a widower for eight and one-half years. There were two daughters, Elizabeth 17 years old and Doreen 13 years old. He had sexual intercourse with both of them. The learned trial judge failed to consider the circumstances. The sentence, considering the offence, is inadequate and not in line with the decisions: see *Rex* v. *Lee Kim et al.* (1930), 42 B.C. 360.

Castillou: On the question of jurisdiction see *Rex* v. *McDonald,* [1928] 2 D.L.R. 787, at p. 790; *Rex* v. *Dennis. Rex* v. *Parker,* [1924] 1 K.B. 867, at p. 868; *Rex* v. *Cassidy,* [1927] 4 D.L.R. 1106; Crankshaw's Criminal Code, 6th Ed., 1155 and 1157. In the indictment, time, place and substance are essential: see *Brodie* v. *Regem,* [1936] S.C.R. 188, at pp. 191 and 199. If essential averment is absent, then the conviction must be quashed: see *Rex* v. *Buck et al.* (1932), 57 Can. C.C. 290; *Rex* v. *Stone* (1910), 6 Cr. App. R. 89.

Maclean: He pleaded guilty and after conviction signed a waiver of appeal and was taken to prison: see *Rex* v. *Henneberry* (1926), 45 Can. C.C. 156; *Rex* v. *Scott* (1929), 51 Can. C.C. 104; *Rex* v. *Rigby* (1923), 17 Cr. App. R. 111; *Langlais* v. *Regem* (1934), 56 Que. K.B. 384; 13 Can. Abr. 1580.

Castillou, in reply: The *Brodie* case [*supra*] makes it imperative in the absence of an essential averment: see *Smith* v. *Moody,* [1903] 1 K.B. 56; *Rex* v. *McLeod* (1940), 55 B.C. 439, at pp. 440-1; *Rex* v. *Langs, Perman, McKinnon and Pulice* (1943), 59 B.C. 112. The place where the alleged crime was committed is essential: see *Rex* v. *Desjardins* (1919), 45 Can. C.C. 100; *Regina* v. *Clennan* (1880), 8 Pr. 418; *Rex* v. *Quinn* (1918),

44 D.L.R. 707, at p. 710; *Rex* v. *Peart* (1914), 23 Can. C.C. 259; *Rex* v. *Theirlyock,* [1928] 4 D.L.R. 431.

Maclean, in reply: There is no ground for holding that the indictment is "bad": see *Rex* v. *Smith* (1931), 44 B.C. 422; *Rex* v. *Thompson,* [1914] 2 K.B. 99; *Rex* v. *Harris* (1910), 5 Cr. App. R. 285.

Cur. adv. vult.

11th April, 1944.

O'HALLORAN, J.A.: Wyatt pleaded guilty to incest with his 13-year-old daughter. He was sentenced to two years' imprisonment by HANNA, Co. J. at Port Alberni on 5th February, 1944. The Attorney-General applied under section 1013, subsection 2 of the Code for leave to appeal against the sentence as inadequate in the circumstances.

At the opening of the Crown appeal against sentence, counsel for Wyatt appeared and sought leave to appeal from his conviction on the ground the indictment was "bad" in law and ought to be quashed. The appellant had not moved under section 1007, but the Court heard argument upon the validity of the indictment, in order to determine if exceptional circumstances existed to justify granting him leave as asked. His time for appeal had expired, and moreover, on or about 8th February, 1944, he had signed a waiver of appeal under section 44 of the Penitentiary Act, Cap. 154, R.S.C. 1927, and amending Acts, and was then taken to the penitentiary to serve his sentence, and *vide Rex* v. *Henneberry* (1926), 45 Can. C.C. 156, *Rex* v. *Scott* (1929), 51 Can. C.C. 104, and *Rex* v. *Colangelo* (1941), 76 Can. C.C. 334.

The conviction reads [already set out in the head-note and statement].

It is to be observed the first reference to time expressly includes the locality, but the second reference immediately following does not.

It was objected that the failure to repeat the circumstance of locality in the part of the conviction reading "and at divers other times during the years 1944 and 1943," was an omission of an essential averment, and hence section 898 could not apply. The objection is grounded upon nullity and not simply upon lack of particularity. The decision lies in their true distinction. In my

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judgment, the conviction is founded on a valid indictment. I am of opinion the complained-of omission is a defect in form apparent on the face of the indictment within the meaning of section 898, and that the present objection cannot now be entertained, since it was not advanced before plea as required by that section.

The indictment contains a double or multifarious count, but it is not invalid on that score, *cf.* section 854 and *Rex* v. *Smith* (1931), 44 B.C. 422, and *cf.* also section 891 and *Rex* v. *Bruck* (1942), 78 Can. C.C. 118, affirmed 80 Can. C.C. 52. Reading the indictment as a whole, I am of opinion it charged the accused with incest in a manner sufficiently explicit to enable him to understand what he was charged with. And that is the basic test imposed by sections 852, subsection 3 and 853, *cf. Rex* v. *Adduono* (1940), 73 Can. C.C. 152. It may be that some of the wording lacks precise particularity, but as later shown, that does not nullify the indictment.

It places no strain upon the language of the indictment when read as a whole, to connect the stated locality of the offence with the reference to time which immediately follows it in the same sentence. The word "and" in the connecting sentence supplies the *nexus* of locality between the several occasions, *viz.*, "Monday, January 24th, 1944, A.D., at or near Alberni, county of Nanaimo, and at divers other times during." . . . It is a matter for emphasis that this is not a case of an entire omission of the circumstance of locality.

Brodie v. *Regem,* [1936] S.C.R. 188 recognizes a rational distinction between an indictment which is "bad" in law (*e.g.,* because it omits an averment of essential circumstance, or charges no crime at all by omitting an essential ingredient), and an indictment which is "defective" (*e.g.,* which does charge a crime but without sufficient particularity of an essential circumstance). Chief Justice Rinfret (then Rinfret, J.) emphasized at p. 198, the difference between a case where an offence is "imperfectly stated," and one where "essential averments are wholly omitted." The word "wholly" there used has special significance to this case, where it cannot be said that an averment of the circumstance of place was "wholly" omitted.

Perusal of the indictment makes it plain that there is no omission of an essential ingredient of the offence charged. The most that can be argued against it, is that the description of the crime "at divers other times" may not be sufficient in form to enable the accused to identify, not the offence with which he was charged, but the locality where he committed it. But reading the indictment as a whole, it is found the averments of ingredients and circumstances are so interrelated, that objectively viewed, repetition of the circumstance of locality, would add more to emphasis than to the appellant's information. That is the realistic conclusion from the appellant's plea of guilty.

Nor in my view, can it reasonably be said to be an essential averment to repeat a circumstance which the accused must plainly expect to form part of the proof of other facts averred in the indictment. The purpose of sections 852 and 853 is to give the accused reasonable information of the offence with which he is charged. What constitutes reasonable information in a given case must depend upon its own circumstances. All essential ingredients of the crime must of course be included. If supporting facts do not furnish enough information to enable the accused to answer the charge, he is entitled to further particulars. One of the purposes of section 852 *et seq.* was to modify the rigid technicality of the old procedure, *cf. Rex* v. *Adduono, supra,* at p. 155.

The indictment, although inaptly drawn if regarded in a purely verbal aspect, is not a nullity because it is couched in "popular language," *cf.* section 852, subsection 2. Popular language is very apt to employ phraseology of loose and inexact meaning. In my view the severest criticism to which the indictment may be properly subjected, is that it is defective because it lacks precise particularity in one circumstance. But that does not vitiate it, *cf.* sections 852, subsection 3, 853, subsection 1, 855 (*g*), 859 (*g*), 889 and 893. Since the present objection was not taken before plea when the defect could have been cured, section 898 does not permit it to be taken now, *cf. Hatem* v. *Regem* (1927), 49 Can. C.C. 164.

Moreover, a defect of this nature is cured by the verdict, *cf.* section 1010, subsection 2. But even if it could be held Wyatt

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was not properly convicted on the part of the indictment his counsel attacked, it is not in doubt he was properly convicted on the part not attacked, *cf.* section 1016, subsection 1, of the Code. It has not appeared that the defect caused Wyatt to be misled or prejudiced. Nor does it appear that any miscarriage of justice has actually occurred. The conclusion is convincing that no exceptional circumstances have been disclosed such as would properly warrant granting leave to appeal from conviction. Leave is refused accordingly.

I would grant the Attorney-General leave to appeal against sentence. The application is supported by adequate reasons, *cf. Rex* v. *Molland* (1937), 52 B.C. 240. The sentence runs concurrently with another sentence for a similar conviction for violating his other daughter. The daughter involved in the present case is 13 years of age. Counsel for the Attorney-General drew to our attention that the father often violated this girl in the presence of the other. It is plain that the sentence is inadequate, and ought to be increased.

In his report under section 1020 of the Code the learned county judge said,

> after hearing counsel for the Crown as to the offence committed and the mentality of the accused,

he was of opinion two years would have a more desirable effect than a heavier sentence. He did not say why. In answer to the above reference to the mentality of the accused, counsel for the Attorney-General submitted an affidavit from the Crown counsel referred to, Mr. *Gordon M. Campbell,* of Port Alberni.

Mr. *Campbell* deposed in paragraph 6, thereof:

> After the accused had entered a plea of guilty the judge asked me if I had anything to say regarding the sentence to which I replied that any person who would commit such a degrading deed must have something wrong with him mentally. This remark was made more in disgust of the offence than of any proof that the accused was mental.

Counsel for Wyatt did not attempt to argue that he was really mentally defective.

The recited circumstances disclose this unnatural offence has been committed under conditions which added to its flagrancy. In my judgment the interests of justice require that the sentence

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be increased. Imprisonment for a term of five years more adequately fits the crime.

I would so order and allow the appeal accordingly.

ROBERTSON, J.A.: I agree with my brother O'HALLORAN that leave to the accused to appeal should be refused, and that the sentence should be increased to five years.

SIDNEY SMITH, J.A.: I agree in the result with my brother O'HALLORAN.

Appeal allowed.

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In Chambers
1944
March 29;
April 17.

GUENETTE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. (No. 2).

Practice—Trial without jury—New trial ordered on appeal—No direction as to form of new trial—Application for trial by jury—Presumption—Discretion—Application refused.

An action for damages, resulting from an automobile collision, was tried by a judge alone, the plaintiff not having then applied for trial by jury. The action was dismissed. The plaintiff appealed and the Court of Appeal ordered that there be a new trial. There was no direction in the judgment as to the form of the new trial. The plaintiff applied for an order for trial of the action by jury.

Held, that in an order of the Court of Appeal directing a new trial simply, there was an implied direction that the new trial be had by the same method of trial as the first. Since there has been no change in the circumstances existing at the time the action was first set down for trial, the Court is not disposed to exercise the discretion given—to permit the plaintiff now to change the method of trial chosen by him.

APPLICATION by plaintiff for an order for trial of the action by jury. The facts are set out in the reasons for judgment. Heard by BIRD, J. in Chambers at Vancouver on the 29th of March, 1944.

Marsden, for plaintiff.
Farris, K.C., for defendant.

Cur. adv. vult.

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17th April, 1944.

BIRD, J.: This is an application by the plaintiff for an order for trial of this action by jury. The plaintiff's claim is for damages for personal injuries and for repairs to the plaintiff's motor-truck, arising out of a collision between the plaintiff's truck and a tramcar operated by the defendant.

The action was tried in November, 1943, by a judge alone, SIDNEY SMITH, J. (now J.A.), the plaintiff not having then applied for trial by jury. The action was dismissed. On appeal to the Court of Appeal a new trial was ordered. No direction was made in the judgment as to the form of the new trial.

I am satisfied that the action is one in which the plaintiff has a right to trial by jury under rule 430 if application is made within the time prescribed thereby, *i.e.*, within four days after notice of trial has been given. The following questions then arise upon this application: First, whether the absolute right to trial by jury given by rule 430 (*per* MACDONALD, C.J.A. in *Nantel* v. *Hemphill's Trade Schools* (1920), 28 B.C. 422) exists upon the giving of a second notice of trial, consequent upon an order directing a new trial; secondly, if not, then in the circumstances arising here, should discretion be exercised to grant the plaintiff's application? Counsel have not been able to refer me to any direct authority upon the point, nor have I been able to find any. Order XXXVI., rr. 2-7 (rr. 426-431) constitute a code of regulations as to trial by jury, and require to be read together. Under those rules there is not a general right to demand a trial by jury. Parties have a right to demand it in certain actions upon compliance with the rule as rule 430, and under rules 426 and 431 the Court or a judge has discretion "at any time" to direct trial by jury (*Timson* v. *Wilson*. *Fanshawe* v. *London and Provincial Dairy Company* (1888), 38 Ch. D. 72; *Nantel* v. *Hemphill's Trade Schools* cited above).

Rule 430 reads in part:

> . . . , upon the application within four days after notice of trial has been given of any party thereto for a trial with a jury . . . , an order shall be made for a trial with a jury.

I am of opinion that the rule contemplates only one notice of trial, and that the notice given when the action is first set down for trial. If it had been intended to give that absolute right at

any other time, one would expect different language to be used, more particularly since the discretion given under rules 426 and 431 may under the provisions of these rules be exercised "at any time." Consequently, I have reached the conclusion that the plaintiff, by his failure to apply upon first setting down the action for trial, has lost the absolute right to an order for trial by jury.

Then are the circumstances here such as to require that discretion be exercised in favour of the plaintiff's application? There is nothing in the material before me to suggest that there has been any change in the situation between the present and the time when the action was first set down for trial, and counsel for plaintiff concedes that there has not been any. He does not advance any reason for a change in the method of trial other than that this is an action which falls within rule 430, and that plaintiff now desires a trial by jury.

It was held in the *Nantel* case, although the first trial was held by consent before a judge alone, notwithstanding the existence of an order for trial by jury, that upon the entry of the action for retrial pursuant to the judgment of the Court of Appeal, the order for trial by jury remained effective. I consider that the *Nantel* case lends some support to the submission of counsel for defendant, that plaintiff having chosen his forum, and having failed there, should not now be permitted to change the forum.

No direction is given by the judgment of the Court of Appeal as to the form of the new trial, nor was any such direction asked by the notice of appeal.

I am impressed by the reasoning of Dysart, J. in *Haackie* v. *Tomlinson Construction Co. Ltd.*, [1939] 2 W.W.R. 309, at p. 313, who held that in an order of the Court of Appeal directing a new trial, simply there was an implied direction that the new trial be had by the same method of trial as the first. True, his reasons are founded largely upon the powers of the Court of Appeal of Manitoba, but I find little material difference between the provisions of the British Columbia and Manitoba Acts as to the jurisdiction of the respective Courts to direct a new trial.

Since there has been no change in the circumstances existing at the time the action was first set down for trial, I am not dis-

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posed to exercise the discretion given—to permit the plaintiff now to change the method of trial chosen by him.

The application, therefore, is dismissed. Costs to the defendant in any event.

Application dismissed.

S. C.
1944
April 18, 22.

ELIZABETH RONAN v. FLORENCE HORTIN.

Husband and wife — Insurance — Fraternal society — Benefit certificate— Issued at instance of husband—Plaintiff named as beneficiary—Beneficiary in fact his concubine and housekeeper—Claim made by legal widow—Concubine seven years dependent on insured.

One William Hortin and his wife entered into a written separation agreement in September, 1935, whereby he agreed to pay her $40 a month for her maintenance. The plaintiff, a married woman who had been separated from her husband for 15 years, lived with Hortin as his concubine for seven years prior to his death. She kept house for him, representing herself as his wife. In December, 1937, the Canadian Mutual Benefit Association issued membership certificate No. A 9815 to Hortin agreeing to pay the plaintiff, the beneficiary named in the certificate, the sum of $2,500 upon Hortin's death. Hortin died intestate on August 6th, 1943, and said association, having had adverse claims made, paid the insurance moneys into Court. In an action by the beneficiary named in the membership certificate against the widow as administratrix of the estate of William Hortin, deceased, for a declaration that she is the owner of and entitled to the moneys paid into Court, the defendant claimed that the said certificate could under section 2 (3) of the Societies Act only be issued to a dependant of the deceased and that the plaintiff was not such a dependant.

Held, that the main consideration of the relationship between the plaintiff and deceased was the service she rendered to him as his housekeeper. He caused her to be named as beneficiary out of gratitude for the service rendered him as the keeper of his home and out of a recognition that she had, to perform this work, abandoned other means of earning a livelihood and became his dependant. On the law, the defendant had no right to the moneys in Court which were the property of the plaintiff.

ACTION by the beneficiary named in the membership certificate No. A 9815 issued by Canadian Mutual Benefit Association to William Hortin, agreeing to pay the plaintiff the sum of $2,500 on the death of William Hortin, for a declaration that she is the

owner of and entitled to be paid said sum. The Canadian Mutual Benefit Association, having had adverse claims made to the insurance moneys by the plaintiff and defendant, paid into Court the sum of $2,485, being the amount of the policy less $15 costs deductible by statute. The facts are set out in the reasons for judgment. Tried by WILSON, J. at Vancouver on the 18th of April, 1944.

Marsden, for plaintiff.
Hamilton Read, for defendant.

Cur. adv. vult.

22nd April, 1944.

WILSON, J.: On December 20th, 1937, Canadian Mutual Benefit Association issued membership certificate No. A 9815 to William Hortin, agreeing to pay the plaintiff, the beneficiary named in the said certificate, the sum of $2,500 on the death of the said William Hortin. William Hortin died on August 6th, 1943. The defendant is his widow and his administratrix, he having died intestate.

On the 29th of December, 1943, by order of this Court made pursuant to section 127 of the Insurance Act, R.S.B.C. 1936, Cap. 133, the Canadian Mutual Benefit Association, having had adverse claims made to the insurance moneys by the plaintiff and defendant, paid into Court the sum of $2,485, being the amount of the policy less $15 costs deductible by statute. The plaintiff, the beneficiary named in the membership certificate, brings this action for a declaration that she is the owner of and entitled to be paid the said $2,485, plus the costs of payment into Court. The defendant says that the plaintiff was named as beneficiary in the said membership certificate on the representation made by William Hortin, that she was dependent on the deceased William Hortin, and says this was untrue. The defendant further says that the said certificate could, under subsection (2) of section 3 of the Societies Act, R.S.B.C. 1936, Cap. 265, only be issued to a dependant of the deceased, and that the plaintiff was not such a dependant. The defendant further says that William Hortin obtained the said certificate and named the plaintiff as beneficiary in consideration of an agreement by her to fornicate with him,

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Wilson, J.

and that the plaintiff induced him so to do, and that the certificate was consideration for continuation of the fornication. Finally the defendant says that William Hortin did not make an appointment of a proper beneficiary of the proceeds payable under the said certificate in accordance with the Societies Act, and asks a declaration that the moneys payable under the said certificate are payable to the defendant as administratrix of the estate of William Hortin.

The facts show that William Hortin and his wife, the defendant herein, entered on September 30th, 1935, into a written separation agreement whereby he agreed to pay $40 per month for her maintenance and that of the children of the marriage and that they thereafter lived apart.

The plaintiff is a married woman who has been separated from her husband for 15 years. She had undoubtedly been living with William Hortin for seven years prior to his death, as his concubine, keeping house for him, sleeping with him and, as alleged by the defendant, representing herself as his wife. This state of affairs I find was well known to the defendant, who was a frequent visitor at her husband's house and well knew the conditions under which Hortin and the plaintiff were living together and, despite such knowledge, continued to visit their house and to allow the children of her marriage to Hortin to do so. The union, if unhallowed, was not objected to by the wife. The plaintiff had been separated from her husband for 15 years and received no support from him. She is a middle-aged woman. She has devoted the past seven years of her life to looking after Hortin as a wife would do, having no other employment or means of support. Despite the immoral relations between her and Hortin, I can find no objection under these circumstances to his describing her as a dependant. I think the main consideration of their relationship was not fornication but the service she rendered to him as his housekeeper. I do not think he caused her to be named as beneficiary in the membership certificate in consideration of the inception or continuance of their admittedly adulterous relations, but out of gratitude for the service she had rendered him as the keeper of his home, and out of a recognition that she had, to perform this work, abandoned other means of earning a liveli-

hood and become his dependant. The membership certificate has at all times been in the possession of the plaintiff.

As a matter of law, it is difficult for me to see how the defendant can lay any claim to the proceeds of the membership certificate. These moneys are the subject of a contract made between the deceased William Hortin and the Canadian Mutual Benefit Association for the benefit of the plaintiff. There is nothing in the contract or in the statutes applicable to indicate to me that the estate of William Hortin, or the widow in her personal capacity, has any *status* to lay claim to these moneys. By the terms of the membership certificate, the only way in which she could have acquired an interest would be by the plaintiff predeceasing William Hortin. This did not happen. The defences raised by her, and particularly the defence that the plaintiff is not a dependant within the meaning of the Societies Act, would seem to me to be defences available only to the Canadian Mutual Benefit Association, and which it has waived by payment into Court coupled with an admission of liability. If the Canadian Mutual Benefit Association had raised and succeeded on these defences as against the plaintiff, I think the result would have been to void the policy, in which case neither the widow nor the estate could have recovered. I am strengthened in this view by the judgment of Dysart, J. in *Blanchett* v. *Hansell,* [1943] 3 W.W.R. 275, and particularly at p. 282, where he says:

> Notwithstanding this defence, of which it had full notice, the society paid the money into Court, thereby waiving any objections it might have had against the claim of Nellie Blanchett. The society was the only party entitled to object. Catherine Hansell was not a party to the contract, was not mentioned in it except as she is remotely and conditionally included under the bylaw.

The case before the learned judge was very similar to the case here, and the objections raised, that Nellie Blanchett was a concubine and that she was not a dependant were the same as raised here.

Counsel for the defendant in a very able argument referred me to *Crosby* v. *Ball* (1902), 4 O.L.R. 496. In that case the Divisional Court, in a very similar case to the one before me used (Falconbridge, C.J. at p. 498) the following words:

> The fact that the Knights of the Maccabees have paid the money into Court can make no difference as to the rights of the parties claiming the same. The

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Wilson, J.

Knights of the Maccabees having, for prudential reasons, not paid any claimant, but paid the money into Court, the Court must now determine who is the proper person to receive it.

Street, J. says at p. 499:

In my opinion we are not absolved by the payment of this insurance money into Court from determining according to law which of these claimants is legally entitled to it. The payment into Court has not changed their rights, but has only freed the assurers from further responsibility as to its application.

I refuse to believe that these judgments mean anything more than they say, that the payment into Court makes no difference as to the rights of the parties. This, however, does not operate to establish in the parties any rights which they did not previously have. I cannot see how the widow, in her personal capacity or as administratrix, had at any time any right to these moneys, or was entitled to establish rights under defences only open to the Canadian Mutual Benefit Association. It may be that the law of Ontario, with which I am not familiar, provided in the *Crosby* v. *Ball* case some rights to the widow in case no proper appointment of the insurance moneys was made by the deceased. I am not aware of, nor have I been referred to, any such law in force in this Province.

On the law I find that the defendant has no right to the moneys in Court, which are the property of the plaintiff. If my view of the law is wrong I would still, as I have already indicated, find for the plaintiff on the facts. The plaintiff will have judgment in the terms claimed in the statement of claim, including costs against the defendant.

Judgment for plaintiff.

IN RE ESTATE OF WILLIAM HENRY GALLAGHER, DECEASED.

S. C.
In Chambers
1944
Feb. 25;
April 3.

Executors and trustees — Remuneration — Commission paid to real-estate agents—Whether allowed as a disbursement—Not a disbursement where executor is partner in agent firm.

The deceased's estate, valued at about $152,000, consisted largely of land holdings, mortgage investments and other interests in real property. He had carried on a real-estate business in Vancouver for some years under the name of W. H. Gallagher & Company. Since his death, the business was carried on by Fred Gallagher, one of the executors who was the sole owner thereof. Sales of lands of the estate were made from time to time by the executors, chiefly through the agency of the firm owned and operated by the executor Gallagher and to a lesser extent by other real-estate agents. These agents were paid the usual commission of five per cent. In addition, the Gallagher firm was paid a commission on collections of principal and interest on deferred payments under the sales contracts and on collection of rents and mortgage interest. On an application by the executors to confirm the report of the district registrar on the passing of accounts and to fix the remuneration to be allowed the executors, two questions arose: First, should the payment of commission made to the real-estate agents other than Gallagher & Company be allowed as a disbursement and if allowed, what remuneration, if any, should be allowed the executors? Secondly, should the commissions paid Gallagher & Company on sales and collections be allowed as disbursements?

Held, as to the first, that the commission should be allowed as a disbursement and as certain additional services are rendered by the executors, some remuneration should be allowed them, depending on the particular circumstances in each case. In the present case two and one-half per cent. of the amount received for such sales is allowed. As to the second, no commission can be allowed as a disbursement where the sales are made through the agency of one of the executors or through a firm in which one of the executors is a partner.

APPLICATION by the executors of the estate of William Henry Gallagher to confirm the report of the district registrar on the passing of the executors' accounts and to fix the remuneration to be allowed the executors. The facts are set out in the reasons for judgment. Heard by COADY, J. in Chambers at Vancouver on the 25th of February, 1944.

C. F. Campbell, for executors.

Cassady, for beneficiaries.

Cur. adv. vult.

S. C.
In Chambers
1944

IN RE ESTATE OF WILLIAM HENRY GALLAGHER, DECEASED

3rd April, 1944.

COADY, J.: This is an application by the executors of the above-named estate to confirm the report of the district registrar on the passing of the executors' accounts and to fix the remuneration to be allowed the executors which, by request of counsel was referred by the district registrar without any recommendation with regard thereto. The deceased died on or about the 11th of July, 1942, and this is the first passing of accounts by the executors. The estate, as appears by Inventory X, was valued at approximately $152,000 and consisted largely of land holdings, mortgage investments or other interests in real property. The deceased had carried on a real-estate business in Vancouver for many years under the name of W. H. Gallagher & Company. Since the death of the deceased this real-estate business has been carried on by the executor Fred Gallagher who is and has been at all material times the sole owner of that business.

Sales of lands belonging to the estate have been made from time to time by the executors, chiefly through the agency of the real-estate firm owned and operated by the executor Gallagher, and to a lesser extent by other real-estate agents. To these agents, as appears by the accounts filed, the usual commission of five per cent. has been paid by the executors, and in addition the executors have paid W. H. Gallagher & Company commission on collections of principal and interest on deferred payments under the sales contracts and on collection of rents and mortgage interest.

The executors now claim as disbursements in their accounts the commissions paid on these sales and collections. In addition the executors are asking for remuneration on the basis of five per cent. of the moneys received on these sales made, and collections.

Two questions arise for consideration: First, should the payment of commission made to the real-estate agents other than Gallagher & Company be allowed as a disbursement, and if allowed, what remuneration, if any, should be allowed to the executors on the moneys received from these sales? Secondly, should the commissions paid to W. H. Gallagher & Company on the sales, and collections made by that agent, be allowed as a disbursement, and if allowed, what remuneration, if any, should be allowed the executors on the moneys received?

With regard to the first point, this has recently been dealt with by my brother MACFARLANE in *In re Trustee Act and In re William Peter Sinclair, Deceased* [(1943), 59 B.C. 559]; [1944] 1 W.W.R. 509, wherein he held that where the executor himself is not a real-estate agent commissions paid by the executor to a real-estate agent on the sale of real property belonging to the estate is a proper disbursement. He further points out that the sale of the real property is a specialized business, and certain persons only are licensed to carry on such business. In that case, while allowing as a disbursement the commission paid to the real-estate agents, a remuneration of two per cent. in addition was allowed the executors on the moneys received on these sales. This would appear reasonable, for, while the sale has been made by the agent certain additional services are rendered by the executors and trustees in the selection of an agent, in the listing of the property for sale, in the completion of the sale, in the receipt, handling and distribution of the moneys arising from such sale. For these services it appears to me some remuneration should be allowed the executors. I do not think the amount should be five per cent., but must depend on the particular circumstances of each case. In the present case I would fix the remuneration at two and one-half per cent. on the amount received from such sales, as all parties agree that the executors have performed their duties exceptionally well and the registrar has so stated in his report. In this connection my attention has been directed to *Taylor* v. *Magrath* (1885), 10 Ont. 669, where it was held that while the executors were entitled to credit for a sum paid to a land agent as commission for making a sale of real estate, yet the amount so paid must be deducted from the five per cent. commission paid to executors for compensation since double commissions cannot be allowed. This, it seems to me, was not intended as a rule of universal application, but must be held as applicable only to the particular facts of that case.

As to the second point, clearly no commission can be allowed as a disbursement where the sales are made through the agency of one of the executors or through a firm in which one of the executors is a partner. In the present case the real-estate firm is in effect the executor (see *Canadian Financiers Trust Co.* v.

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1944

IN RE ESTATE OF WILLIAM HENRY GALLAGHER, DECEASED

Coady, J.

Chan Shun Chong (1921), 29 B.C. 543; *Stephen* v. *Miller,* 25 B.C. 388; [1918] 2 W.W.R. 1042; *Re Sanford Estate* (1909), 18 Man. L.R. 413; *Cox* v. *Bennett (No. 1)* (1891), 39 W.R. 308.

On the same authorities no commission would appear to be allowable on collections made by any agent, whether independent or otherwise. This is a duty which the executors are called upon to perform, and they cannot by delegating that duty to another be allowed two commissions. This, however, does not apply where a solicitor is engaged to make a collection (*In re Estate of Louis Level, Deceased* (1926), 38 B.C. 211), although it does not appear from that report what remuneration was allowed the executors.

The result is therefore that the commission paid by the executors herein to the independent agents on sales of real property is allowed, and the remuneration of the executors on the moneys received from those sales is fixed at two and one-half per cent. All commissions paid by the executors to Gallagher & Company on sales and collections are disallowed as a disbursement. The registrar's report states that the receipts upon which interim remuneration is allowable amount to $51,079.97, and on this the executors, subject as aforesaid, are entitled to remuneration on the basis of five per cent. If any difficulty arises with respect to the calculations of the definite amount the matter may be spoken to. Subject to the foregoing the report of the district registrar is hereby confirmed.

Application granted.

LEVI AND LEVI v. MACDOUGALL *ET AL.*

S. C.
1942
Dec. 16, 17, 18.
1943
Jan. 4.
C. A.
1944
March 21, 22, 23; *April* 26.

Company law—Action by shareholders—Request for company to bring action—Refused—Mortgage given as security—Whether right of foreclosure—Conspiracy to defraud company—Negligence by solicitor for company.

The plaintiffs Sam and Dora Levi sued on behalf of themselves and all other shareholders of Pacific Coast Distillers Limited, save the defendants *MacDougall* and Trites, alleging that the defendant *MacDougall*, acting in his capacities as president, director and solicitor of the company in breach of his fiduciary duty, connived with defendant Trites with the result that Trites, through the failure of the company to defend an action brought by Trites to foreclose a mortgage held by him upon the assets of the company, obtained a final order for foreclosure and having obtained title to such assets, sold them at a large personal profit. In 1936 the defendant company had an offer to purchase the assets of Scottish Distillers Limited. The company did not have a distiller's licence and to get a licence it was necessary that a bond of a guarantee company for $50,000 be deposited with the Minister. Levi, who was a large shareholder in the company, told Trites that if he could arrange with the guarantee company to give the guarantee, he would give him 40,000 shares in the company. Trites arranged the guarantee, received the 40,000 shares and put them in the name of *MacDougall* (his nephew and general solicitor). At the request of Levi, *MacDougall* was made a director and later president of the company. Shortly after $3,000 was required to release the liquor in bond and Trites paid $3,000 for 3,000 shares in the company and received 3,000 more shares for so doing. In August, 1936, the company was again in financial difficulties and Trites paid $15,000 for 15,000 shares, receiving a bonus of 10,000 shares. In November, 1936, the company was again in difficulties and Levi asked Trites to guarantee a loan from the Bank of Nova Scotia for $20,000. Trites did so upon receiving from the company as security a mortgage over all the assets of the company, the company to pay in addition to the bank charges 5 per cent. on the $20,000 as a bonus. In 1937 Trites guaranteed three more loans from the bank for in all $7,500. In May, 1938, a judgment creditor issued execution and the sheriff went into possession of the company's assets. The company had lost money steadily since March, 1936, and was hopelessly insolvent. Trites took foreclosure proceedings on May 11th, 1938, and obtained final order September 29th, 1938. *MacDougall* entered an appearance for the company, called a meeting of the directors and a meeting of the shareholders, resulting in no further action by the company. Trites then sold all the assets of the company for $32,500, paid off the bank loan and other liabilities of the company in an amount exceeding the proceeds from the sale. It was held on the trial that the security given Trites by the company was a mortgage and there is no satisfactory evidence to show that the assets of the company were worth more than what Trites received. There is no evi-

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1942

LEVI v. MAC-DOUGALL ET AL.

dence to support the allegation of conspiracy or of negligence on the part of *MacDougall*.

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

Per SLOAN, J.A.: The defendants made an effective and complete answer to the plaintiffs' right of action not only as pleaded, but as presented on the merits at the trial.

Per O'HALLORAN, J.A.: I am not satisfied the appellants have shown they requested the respondent company to take the action upon which the appeal is founded, nor am I satisfied they have shown that it would have been futile to have done so. Even if the action were properly brought the appeal fails.

Per SIDNEY SMITH, J.A.: The main point urged was that the mortgage in question was really a conveyance in trust for sale and did not carry the right to sue for foreclosure, and this should have been brought to the attention of the Court when the order *nisi* was obtained. It contains an express proviso for redemption and the right of foreclosure is incident to it. When a mortgage is in default, the mortgagor's right to redeem and the mortgagee's right to foreclose go hand in hand. In any case, on the facts of this case, the evidence discloses neither fraud nor negligence nor breach of trust and the appeal must be dismissed.

APPEAL by plaintiffs from the decision of ROBERTSON, J. of the 4th of January, 1943, in an action by Sam Levi and his daughter, suing on behalf of themselves and all other shareholders of the Pacific Coast Distillers Limited, except *Albert R. MacDougall* and Amos D. Trites and the Pacific Coast Distillers Limited for damages caused to the Pacific Coast Distillers Limited by an alleged conspiracy between Trites and *MacDougall* to defraud the company and by the alleged negligence of *MacDougall* as solicitor for the company. The facts are sufficiently set out in the reasons for judgment of the learned trial judge. The trial was held at Vancouver on the 16th, 17th and 18th of December, 1942.

J. A. MacInnes, and *Tufts*, for plaintiffs.

Locke, K.C., for defendants *MacDougall* and Pacific Coast Distillers Limited.

Sheppard, for defendant Trites.

Cur. adv. vult.

4th January, 1943.

ROBERTSON, J.: This is an action by the plaintiffs, Sam Levi and his daughter, Dora Levi, suing on behalf of themselves and

all other the shareholders of the Pacific Coast Distillers Limited except *Albert Reginald MacDougall* and Amos Bliss Trites against the said *MacDougall,* Trites and the Pacific Coast Distillers Limited for damages said to have been caused to the Pacific Coast Distillers Limited by (1) an alleged conspiracy between Trites and *MacDougall* to defraud the company and (2) by the alleged negligence of *MacDougall* as solicitor for the company.

In 1936 the company had an option to purchase certain assets of the Scottish Distillers Limited. It had not a distiller's licence. Levi represented to Trites that the company owned the assets covered by the option free of debt; that it had ample working capital and a certain amount of liquor in bond; and that all it needed to carry on a profitable business was a licence. To get a licence it was necessary that a bond of a guarantee company for $50,000 should be deposited with the Minister. Levi, who owned a large number of shares in the company, told Trites that if he would arrange with the guarantee company to give the guarantee he would give him 40,000 shares. Trites agreed, arranged the guarantee, and the company got the licence in March, 1936. Trites received his 40,000 shares which at his request were put in the name of *MacDougall* (his nephew and general solicitor) as Trites did not wish his name to appear as the holder of shares in a distillery company. At the request of Levi, and, with Trites' approval, *MacDougall* became a director on the 31st of March, 1936, and subsequently was elected president of the company. The other directors were Gale and Burgess. Shortly after *MacDougall* went on the board it was necessary to find $3,000 to secure the release of some of the liquor in bond. Trites came to the rescue by buying 3,000 shares for $3,000. For so doing he received a bonus of 3,000 shares. By August, 1936, the company was again in financial difficulties and Trites came to its aid. He purchased 15,000 shares for $15,000 and was given a bonus of 10,000 shares. In the autumn of 1936 the company was once more short of funds. Levi asked Trites to guarantee a loan of $20,000 to the company from the Bank of Nova Scotia. Trites agreed to do this provided he was given as security a mortgage over all the assets of the company and further provided that the company should pay, in addition to all bank charges, five per

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ET AL.
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cent. on the $20,000 as a bonus. Accordingly the company gave to Trites a mortgage dated 25th November, 1936, to which reference will be made later. Trites guaranteed to the bank further loans as follows: February, 1937, $2,000; April, 1937, $5,000; September, 1937, $500. By May, 1938, the position was as follows: Trites had guaranteed to the bank loans to the company amounting to $27,500 for $20,000 of which he had security; he had given a guarantee for $50,000 to the guarantee company; he had not received any interest since January, 1937; the company was in arrears in payments of interest to the bank. It owed over $2,500 for wages and to its general creditors about $16,000. It had not paid the taxes on its property to the city of Vancouver for the years 1937 and 1938.

Early in May, 1938, a judgment creditor issued execution and the sheriff went into possession of the company's assets. The company was unable to pay. It had lost money steadily since March, 1936. In short, it was hopelessly insolvent. Gale and *MacDougall* had a consultation at this time and agreed that this was the case. See Exhibits 15, 19, 20, 21 and 22. *MacDougall* says that about this time, namely, May 9th, 1938, he and Burgess had a consultation and discussed the whole question of the company's position. He told Burgess about the execution and the foreclosure proceedings. Burgess agreed that there was no defence to the action and that the only hope was to sell the undertaking as a going concern. Burgess was called as a witness and did not deny this. In March, 1938, *MacDougall* told Trites of the position of affairs. Trites determined then to foreclose. As *MacDougall* told him he could not act for him, he asked him to suggest some solicitor. *MacDougall* suggested Mr. *H. H. Griffin,* now overseas in the Canadian Army, who, although he had an office in the same suite as *MacDougall's* firm, was quite independent of them. *Griffin* went to Trites' office, got instructions from him and issued a writ for foreclosure against the company on the 11th of May, 1938, for, *inter alia,* default in payment of interest and taxes. *MacDougall* entered an appearance and then had the correspondence above mentioned with Gale and the consultation with Burgess. *MacDougall* then called a meeting of the shareholders for the 30th of May. At this meeting he pre-

sented a report signed by Gale, Burgess and himself which showed how hopeless they regarded the affairs of the company. *MacDougall* reported that "options had been asked for by persons interested in a possible purchase of the company's property." A committee consisting of *MacDougall,* Taylor and Whealton was appointed "to investigate any offers made and to report back at the next meeting." This committee met once. There was nothing definite to report. Trites moved for a decree *nisi* on the 14th of June, 1938, and asked that the usual redemption period of six months be reduced to three months alleging that he had received a firm offer to purchase the mortgaged premises "as and when an order absolute shall be made." The order was made but leave was reserved to the company to apply for an extension of the time for redemption. On the 28th of September, 1938, a directors' meeting was held. The minutes signed by *MacDougall,* Burgess and Gale (who was not at the meeting) read, in part, as follows:

> Some discussion took place between the directors as to their efforts to endeavour to interest various parties in purchasing the property of the company. Several interviews and several inquiries have resulted over the past three months. The president said that he had afforded every facility to those interested to examine the property and the company's books with the hope of being able to sell at a figure at least sufficient to pay off the existing liabilities. So far, however, no firm offer had been made and it was the considered view of the meeting that it was impossible to sell the company's plant, at least for a sum which would take care of the company's indebtedness and certainly there could be nothing obtained for shareholders.

It was disclosed that the mortgagee of the company's premises had served notice that he intended to apply for a final order for foreclosure and after discussion the directors were unanimous that there existed no ground on which the application could be opposed. It was also felt that even if the order for foreclosure were postponed further, the experience over the past three months convinced the directors that no purchaser would be found for the company's assets at a price to be of any possible interest to the company or its creditors.

The final order of foreclosure was made on the 30th of September, 1938. On the 14th of October, 1938, Trites transferred the foreclosed assets to one McLennan. It is submitted that the conspiracy should be inferred from the facts, already, and to be, related. The plaintiffs say that *MacDougall* should not have

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acted for the company in the foreclosure proceedings; that his doing so was in order to aid the conspiracy; that he failed to keep the company advised as to the progress of the foreclosure action; that an independent solicitor would have seen, and set up as defence, that the security sued upon was not a mortgage but only a trust for sale and therefore could not be foreclosed; that before any sale or any action whatsoever could be taken on the security a 60-days' notice had to be given and that no notice had been given; that there were no taxes "due and payable"; that no interest was owing as Trites had agreed in 1937 to forego this; and that the property was worth far more than the security and consequently the time for redemption should not have been shortened. Now it might have been wiser for *MacDougall* to have an independent solicitor not connected in any way with his firm to act for the company, but one must bear in mind that the company had no money to pay outside solicitors and that *MacDougall* was of the opinion that there was no defence to the action. However, he consulted his partner, Mr. *Christopher Morrison*. It was not suggested in any way that Mr. *Morrison* was a party to the conspiracy. He was called as a witness and said that he considered the whole matter carefully including the points which it was suggested, *supra,* would have been raised by an independent solicitor and he came to the conclusion that there was no defence to the action. He appeared for the company on the motion for the decree *nisi,* and opposed, unsuccessfully, the shortening of the redemption period. He also appeared on the taking of the accounts and on the motion for the final order.

Mr. *Morrison* and Mr. *MacDougall* consulted together and Mr. *Morrison* advised Mr. *MacDougall* that in his opinion there was no defence to the action. He thought the security was a mortgage, that no notice was necessary prior to enforcing the foreclosure for default of interest and taxes; that the taxes for 1937 and 1938 were in default. In my opinion Mr. *Morrison* was right except as to the taxes of 1938. The mortgage provided that the mortgagor should pay the taxes when "due and payable." While the taxes of 1938 were due on the 1st of January, 1938, they were not delinquent until the 31st of December, 1938. See section 61, Cap. 55, B.C. Stats. 1921 (Second Session). In

Tatroff v. *Ray* (1934), 49 B.C. 24, FISHER, J. speaking of section 61 said:

> Due payment would seem to me also to mean payment at or before the time when otherwise the taxes would become delinquent which in this case would be on the 31st day of December, 1933, according to section 61 of the Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55.

This case was reversed in part on appeal but not on this point. While this would have the effect of reducing the amount which might be claimed in the action it would not affect the result. It is clear the "security" is a mortgage. There was no satisfactory evidence to show that the assets of the company were worth more than Trites sold them for.

In the report presented to the shareholders on the 30th of May, 1938, the following paragraph appears:

> It should be stated that Mr. Tillett is of the opinion that provided, and provided only, the gin can be placed on the shelves of the British Columbia Liquor stores and a few thousand dollars additional capital secured, he could, by very drastic reduction of overhead and hard work, carry on the business for the manufacture and sale of industrial alcohol and gin at a very modest profit which would, over a long period of years, eventually pay off the company's indebtedness. This, however, does not mean any enlargement of the scope of operations, neither does it mean that the company would ever be a large distillery compared with distilleries as properly known.

McLennan swore he did not think the property was worth what he had paid for it. McLennan said the company's plant was too small to operate profitably. There was also evidence of the severe competition which the company's goods would experience in the market. *MacDougall* tried to have the company's product put on the shelves of the British Columbia Liquor Control Board but without success. The facts with regard to the interest appear to be as follows: The mortgage provides for it. The terms of the mortgage were to be in a form acceptable to Gale and Burgess who executed the mortgage on behalf of the mortgagor. The plaintiffs submitted that Trites had agreed to forego this interest, at a meeting of directors held about April, 1937, at which meeting there were present Gale, Burgess, *MacDougall*, Trites and Levi.

On the 4th of March, 1937, Gale wrote to *MacDougall* stating:

> Mr. Trites quite definitely said at a recent meeting . . . that he did not

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> want the interest amounting to some $80.00 per month that you have been collecting for him. . . .

On the 9th of March, 1937, *MacDougall* replied to this letter, pointing out that Trites told him

> very definitely that when he spoke in the hearing of yourself about not expecting interest, he meant interest on the additional sum of $2,000.00 which he guaranteed on behalf of the company and not interest on the original amount of the mortgage.

Trites gave evidence to the same effect. Burgess was called and was not asked about this. Levi said Trites had said he would not expect the interest. It is true that no interest was paid after February, 1937, but *MacDougall* says the reason for this was that the company did not have the money. I find that Trites did not agree to forego the interest on the $20,000. Even if he had done so there was no consideration for it. It was not binding upon him. Then it was alleged in paragraph 24 of the statement of claim that *MacDougall* and Trites had at some time prior to the shareholders' meeting (presumably meeting of the 30th of May, 1938) opened negotiations, and at the time of the meeting, were in the course of negotiations secretly with A. L. McLennan, a director of the United Distillery Limited, a business in competition with that of the defendant company, for the sale to McLennan or his nominee and that this negotiation culminated in an agreement about the 13th of June, 1938, between the said Trites and McLennan that Trites should, as soon as he could obtain foreclosure of the mortgage, sell the mortgaged premises to McLennan or his nominee. McLennan was called as a witness. He did not know either Trites or *MacDougall*. He had heard of the matter through one Kline who was connected with his company and whom *MacDougall* had tried, unsuccessfully, to interest in the purchase of the company's assets, and that through his, *MacDougall's* solicitor, he had got in touch with Mr. *Griffin*. *MacDougall* swore that he did not know of the offer until service of the notice of motion for decree *nisi* on or about the 13th of June, when he learned only that Trites had received an offer but he did not know from whom. So the plaintiffs fail upon this allegation. *MacDougall* interviewed a number of persons after foreclosure proceedings were commenced in an endeavour to interest them in a purchase of

the company's assets. It was of course no part of *MacDougall's* duties as a solicitor to try to sell the assets of the company. This only arose from his appointment by the shareholders on the 30th of May as a member of the committee. *MacDougall* tried to get the company's gin placed on the shelves of the British Columbia Liquor stores but was finally advised by the proper authorities on or about July 17th, 1938, that this could not be arranged.

There was no evidence called to show that there was a possibility of a sale and it is rather difficult to see what more *MacDougall* should have done. When persons are charged with a conspiracy it is usual to look for some motive. As *MacDougall* was a large shareholder it would not be to his interest that Trites should acquire the property by foreclosure. Then again Trites could not have intended to get the title to the property and then sell at a large figure otherwise he would not have entered into the agreement with McLennan. I am satisfied that there is no evidence to support the allegation of conspiracy or of negligence against *MacDougall.* Even if it could be said that there is some evidence from which a conspiracy might be inferred it falls far short of the standard which is required in civil cases where the right rests upon the suggestion that conduct is criminal. See *London Life Ins. Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.,* [1929] S.C.R. 117, at pp. 125-6.

The action is dismissed with costs.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 21st, 22nd and 23rd of March, 1944, before SLOAN, O'HALLORAN and SMITH, JJ.A.

Tufts, for appellants: The right of foreclosure was not a remedy open to the defendant Trites under the security. The document (called a mortgage) and given as security to Trites by the company does not purport to be drawn in pursuance of the Short Form of Mortgages Act and does not contain a condition upon the breach of which a forfeiture results and the Court grants foreclosure upon the principle that the mortgagor has broken a condition which forfeits his legal right to redeem: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 224, par. 328;

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Sampson v. *Pattison* (1842), 1 Hare 533, at p. 536; *Jenkin* v. *Row* (1851), 5 De G. & Sm. 107; *Scweitzer* v. *Mayhew* (1862), 31 Beav. 37; *Williams* v. *Morgan,* [1906] 1 Ch. 804; *Kendall* v. *Webster* (1910), 15 B.C. 268; *B.C. Timber Industries Journal Ltd.* v. *Black* (1934), 48 B.C. 209; *McLean* v. *Grant* (1873), 20 Gr. 76; *Madden* v. *Dimond. Rudolph* v. *Macey* (1906), 12 B.C. 80; *Ex parte James* (1803), 8 Ves. 337. Trites had an express remedy of sale only and the plaintiff is entitled to an accounting: see *Charles* v. *Jones* (1887), 35 Ch. D. 544; *Thorne* v. *Heard,* [1894] 1 Ch. 599. The taking over of the assets of the company by foreclosure was a breach of the fiduciary relationship which Trites owed to the company as he was in effect a shareholder through his co-defendant *MacDougall*: see *Parker* v. *McKenna* (1874), 10 Chy. App. 96, at p. 118; *In re The National Assurance and Investment Association* (1862), 31 L.J. Ch. 828, at p. 841. If *MacDougall* had discharged his duty to the company Trites could not have carried through the foreclosure proceedings. Through *MacDougall* one *Griffin* undertook the foreclosure proceedings for Trites. *MacDougall* was Trites' representative on the board of the defendant company at all times material. The provision for a bonus and interest to Trites which was the basis of the foreclosure proceedings was independent of the covenant for indemnity and comes within *Williams* v. *Morgan,* [1906] 1 Ch. 804. As to damages, an offer for the property by McLennan was accepted at once when no attention was paid by *MacDougall* to a further offer of $60,000 for all the shares of the company: *Chaplin* v. *Hicks* (1911), 80 L.J.K.B. 1292. The company should have had the opportunity of enquiring for purchasers in a wider field: see *Chaplin* v. *Hicks* (1911), 80 L.J.K.B. 1292. As to the alternative claim for an accounting against Trites, such a claim is well within the decisions in *Burland* v. *Earle,* [1902] A.C. 83; *Ferguson* v. *Wallbridge,* [1935] 1 W.W.R. 673; *Christie et al.* v. *Edwards,* [1940] S.C.R. 410.

Locke, K.C., for respondent *MacDougall*: The learned trial judge properly held that the charges of conspiracy, negligence and wrong-doing by *MacDougall* were not proven. Both *MacDougall* and Trites were misled by the misrepresentations of

Sam Levi as to the financial position of the company and as to the profits which could be realized from its operations. At the instance of *MacDougall* on behalf of the company in October, 1936, Trites agreed to guarantee a loan from the bank for $20,000 after he had already purchased shares at a cost of $18,000. He then obtained as security the mortgage in question. In 1937 Levi induced Trites to guarantee three more loans from the bank, amounting in all to $7,500. The company continued to lose money steadily. In May, 1938, one Judson obtained judgment and issued execution against the company which started the train of events which culminated in the final order for foreclosure. There were undoubted defaults entitling the mortgagee to proceed either by sale or foreclosure. The taxes for 1937 and 1938 were not paid. The company was in insolvent circumstances; there was default in payment of interest on the mortgage and execution was issued against the company and a seizure made of its assets. The company was hopelessly insolvent, and all efforts to sell the property or obtain further finances had failed. *MacDougall* had nothing to do with the sale of the property by Trites to McLennan. There was no proper attempt to obtain authority from the company to sue in its name. To redress a wrong done to the company or to recover money or damages due to it, the action must *prima facie* be brought by the company: see Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 408; *Burland* v. *Earle,* [1902] A.C. 83, at p. 93; *Gray* v. *Lewis. Parker* v. *Lewis* (1873), 8 Chy. App. 1035, at p. 1050. What must be alleged and proven is stated in *Rose v. B.C. Refining Co.* (1911), 16 B.C. 215, at p. 219 and followed by MCDONALD, C.J.B.C. in *Levi* v. *MacDougall, Trites and Pacific Coast Distillers Ltd.* (1940), 56 B.C. 81, at p. 95; see also *Foss* v. *Harbottle* (1843), 2 Hare 461; *Mozley* v. *Alston* (1847), 1 Ph. 790. In view of the evidence showing the company was insolvent at the time of the foreclosure proceedings, the liabilities greatly exceeding the value of the assets, the action could not possibly succeed and Gale's evidence as to information given him as to the Trites sale to McLennan would be of no value.

Sheppard, for respondent Trites: There was no evidence of wrong-doing on the part of Trites in connection with this trans-

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action. *MacDougall* was not his solicitor in respect to any of the matters involved in this action. *MacDougall* acted solely in his capacity as president of the company. The mortgage given was prepared by the officials of the company and there is no ground whatever for the statement that Trites agreed that he would not insist on payment of interest. The charges are of fraudulent conspiracy between *MacDougall* and Trites and it is fair to say that no evidence was adduced in support of any of them. The plaintiffs did not, prior to the commencement of this action, request the company in public meeting assembled or otherwise, to commence action against Trites or to grant the plaintiffs leave. The letter from *Tufts* did not suggest any claim against Trites and the action against him is not maintainable: see Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 408 *et seq.; Burland* v. *Earle,* [1902] A.C. 83, at p. 93; *Gray* v. *Lewis. Parker* v. *Lewis* (1873), 8 Chy. App. 1035, at p. 1050; *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215, at pp. 219 and 226-7. Rectification of the mortgage cannot be asserted by minority shareholders. A judgment obtained by fraud and concealment is voidable only: see *McGuire* v. *Haugh et al.,* [1934] O.R. 9. The company alone has the right to elect whether to avoid or confirm a judgment, not a third person: see *United Shoe Manufacturing Co. of Canada* v. *Brunet* (1909), 78 L.J.P.C. 101, at p. 104. Minority shareholders could not elect: see *Foss* v. *Harbottle* (1843), 2 Hare 461; *Mozley* v. *Alston* (1847), 1 Ph. 790; *North Western Transportation Co.* v. *Beatty* (1887), 56 L.J.P.C. 102. All the objections taken were conclusively determined in the foreclosure action and are *res judicata.* The effect of the judgment is to estop the defendant company from denying the rights of the defendant Trites to the property acquired by foreclosure: see *Patch* v. *Ward* (1867), 3 Chy. App. 203, at p. 206; *Heath* v. *Pugh* (1881), 6 Q.B.D. 345, at p. 365. As to the right of foreclosure see *Balfe* v. *Lord* (1842), 4 Ir. Eq. R. 648.

Tufts, in reply, referred to *Ferguson* v. *Wallbridge,* [1935] 1 W.W.R. 673.

Cur. adv. vult.

26th April, 1944.

SLOAN, J.A.: The learned trial judge having found neither fraud nor negligence nor breach of trust—findings in which,

after careful consideration of the evidence, I concur—it follows that, in consequence, under the circumstances of this case, the defendants made an effective and complete answer to the plaintiffs' right of action not only as pleaded in the statement of claim but as presented on the merits at the trial.

I would therefore dismiss the appeal.

O'HALLORAN, J.A.: I am not satisfied the appellants have shown they requested the respondent company to take the action upon which this appeal is founded. Nor am I satisfied they have shown it would have been futile to have done so. However, even if the action were properly brought, I am of opinion the appeal must fail.

I agree with my brother SIDNEY SMITH that the security in question was in effect a mortgage with the right to foreclose incident to it, and was not a conveyance in trust for sale. In addition, the allegations of fraud, conspiracy, breach of trust, and negligence were rejected by the learned trial judge after an analytical review of the evidence. The trial judge's reasons were critically examined by counsel for the appellants. Further consideration of the arguments then advanced serves to confirm me in the opinion that the judgment appealed from was fully warranted by the evidence.

I would dismiss the appeal.

SIDNEY SMITH, J.A.: The facts of this case are set out in the findings of the learned trial judge.

The main point urged upon us by counsel for the appellants was that the mortgage in question was really a conveyance in trust for sale and did not carry with it the right to sue for foreclosure, and that this fact should have been brought to the attention of the Court when the order *nisi* was sought and obtained. Upon the hearing I was rather impressed with this view of the document, but the submissions of Mr. *Sheppard* and a consideration of the authorities have convinced me otherwise. I think that the instrument was in effect a mortgage, with a right of foreclosure.

It is trite law that the Court will look to the substance and not to the form of a transaction. But the form should not be dis-

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regarded. In this case (and apart from the pleadings where it is referred to throughout as a "mortgage") the instrument is called an "indenture" and the parties to it are referred to as the "mortgagor" and the "mortgagee." It is expressed to

> grant, convey, assign, transfer, demise, set over, mortgage and charge to and in favour of the mortgagee, as and by way of a first and specific mortgage and charge, all the real estate and properties now owned or hereafter acquired by the mortgagor, . . .

It is subject to various conditions and, upon these conditions being complied with by the mortgagor, the mortgagee undertakes to "discharge this security." It thus contains an express proviso for redemption, and I think therefore that the right to foreclosure is incident to it. When a mortgage is in default the mortgagor's right to redeem and the mortgagee's right to foreclose go hand in hand. "The correlative and reciprocal remedy to redemption is foreclosure" (Falconbridge on Mortgages, 3rd Ed., pp. 411-12; and cases therein cited). It is true that it also contains a power of sale but in my opinion this is not in substitution for, but in addition to, the incidental right to foreclosure.

The authorities quoted in support of the view that the indenture is not a mortgage, namely: *Sampson* v. *Pattison* (1842), 1 Hare 533; *Jenkin* v. *Row* (1851), 5 De G. & Sm. 107; 64 E.R. 1039; *Scweitzer* v. *Mayhew* (1862), 31 Beav. 37, are distinguishable. They are concerned each with its own particular transaction and its own type of instrument. In each case the property is conveyed to trustees upon trust, and in each case the transaction differs from the one now under consideration.

But I have re-read the testimony upon the assumption that I am wrong in this view and that the instrument is not a mortgage and contains no right to foreclose. Even upon this footing and assuming all other legal points in appellants' favour, I have come to the conclusion on the facts of this case that the evidence discloses neither fraud nor negligence nor breach of trust, and that therefore the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *S. S. Tufts.*

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

Solicitor for respondent Trites: *F. A. Sheppard.*

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

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March 28; *April* 26.

Will—Interpretation—Whole estate to wife "for her sole use and benefit"—Upon her death the residue to be divided between his two sons—Predominant intention—Widow takes whole estate.

A testator by his will, after appointing his wife executrix and directing payment of his debts, proceeded: "3rd. I give, devise and bequeath to my beloved wife Ann Elizabeth Wilson all my property both personal and real whatsoever and wheresoever situated for her sole use and benefit forever. 4th. I direct that upon the decease of my said wife Ann Elizabeth Wilson that the residue of my estate shall be equally divided between my sons George Frederick Wilson and Charles Wilson or their direct issue share and share alike." On the trial it was held that the widow took only a life interest and that the remainder should go to the sons.

Held, on appeal, reversing the decision of FARRIS, C.J.S.C. that the widow takes the whole estate this being the predominant intention disclosed by the will read as a whole.

APPEAL by defendants from the decision of FARRIS, C.J.S.C. of the 3rd of November, 1943 (reported, *ante*, p. 31), in which he held that by the terms of the will of Charles Wilson, deceased, made on the 28th of February, 1922 (recited below), the defendant Ann Elizabeth Wilson was entitled to a life interest only in the property bequeathed and the remainder vested in the two sons of the deceased.

The appeal was argued at Vancouver on the 28th of March, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Locke, K.C., for appellants: By the third clause of the will the testator gave his wife all his property for her sole use forever. It is a small estate. The word "forever" in section 3 of the will has no effect whatever as there is an absolute gift of the estate to the wife without it. On the general construction of the will see *In re Hunter* (1897), 66 L.J. Ch. 545, at p. 550; *Rhodes* v. *Rhodes* (1882), 51 L.J.P.C. 53, at p. 58; *In re Jones* (1898), 67 L.J. Ch. 211, at p. 212. In parts 4 and 5 of the will he uses the word "direct": see Jarman on Wills, 7th Ed., 2144-5. The words "any residue" is what is left on death of wife: see *In re Scott Estate* (1937), 52 B.C. 278; *Re Walker* (1925), 56 O.L.R. 517; *Watkins* v. *Williams* (1851), 3 Macn. & G. 622;

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Perry v. *Merritt* (1874), L.R. 18 Eq. 152; *Nova Scotia Trust Co.* v. *Smith,* [1933] 2 D.L.R. 272; *In re Foss Estate,* [1940] 3 W.W.R. 61, at pp. 63-4; Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 338, par. 388; *Sherratt* v. *Bentley* (1834), 2 Myl. & K. 149. The whole estate is given to the wife and after that he merely "directs": see *Shearer* v. *Hogg* (1912), 46 S.C.R. 492, at pp. 500-1; *Re Walker* (1925), 56 O.L.R. 517. She has the right to spend such portion of the estate as she sees fit: see *Re Johnson* (1912), 8 D.L.R. 746.

Cunliffe, for respondent: "Residue" means after payment of debts: see *In re Brooks's Will* (1865), 34 L.J. Ch. 616; *Gisborne* v. *Gisborne* (1877), 46 L.J. Ch. 556. We submit the wife has a life estate only: see *Re John Dixon, Deceased*: *Dixon* v. *Dixon* (1912), 56 Sol. Jo. 445; Theobald on Wills, 8th Ed., 579; *Shields* v. *Shields,* [1910] 1 I.R. 116; *Dinsmore et al.* v. *Dinsmore et al.* (1936), 11 M.P.R. 196; *Lister et al.* v. *Gilbert et al.* (1938), 12 M.P.R. 566; *In the Goods of Lupton* (1905), 74 L.J. P. 162.

Locke, in reply, referred to *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192.

Cur. adv. vult.

26th April, 1944.

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

ROBERTSON, J.A.: I would allow the appeal for the reasons given by my brother SIDNEY SMITH.

SIDNEY SMITH, J.A.: This is an appeal from an order of the Chief Justice of the Supreme Court determining before trial a question of law raised on the pleadings in this action. The matter concerns the true construction of a will made on the 28th of February, 1922, by one Charles Wilson, who died at Nanaimo, B.C., on the 5th of November, 1924.

The question for decision is whether the widow became entitled to the whole of the estate of the testator (less the debts) or whether she became entitled to a life interest only, with the remainder passing to his two sons in equal shares.

The testator was a carpenter. We decided (by a majority) that in the special circumstances we could not look beyond the pleadings. But looking at the pleadings only, I think it may fairly be inferred that the estate was not a large one, and that at least part of it consisted of realty.

The will is in the following terms:

I, Charles Wilson, of the City of Nanaimo, in the Province of British Columbia, Carpenter, being of sound and disposing mind and memory, do make and publish this my last Will and Testament, hereby revoking all former Wills by me at any time heretofore made. 1st. I hereby appoint my wife Ann Elizabeth Wilson, to be the Executrix of this my last Will, directing my said Executrix to pay all my debts, funeral and testamentary expenses out of my estate as soon as conveniently may be after my decease.

2nd. After the payment of my said debts, funeral and testamentary expenses, I give, devise and bequeath all my real and personal estate which I may now or hereafter be possessed of or interested in, in the manner following: that is to say:

3rd. I give, devise and bequeath to my beloved wife Ann Elizabeth Wilson, all my property both personal and real, whatsoever and wheresoever situated for her sole use and benefit forever.

4th. I direct that upon the decease of my said wife Ann Elizabeth Wilson, that the residue of my estate shall be equally divided between my sons George Frederick Wilson and Charles Wilson or their direct issue, share and share alike.

5th. I also direct that upon the decease of my said wife Ann Elizabeth Wilson, Conrad Reifle, Brewer, and William Rumming, Aerated Water Manufacturer, both of the City of Nanaimo, Province of British Columbia, shall be the executors of this my LAST WILL AND TESTAMENT.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 28th day of February in the year of our Lord one thousand nine hundred and twenty-two.

Signed, published and declared by the said Charles Wilson the testator, as and for his LAST WILL AND TESTAMENT in the presence of us both present together at the same time, and in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses to the due execution thereof.

CHARLES WILSON

ALBERT MANIFOLD
HORACE TYLER.

This is the instrument which we have to construe. The principle of construction which we are to apply is simple enough. We are to collect the testator's intention from the language which he has used in the will taken as a whole, and, in the first instance, without regard to any canons of construction. *Pearks* v. *Moseley*

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(1880), 5 App. Cas. 714, at p. 719; *Comiskey* v. *Bowring-Hanbury,* [1905] A.C. 84, at p. 88. There would be no difficulty if the will ended at paragraph 3. Indeed, it would be difficult to frame more definite language than that contained in paragraph 3 for the purpose of making an absolute gift of the whole estate to the widow. But then follows the direction in paragraph 4, that upon the decease of the testator's wife the residue of the estate shall be equally divided between the two sons; and the further direction in paragraph 5 appointing, upon that event, the two executors. It was submitted by the appellant that the effect of these provisions was to give an absolute gift of the whole estate (less the debts) to the widow. On the other hand, the respondent contended, and it was so found by the learned Chief Justice that their effect was to give to the widow a life estate only with remainder to the two sons.

The respondent argued that a clear indication that the widow was to take a life estate only is found in the words "the residue" in paragraph 4; that the ordinary meaning of the word "residue" is that which remains after payment of debts, funeral and testamentary expenses (*In re Brooks's Will* (1865), 34 L.J. Ch. 616); and that by his use of this word in paragraph 4 the testator meant that upon the death of his wife the whole of his estate (less his debts) was to pass to his sons.

No doubt the word "residue" has been given different meanings in different wills (compare, for example, *Green* v. *Pertwee* (1846), 5 Hare 249, at p. 252; 67 E.R. 905, at p. 907). And it is significant to note that the same is true in the will forms set out in The Encyclopædia of Forms and Precedents, 2nd Ed., Vol. 18. But what we are concerned with now is the meaning to be given to the word in this will.

In *Lucas-Tooth* v. *Lucas-Tooth,* [1921] 1 A.C. 594, at p. 601, Lord Birkenhead, L.C. remarks as follows:

> . . . it is important never to lose sight of the true principle of construction in such cases—that it is the duty of the Court to discover the meaning of the words used by the testator, and, from them and from such surrounding circumstances as it is permissible in the particular case to take into account to ascertain his intention. For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause.

Unless this is done, there is a great danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case may produce consequences contrary to that intention.

As an illustration of the recent application of this principle reference may be made to the case of *Perrin and others* v. *Morgan* (1943), 59 T.L.R. 134. There the House of Lords had under consideration the interpretation to be given to the word "money" in a will. Viscount Simon, L.C. at p. 135 put the matter thus:

. . . in most instances the duty of a judge who is called on to interpret a will containing ordinary English words is not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied whatever the testator may have intended, but to construe the particular document so as to arrive at the testator's real meaning according to its actual language and circumstances.

And at p. 137 Lord Atkin made the following observation:

The sole object is, of course, to ascertain from the will the testator's intentions. The result of your Lordships' decision will be to relieve judges in the future from the thraldom, often I think, self-imposed, of judgments in other cases believed to constrain them to give a meaning to wills which they know to be contrary to the testator's intention.

In the result the House of Lords lifted the word "money" out of the strict construction it had hitherto received and held that it included all the personalty of the estate in question, *viz.*, cash, investments, dividends accrued, rent due, income-tax repayment and household goods.

When this will is looked at in the light of these principles I think it becomes clear what the testator meant by the word "residue," namely, that part of his estate which might remain after the death of his wife. If, instead of "the residue," he had used the words "any residue," there could be no room for doubt. I think he assumed that there would be some part remaining at his wife's death, and on this assumption inserted the 4th and 5th paragraphs.

The context of these words in paragraph 4 would seem to confirm this view. He says (after having in paragraph 3 given the whole estate to his wife):

Upon the decease of my said wife . . . the residue of my estate shall be equally divided, . . .

I think the run of this language shows that his mind was directed

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to what remained of his estate at the death of his wife, and not what remained at his own death.

Moreover, paragraphs 2 and 3 appear to point to the same conclusion. In paragraph 2 he says

> after the payment of my said debts, funeral and testamentary expenses, I give, devise and bequeath all my real and personal estate . . . in the manner following.

Again in paragraph 3 he says:

> I give, devise and bequeath to my beloved wife Ann Elizabeth Wilson, all my property both personal and real, ...

In neither paragraph does he use the word "residue" in the sense in which it has been applied to personalty, in *In re Brooks's Will, supra,* and *cf. Green* v. *Pertwee, supra,* and *Trethewy* v. *Helyar* (1876), 46 L.J. Ch. 125. This I think shows that he distinguished sharply between his estate less the debts (*viz.,* the net estate at his death) and whatever part might remain at the death of his wife (the "residue" he had in mind). What the testator overlooked, or did not know, was that, having given his wife the whole estate absolutely, he could not in law direct how she should dispose of any part that might remain at her death. But so it is. And in the result his widow takes the whole estate, and this, in my opinion, and, with respect, is the predominant intention disclosed by the will read as a whole.

The appeal must therefore be allowed with costs.

Appeal allowed.

Solicitor for appellants: *Victor B. Harrison.*
Solicitor for respondent: *F. S. Cunliffe & Co.*

REX v. MACKIE.

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April 24, 26.

Criminal law—False pretences — Conviction — Appeal — Unusual circumstances—Sentence reduced—Criminal Code, Secs. 405 and 1035.

Accused sold her rooming-house business and furniture to complainant for $1,547.70. In the course of negotiations, she told the complainant that the rooming-house was not leased to anyone whereas, in fact, it was under lease to accused's husband and she stated that the landlord was out of town when he was not. On a charge of false pretences, accused was sentenced to 15 months' imprisonment with hard labour. On appeal from sentence, the evidence disclosed that the complainant took possession at once and for more than four months remained in undisturbed possession of the rooming-house and received a satisfactory extension of the lease; further, was unwilling to sell her interest for the amount she paid and was satisfied with her bargain. Accused was in gaol for one month.

Held, varying the decision of police magistrate Wood, that the sentence should be reduced and in the unusual circumstances of this case, the interests of justice would be adequately served by reducing the term of imprisonment to the time already spent in gaol and by imposing a fine of $250.

APPEAL by accused from her conviction by police magistrate Wood, Vancouver, on a charge that she unlawfully with intent to defraud, did obtain by false pretences the sum of $1,547.70 from Mrs. Frances Johnson and was sentenced to 15 months at hard labour. The accused sold a rooming-house business with furniture to the complainant. In negotiations for the sale, accused told the complainant that the rooming-house was not leased to anyone whereas it was, in fact, under lease to accused's husband for a term of eight months still to run. She also represented that the landlord was out of town when he was actually in Vancouver.

The appeal was argued at Victoria on the 24th of April, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Wismer, K.C., for appellant: We are only appealing from sentence as the misstatements were no doubt made, but Mrs. Johnson took over the premises and for over four months has been in undisturbed possession. There is evidence that she is unwilling to sell her interest for the amount she paid and has

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received an extension of the lease. There has been no loss whatever and she is satisfied with her bargain. Accused has been in gaol for over one month.

Martin, K.C., for the Crown, referred to sections 405 and 1035 of the Criminal Code.

Cur. adv. vult.

On the 26th of April, 1944, the judgment of the Court was delivered by

O'HALLORAN, J.A.: This appeal against sentence presents unusual features. The appellant a 28-year-old married woman was convicted by magistrate Wood, under section 405 of the Code, and sentenced to 15 months' imprisonment with hard labour for obtaining $1,547.70 from the complainant by false pretence in the sale of a rooming-house business with the furniture. No question arises as to the furniture. The false pretence was that the rooming-house was not leased to anyone, whereas it was in fact under lease to the appellant's husband with a term of eight months still to run. Although the complainant remained in possession up to the time of trial she testified the landlord still refused to acknowledge her as a tenant.

At the conclusion of the argument we were all clearly of opinion the sentence was unduly severe and ought to be reduced, *cf. Rex* v. *Zimmerman* (1925), 37 B.C. 277. We reserved judgment to permit our examination of the evidence as a guide to an appropriate sentence. The significance of the lease seems to have been that it could not be assigned without the consent of the lessor, and the appellant had every reason to believe that the lessor was not likely to consent to its assignment to the complainant, because he objected to a woman as a lessee. Hence the appellant induced the complainant by the representation in question to buy something she was uncertain that she could deliver. However, as events developed delivery was not interfered with, and the complainant today more than four months later remains in undisturbed possession of the rooming-house.

The money was paid in the first week of December, 1943. The complainant took possession on 8th December, 1943, and the appellant was convicted on 22nd February last. During the hear-

ing of the appeal counsel for the appellant produced an affidavit (*vide* section 1015 of the Code) of one Newton Parker McDonald described as a Vancouver real-estate agent, sworn the 17th inst., wherein he deposed he interviewed the complainant on the 15th inst., and that she was still in possession of the rooming-house at the same rental, and was unwilling to sell it for the price she had paid the appellant. It also appears from his affidavit that the complainant had succeeded in obtaining a satisfactory extension of the lease from the lessor.

That affidavit has not been challenged by counsel for the Crown respondent. In the result the appellant's representation that there was no lease has not caused the complainant loss of the money she paid nor has it deprived her of what she bargained for. It seems to have had no more harmful operating effect than if it had been true. The difference between buying a rooming-house without a lease, and buying it subject to an undisclosed lease which is not enforced, may be grave in many cases, but in this case it has not been so. That is a vital consideration in weighing the appropriate punishment to be imposed. The complainant, advised by a Vancouver real-estate agent, was eager to buy the rooming-house without a lease in the hope of getting a lease. It would now appear she has got what she wished for and that her hopes have been realized with undisturbed possession throughout.

The foregoing analysis assisted by the fresh evidence which was not before the learned magistrate throws a new perspective upon the gravity of the offence, *cf. Rex* v. *Smith* (1941), 57 B.C. 158. The appellant's character is not otherwise impeached and this is a first offence. The appropriate sentence has given us anxiety, for each case must be governed by its own facts. In *Rex* v. *Stonehouse and Pasquale* (1927), 39 B.C. 279, at p. 282, this Court held that in all cases of punishment it is the duty of the Court to take into consideration the circumstances in which the crime was committed, and further that no rule can be laid down defining a uniform punishment for crimes of a particular sort.

After careful consideration we are all of opinion that in the unusual circumstances of this case the interests of justice will be adequately served by reducing the term of imprisonment to the

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time already spent in gaol, and by imposing a fine of $250 or two months' further imprisonment in default of payment (*cf.* section 1035 of the Code).

The appeal against sentence is allowed to that extent.

Appeal allowed in part.

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April 12, 13, 14, 26.

REX v. STEWART.

War—The National Selective Service Mobilization Regulations—Failure to report—Exemption claimed under Part I., regulation 3 (2) (c), P.C. 10924—"Regular clergyman or minister of religious denomination"—Member of Jehovah's Witnesses.

Accused was charged for that he, being a designated man within the meaning of the National Selective Service Mobilization Regulations, had unlawfully failed to report for military training in accordance with an order given him under said regulations. He claimed exemption under Part I., regulation 3 (2) (c) which provides that the regulations shall not apply to "a regular clergyman or minister of a religious denomination." He is a member of Jehovah's Witnesses, but had never been formally dedicated to the work of the religious ministry, such a dedication being contrary to the religious convictions of said sect. In 1939 he had received a letter of general introduction from "The Watch Tower Bible and Tract Society, Canadian Branch," which stated that he was "a fully recognized minister of the International Bible Students Association of Canada and of its parent organization, The Watch Tower Bible and Tract Society, Brooklyn, N.Y." Jehovah's Witnesses are adherents in Canada of said associations, which are incorporated in Canada as private companies. Any member of Jehovah's Witnesses can conduct the services. It was held on the trial that accused was not "a regular minister of a religious denomination" within the meaning thereof in said exempting clause and was guilty as charged.

Held, on appeal, affirming the decision of LENNOX, Co. J., that assuming Jehovah's Witnesses is a "religious denomination" within the meaning of section 3 (2) (c), Part I. of The National Selective Service Mobilization Regulations, the appellant had never been duly appointed a regular minister thereof, and that at no time was he a minister thereof in any sense in which that word can reasonably be used.

Saltmarsh v. *Adair*, [1942] S.C. (J.C.) 58, applied.

APPEAL by defendant from the decision of LENNOX, Co. J. of the 10th of February, 1944, on a charge that he at the

city of Vancouver on the 10th of November, 1943, being a designated man within the meaning of The National Selective Service Mobilization Regulations unlawfully did fail to report within the time limited by and in accordance with the terms of an "Order—Military Training" given to him under the said The National Selective Service Mobilization Regulations contrary to the provisions of the regulations aforesaid. The defendant claims that he is exempt under Part I., regulation 3 (2) (c) which provides that the regulations shall not apply to "a regular clergyman or a minister of a religious denomination," as he is a minister of Jehovah's Witnesses, a religious denomination, the members thereof being adherents of the International Bible Students Association and the Watch Tower Bible and Tract Society, Brooklyn, N.Y.

The appeal was argued at Victoria on the 12th, 13th and 14th of April, 1944, before SLOAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Hodgson, for appellant: The appellant claims he comes within the exceptions in the regulations. He claims he is a regular minister within the meaning of the regulations. The case of *Saltmarsh* v. *Adair,* [1942] S.C. (J.C.) 58 is distinguishable from the case at Bar. In that case the accused did nothing that could not be done by members of the congregation. In 1940 the International Bible Students Association and Watch Tower Bible and Tract Society (parent bodies of Jehovah's Witnesses) were declared illegal, also Jehovah's Witnesses, but in 1943 the ban was removed as to Jehovah's Witnesses and it was no longer declared to be an illegal organization. Now Jehovah's Witnesses is a religious denomination and this man was ordained. He is not a member of the banned organizations: see *In re Bien and Cooke,* [1944] 1 W.W.R. 237. It is not necessary that he should have the power to perform the marriage ceremony. The regulations apply to the ministers of all religious denominations. Christianity is part and parcel of the laws of the country: see *Taylor's Case* (1676), 1 Vent. 293; 86 E.R. 189; *Regina* v. *Dickout* (1893), 24 Ont. 250, at p. 253; *Kipps* v. *Lane* (1917), 86 L.J.K.B. 735; *The Queen* v. *Oldham* (1869), 38 L.J.Q.B. 125. On interpretation of the regulations see Maxwell on the

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Interpretation of Statutes, 8th Ed., 12; *Rex ex rel. Scroggie* v. *Robb* (1925), 57 O.L.R. 23. That he was duly ordained and appointed see *Re Marriage Act and W. J. Thompson* (1934), 49 B.C. 277; *Robins* v. *Wood* (1917), 81 J.P. 311; *Baxter* v. *Langley* (1868), 38 L.J.M.C. 1. The American cases on the subject are *Lovell* v. *Griffin* (1938), 303 U.S. 444; *Schneider* v. *State* (1939), 308 U.S. 147; *Cantwell* v. *Connecticut* (1940), 310 U.S. 296; *Jobin* v. *Arizona* (1942), 316 U.S. 584; *Jamison* v. *Texas* (1943), 318 U.S. 413; *Largent* v. *Texas* (1943), *ib.* 418; *Jones* v. *Opelika* (1943), 319 U.S. 103; *Murdock* v. *Pennsylvania* (1943), *ib.* 105.

Remnant, for the Crown: The defence of accused is built up on the activities of Jehovah's Witnesses. Accused's activities are going from house to house. The main office is in Toronto. He states he has no official appointment, but states he is recognized by appointment he had in 1937-8. He states all Jehovah's Witnesses are ministers. His evidence of ordination is vague and was not accepted below. The evidence shows this is a commercial organization. They have printing establishments and issue tracts, pamphlets, magazines and books that are sold throughout the continent. Their literature contains violent attacks on all organized churches, especially on the Roman Catholic Church. Brooklyn, New York, is the home of Watch Tower. Millions of tracts are printed, but not a single Bible. On the question of whether Stewart is a minister, this is a question of fact and it was found below that he was not a minister. He has not shown ordination. In fact, ordination is contrary to their organization. Next, these people are not a religious denomination. In visiting from house to house they pay no attention to what church the people belong to: see *Flint* v. *Attorney-General,* [1918] 2 Ch. 50; *Rex* v. *Brown* (1908), 17 O.L.R. 197. The case of *Kipps* v. *Lane* (1917), 86 L.J.K.B. 735 is in our favour; see also *Nock* v. *Malins* (1917), 34 T.L.R. 3. They have not the power to perform marriage.

Hodgson, replied.

Cur. adv. vult.

26th April, 1944.

SLOAN, J.A.: I agree with my brother SIDNEY SMITH.

ROBERTSON, J.A. agreed with SIDNEY SMITH, J.A.

SIDNEY SMITH, J.A.: The appellant was charged before LENNOX, Co. J. with failure to report for military training pursuant to the terms of an "Order—Military Training" given to him under The National Selective Service Mobilization Regulations (order in council P.C. 10924, dated December 1st, 1942), found guilty, and ordered to be handed over to the military authorities after serving a term of imprisonment. His sole defence on the trial, and the sole argument of his counsel before us, was that he was exempted from the operation of the said regulations on account of his being a "minister of a religious denomination" within section 3 (2) (c), Part I., thereof. The organization of which he claimed to be a minister is that known as Jehovah's Witnesses. The facts as to the relationship between that body and the two closely allied parent organizations known as the Watch Tower Bible and Tract Society and the International Bible Students Association, together with the other relevant facts, are set out in the reasons of the learned trial judge below (see [1944] 1 W.W.R. 469). They need not be repeated now.

The appellant gave evidence at the trial and this was the sole evidence on his behalf. We have before us therefore only his own evidence, the lengthy cross-examination thereon, and the exhibits that were filed. These exhibits consist for the most part of the relevant orders in council, and certain tracts and other literature published as study material for the Jehovah's Witnesses by one or other of the three affiliated organizations.

I do not consider it necessary to make any finding as to whether or not the organization known as Jehovah's Witnesses is a religious denomination; but, assuming that it is, I am of opinion that the learned trial judge was right in holding that the appellant was never duly appointed a regular minister thereof; and I am further of opinion that at no time was he a minister thereof in any sense in which that word can reasonably be used.

I have come to this conclusion upon a consideration of his evidence, of the authorities referred to us, and in particular upon an examination of the Scottish case of *Saltmarsh* v. *Adair*,

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[1942] S.C. (J.C.) 58. That case is substantially on all fours with this and, with respect, I adopt the reasoning of their Lordships of the Court of Justiciary and the conclusion to which they came.

The arguments by which appellant attempted to distinguish the *Saltmarsh* case, *supra,* from the present one do not appear to be capable of being maintained. Indeed, if there be any distinction between the two cases, such distinction is unfavourable to the appellant, because the said two parent bodies were declared illegal organizations in Canada in January, 1941, and still continue under that disability. Some months before, *viz.,* on July 4th, 1940, Jehovah's Witnesses had also been declared illegal, but as to them the illegal *status* was removed on October 14th, 1943.

It is significant that the appellant in August, 1940, long before this controversy arose, stated his occupation on his national registration card as being that of "colporteur"—that is to say, one who distributes literature, especially religious literature, from door to door. Yet nine months previously, when 24 years of age, he had received an appointment as minister (the only document of its kind, which he produced) in the following terms:

INTERNATIONAL BIBLE STUDENTS ASSOCIATION.
117 Adams Street - Brooklyn - New York - USA.
November 21, 1939.

TO WHOM IT MAY CONCERN:—

This letter will serve to introduce the bearer, Mr. Earl K. Stewart, who is a minister of the Gospel.

Mr. Earl K. Stewart is a fully recognized minister of the International Bible Students' Association of Canada, and of its parent organization The Watchtower Bible and Tract Society, Brooklyn, N.Y. He is sent forth by the Society for the purpose of furthering its work in promulgating Christian knowledge.

We have pleasure in recommending Mr. Stewart to you, and any courtesies extended or privileges granted to him will be appreciated.

Respectfully yours,
Watch Tower B. & T. Society,
Canadian Branch.

It will be observed that this letter does not appoint him a minister of Jehovah's Witnesses but of the other two organizations, which, as has been stated, were later declared illegal. He gave evidence that Jehovah's Witnesses were quite separate from both of them. But I think that he meant by such testimony no

more than this, that collaboration of the three had been discontinued by compulsion of law while the two parent bodies remained under the illegal ban. Be that as it may, he maintained that he relied upon a subsequent appointment directly from the head office of Jehovah's Witnesses at Toronto. This office was established only after their restoration to legal *status,* that is to say, after October 14th, 1943. But his testimony as to this appointment is of such a flimsy nature and so entirely unconvincing that in my opinion the learned trial judge was fully justified in not attaching any evidentiary value thereto.

The appeal must therefore be dismissed.

Appeal dismissed.

TRERISE v. EVANOCKE.

Landlord and tenant—Lease "for the duration of the war"—Validity—Parol agreement — Tenancy from year to year — Terms of holding—Presumption.

By written agreement of March 22nd, 1943, one Barnes agreed to rent the O'Sullivan farm in New Westminster District to the plaintiff for pasture purposes only for the duration of the war at an annual rental of $150, payable $25 per month, commencing April and ending September, 1943. By memorandum in writing signed by the parties on May 27th, 1943, Barnes agreed to sell the farm to the defendant Evanocke and on November 20th, 1943, an agreement for sale of the farm was entered into between Barnes and the defendant. No reference was made to the lease to the plaintiff in either the memorandum of May 27th, 1943, or in the agreement for sale, but it was found on the evidence that Evanocke bought the farm with full knowledge of the lease and subsequent to the purchase Evanocke received payment from the plaintiff the balance of the rent payable for the year commencing March 22nd, 1943, under the terms of the lease. Soon after the purchase, at the request of the defendant, the plaintiff agreed to exclude from the leased land five acres where buildings were situated and in consideration thereof the annual rental was reduced by $25. In December, 1943, and prior to the registration of the agreement for sale from Barnes to the defendant, the plaintiff procured from Barnes and caused to be registered a lease of said farm in the same terms as the agreement for lease of March 22nd, 1943. In November, 1943, the defendants denied the

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plaintiff the use of the farm by removing a plank bridge, being the only means of approach to the farm. In an action to recover possession of the farm (less the five acres referred to) and for damages for being wrongfully dispossessed:—

Held, that a tenancy for the duration of the war could not be considered a valid lease, since the certainty of the lease as to its continuance is not ascertainable either by the express limitation of the parties or by reference to any collateral act which might with equal certainty measure the continuance of it.

Held, further, on the evidence that when the bargain was made between the plaintiff and the defendant Evanocke in June, 1943, providing for exclusion from the lands subject to the Barnes lease of the five-acre portion and reduction of the annual rental, that it was the intention of both parties that the plaintiff should become tenant of the defendants for a term of years under the provisions of the Barnes lease, varied as to area and rental as above mentioned. A tenancy from year to year, commencing March 22nd, 1943, was thereby created. There has been a breach of the plaintiff's right of occupation by the defendants and the plaintiff in consequence of the defendants' act has been denied that right of occupation for a period in excess of six months. Damages allowed in the sum of $250.

ACTION to recover possession of certain lands known as the O'Sullivan farm in the District of New Westminster, British Columbia, and for damages by reason of the defendants having wrongfully dispossessed the plaintiff from the said lands. The facts are set out in the reasons for judgment. Tried by BIRD, J. at New Westminster on the 20th and 31st of March, 1944, and at Vancouver on the 22nd of April, 1944.

Lewis, for plaintiff.
Bartman, for defendants.

Cur. adv. vult.

3rd May, 1944.

BIRD, J.: The plaintiff claims in this action to recover possession of lands known as the O'Sullivan farm in the District of New Westminster, British Columbia, save and except five acres thereof, and for damages by reason of the defendants having wrongfully dispossessed the plaintiff from the said lands.

On March 22nd, 1943, the then owner of the O'Sullivan farm, one R. G. Barnes, agreed to rent the farm to the plaintiff for pasture purposes only, for the duration of the war, at an annual rental of $150 payable $25 per month commencing April and

ending September, 1943. A written memorandum of this transaction was signed by Barnes and the plaintiff on the same day. On May 27th, 1943, Barnes agreed to sell the O'Sullivan farm to the defendant John Evanocke, and a memorandum in writing covering that transaction was on the same day signed by Barnes and the said defendant. Subsequently, on or about the 20th of November, 1943, an agreement for sale of the farm was entered into between Barnes and the defendant. No reference was made to the lease to Trerise in either the memorandum of May 27th, 1943, or in the agreement for sale.

I am satisfied on the evidence adduced before me and find (1) that John Evanocke bought the farm with full knowledge of the existence of the lease from Barnes to Trerise, and of the terms of it; (2) that subsequent to the purchase of the farm the defendant John Evanocke received payment from the plaintiff of the balance of rent payable for the year commencing March 22nd, 1943, under the terms of the said lease, by monthly instalments paid on June 23rd, July 15th and September 15th, 1943; (3) that soon after the purchase of the farm by the defendant the plaintiff agreed, at the request of the defendants, to exclude from the leased lands a five-acre portion of the farm upon which were situate certain buildings, in consideration for which the annual rent payable by the plaintiff was reduced by the sum of $25. The plaintiff occupied the farm with the exception of the five-acre portion before mentioned, for pasturage purposes, to the knowledge of and with the consent and approval of the defendants, continuously from the date of the defendant's purchase of the farm to October 27th, 1943.

Early in the month of November, 1943, the defendants denied the plaintiff the use and enjoyment of the said farm by removing a plank bridge, being the only means of approach to the farm for the plaintiff's cattle, and since that date have refused to permit the plaintiff to enter upon the farm lands.

On the trial the defendants contended that although aware of plaintiff's tenancy, they were informed that plaintiff had agreed to vacate the farm upon consummation of a sale, also that the rental paid by the plaintiff was in respect of a tenancy for the summer months only.

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Bird, J.

Where there is conflict between the evidence of the plaintiff's witnesses and those of the defendants relative to the pasturage lease and the defendants' knowledge of it, I accept the evidence of the plaintiff's witnesses without hesitation.

During the month of December, 1943, and prior to the registration of the agreement for sale from Barnes to the defendant, the plaintiff procured from Barnes and caused to be registered, a lease of the O'Sullivan farm in the same terms as the agreement for lease dated March 22nd, 1943.

Counsel for the defendant now submits that the lease from Barnes to the plaintiff is void for uncertainty, and cites in support of this submission *Lace* v. *Chantler,* [1944] W.N. 77, wherein it was held that "a tenancy for the duration of the war could not be considered a valid lease," since the certainty of the lease as to its continuance was not ascertainable either by the express limitation of the parties or by reference to any collateral act which might with equal certainty measure the continuance of it.

The lease here under consideration is similarly defective and must be held to be void for the same reasons.

Then can any effect be given to the bargain made between Barnes and the plaintiff which, as I find, was subsequently confirmed and ratified by the defendants?

It has been held that where a tenant enters under a lease which is void for uncertainty but pays rent on the basis of a yearly tenancy, that a tenancy from year to year arises by presumption of law, provided there are no circumstances to rebut the presumption (*Arden* v. *Sullivan* (1850), 19 L.J.Q.B. 268).

Whether those circumstances exclude the implication of a yearly tenancy, has been held to be a question of fact to be decided on the circumstances of the case (Halsbury's Laws of England, 2nd Ed., Vol. 20, par. 137, p. 126, and cases there cited).

I take it that the same presumption arises where a tenant continues in possession after sale of the reversion and pays rent to the purchasers of the reversion (*Buckworth* v. *Simpson* (1835), 1 C.M. & R. 834; 4 L.J. Ex. 104).

The learned author of Foa, 6th Ed., 116, refers with approval

to *The Bishop of Bath's Case* (1605), 6 Co. Rep. 34 b wherein it was held that

a lease for years (without saying how many) has been held a good lease for two years, because "for more there is no certainty, and for less no sense in the words."

I do not find here any circumstances which rebut the presumption of a tenancy from year to year arising from the fact of Trerise continuing in possession after the sale of the farm to the defendant, and the acceptance thereafter by the defendants of the balance of the year's rent. On the contrary the evidence convinces me that when the bargain was made between the plaintiff and the defendant John Evanocke in or about the month of June, 1943, providing for exclusion from the lands subject to the Barnes lease of the five-acre portion and reduction of the annual rental, that it was the intention of both parties that the plaintiff should become tenant of the defendants for a term of years under the provisions of the Barnes lease, varied as to area and annual rental as above mentioned.

It would appear from the evidence that the defendants subsequently repented the bargain and endeavoured to determine the tenancy by preventing the plaintiff's access to the lands, and thereafter by pasturing their own cattle on those lands. In my judgment a tenancy from year to year commencing March 22nd, 1943, was thereby created.

I would grant the plaintiff's application to amend the prayer by adding in the alternative a claim for a declaration that the plaintiff is entitled to possession of the farm except the said five-acre portion upon a tenancy from year to year commencing March 22nd, 1943, at an annual rental of $125.

It follows that the defendants wrongfully dispossessed the plaintiff on or about the 7th of November, 1943, and have since wrongfully denied the plaintiff possession of the said lands.

There will be a declaration that the plaintiff is entitled to possession of the said lands in terms of the prayer as amended.

The evidence adduced upon the plaintiff's claim for damages is far from satisfactory. It was not established that the plaintiff had made any effort to reduce the loss by finding or attempting to find other pasturage, but the plaintiff seeks to recover the cost of feeding the cattle, which, had it not been for the act of the

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defendants, would have been put out to pasture on the O'Sullivan farm.

The evidence does not satisfy me that the cattle could have been on pasture through the winter. In these circumstances I do not find any special damage proved.

There has been a breach of the plaintiff's right of occupation by the defendants, and the plaintiff in consequence of defendants' act has been denied that right of occupation for a period in excess of six months. I would allow damages in the sum of $250.

There will be judgment for the plaintiff accordingly with costs.

Judgment for plaintiff.

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1944

April 3;
May 8.

McCLAY v. WARTIME HOUSING LIMITED.*

Crown — War housing — Incorporation — Action in tort — Emanation or servant of the Crown—Liability to be sued—Claim for a declaration of title—R.S.C. 1927, Cap. 64—R.S.B.C. 1936, Cap. 290, Sec. 11.

Prior to October 13th, 1942, the plaintiff was owner and held a certificate of indefeasible title for two certain lots in Prince Rupert, B.C., and on that date a plan and description of 14 parcels of land situate in Prince Rupert, among which the above-mentioned two lots were included, was deposited of record in the registrar's office by His Majesty the King in right of Canada represented by the Minister of Munitions and Supply. After October 13th, 1942, the defendant entered the said two lots and subsequently built or caused to be built a dwelling-house thereon. In an action for damages for trespass and for a declaration that the said lands and premises are the property of the plaintiff, the defendant claimed that the lands were taken by the King in the right of Canada under the Expropriation Act by virtue of the deposit of the plan and description of said land made in the Land Registry office at Prince Rupert on October 13th, 1942. That the lands were the freehold of His Majesty in right of Canada after said deposit and at the time of defendant's entry thereon the plaintiff had no title to or right to possession of said lands. That the defendant is an emanation of the Crown or an agent or servant of the Crown and any entry made on said lands or action taken in construction of a dwelling thereon by the defendant was made for and on behalf of His Majesty.

Held, that it has been established here that the defendant is an emanation or servant of the Crown. The defendant company was incorporated by the Minister for the purpose of purchasing, constructing and acquiring

* See *North and Wartime Housing Ltd.* v. *Madden*, [1944] 4 D.L.R. 161.

suitable living-quarters for persons engaged in production of munitions and it is provided by order in council that the company shall be deemed to be an emanation of the Crown and servant of His Majesty for such purpose. All the shares of the company are held by His Majesty in right of Canada. By agreement in writing in 1941 between His Majesty and the defendant, the Minister delegated to the defendant the power and duty of purchasing and constructing accommodation for persons engaged in production of munitions of war, and by order in council of August 18th, 1942, a like authority was given the defendant. It is established that all the actions complained of have been taken by the defendant in its representative capacity for and on behalf of the Crown. The claim for damages for trespass cannot be entertained against the defendant.

Held, further, that the action in so far as it relates to the claim for a declaration of title, cannot be entertained here for want of proper parties as the lands are now registered in the Land Registry office in His Majesty the King in right of Canada.

ACTION for damages for trespass upon certain lands of the plaintiff in Prince Rupert, British Columbia, and for a declaration that said lands and premises are the property of the plaintiff, the plaintiff alleging that the defendant has wrongfully entered upon said lands and has erected a dwelling thereon. The facts are set out in the reasons for judgment. Tried by BIRD, J. at Vancouver on the 3rd of April, 1944.

Lennie, K.C., for plaintiff.
Grossman, K.C., and *Sharp*, for defendant.

Cur. adv. vult.

8th May, 1944.

BIRD, J.: The plaintiff alleges that the defendant has wrongfully entered upon the plaintiff's lands in Prince Rupert, British Columbia, and has erected a dwelling-house thereon. She claims damages for trespass and a declaration that the said lands and premises are the property of the plaintiff.

I find that the following facts are established upon the evidence adduced: 1. That prior to October 13th, 1942, the plaintiff was the owner of lots 17 and 18, block 39, section 7, map 923, Prince Rupert, British Columbia, and then held in respect thereof certificate of indefeasible title No. 23989-I, issued by the registrar, Land Registry office, Prince Rupert, pursuant to the pro-

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visions of the Land Registry Act, R.S.B.C. 1936, Cap. 140. 2. That on the 13th of October, 1942, there was deposited of record in the office of the said registrar by His Majesty the King in right of Canada, represented by the Minister of Munitions and Supply, a plan and description of 14 parcels of land situate in the city of Prince Rupert, among which were included the plaintiff's lots before mentioned. 3. That the defendant entered the said lots 17 and 18 after October 13th, 1942, and subsequently built or caused to be built a dwelling-house thereon. 4. That an entry was made on the said lands prior to October 13th, 1942, by one G. M. Christie, acting on behalf of the defendant. This entry was made by Christie in his capacity as a British Columbia Land Surveyor, and solely for the purpose of conducting a survey of the lots.

I take it that the plaintiff's claim of trespass does not extend to or embrace the entry made by Christie. However, if the claim is intended to include it, then I am of opinion that this entry was lawfully made under the provisions of the Trespass Act, R.S.B.C. 1936, Cap. 290, Sec. 11.

The defendant contends: (1) That the plaintiff's lands were taken by His Majesty the King in right of Canada and not by the defendant, under the provisions of the Expropriation Act, R.S.C. 1927, Cap. 64, by virtue of the deposit of the plan and description of the said lands made in the Land Registry office at Prince Rupert on October 13th, 1942. (2) That the said lands were the freehold of His Majesty the King in right of Canada from and after the time of that deposit on October 13th, 1942, and that at the time of the defendant's entry thereon the plaintiff had not any title to or right to possession of the said lands. (3) That the defendant is an emanation of the Crown or an agent or servant of the Crown, and that any entry made upon the said lands and any action taken in connection with the construction of a dwelling-house thereon by the defendant was made and taken in that capacity, and for and on behalf of His Majesty the King in right of Canada.

In my judgment it has been established conclusively here that the defendant is an emanation or servant of the Crown.

The defendant was incorporated under The Companies Act,

1934 (Dominion), by direction of the Minister of Munitions and Supply, pursuant to order in council P.C. 1286, passed February 24th, 1941,

with the intent and for the purpose of . . . purchasing, constructing or otherwise acquiring and providing . . . suitable living accommodation for persons who are or may be engaged in the production of the munitions of war and supplies or on defence projects . . . in areas where in the opinion of the Minister there is likely to be a lack or serious shortage of such accommodation.

It is further provided by the order in council as follows:

The said company shall be deemed to be an emanation of the Crown, and in exercising the powers . . . conferred . . . such company shall be deemed to be an agent and/or a servant of His Majesty for such purpose, notwithstanding its corporate character and/or that it may be vested with the right to sue and be sued.

All of the issued share capital of the defendant is held by His Majesty the King in right of Canada. All of the moneys required to carry on the activities of the defendant have been furnished by His Majesty the King in right of Canada.

By agreement in writing made April 17th, 1941, between His Majesty the King in right of Canada, represented by the Honourable the Minister of Munitions and Supply and the defendant, the Minister delegated to the defendant

the power and duty of . . . purchasing, constructing or otherwise acquiring . . . suitable living accommodation . . . for persons who are or may be engaged in the production . . . of munitions of war . . . or on defence projects . . . or with the approval of the Minister others engaged in similar work connected with the prosecution of the war . . . in areas where in the opinion of the Minister there is or is likely to be a lack or serious shortage of such accommodation.

Further, that

all real . . . property purchased or otherwise acquired . . . by the company shall at all times be and remain the absolute property of His Majesty until sold, . . .

By order in council P.C. 7300 approved on the 18th of August, 1942, authority was given to the defendant on recommendation of the Minister of Munitions and Supply

"for the provision of the additional living accommodation herein described" being 100 houses . . . at Prince Rupert, in order to provide accommodation for persons engaged in war industries in that locality.

The evidence convinces me that all actions taken by the defendant or under the direction of the defendant relative to the lands the subject-matter of this action, were taken in the defend-

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ant's capacity as a Crown company, or as the agent or servant of and for and on behalf of the Crown, pursuant to authority conferred upon it by the said agreement made April 17th, 1941, by order in council P.C. 7300.

Then in those circumstances, assuming that the defendant's entry constituted a trespass upon the plaintiff's lands, can this action be maintained by the plaintiff against the defendant? I take it to be established that an action in tort cannot be successfully maintained against the Crown or an emanation of or servant of the Crown unless in very exceptional circumstances (*Gooderham & Worts Ltd.* v. *C.B.C.*, [1939] 4 D.L.R. 241, at p. 244), and cases there cited. In *Roper* v. *Public Works Commissioners*, [1915] 1 K.B. 45, Shearman, J. held that a servant of the Crown was not liable to be sued in his official capacity for tort in that instance for nuisance and trespass—although Atkin, L.J. in *Mackenzie-Kennedy* v. *Air Council*, [1927] 2 K.B. 517, at p. 533, after expressing the opinion that a corporation being a servant of the Crown cannot be made liable in a representative capacity for tort, says that the decision in the *Roper* case

> could only be supported on the view that the action there was against the Commissioners . . . in a representative capacity,

he being of opinion that a corporation, a servant of the Crown, can be made liable in its private capacity for torts

> actually committed by it, or to which it is directly privy, as by giving orders for their performance.

I conclude that Bankes, L.J. does not subscribe to the opinion of Atkin, L.J. last expressed, since he refers at p. 523 with evident approval to the words of Wills, J. in *Gilbert* v. *Corporation of Trinity House* (1886), 17 Q.B.D. 795, at p. 803, when he says:

> "I am clear that at common law there is no instance of any person or body having two distinct capacities—in one of which there is no liability to be sued because the person or body is the direct representative of the Crown, and in the other there is a liability to be sued because the capacity is that of a private corporation."

Since, as before stated, I consider it established that all the actions complained of here were taken by the defendant in its representative capacity and for and on behalf of the Crown, I am of opinion that the claim for damages for trespass cannot be maintained against the defendant.

Then can the action in so far as it relates to the claim for

a declaration of title be maintained? If that claim is to be taken as wholly independent of the claim for trespass, it is not a claim which could be entertained here for want of proper parties, since it is clear that the lands are now registered in the Land Registry office in His Majesty the King in right of Canada.

It appears to me that although the prayer in the statement of claim embraces a claim for damages for trespass as well as one for a declaration of title, that the action is primarily designed to determine the validity of the expropriation proceedings taken by the Crown on October 13th, 1942, against lands then held by the plaintiff. That being so, I consider that the action cannot be maintained in this Court. In Canada there is a special forum provided for determination of claims of that nature.

The Exchequer Court Act, R.S.C. 1927, Cap. 34, Sec. 18, provides, *inter alia*:

> The Exchequer Court shall have exclusive original jurisdiction in all cases . . . in which the land, . . . of the subject are in the possession of the Crown.

And again, section 19:

> . . . to hear and determine . . . (*a*) Every claim against the Crown for property taken for any public purpose.

In my opinion the forum for presentation of such claims as are put forward here is determined by the statute, and this Court has not jurisdiction to entertain such claims. *National Harbours Board* v. *Workmen's Compensation Commission* (1937), 63 Que. K.B. 388; *Moore* v. *Federal District Commission*, [1937] 1 D.L.R. 461.

The action therefore is dismissed with costs.

Action dismissed.

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1944

March 22; May 11.

IN RE ESTATE OF C. H. HITCHEN, DECEASED. *IN RE* TRUSTEE ACT. *IN RE* ADMINISTRATION ACT.

Will—Construction—Legacies—Duty—"All the proceeds of my estate"—What it includes—Rule 762a—R.S.B.C. 1936, Cap. 270, Secs. 10 and 28.

Clauses 7 and 8 of a will are as follow: "7. I direct that my trustees shall pay and divide all the proceeds of my estate in the following proportions, namely, 8. All the rest and residue of my estate both real and personal whatsoever and wheresoever situate I give, devise and bequeath to my son Richard Charles Horatio Hitchen for his own use absolutely." The trustees by originating summons asked the following questions: "1. Are the legatees entitled under the will of the deceased to receive their legacies free of any or all duties? 2. Is there authority under the terms of the will to the trustees to sell shares and stocks belonging to the estate other than oil and mining shares? 3. Having regard to paragraph 7 of the will of the deceased:—(a) what part of the estate is included in the phrase 'all the proceeds of my estate'? (b) do moneys on deposit in the bank to the credit of the testator at the time of his death fall into the residuary estate? (c) do the proceeds derived from the sale by the executors of any shares other than oil and mining shares fall into the residuary estate?"

Held, as to question 1, that there must be a clear direction in the will before executors are authorized to charge upon the estate generally the liability imposed by section 10 of the Succession Duty Act upon a legatee and the answer is in the negative. As to question 2, the direction for sale is confined to oil and mining shares and the answer is in the negative. As to questions under 3, the intention of the testator is to be collected from a consideration of the whole will. If he intended that clause 7 would operate as a residuary clause and the entire estate would thus be disposed of, there would be no need for the addition of a residuary clause and no effect could be given to clause 8. It follows that the phrase "all the proceeds of my estate" should be interpreted as a disposition only of the sum realized upon sale of the assets of the estate directed to be made under clauses 1 to 6 of the will.

ORIGINATING summons for determining certain questions of construction arising under the will of Charles Henry Hitchen, deceased, made on the 24th of July, 1942. The facts are set out in the reasons for judgment. Heard by BIRD, J. at Vancouver on the 22nd of March, 1944.

G. Roy Long, for executors.

Tysoe, and *Mayall*, for R. C. H. Hitchen.

Hunter, and *P. A. White*, for other beneficiaries.

Cur. adv. vult.

11th May, 1944. S. C. 1944

IN RE ESTATE OF C. H. HITCHEN, DECEASED

BIRD, J.: The executors and trustees named in the will of the deceased have submitted, by way of originating summons, for determination under rule 762a, certain questions of construction, arising under the will of the deceased made July 24th, 1942. The questions set out in the summons have been amended and substituted by consent of counsel representing the executors and all persons interested under the will, to read as follows:

1. Are the legatees entitled under the will of the deceased to receive their legacies free of any or all duties? 2. Is there authority under the terms of the will to the trustees to sell shares and stocks belonging to the estate other than oil and mining shares? 3. Having regard to paragraph 7 of the will of the deceased which reads in part as follows: "I direct that my trustees shall pay and divide all the proceeds of my estate in the following proportions, namely;" (a) what part of the estate is included in the phrase "all the proceeds of my estate"? (b) do moneys on deposit in the bank to the credit of the testator at the time of his death fall into the residuary estate? (c) do the proceeds derived from the sale by the executors, of any shares other than oil and mining shares fall into the residuary estate?

1. The answer to question 1 is in the negative. I do not find any such direction in the will. Clause 4 is not open to the construction that the gift thereunder is free of duty. In my opinion there must be a clear direction in the will before executors will be found authorized to charge upon the estate generally the liability imposed by section 10, Succession Duty Act, upon a legatee or other person entitled under the will.

2. The direction for sale, which is set out in clause 6 of the will is, in my opinion, confined to oil and mining shares. I am unable to find in the will any other direction for the sale of shares and stocks. In view of section 28, Succession Duty Act, no other authority is necessary. The answer to question 2 is in the negative.

3. Determination of the points raised under the three heads of this question appears to me to depend upon the interpretation of the phrase "proceeds of my estate" found in clause 7 of the will. If that phrase is construed to embrace the entire estate, then no effect can be given to the residuary disposition found in clause 8 of the will, but if the phrase is found to refer only to the proceeds of sale of assets directed to be made under the preceding clauses of the will, effect can be given to clause 7 as well as the residuary clause.

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IN RE ESTATE OF C. H. HITCHEN, DECEASED

Bird, J.

These clauses read in part as follows:

7. I direct that my trustees shall pay and divide all the proceeds of my estate in the following proportions, namely.

8. All the rest and residue of my estate both real and personal whatsoever and wheresoever situate I give, devise and bequeath to my son Richard Charles Horatio Hitchen for his own use absolutely.

Under the terms of the will the testator devises and bequeaths all his estate, real and personal, to trustees upon certain trusts and under clauses 2 and 6 thereof specifically directs his trustees to sell certain chattels and oil and mining shares, and under clause 5 to sell subject to certain conditions shares of English Herbal Dispensary Limited.

The intention of the testator is to be collected from a consideration of the whole will, and the meaning of the will and of every part of it is to be determined according to that intention—Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 189, par. 240.

Subject to certain limitations the will should be so construed as to give effect to every word—Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 197 and cases there cited.

I take it that for the purpose of ascertaining the testator's intention the words of the will should be given that meaning which is rendered necessary by the context of the whole will—Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 190, par. 243. Then applying the tests referred to in the cases cited in support of the propositions referred to by the learned author of the Halsbury article, and since clause 7 is preceded here by several directions to sell various assets of the estate, I conclude that the word "proceeds" in clause 7 was used in reference to those directions. I am fortified in that view by the incorporation in the will after clause 7 of the residuary clause.

If the testator had intended that clause 7 would operate as a residuary clause and that thus the entire estate would be disposed of, then there would have been no need for nor purpose in the addition of a residuary clause, and in those circumstances no effect could be given to clause 8, since, in my opinion, clause 7 would have taken lapsed gifts under clauses 1 to 6 of the will. *In re Isaac. Harrison* v. *Isaac,* [1905] 1 Ch. 427. Upon consideration of the whole will I am of opinion that the phrase "proceeds of my estate" found in clause 7 of the will was

intended to and is to be construed as having reference to the earlier directions for sale.

It follows therefore that the phrase, "all the proceeds of my estate" should be interpreted as a disposition of the total sum realized upon sale of assets of the estate directed to be made under clauses 1 to 6 of the will.

The answer to questions 3 (b) and (c) for the same reason is in the affirmative.

The summons further requires a direction as to the costs of this application. The costs will be allowed to the trustees as between solicitor and client. The costs of the several beneficiaries will be allowed on a party and party basis, costs of the trustees to be taxed under Appendix M. and of the beneficiaries under Appendix N. Since the trustees and beneficiaries Marler and Witherspoon appeared by one solicitor and counsel there will be one set of costs only.

Order accordingly.

REX v. GEORGE ELDRIDGE.

Criminal law—Breaking and entering a dwelling-house with intent to steal—A room in an hotel occupied temporarily not a "dwelling-house"—Substitution of lesser offence—Sentence reduced—Criminal Code, Secs. 335 (g), 459 and 1016, Subsec. 2.

A room in an hotel occupied temporarily by a guest in the course of travelling is not a "dwelling-house" within the meaning of section 335 (*g*) of the Criminal Code.

At 7 o'clock in the morning the accused was seen by the occupant of a room in an hotel as he was going out of his door. Nothing in the room was stolen or disturbed. He was convicted on a charge of "breaking and entering a dwelling-house with intent to steal" and sentenced to two years.

Held, on appeal, varying the decision of LENNOX, Co. J., that the conviction cannot be upheld as the hotel room in the circumstances is not a dwelling-house within section 335 (*g*) of the Criminal Code, but under section 1016, subsection 2 of the Code the offence of "attempted theft," which the evidence established, was substituted and the sentence reduced to six months.

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1944

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APPEAL by defendant from his conviction by LENNOX, Co. J. on the 26th of February, 1944, on a charge that

> at the city of Vancouver on the 22nd day of December, A.D. 1943, [he] did unlawfully break and enter by day the dwelling house of Robert Creedon, Room 100 York Hotel there situated, with intent to commit an indictable offence therein, to wit, to steal the goods and chattels the property of Robert Creedon then and there being found in the said dwelling house, contrary to the form of the statute in such case made and provided.

The complainant one Creedon occupied room 100 in the York Hotel, Vancouver, on the 21st of December, 1943. On going to bed his door was not locked. At about 7 o'clock in the morning on seeing a man leaving his room and shutting the door, he got up and went out into the hall where he saw the accused about 17 yards down the hall. Nothing was taken from his room. On the trial accused gave evidence and said he was looking for his wife. He and his wife had not been living together for some time. Accused had a record of some length. The learned trial judge did not believe accused's story and sentenced him to two years' imprisonment.

The appeal was argued at Vancouver on the 22nd and 23rd of May, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Crux, for appellant: When the complainant returned on the night of the 21st of December, the door of his room was not locked as the lock was out of order. When he woke up in the morning, the accused had his hand on the door and he was just going out. It is submitted that nothing was taken from the room and nothing was disturbed. Complainant telephoned the hotel clerk who immediately advised the police and the police arrived shortly. There was a man named Fontaine with accused as they went down stairs. Accused had $50 on him and Fontaine from five to six hundred dollars. He was accused of breaking and entering with intent to commit theft. First, the Crown must prove that he did unlawfully break and enter. There is no evidence of breaking. In the next place, room 100 of the York Hotel is not a "dwelling" within the meaning of section 335 (*g*) of the Criminal Code. Thirdly, there is no evidence of intent to steal goods of Creedon. The evidence of intent is circumstantial only

and is quite consistent with the innocence of the accused. Further, the learned trial judge did not give fair consideration to the evidence of the accused and Fontaine. Accused states the door was ajar when he stepped into the room. If it was ajar there was no breaking: see *Rex* v. *Burns* (1903), 7 Can. C.C. 95. A "dwelling-house" is a house occupied by some person as his permanent home. This is an hotel occupied by transients. It is not a dwelling within section 335 (*g*) of the Code. They must show it is a permanent building: see 1 Hale, P.C. 557; 2 East, P.C. 497; Archbold's Criminal Pleading, Evidence and Practice, 31st Ed., 615. We say "resident" does not include a transient whose home is somewhere else. There is no evidence of intent to steal. There must be evidence to show that there is presumed to be an intent to steal.

H. Alan Maclean, for the Crown: The evidence is sufficient to establish an intention to steal. Accused's going down the servants' stairway is a suspicious circumstance. As to "dwelling-house," Creedon was residing in the room for the time being. The definition of "dwelling-house" should be considered as distinguished from office. A man can have a dwelling-place at an hotel as well as anywhere else: see 1 Hale, P.C. 556; Crankshaw's Criminal Code, 6th Ed., 547. Evidence of intent may be gathered from all the facts of the case: see *Rex* v. *Ellis* (1943), 59 B.C. 393. As to substituting the lesser offence of attempt to steal see *Rex* v. *Sam Chin* (1926), 36 B.C. 397; Snow's Criminal Code, 5th Ed., Sec. 459, Subsec. 2, see note. Attempted theft is a common-law offence: see *Smith* v. *Regem,* [1931] S.C.R. 578, at p. 581; *Rex* v. *Orford* (1942), 58 B.C. 51. That there should not be substitution see *Rex* v. *Anderson* (1924), 55 O.L.R. 586; *Rex* v. *Taylor and Young,* [1924] 2 D.L.R. 109; *Duplessis* v. *Regem* (1935), 65 Can. C.C. 255; *Rex* v. *Rossignol and Roy* (1923), 40 Can. C.C. 253; *Hoolahan* v. *Malepart* (1912), 19 Can. C.C. 405; *Rex* v. *Orford* (1942), 58 B.C. 51. On circumstantial evidence, the evidence taken as a whole is conclusive: see *Rex* v. *McDonald* (1942), 57 B.C. 478.

Crux, in reply: There is no evidence to support the charge laid and the Court may substitute the lesser offence: see *Rex* v.

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Low Quong (1924), 33 B.C. 522, at p. 523; *Rex* v. *Orford*, [1943] S.C.R. 103, at pp. 110-11.

Cur. adv. vult.

On the 31st of May, 1944, the judgment of the Court was delivered by

O'HALLORAN, J.A.: The appellant was charged under Code section 459 that he

> at the said city of Vancouver on the 22nd day of December, A.D. 1943, did unlawfully break and enter by day the dwelling house of Robert Creedon, Room 100 York Hotel there situated, with intent to commit an indictable offence therein, to wit, to steal the goods and chattels the property of Robert Creedon then and there being found in the said dwelling house, contrary to the form of the statute in such case made and provided.

He was convicted by LENNOX, Co. J. and sentenced to two years' imprisonment.

The learned judge found that the appellant did break and enter the premises by day, and I am satisfied that such finding is warranted by supporting evidence. Under Code section 459, subsection 2, that finding is evidence of an intent to commit an indictable offence. The surrounding circumstances point irresistibly to an intent to steal. The explanation offered by the appellant that he was searching for his wife, was not believed by the learned judge. Moreover, viewed in the light of all the evidence it cannot be regarded as a reasonable explanation, and I read the learned judge's reasons to mean that he so found. The evidence does not permit an objective conclusion which points to innocence, *cf. Rex* v. *McDonald* (1942), 57 B.C. 478.

I am convinced, however, that the complainant's hotel room, in the special circumstances of this case, is not a "dwelling-house" within the scope of section 335 (*g*) and accordingly the conviction cannot be upheld. The latter subsection reads:

> "Dwelling-house" means a permanent building, the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family or servants, or any of them, although it may at intervals be unoccupied.

It was not argued that the hotel room occupied by the complainant was "kept" by the owner or occupier of the hotel, for "the residence therein of himself, his family or servants."

The complainant lives at Port Mellon and occupied the hotel room in the usual way during a visit to Vancouver. The defini-

tion in section 335 (*g*) clearly implies an occupation of some permanency when it says "although it may at intervals be unoccupied." The same idea is conveyed also by the use of the word "kept." The carefully chosen language which defines "dwelling-house" negatives its application to a room occupied for temporary accommodation in the course of travelling from one locality to another, or while one is temporarily away from his residence and family. No relevant decision upon the definitive subsection has come to our attention.

Since the conviction cannot stand, does Code section 1016, subsection 2, enable this Court to substitute the offence of "attempted theft" as submitted by counsel for the Crown respondent? It is not substitution of an "attempt" under Code section 949. To come within that section the substituted offence would be "an attempt to break and enter a dwelling-house with intent to steal." But since "dwelling-house" would be an essential circumstance thereof, such a charge would necessarily fall with the original charge. Attempted theft is not so affected for it is a substantive offence in itself at common law. Compare *Smith* v. *Regem,* [1931] S.C.R. 578 adopting *Reg.* v. *M'Pherson* (1857), 7 Cox, C.C. 281.

Attempted theft is proven in the evidence although the whole offence as charged under Code section 459 was not proven. Compare section 951. The Court finds unanimously that breaking and entering with intent to steal occurred in a place not a dwelling-house. The fact that the place was not a dwelling-house does not exclude the attempt to steal which is the necessary legal consequence of the evidence of breaking and entering with intent to steal. The only rational conclusion as found below and upheld in this Court, is that the appellant went to the place to steal and then broke and entered the complainant's room for that purpose.

The New Brunswick decision of *Rex* v. *Rossignol and Roy* (1923), 40 Can. C.C. 253 is not in conflict. The accused was charged there under Code section 461 with breaking and entering with intent to steal. The jury found him not guilty of that charge but guilty of attempted theft. In quashing the conviction the majority of the Court said (p. 256), the jury had found there was no intent to commit a criminal act, but held that the trial

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judge had failed to instruct them properly regarding the distinction between intent to steal and an attempt under Code section 949. Moreover, the majority were "more than doubtful" (p. 256) that the evidence established a verdict of attempted theft. In the case at Bar, as has been pointed out, no doubt remains of the sufficiency of the evidence of the intent to steal and the attempt to steal.

This is a case within section 1016, subsection 2, where the learned judge "could on the indictment" have found the appellant guilty of the substantive common-law offence of attempted theft. And moreover, on the "actual findings" in the Court below the learned judge "must have been satisfied of facts which proved" the appellant guilty of attempted theft, *cf. Rex* v. *Sam Chin* (1926), 36 B.C. 397, at p. 400 and *Rex* v. *Lee Foon* (1927), 39 B.C. 298. It should be added perhaps that because of its distinguishing subject-matter *Rex* v. *Orford* (1942), 58 B.C. 51; affirmed, [1943] S.C.R. 103, has not been found in point here.

We asked counsel to speak to sentence. It appears that under Code sections 773 (*b*) and 779 if the appellant had been charged with attempted theft and had been tried summarily, the maximum sentence would have been six months. In the circumstances it does not appear just that the appellant should be deprived of that advantage by what is now found to have been a misappreciation of the nature of the offence on the part of the prosecution.

I would therefore set aside the conviction, but in substitution find the appellant guilty of attempted theft and impose a sentence of six months' imprisonment with hard labour.

Conviction set aside; "guilty of attempted theft" substituted.

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March 10, 13, 14, 15; *April* 26.

Woodmen's liens — Judgment obtained in default — Judgment in rem — Seizure and removal of lien logs by defendant — Action for damages — R.S.B.C. 1936, Cap. 310, Secs. 4 (2), 5, 6, 7, 8, 15 and 21 to 26.

The American Timber Holding Company, who held a timber licence upon land on the east side of Narrows Arm, entered into an agreement to sell the timber to the Narrows Arm Logging Company in April, 1937. The agreement provided that the logging was to commence on the 2nd of June, 1937, and continue till the 1st of June, 1941. The Narrows company cut the logs in question (about one million feet) between April and July, 1938, when logging operations ceased, the logs being left on the ground. The workmen, not being paid, filed liens under the Woodmen's Lien for Wages Act within 30 days after the last day their services were performed and on the 30th of August, 1938, they assigned their liens to the plaintiff company who, on the 16th of August, 1938, being within the time allowed by said Act, commenced action to enforce its liens against the Narrows company. The Narrows company did not enter an appearance or statement of defence and judgment was obtained in default on October 19th, 1938. On March 7th, 1939, the American Timber Holding Company obtained judgment rescinding the contract of April, 1937, a clause in the judgment providing that the Narrows company could remove the logs cut on the premises with machinery and equipment before June 1st, 1939. The machinery and equipment were removed, but the logs were left lying on the premises. By *mesne* assignments from the American Timber Holding Company, the licence became the property of the defendant on October 19th, 1939. In this action the plaintiff claimed that the defendant, with knowledge of the said liens and assignment to the plaintiff and without authority, caused the logs upon which the plaintiff had liens to be removed from the premises where they were situate and mixed the said logs together with logs cut by it so that it was impossible for the plaintiff to realize upon its liens and thereby its liens were lost. They claimed general damages and special damages. On the trial the jury found in favour of the plaintiff and assessed the damages at $2,244.39 for which judgment was entered.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C., that a proper judgment under the Woodmen's Lien for Wages Act is a judgment *in rem* and good against all the world and accordingly the liens were properly proved by such judgment. There was ample evidence upon which the jury could find that the profit on the sale of the logs in question which had been or could be made by the appellant would equal the amount of their verdict.

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APPEAL by defendant from the decision of FARRIS, C.J.S.C. of the 15th of June, 1943, on a trial with a jury, who found a verdict for the plaintiff for $2,244.39. The action was with reference to liens upon certain logs cut by workmen of the Narrows Arm Logging Company Limited upon land, covered by a timber licence, situate on the east side of Narrows Arm. The licence originally belonged to the American Timber Holding Company, who, on the 7th of April, 1937, entered into an agreement to sell the timber to the Narrows company. It provided that the logging was to commence on the 2nd of June, 1937, and continue until June 1st, 1941. The Narrows company cut the logs in question between April and July, 1938, when operations stopped, there being about one million feet of logs cut and lying on the licensed area. The workmen who performed services for the Narrows company then filed liens for wages under the Woodmen's Lien for Wages Act upon these logs within 30 days after completion of their work and assigned their liens to the plaintiff company who, on August 16th, 1938, commenced an action to enforce the liens against the Narrows company. The Narrows company did not enter an appearance or file a defence and on the 19th of October, 1938, the plaintiff obtained a judgment by default. In March, 1939, the American Timber Holding Company obtained judgment against the Narrows company, declaring that the above contract was rescinded, the judgment containing a clause that the defendant be at liberty to remove the logs cut by the defendant and its equipment. Through *mesne* assignments the licence was on the 19th of October, 1939, assigned to the defendant Oscar Niemi Limited. The plaintiffs claim that the defendant, with knowledge of the said liens and assignment to the plaintiff company and without authority from it, caused the logs upon which the plaintiff had liens to be removed from the premises where they were situate and mixed the said logs together with logs cut by it, so that it was impossible for the plaintiff to realize upon its liens and thereby its liens were lost. Accordingly they claimed general damages and special damages.

The appeal was argued at Vancouver on the 10th and the 13th to the 15th of March, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

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Locke, K.C. (*F. R. Anderson,* with him), for appellant: There is no proof as against the defendant that the plaintiff had a lien upon the logs referred to and the learned judge erred in charging the jury that the lien had been established by the filing at the trial, as an exhibit, of a judgment in favour of the plaintiff against the Narrows company. This is not a judgment *in rem*: see *Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd. and Oscar Niemi Ltd.* (1942), 57 B.C. 346, at p. 350; Halsbury's Laws of England, 2nd Ed., Vol. 13, pp. 408-9; Phipson on Evidence, 8th Ed., 403; *Wakefield Corporation* v. *Cooke* (1903), 73 L.J.K.B. 88; *Hart and another* v. *M'Namara and another* (1817), 4 Price 154 (n.); 146 E.R. 424 (n.); *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414. Even if it is a judgment *in rem,* it fails to establish against the defendant that the amount claimed was wages. The judgment does not say so and in this action the plaintiff cannot ask the Court to surmise. Assuming it is a judgment *in rem,* it fails to establish against the defendant that the lien adjudged in the plaintiffs was a lien for wages and fails to establish that it was a lien for any amount whatsoever and fails to establish anything upon which to found an assessment of damages. No cause of action is pleaded and none proven, and there was error in the charge as to assessment of damages. One cannot sue in tort unless he proves that a tort has been committed: see *Mayor, &c., of Bradford* v. *Pickles,* [1895] A.C. 587; *Sorrell* v. *Smith,* [1925] A.C. 700, at pp. 727-8. In any event the action is premature. There was error in the charge in that the Woodmen's Lien for Wages Act created a right unknown at common law and specified a remedy therefor which remedy ceased to be available only after sale of the timber in the ordinary course of business, which had not occurred at the time of commencement of this action. The judgment obtained by the plaintiff against the Narrows company was a nullity, there being no jurisdiction in the registrar to sign default judgment. The same accordingly is not available as proof of anything therein contained. The learned trial judge erred in charging the jury as a matter of law that there was no abandonment by the plaintiffs of their interest. Upon the evidence the plaintiff company

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had abandoned the logs. The evidence established that the logs in question were valueless and could not be brought out at a profit.

Castillou, K.C., for respondents: Neither in the statement of defence nor on the trial was any application mentioned to have the lien judgment on the logs declared null and void. Only two points were raised, first, that the liens do not prove themselves and, secondly, that the judgment does not dispense with intermediate steps. The learned trial judge said the lien judgment is conclusive and dispenses with proof of intervening steps. The declaration of nullity on the first trial was reopened by the Court of Appeal: see *Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd. and Oscar Niemi Ltd.* (1942), 57 B.C. 346. A direction by the Court that a judgment should be treated as void should be made in the same action and not in a collateral proceeding: see *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165, at p. 167. As to the validity of the lien judgment see *Pelly* v. *Ala and Canadian Forest Products Ltd.*, [1940] 1 W.W.R. 528, at p. 535; *Jones* v. *Macaulay* (1890), 60 L.J.Q.B. 258; *Higgins* v. *Scott* (1888), 58 L.J.Q.B. 97. There are two classes of cases in these woodmen's lien actions. First, against the party with whom he contracts and, secondly, the right against the logs. The lien attaches against the logs and not against any person. The learned judge was justified in admitting as evidence against the defendant the judgment against the Narrows company and the judgment proved the workmen whose liens were assigned to the plaintiff had rendered services entitling them to a lien upon the logs. He was right in finding in law and fact that there was evidence showing the plaintiff was entitled to a lien on the logs. There was no evidence to support the contention that the plaintiff had abandoned the lien in question or any claim to lien as the lien has been kept alive by action and judgment. The learned judge left the matter of abandonment to the jury who found in favour of the plaintiff. If it is held that the appellant or its predecessor had no interest in the logs, but same were owned by the Narrows company when the work was done, the case was equally strong for the plaintiff for then without any claim to title when the work was being done they would be interfering with the right to enforce the lien and judgment and so would be guilty of a tort

and liable to damages: see Salmond on Torts, 9th Ed., 356-7; Pollock on Torts, 14th Ed., 285; *Mears* v. *London and South-Western Railway Co.* (1862), 11 C.B. (N.S.) 850; *Chassy* v. *May* (1925), 35 B.C. 113; *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83, at p. 97. The verdict of the jury was consistent with the law and evidence, and the damages not in excess of the value of the logs. The lien and judgment create and prove the charge and property right in respect to the logs: see Phipson on Evidence, 7th Ed., 397.

Locke, in reply, referred to *Vipond* v. *Galbraith* (1922), 31 B.C. 58, at pp. 61-2 and 65.

Cur. adv. vult.

26th April, 1944.

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

O'HALLORAN, J.A.: When this matter came before the Court previously on appeal from a judgment dismissing the action upon two points of law set down under rule 282 for hearing before trial, we allowed the appeal and directed the action proceed to trial with leave to amend the pleadings, *vide Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd. and Oscar Niemi Ltd.* (1942), 57 B.C. 346. The claim against the defendant Niemi Logging Co. Ltd. was abandoned, and at the trial the jury gave the respondent plaintiff $2,244.39 damages against the present appellant for infringement of its woodmen's lien under the Woodmen's Lien for Wages Act, Cap. 310, R.S.B.C. 1936.

In the appeal now argued I did not understand counsel for the appellant to directly attack the charge of the learned judge to the jury. The grounds of appeal as argued readily divide themselves into two classes, relating to (a) proof of the existence of the lien, and (b) whether there was or was not evidence to go to the jury upon several questions of fact upon which the appellant defendant relied. The facts and arguments of counsel are succinctly stated in the judgment of my brother ROBERTSON. I agree with him that there was no evidence of abandonment of the lien to go to the jury. I agree with my brother ROBERTSON also there was abundant evidence before the jury to warrant not only a finding in the respondent's favour, but an award of damages in

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the amount of the verdict. That disposes of the grounds of appeal of the second class.

The grounds of appeal of the first class arose in this way. The respondent as assignee of several workmen's liens for wages obtained a default judgment against the Narrows Arm Logging Company Limited which declared it entitled to a lien under the Woodmen's Lien for Wages Act, *supra* (*vide* section 7 (2) thereof). In the present action for damages against the appellant defendant for infringing the said lien, the respondent plaintiff proved its lien at the trial by production of the said judgment obtained in the woodmen's lien action. Counsel for the appellant submitted then as now that was not proof of the lien. Several objections were taken, but the only ones I regard of vital importance are that the registrar had not jurisdiction to sign the default judgment, and secondly in the alternative if he had, it was a judgment to which the appellant was not privy, and was binding only upon the parties thereto, *viz.*, the respondent and Narrows Arm Logging Company Limited.

On the first objection, I investigated the registrar's powers with some care in the previous appeal, and satisfied myself the statute conferred jurisdiction upon him, *vide Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd. and Oscar Niemi Ltd., supra,* at pp. 365-6. Further consideration of my reasons then given which I adopt here without repeating them, confirms my opinion that the registrar had jurisdiction to do what he did, and hence the impugned judgment cannot be a nullity. I associate myself also with the observations of my brother ROBERTSON regarding the effect of section 8 of the statute in that respect.

The second objection was made to embrace and interrelate such questions as, whether the judgment was *in rem,* the nature of a judgment *in rem,* and whether a woodmen's lien conferred upon the lienholder a property interest in the logs. We were pressed with comparisons between a woodmen's lien and a maritime lien, and many cases were cited involving liens of the latter description. From the reasoning of those decisions, we were asked to hold that the impugned judgment under the Woodmen's Lien for Wages Act is not a judgment *in rem,* and therefore not

binding upon the appellant which was not one of the parties thereto. I have read the maritime lien cases with benefit, but their perusal warns me of more than one danger in accepting their analogy as complete and their reasoning as decisive of a case such as the present, which depends wholly upon the terms of the statute creating the lien.

A maritime lien in our law is not a creation of statute. Nor is the term lien used in maritime law in the strict legal sense it is understood in the common law, *cf. Harmer* v. *Bell. The Bold Buccleugh* (1851), 7 Moore, P.C. 267, at p. 284; 13 E.R. 884, at p. 890. It is true that there are liens relating to maritime matters which are created by statute, *e.g.,* for necessaries supplied to a ship. Again, our Courts will enforce a maritime lien declared to be such in foreign law by a foreign Court, even if the original claim would not have been recognized as a maritime lien under English law, *cf. Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India* (1897), 66 L.J.Q.B. 339. Speaking for myself, I hesitate to rest the decision of this case upon maritime-lien decisions, however apt those decisions may appear to be in many aspects.

Whatever a judgment *in rem* may or may not be, perusal of the Woodmen's Lien for Wages Act as a whole, convinces me that a lien under that statute and a judgment declaring its existence, are as effectually binding upon all the world as if the statute used those very words. I must regard that as implicit in the statute particularly in section 6 thereof. The Act is a public statute for the protection of workmen who do work within the purview of the statute. It is notice to the world and binding upon everyone who deals with the logs upon which that work is done, just as effectively as the filing of a mechanic's lien affidavit in the Land Registry office binds the land and all who may deal with that land. I confirm here the observations in that respect to be found in my judgment in the previous *Warehouse Security* appeal, *supra,* at pp. 361-2.

I can read no other meaning into section 6 which says in material part:

> . . . , no sale or transfer of the logs or timber . . . shall in anywise affect the lien, but the lien shall remain and be in force against the logs or timber in whosesoever possession the same shall be found, . . .

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It is my conclusion that such express and comprehensive language sustains the lien against all the world, and was employed for that purpose, and to make it clear beyond doubt that the lien and any judgment pursuant to the statute declaring its existence is not limited in its legal effect solely to the lienholder and the person liable for payment of the work for which the lien attached. Hence in my view, production in this action of the judgment declaring the existence of lien, was in itself sufficient proof of the lien.

While, because of the statutory language to which I have referred, I doubt if it is essential to the decision of this case to find specifically that the judgment declaring the lien is a judgment *in rem,* I must say nevertheless, that I agree with my brother ROBERTSON that it is a judgment *in rem.* I conceive a judgment may be essentially *in rem,* although it may not be so to the same extent as a judgment against a ship in the Admiralty Court. There is no doubt a recognized distinction in admiralty law between an action *in rem* literally against the ship itself, and an action *in personam* against a defendant in person for debt, and *cf. Harmer* v. *Bell. The Bold Buccleugh* (1851), 13 E.R. 884, at p. 891, and *Northcote* v. *Owners of the Henrich Bjorn* (1886), 55 L.J. Adm. 80.

But in my judgment that distinction, if it extends beyond admiralty law, loses much of its rigidity when subjected to the provisions of the Woodmen's Lien for Wages Act. That statute established new rights and provides procedure for enforcing those new rights in a manner which may perhaps cut across and render inapplicable some of the distinctions which appear in the English decisions cited to us. It provides substantively for an action *in rem* brought against a defendant *in personam, cf.* section 7 (1). A person and not the *res* is the defendant, but the proceeding is not primarily for debt as such. It is in essence a proceeding to perfect an existing lien for wages, and to enforce that lien by a judgment against the *res.*

Incidentally, the *Northcote* case, *supra,* which Lord Watson at p. 82 described as an action *in rem,* was not brought against the ship, but against the owners of the ship for necessaries supplied to it, *vide* (1883), 52 L.J. Adm. 83, at p. 84. And it

appears from what Lord FitzGerald said in the House of Lords, (1886), 55 L.J. Adm. at p. 87, that a maritime lien was not alleged in the pleadings or put forward at the trial, but was raised for the first time in argument before the Court of Appeal.

Running through the argument before us was the implication that the foregoing conclusions were in some way dependent upon the woodmen's lien conferring a right of ownership in the logs. I am led to the reasoned conclusion that the statutory lien now considered does not depend upon the lienholder possessing ownership or property interest in the *res*. I use these words in the same sense although not necessarily in the same degree. I am equally convinced the lien does not confer upon the lienholder ownership or property interest in the *res*.

In the *Minna Craig* case, *supra*, some general remarks of Lord Esher may appear to lend colour to that theory. However, the property interest there pictured is described in such intangible terms as to make it inconsistent with ownership in the legal sense. The inference remains that the remarks were illustrative only, and were not directed to the question of ownership as such. That is borne out by the fact that the majority of the Court, Lopes and Chitty, L.JJ. found no occasion to examine that question, as no doubt they would have done if it had been raised, or had been pertinent to the decision.

Chitty, L.J. in particular at p. 344 used language which excludes the theory of ownership or property interest. He accepted the lienholders as ship's creditors "with the right to be paid by the ship, or out of the proceeds of her sale." In the previous *Warehouse Security* appeal, *supra*, at pp. 361-2, I stressed an important resemblance between a woodmen's lien and a mechanic's lien, in that both were statutory liens, and then repeated as applicable to a woodmen's lien, what I had said in *Triangle Storage Ltd.* v. *Porter* (1941), 56 B.C. 422, at p. 427, that a mechanic's lien is created by the statute and not by the order of the Court which is designated in the statute to enforce it. The latter was simply a restatement of what this Court had already held in *Hodgson Lumber Co. Limited* v. *Marshall et al.* (1940), 55 B.C. 467, at p. 471 (MACDONALD, C.J.B.C., SLOAN

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and O'HALLORAN, JJ.A.). Effect is given to the lien by a judgment *in rem.*

It follows that except in the procedural aspect, the judgment declaring the existence of the lien does not add to the statutory lien. The proceedings leading to judgment constitute a process requisite only to perfect a right inchoate from the moment the lien attaches. And the statute does not create in the lienholder a right to property in the *res.* This Court (MACDONALD, C.J.B.C., O'HALLORAN and MCDONALD, JJ.A.) had to consider that very point in *Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472. In that case Watt had been declared entitled to a mechanic's lien for work done in a mine. It was objected he had not a free miner's licence under section 12 of the Mineral Act (Cap. 181, R.S.B.C. 1936) and therefore could not have a mechanic's lien because the latter was "a right or interest in or to mining property" within the meaning of the Mineral Act.

That submission was rejected by the Court on the ground that the statutory lien did not confer upon the lienholder a property interest in the mine, but only a right to enforce payment for work done by a sale under the supervision of the Court. *Obiter dicta* observations of MARTIN, J.A. in *Chassy* v. *May* (1925), 35 B.C. 113, at p. 118, were there distinguished. I had to advert to the subject again in the previous *Warehouse Security* case, *supra,* at pp. 362-3, because the plaintiff then claimed a declaration it was entitled to possession of the logs by virtue of a property interest which it alleged the lien gave it in the logs. I then relied upon the *Watt* decision and examined the *Chassy* v. *May* decision anew with the assistance of the Court's previous judgment in *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83. I pointed out at p. 363 that the lien in *Chassy* v. *May* was not statutory but seemed to have been created by the Court itself. I add now, that it had the attributes of an equitable lien imposed by the Court to prevent unjust enrichment. Lord Wright of Durley in his "Legal Essays and Addresses" (1939) fortified that proposition by an illustration similar to *Chassy* v. *May, viz.,* where a person is entitled to claim for improvements made by him on another's land (my note such

as assessment work on a mineral claim in *Chassy* v. *May*), he cannot claim to enforce a constructive trust but only an equitable lien. Such a lien may be said to carry with it some real interest in the *res*, extending beyond and quite distinct from a mere claim for wages.

But an equitable lien of that type and the statutory lien now under review are founded on two different conceptions. The latter is not designed to confer a property interest in the *res* upon the lienholder, but it is designed to protect his claim for wages against the world, by making the lien attach to the *res* as long as the *res* exists. Lord Watson may have had this in mind in *Northcote* v. *Owners of the Henrich Bjorn* (1886), 55 L.J. Adm. 80, when he said at p. 82 that an action *in rem* was an appropriate remedy for one

> who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognizes.

Although that was said in an Admiralty proceeding, the rational distinctions which it imports run in no one channel of the law and adapt themselves easily to general application. It is particularly appropriate in the conditions which make their appearance in this case. It confirms that the legal incidents which may result from a lien vary according to the nature of the lien. Without attempting to be exhaustive, it may recognize a right to property (*e.g.*, a vendor's lien), or some real interest not amounting to a property interest (*e.g.*, *Chassy* v. *May*, *supra*), or as in this case paraphrasing Lord Watson's language, a claim of debt secured by a statutory lien.

A painter who paints a house does not thereby acquire an ownership in the house. Neither does the plumber who repairs the furnace, or the electrician or the carpenter who do other repairs. To hold they do in the absence of an unequivocal statutory provision to that effect, would be straining the concept of ownership and property interest beyond any legitimate sense which these terms are now capable of expressing.

I would dismiss the appeal.

ROBERTSON, J.A.: This is an appeal from the judgment of the learned Chief Justice, following a trial by jury, who found a verdict for the plaintiff in the sum of $2,244.39. The action

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concerned alleged liens upon certain logs cut by workmen of the Narrows Arm Logging Company Limited upon the land covered by a timber licence situate on the east side of Narrows Arm. The timber licence originally belonged to the American Timber Holding Company Limited, who, on the 7th of April, 1937, entered into an agreement to sell the timber to the Narrows company; the purchase price to be based at so much per thousand feet. The agreement provided that logging was to commence on the 2nd of June, 1937, and to continue till the 1st of June, 1941. By an amendment to the agreement dated the 8th of October, 1937, it was provided, *inter alia,* that the purchase price should be $55,000, payable as therein mentioned.

The Narrows company cut the logs in question between April and July, 1938, and stopped operations in the last-mentioned month. The plaintiff claims that at the time these operations ceased there was cut and lying upon the timber licence a million feet of logs, in respect of which the work was done and the liens were claimed.

On the 7th of March, 1939, the American Timber Holding Company obtained a judgment against the Narrows company, declaring that the contract above mentioned had been in effect since the 8th of October, 1937, and "rescinding" the contracts. Paragraph 5 of the said judgment provided as follows:

(5) That the defendant, its servants and agents, be at liberty to enter upon the said lands and premises and to remove therefrom on or before the 1st day of June, A.D. 1939, all logs already cut by the defendant, whether in the water or elsewhere, and also all logging equipment and machinery, camp supplies and camp buildings belonging to the defendant; and that the defendant's equity or interest in any portion thereof not removed within the said time, be forfeited to the plaintiff.

On the 29th of June, 1939, the American Timber Holding Company assigned the licence to one J. P. Meehan. On the 12th of October, 1939, Meehan absolutely assigned the timber licence to *F. R. Anderson.* On the 19th of October, 1939, *Anderson* absolutely assigned the timber licence to the defendant. The statement of claim alleges that during the months of April, May, June and July in the year 1938 a number of workmen performed labour and services for the Narrows company in connection with logs on the timber licence and thereby became entitled to liens

under the Woodmen's Lien for Wages Act upon those logs; that in accordance with the said Act they duly filed their liens for wages amounting in all to $2,896.42, within 30 days after the last day such labour or services were performed in the proper county court registry, and that thereby said liens attached to and became a charge on the one million feet of logs, before referred to. That by assignment in writing dated 30th August, 1938, the workmen duly assigned their liens to the plaintiff company, who, on the 16th of August, 1938, being within the time allowed by the said Act, commenced an action in the Supreme Court of British Columbia to enforce its liens against the said Narrows Arm Logging Company, and on the 19th of October, 1938, obtained a judgment, in default, as follows:

The defendant, Narrows Arm Logging Company Limited, not having entered an appearance, it is this day adjudged that the plaintiff recover against the said defendant $2,896.42 and $45.70 costs, amounting together to the sum of $2,942.12.

It is further adjudged and declared that the plaintiff is entitled to a lien under the Woodmen's Lien for Wages Act being chapter 310 of the Revised Statutes of British Columbia, 1936, upon certain logs or timber of the said defendant, consisting of one boom of logs comprising about 14 sections of fir, hemlock and cedar now situated at the booming grounds of the Johnston Storage Company in the harbour of the city of Vancouver, in the county of Vancouver, in the Province of British Columbia, and about 170,000 feet of logs now situated in the Narrows Arm River at Sechelt Inlet adjacent to the premises of the said defendant and 500,000 feet of logs felled and bucked and cold decked and at present in the woods at the premises of the said defendant at Sechelt Inlet, in the Province of British Columbia, and one million feet of logs felled and bucked at present in the woods at the premises of the said defendant in the county of Vancouver, in the Province of British Columbia.

I ought to say that this judgment was reduced to $2,198.69 in 1938 by an amount received from the sale of part of the liened logs.

The statement of claim continues: That the defendant with knowledge of the said liens and assignment to the plaintiff company and without authority from it, caused the logs upon which the plaintiff had liens, to be removed from the premises where they were situate, and mixed the said logs together with logs cut by it, so that it was impossible for the plaintiff to realize upon its liens, and thereby its liens were lost. Accordingly they claimed general damages and special damages. The evidence shows that

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the defendant while removing logs which it had cut upon the said licence, also removed the logs upon which the plaintiff alleged it had liens and mixed them with its own logs as alleged. At the trial the plaintiffs sought to prove the existence of their liens and their right thereto by putting in the said judgment. The defendant took three objections to this: (1) That the proper way to prove the liens was as if they were being proved in an action, under the Woodmen's Lien for Wages Act, to enforce a lien; and not by the production of the judgment; (2) alternatively, that the judgment was *res inter alios acta,* and therefore was not admissible in evidence against it; (3) alternatively, that in so far as the judgment purported to declare a lien, it was a nullity, as the registrar had no power in a default judgment to declare that there was a lien; that this could be done only by the Court upon motion; and that accordingly the judgment was only a money judgment; and, further, in any event, the judgment did not declare for what amount the plaintiff was entitled to a lien, or that it was for wages. The judgment was admitted. The defendant appeals.

As to the first two objections, counsel for the respondent submitted that the judgment was, or was in the nature of, a judgment *in rem.* Section 6 of the Act reads as follows:

> 6. Such statement shall be filed within thirty days after the last day such labour or services were performed: Provided that no sale or transfer of the logs or timber upon which a lien is claimed under this Act during the time limited for the filing of such statement of claim, and previous to the filing thereof, or after the filing thereof and during the time limited for the enforcement thereof, shall in any wise affect the lien, but the lien shall remain and be in force against the logs or timber in whosesoever possession the same shall be found, except sawn timber sold in the ordinary course of business.

He submitted that the liens attached as soon as the labour or services were performed, and that, if the sale or transfer was not in any way to affect the liens and they were to remain in force against the logs in "whosesoever possession" the same should be found, then the judgment was a judgment *in rem* and good against all the world, just as a judgment enforcing a maritime lien is a judgment *in rem* and good against all the world; and therefore the judgment was admissible to prove the liens.

It was suggested that the lien under the Act does not attach

until the statement provided for by subsection (2) of section 4 has been filed. Section 3 of the Act declares that a person performing any labour or services in connection with any logs in the Province

> shall have a lien thereon for the amount due for the labour or services, and the same shall be deemed a first lien or charge on the logs . . . , and shall have precedence of all other claims or liens thereon, except any lien or claim which the Crown may have. . . .

Then subsection (2) of section 4 says:

> The liens provided for in the last preceding section shall not attach or remain a charge on the logs . . . unless a statement thereof in writing, verified upon oath by the person claiming the lien, . . . , is filed in the proper office . . .

Section 5 provides that the statement, which may be in the form in Schedule A, shall contain, *inter alia,* "a description of the logs or timber upon or against which the lien is claimed." The form is headed "Statement of Claim of Lien." In it the claimant "claims a lien" upon certain logs in respect of work done. An affidavit must be attached to the statement of claim, in which the claimant swears to "the amount claimed to be due to me in respect of any lien."

According to section 6, *supra,*

> no sale or transfer of the logs . . . upon which [the] lien is claimed . . . during the time limited for the filing of [the] . . . claim, and previous to the filing thereof, . . . , shall in anywise affect the lien, but the lien shall remain and be in force against the logs or timber in whosesoever possession the same shall be found.

O'HALLORAN, J.A. said in *Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd. and Oscar Niemi Ltd.* (1942), 57 B.C. 346 (a previous appeal in this action), at p. 361:

> . . . These sections make it clear beyond doubt that the lien comes into existence when the work is done, and that the filing of the statement and subsequent suit are the means provided to enforce it, *e.g.*, not to create it, but to enforce something already in existence.

In *Triangle Storage Ltd.* v. *Porter* (1941), 56 B.C. 422, at p. 427, O'HALLORAN, J.A. said:

> A mechanic's lien is created by the statute and not by the order of the Court which is designated in the statute to enforce it. The statute creates a right *in rem* and prescribes the method to enforce it. It becomes enforceable by sale under the authority and supervision of the Court, *vide Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472, at 475, and *Hodgson Lumber Co. Limited* v. *Marshall et al.* (1940), *ib.* 467, at 471.

At p. 362 of the *Niemi* case, *supra,* O'HALLORAN, J.A. said:

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. . . What was said in *Triangle Storage Ltd.* v. *Porter* (1941), 56 B.C. 422, at p. 427 regarding a mechanic's lien may be applied appropriately to a woodmen's lien, *viz.*: "A mechanic's lien is created by the statute and not by the order of the Court which is designated in the statute to enforce it. The statute creates a right *in rem* and prescribes the method to enforce it."

I respectfully agree with O'HALLORAN, J.A. that the lien under the Act in question is a right *in rem* and comes into existence when the labour or services are performed. Then is the judgment a judgment *in rem?* The lien under the Act is like a maritime lien. It attaches when the labour or services are performed, just as in the maritime lien it may arise, for instance, upon a collision taking place. It adheres to the logs and travels with them until they become sawn lumber, sold in the ordinary course of business, just as the maritime lien adheres to the ship from the time the facts happen which give the maritime lien, and then continues binding upon the ship until its discharge—*Johnson* v. *Black. The "Two Ellens"* (1872), L.R. 4 P.C. 161, at p. 169—and "travels with the thing, into whosesoever possession it may come." *Harmer* v. *Bell. The Bold Buccleugh* (1851), 7 Moore, P.C. 267, at pp. 284-5.

It is necessary to keep in mind the difference between an action *in rem,* that is, an action against the *res* itself and a judgment *in rem.* Dicey on Conflict of Laws, 5th Ed., 272 (*m*), says:

> 1. An action *in rem* is a proceeding to determine the right to, or disposition of a thing under the control of a Court. The only formal proceeding *in rem* now existing under English law is, as already pointed out, an action *in rem* in the Admiralty Division.
>
> 2. A judgment *in rem* is a judgment whereby a Court adjudicates upon the title to, or the right to the possession of, property within the control of the Court.

In *Northcote* v. *Owners of the Henrich Bjorn. The Henrich Bjorn* (1886), 11 App. Cas. 270, Lord Watson said at pp. 276-7:

> My Lords, this appeal is taken in an Admiralty suit, at the instance of the appellants, for recovery of moneys said to have been advanced by them in March 1882 for equipping and supplying with necessary stores the Norwegian ship Henrich Bjorn, which was then lying in the port of Liverpool. The action is *in rem*, that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the *res* adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or

other real interest in the ship, or a claim of debt secured by a lien which the law recognises.

In *Fracis, Times, and Co.* v. *Carr* (1900), 82 L.T. 698, Williams, L.J., delivering the judgment of the Court of Appeal (reversed on other grounds [1902] A.C. 176), said at p. 701:

> Now, to constitute a judgment *in rem*, the judgment must be a judgment of a competent court in respect of a *res* actually or constructively within the jurisdiction of the court, and the judgment must determine the right to, or disposition of, such *res* in the control of the court.

In *Clifford* v. *Timms*, [1907] 2 Ch. 236 (affirmed [1908] A.C. 12) Cozens-Hardy, M.R., said at p. 244:

> It is by no means easy to find a satisfactory definition of a judgment *in rem*. In Smith's Leading Cases it is defined as "an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose."

In Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 405 there appears the following:

> A judgment *in rem* may be defined as the judgment of a Court of competent jurisdiction determining the *status* of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation). Apart from the application of the term to persons, it must affect the *res* in the way of condemnation, forfeiture, declaration of *status* or title, or order for sale or transfer.

The facts appearing in the head-note in *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414 are that a ship while in a port in an English colony was repaired and furnished with necessaries for the voyage. The captain drew on his owner for the amount due. The bill was never accepted. The ship sailed on its prescribed voyage and before reaching England entered a French port. The bill was indorsed to a French subject who sued the captain on it and obtained judgment, but the judgment freed him from personal arrest and declared the debt "privileged on the ship" (having priority over others). The ship was taken possession of by the French authorities under this judgment. While the ship was on its voyage and before its arrival in the French port, the owner had executed a mortgage of the ship to a creditor. Neither the original owner nor the mortgagee was in any way personally cited in the action. The ship could not actually be sold till the Civil Tribunal of the District had confirmed the original judgment. It was confirmed, after the original owner and his assignee (for he had in the meantime become bankrupt) had been cited before the Civil Tribunal. The Court disregarded the opinion of an

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English lawyer as to what would be the relative rights of a holder of a bill of exchange and the holder of a bill of sale of the ship. The assignee of the mortgagee afterwards instituted before the Civil Tribunal a process in the nature of a replevy of the ship but failed in the process, and the ship was sold. It was held there had been a judgment *in rem* in the French Court and the title of the vendee of the ship (an Englishman) could not afterwards be disturbed in this Court. The appeal came to the House of Lords. The judges were summonsed. Mr. Justice Blackburn delivered the joint opinion of himself and four of his learned brothers. He said at pp. 427-8 as follows:

> We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the Courts of Common Law in England are of this nature, and it is every day's experience that where the sheriff, under a *fieri facias* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the Courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the right of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

At p. 429 he said:

> We may observe that the words as to the action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.

The Lord Chancellor said at pp. 442-3:

> We have been assisted with the opinions of the learned Judges in this

case, and I entirely concur in the conclusion at which they have arrived. It appears to me, in the first place, desirable to consider whether this judgment must be taken as a judgment by the French Court *in rem*, or whether it is to be taken as a judgment purporting only to deal with the interest in the vessel, whatever that interest might be, of Benson, who was the debtor in the action on the bill, and as giving no farther or other right than such interest as Benson had. As it was stated by the learned Judges, we are familiar in our law with that distinction; we are familiar with the course taken by the Court of Admiralty in proceedings against a ship, selling a ship, and giving a title against all third persons who become purchasers under a decree of that Court; we are familiar also with the course taken by our own Courts of Law in decreeing judgment of any property of a debtor taken by levy upon his goods, in which case the interest of the debtor in the chattel is sold, and that interest alone, and no farther or other right than that possessed by the debtor, can be transferred to persons purchasing under that sale. In other words, they purchase simply the interest of the debtor in that chattel.

It will be noticed this was not an action *in rem*. It was a personal action, and judgment, against the captain of the ship. The ship was seized under this judgment and a sale of the ship ordered. The Court of Appeal held this was a judgment *in rem*.

Under the Act, a lienholder may proceed by suit (section 7) or in the first instance by attachment (section 11) or by action followed by attachment (section 11). If he proceeds in the Supreme Court, he issues a writ against the person liable for the payment of the debt or claim (section 7), attaching or endorsing upon it "a copy of the lien claim . . . no other statement of claim or particulars [are] necessary . . . [and if] no defence . . . is filed," he may sign a default judgment and issue execution "according to the practice of the Court." If he proceeds by attachment "in the first instance, . . . , the statement of claim and defence . . . , and proceedings to judgment, may be the same as" when he has proceeded by a writ (section 11). The writ of attachment summons the defendant to appear (section 15), just as the writ, which is in the form used in the Supreme Court (section 8), does. The defendant may enter a dispute note (section 18) and if he does not, judgment may be entered as in the case of default, and the practice or procedure may be the same as in a suit begun by writ. Where a lienholder commences an action by writ and later a writ of attachment is issued, the proceedings continue and are carried to judgment under the writ except such proceedings as are neces-

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sary to be taken under the attachment (section 11). So that whatever the proceeding the plaintiff adopts, he gets a judgment. If the sheriff has seized under a writ of attachment the logs are in the hands of the sheriff subject to an order for sale by the Court, as will later be pointed out.

Section 9 of the Act is as follows:

> Where an execution has issued and has been placed in the Sheriff's hands for execution, and no attachment has been issued, the proceedings for the enforcement of the lien shall be by sale under the execution; and the proceedings relating to proof of other claims, and the payment of money into Court, and the distribution of the moneys, and otherwise, shall, as far as practicable, be the same as is hereinafter provided for proceedings upon and subject to an attachment.

The proceedings relating to proof of other claims and the other matters referred to in section 9 are set out in sections 21 to 26. Shortly, they provide for the judge issuing an appointment to name a day upon which all persons claiming a lien on the logs shall appear in person before the judge for the adjustment of their claims and the settlement of their accounts. The appointment is to be served on the defendants and upon the owner if the judge so directs. Upon the date of the hearing, those who have been served with a copy of the appointment and all other persons claiming a lien on the logs who have, prior to the date of the hearing, filed with the registrar of the proper Court a notice claiming "such lien on the logs" and stating the nature and amount of the claim, attend before the judge named in the appointment. The judge then hears all parties and takes all accounts necessary to determine the amounts, if any, due to them or any of them, or to any other holders of liens, taxes their costs and settles their priorities and generally determines all such matters as may be necessary for the adjustment of the rights of the several parties.

Section 24 then provides that:

> At the conclusion of the inquiry the Judge shall make his report and order, which shall state his findings and direct the payment into the Court in which proceedings are pending of the amounts (if any) so found due, and the costs, within ten days thereafter, and in default of such payment, that the logs . . . shall be sold by the Sheriff for the satisfaction of the amounts found due to the several parties upon the inquiry and costs.

Then section 25 provides that in default of payment into Court

under section 24 the logs shall be sold by the sheriff holding the same.

The appellant submitted that the respondent's remedy upon the judgment against the Narrows company was to issue a writ of execution under which the sheriff could sell merely the interest of the defendant in the logs and that the decisions show that such a judgment is one *inter partes;* that the case is quite different when a writ of attachment is issued under the Act because in such case, the sale being by order of the Court, the purchaser gets a good title against all the world. It would be extraordinary if this were so. A writ of attachment can only be issued under the special circumstances referred to in paragraph 13 of the Act, which provides for cases where it is thought the logs are about to be removed out of the Province or district or locality in which the same then lie, or the person indebted for the amount of the lien has absconded with intention to defraud or defeat his creditors, or the logs are about to be cut into lumber or other timber so the same cannot be identified.

It is obvious that the only purpose of issuing a writ of attachment in such cases is that the sheriff may seize and safely keep the logs subject to the order of the Court. Section 9 provides that the enforcement of the lien is to be by sale under a writ of execution where no attachment has issued. But the latter part of the section brings in the procedure set out in section 21 to section 26; so that no sale can be made until the proceedings mentioned have been taken. There may be other lien-claimants who have commenced actions, who may prove their claims (section 22 (1)) and the logs may be sold to realize the amount to cover these claims as well as the amount for which execution was issued; or there may be no lien-claimants. In either event, after the hearing the judge makes his report and orders the logs to be sold (section 24). It seems to me therefore that while the sale takes place under the execution it cannot take place until there is an order for sale by the Court, that is "a disposition of the thing," as said by Blackburn, J., *supra.* The purpose of the writ of execution is, in the first instance, to get the logs in the sheriff's hands, just as a writ of attachment does, and that afterwards,

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after an order for sale has been made, the logs may be sold by the sheriff.

In *Minna Craig Steamship Company* v. *Chartered Mercantile Bank of India, London and China,* [1897] 1 Q.B. 460 the facts were that a master of a ship while loading at Bombay for a voyage to Hamburg, was induced by fraud to sign bills of lading for goods which were never put on board. The bills of lading were endorsed for value without notice of the fraud to the defendants, an English banking company. By the law of Germany non-delivery of the goods specified in a bill of lading entitled the holder to a lien upon the vessel. The ship sailed and while she was at sea a petition was presented in England for the winding up of the plaintiff company who owned the ship, and on the day on which the ship arrived at Hamburg a winding-up order was made. On the same day the defendants who had in the meantime discovered the fraud, took proceedings in the German court at Hamburg to arrest the ship and enforce their lien. The German court declared the defendants to be entitled to the lien claimed, ordered the ship to be sold and the defendant's claim paid out of the proceeds. The liquidator of the plaintiff company who had not appeared in the proceedings in the German court, brought an action in the name of the company against the defendants to recover from them the amount which they had received under the German judgment as money had and received to the plaintiff's use, seeking to make them liable as trustees of the money for the benefit of the general body of the company's creditors. It was held that the judgment of the German court was a judgment *in rem.*

As has been said, the lien arose because of a German statutory provision giving a lien on the vessel in question. It was a statutory lien just as the lien under the Woodmen's Lien for Wages Act is. As appears at p. 464, it was urged that in that case the non-delivery of the cargo did not confer a maritime lien according to the international rules of law with regard to maritime liens. But Lord Esher said at p. 464 that the Court at Hamburg had held that by virtue of the statute governing the matter in question, they had power to proceed *in rem* against the ship and they accordingly did so; that, that being so, the rule was that

as a matter of international comity no court in England could say that the German court had no jurisdiction to decide as they did; that it was clearly for the German court to construe the statute of their own country and decide accordingly, and they were therefore bound to decide the ship was rightly condemned in an action *in rem* as if there had been a maritime lien.

Such an adjudication, being a most solemn declaration from the proper and accredited quarter that the *status* of the thing adjudicated upon is as declared, concludes all persons from saying that the *status* . . . adjudicated upon was not such as declared by the adjudication:

2 Sm. L.C., 13th Ed., 666.

. . . a judgment *in rem* is always as to the *status* of the *res* [and] is conclusive against all the world as to that *status*:

Per A. L. Smith, L.J. delivering the judgment of the Court of Appeal in *Ballantyne* v. *Mackinnon,* [1896] 2 Q.B. 455, at p. 462.

In the case at Bar the lien declared by the judgment attached to the logs against all the world, and therefore it may be said the *status* of the logs to that extent was conclusively determined.

At pp. 467-8 in the *Minna Craig* case Lopes, L.J. said:

The learned judge in the Court below has found that the judgment in Germany was a judgment *in rem*, and that it was binding upon all the world. I agree with him. Repeatedly in the judgments the right of the plaintiffs in the German suit is referred to as a lien. The judgment has declared that there was a lien or charge created by the act of the master in signing for the goods as he did. They have asserted that that lien existed, and they have given effect to it by the judgment *in rem*. We can therefore only deal with it as a judgment *in rem*, as a conclusive judgment binding upon all the world, declaring that the persons through whom or in whose behalf the plaintiffs in the German suit claimed had such a lien. It is a declaration as to the *status* of the ship, binding upon everybody, and no English Court can impeach it.

The difference then is clear between a judgment deciding as to which of the parties a chattel belongs and the judgment in question by which the lienholders were declared to be entitled to a lien upon the logs, which by virtue of section 6 of the Act continues and remains in force against the logs "in whosesoever possession" the same shall be found, and for which the logs—not only the interest of the defendant therein—may be sold to satisfy the lien.

In the first-mentioned case there is no change of *status*. It is merely a declaration as to who is the owner. In the second case in my opinion there is a change of *status*. There has been or

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will be, as a result of the sale under the judgment, "a disposition of the thing."

I am of the opinion, with great respect for all contrary views, that a proper judgment under the Woodmen's Lien for Wages Act is a judgment *in rem* and good against all the world, and that accordingly the liens were properly proved by such judgment. In coming to this conclusion I carefully considered the position taken by the late learned Chief Justice of this Court (whose recent passing we so deeply regret) in *Warehouse Security Finance Co. Ltd.* v. *Niemi Logging Co. Ltd. and Oscar Niemi Ltd., supra,* at pp. 350-51, where he was considering the judgment which I have before referred to, and held that it was not a judgment *in rem.* Apparently, however, the cases to which I have referred were not cited to him, nor were the arguments I have outlined, submitted to him.

In *Vipond* v. *Galbraith* (1922), 31 B.C. 58 the Court of Appeal set aside a judgment obtained under the Act. MCPHILLIPS, J.A. was the only member of the Court to deal with the submission that the judgment was *in rem.* He said he was unable to accede to this contention; that a judgment *in rem* was always "as to the *status* of a *res*" and he enquired "what *res* have we here?"

With respect, I think there is a *res* in an action under the Woodmen's Lien for Wages Act and that is the logs. It is not an "action *in rem*" such as an action against a ship, but it is an action upon a "right *in rem*" which results in a judgment under which the entire interest in the lien logs may be sold and therefore in my opinion is a judgment *in rem.*

In *Castrique* v. *Imrie* the action was not against the ship but against its captain. It resulted in the sale of the ship being ordered, and that was held to be a judgment *in rem.*

In the quotation from Halsbury's Laws of England, Vol. 13, *supra,* a judgment *in rem* is said to be one determining the *status* of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation.

With regard to the third objection, I would refer to the judgment of my brother O'HALLORAN in the *Warehouse Security Finance Co. Ltd.* case, *supra,* in which he was of the opinion that

the registrar had the impeached power. I agree with this view and desire merely to add another ground which I think supports the conclusion at which he arrived. Section 8 of the Act provides that the judgment shall declare that the same is for wages, the amount thereof and costs, and that the plaintiff has a lien therefor on the property described when such is the case.

It is obvious then that if the registrar may sign a judgment in default, it must be in accordance with section 8. The first part of section 8 provides that:

> The Court or Judge may . . . set aside any judgment and permit a defence or dispute note to be entered or filed, on such terms as to the Court or Judge appear proper.

If a judgment in accordance with section 8 could only be obtained on motion to the Court, then no effect could be given to the provision in section 8 for setting aside the judgment, unless it meant that a judge could set aside his own judgment. It has been held that a judge cannot set aside his own judgment—*Vandepitte* v. *Berry* (1928), 40 B.C. 408. Therefore, I would require to find express words in the section before I could come to the conclusion that the words in section 8 permit a judge to set aside his own judgment. It could, in my opinion, only refer to a judgment signed by a registrar in accordance with section 8.

In my opinion this disposes of the matter, but if it did not, I should have had to consider very carefully what right the defendant had to question the validity of this judgment, obtained long before it came into the picture.

The limits of the right of a litigant in an action to attack in that action the judgment of a court of competent jurisdiction in another action are set out in the speech of Lord Brougham in *The Earl of Bandon* v. *Becher* (1835), 3 Cl. & F. 479, at pp. 509-10 as follows:

> It is said that the whole of these proceedings spring from a decree of the Court of Exchequer in Ireland, and that that decree, being pronounced by a court of competent jurisdiction upon parties legally before it, cannot now be questioned in another court of co-ordinate jurisdiction; but if brought into dispute at all, should be brought into dispute in the court where it was originally pronounced. I agree generally to the proposition, but I must add to it this one qualification, . . .

With reference to the submission that the judgment did not show that it was for wages and for what amount the plaintiff was

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entitled to a lien, reference must be made again to that part of section 8 above referred to, namely,

> and the judgment shall declare that the same is for wages, the amount thereof and costs, and that the plaintiff has a lien therefor on the property described, when such is the case.

Now, the judgment does not declare that it is for wages, nor that the plaintiff has a lien "therefor," that is, for the amount thereof and costs.

It seems clear that the Court may look at the proceedings to see what the action was about. See *Preston* v. *Peeke* (1858), 27 L.J.Q.B. 424. In that case the facts were that the defendant, the owner of a public house, had employed the plaintiff to distrain upon his sub-tenant and gave him a guarantee to hold him harmless from any action. The plaintiff seized and sold, amongst other things, certain fixtures upon which an action was brought against him and the defendant, by the sub-tenant. The action was dismissed as against the landlord. Judgment was recovered against the plaintiff, who then sued the landlord on his guarantee. At the trial the plaintiff put in evidence the *nisi-prius* record in the former action brought against him by the sub-tenant. It showed there were two counts, one for breaking and entering the plaintiff's house and for severing, cutting and carrying away certain fixtures of the plaintiff, and the other for wrongfully selling the goods distrained, etc. Upon this record damages for £65 were awarded. The plaintiff then sought to show by parol evidence on which of the two counts of damages had been substantially awarded. This evidence was held admissible upon the ground that it was explaining and not contradicting the record.

I have examined the record in this Court and I find that the action was for wages and claims for liens in respect thereof.

In the *Minna Craig* case Collins, J., the trial judge, says at p. 61 [1897] 1 Q.B. that he

> took time to go carefully through the proceedings in the German court in order to satisfy [himself] whether they were or were not proceedings *in rem*,

and on appeal Lord Esher, M.R. at p. 464, evidently examined the proceedings carefully for the same purpose, because he says:

> Every step in the proceedings so taken in the German Court appears to

me to have been in accordance with the procedure in an action *in rem*, and not in accordance with the procedure in an action *in personam*.

Lopes, L.J. says at p. 467:

Repeatedly in the judgments the right of the plaintiffs in the German suit is referred to as a lien.

The appellant also submitted that the respondent had "abandoned" its lien. The learned trial judge found there was no evidence of abandonment to go to the jury and I agree with him. The letter of February 9th, 1940, from the respondent to the Niemi Logging Co. Ltd. and the letter of February 23rd, 1940, from *McInnes & Arnold* to Niemi Logging Co. Ltd. and the negotiations which took place made it clear that the respondent was maintaining its claim to a lien on the logs in question. Nothing was done by the respondent which in any way misled the appellant, who commenced to take out the logs in July, 1940. There is nothing in the case to show any intention on the part of the respondents to abandon their claim.

Then it was said that in any event the respondents could not have taken out the logs and sold them at a price which would have more than met the cost and therefore had suffered no damage. The appellant could have left the logs in the woods, in which case there would have been no liability. Having elected, however, to take the logs out of the woods, I cannot see how it can say to the respondents "It would have cost you more to market the logs than the amount for which you could have sold them, your lien was accordingly of no value and therefore you have suffered no damage by our selling them." To give a good title to the logs the appellant had to take care of the lien, and it seems to me that, having removed the logs and mixed them with its own logs so that the plaintiff is unable to realize upon its lien, it is responsible to the respondent in damages for the balance due to it in respect of its lien.

It may be that if the respondent had attempted to take the logs out as an independent operation the cost might have equalled or exceeded the amount received. The jury were entitled to assume that the appellant would not have taken out the logs unless it could make a profit on them. It seems obvious that if it could make a profit on its own logs, which it had to fell, buck, and cold deck, it should be able to make a much larger profit on logs which

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had been already felled, bucked and cold decked, ready to put in the water.

There was ample evidence upon which the jury could find that the profit on the sale of the logs in question which had been or could be made by the appellant would equal the amount of their verdict. The jury did not give exemplary damages, but they found for the respondent for the balance owing in respect of its judgment.

I think the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *F. R. Anderson.*
Solicitor for respondents: *Henry Castillou.*

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March 27;
April 11.

REX v. PENNEY.

Criminal law—False pretences—Evidence of similar acts—Admissibility—Course of conduct or system.

The accused, a building contractor, was convicted of false pretences. There was evidence that he obtained the sum of $1,000 from the complainant to build a house for her on the representation that he had bought and paid for and had available the necessary material to do so. The representation was false. Evidence was tendered in chief that he had made similar representations to several other people.

Held, on appeal, affirming the conviction, that similar acts, if they tend to prove identity, intent or system or are relevant to any issue before the Court, should be allowed in evidence.

APPEAL by accused from his conviction before SIDNEY SMITH, J. and the verdict of a jury at Vancouver on the 19th of October, 1943, on a charge of false pretences. The accused obtained $1,000 from the complainant to build a house for her on the

representation that he had bought and paid for and had available the necessary material to do so. There was evidence admitted that he made representations to several others that he had the material on hand but he was unable to proceed with building operations because he could not secure the material.

The appeal was argued at Vancouver on the 27th of March, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Accused, in person: They admitted in evidence matters with relation to contracts I had with other people. They have no relation whatever to the complaint before the Court and should not have been allowed in evidence. I paid back $2,700 to people with whom I had contracts, but was unable to pay the complainant in this case. I say that I did not make the representations alleged by the complainant.

Wismer, K.C., for the Crown: There is ample evidence to support the conviction, the only question is as to the admissibility of evidence of similar contracts. It is submitted we should be allowed to prove guilty intent and knowledge and a systematic course of fraud: see *Makin* v. *Attorney-General for New South Wales* (1893), 17 Cox, C.C. 704; *Rex* v. *Hamilton* (1931), 55 Can. C.C. 85, at p. 91; *Reg.* v. *Ollis*, [1900] 2 Q.B. 758; *Rex* v. *Bond* (1906), 75 L.J.K.B. 693, at pp. 700-1 and 704; *Rex* v. *Levine* (1922), 38 Can. C.C. 182; *Rex* v. *Labrie* (1919), 34 Can. C.C. 407; *Rex* v. *Anderson* (1935), 50 B.C. 225; *Rex* v. *Porter* (1935), 25 Cr. App. R. 59, at pp. 63-4.

Cur. adv. vult.

11th April, 1944.

SLOAN, J.A.: In my opinion the impugned evidence is admissible under the principle exemplified in *Rex* v. *Porter* (1935), 25 Cr. App. R. 59, and I would, in consequence, dismiss the appeal.

O'HALLORAN, J.A.: The appellant, a building contractor, was convicted of false pretences at the October Vancouver Assize. The jury believed the evidence that he obtained the sum of $1,000 from the complainant to build a house for her on the representa-

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tion that he had bought and paid for and had available the necessary material to do so. The representation was false. The availability of such building material was a matter of first importance owing to wartime scarcity.

The prosecution tendered evidence in chief that the appellant had made similar representations to several other people, but that he was unable to proceed with building operations because he could not secure the material. Counsel for the appellant objected to its admissibility in the Court below, but after argument it was admitted. The appellant appearing in person before us founded his appeal upon what he alleged was improper admission of that evidence of similar acts, relying mainly on *Makin* v. *Attorney-General of New South Wales* (1893), 63 L.J.P.C. 41, at p. 43; *Rex* v. *Bond* (1906), 75 L.J.K.B. 693, and *Brunet* v. *Regem* (1918), 57 S.C.R. 83. But those decisions as well as *Maxwell* v. *Director of Public Prosecutions* (1934), 103 L.J.K.B. 501 (H.L.) and *Koufis* v. *Regem,* [1941] S.C.R. 481 implicitly permit evidence of similar acts if they tend to prove identity, intent, or system, or are relevant to any issue before the Court, *cf. Rex* v. *Bond, supra,* Kennedy, J. at pp. 704-5 and Jelf, J. at p. 709. *Rex* v. *Lyons* (judgment delivered this day) [*ante*, p. 250] is an example of evidence of the circumstances of a previous conviction adduced to prove identity. In my judgment the evidence of the other similar acts was historically a part of the circumstances of this case. That evidence is more closely connected with the charge than it was in *Rex* v. *Porter* (1935), 25 Cr. App. R. 59. But in the latter case it was held to have supplied a *nexus* in method and circumstance.

What was done by the appellant here was in truth part of a larger fraudulent scheme and design in which the appellant was engaged, *cf. Rex* v. *Hamilton,* [1931] 3 D.L.R. 121, Middleton, J.A. at p. 128. The impugned evidence was admissible to show the pretences upon which the appellant was charged were not inadvertent or accidental, but were a part of a systematic fraud, *cf. Reg.* v. *Ollis* (1900), 69 L.J.Q.B. 918, at p. 930, and also to negative any accident or mistake, or the existence of any reasonable or honest motive, *cf. Rex* v. *Wyatt* (1903), 73 L.J.K.B. 15. The application of *Brunet* v. *Regem* was dis-

cussed by MARTIN, C.J.B.C. (then J.A., with whom MCPHILLIPS and MCQUARRIE, JJ.A. agreed) in *Rex* v. *Anderson* (1935), 50 B.C. 225.

The appellant took the further ground that even if the evidence of similar acts was admissible, it was not admissible in chief but only in rebuttal, and then only if relevant to any defence raised. It was argued that if the defence confined itself to denial of the representations, the evidence would not be admissible, and the prosecution could not anticipate the nature of the defence. In my judgment, an adequate answer to that submission is found in *Rex* v. *Anderson, supra,* MARTIN, J.A. at p. 233, and MACDONALD, J.A. at p. 236. As the latter there said:

> . . . It is part of the Crown's case, whatever may be the attitude of the accused when called upon to defend, to show "intent" . . . Any evidence, therefore, bearing on intent, [or] design . . . is part of the *res gestæ*.

Also at p. 237, and the analysis of *Brunet* v. *Regem, supra,* in this aspect found in *Rex* v. *Anderson.*

As the appellant appeared in person, attention was not confined only to the points raised by him in argument, but the evidence and the charge to the jury were examined for the purpose of discovering any objection favourable to him. I have reached the conclusion that evidence of his guilt was of an overwhelming character even if it could be held (which I do not) that any evidence was admitted which was not essential to the result. It cannot be said in my view that any substantial wrong or miscarriage of justice has occurred to prevent the application of section 1014, subsection 2 of the Code. The jury's verdict was a just verdict on the evidence, *cf. Dal Singh* v. *King-Emperor* (1917), 86 L.J.P.C. 140, at p. 144.

The appellant also appealed against his sentence of imprisonment for two years. He stated he had made restitution of $2,700 to several people, but had been unable to make any restitution of the $1,000 upon which this conviction was founded. I am unable to satisfy myself the learned judge left any substantial element out of his consideration, or that he took a less lenient view of the case than his duty to the public warranted, *cf. Rex* v. *Zimmerman* (1925), 37 B.C. 277.

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

ROBERTSON, J.A.: I think the appeal should be dismissed for the reasons given by my brother O'HALLORAN.

Appeal dismissed.

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1944
April 18;
May 9.

JOHN RIDDELL, AT THE PROSECUTION OF THE CHILDREN'S AID SOCIETY OF VANCOUVER v. JUDGE OF THE JUVENILE COURT OF VANCOUVER.

Juvenile delinquent—Children's Aid Society—Juvenile court—Application under section 8 of the Industrial School for Boys Act—"Guardian"—Construction—Mandamus—R.S.B.C. 1924, Cap. 112—B.C. Stats. 1937, Cap. 32, Sec. 8; 1943, Cap. 5

By order of the judge of the juvenile court of November 7th, 1935, made under the Infants Act, John Riddell, an infant, was committed to the care and custody of The Children's Aid Society, which thereupon pursuant to said Act became the legal guardian of the infant. The child was placed in a number of foster homes by the society, but foster-home care was not successful and the society laid a complaint under section 8 of the Industrial School for Boys Act with the object of having the infant transferred to the industrial school. The judge of the juvenile court held that The Children's Aid Society is not a "guardian" within the meaning of said section 8 and that he was without jurisdiction to make the order. On proceedings by The Children's Aid Society by way of *mandamus* directed to the judge of the juvenile court to have said infant brought before him and dealt with as a juvenile delinquent under said section 8 of the Industrial School for Boys Act:—

Held, that section 8 of the Industrial School for Boys Act, under which these proceedings were taken, shows that the object and intention of this Act is to do that which is for the welfare of the child. The society is the legal guardian of this boy and while the custody of the boy has been with foster parents in various homes from time to time, it must not be overlooked that the guardianship has never changed and there is no reason why the term "guardian" as used in section 8 should be construed so restrictively as to exclude the society, particularly when the purpose of the legislation is kept in mind. It is the duty of the society, if the welfare of the child requires it, to take that further step contemplated by section 8 to have the child declared a juvenile delinquent and

committed to the industrial school if in the opinion of the judge the material and moral welfare of the child manifestly requires that he be dealt with as a juvenile delinquent.

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PROCEEDINGS by way of *mandamus* directed to the judge of the Juvenile Court of Vancouver to have one John Riddell, an infant, brought before him and dealt with as a juvenile delinquent under section 8 of the Industrial School for Boys Act. The facts are set out in the reasons for judgment. Heard by COADY, J. in Chambers at Vancouver on the 18th of April, 1944.

Walter Owen, for applicant.
O'Brian, K.C., contra.

Cur. adv. vult.

9th May, 1944.

COADY, J.: This is a proceeding by way of *mandamus* directed to His Honour H. S. Wood, judge of the Juvenile Court of Vancouver to have John Riddell, an infant, brought before him and dealt with as a juvenile delinquent under the provisions of section 8 of the Industrial School for Boys Act, B.C. Stats. 1937, Cap. 32. The grounds are:

(a) Upon hearing the information and complaint of the prosecutor and the evidence adduced on its behalf on the 27th of January and the 3rd of February, A.D. 1944, the learned judge wrongfully refused to exercise the jurisdiction vested in him under the provisions of the aforementioned Industrial School for Boys Act and the Juvenile Delinquents Act. (b) That in declining to exercise the jurisdiction as aforesaid, the learned judge erred in construing the provisions of the aforesaid Industrial School for Boys Act and the provisions of The Infants Act, R.S.B.C. 1924 and amending Acts, and the Protection of Children Act, B.C. Stats. 1943, Cap. 5; and in particular the learned judge erred in holding that the said Children's Aid Society is not the guardian of the said John Riddell within the meaning of the said Acts.

No objection was taken to the form of the proceeding. Section 8 of the Industrial School for Boys Act reads as follows:

8. Upon complaint and due proof made to a Judge of any Juvenile Court in respect of any boy by a parent or guardian of the boy, or by the Super-

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intendent of Neglected Children or any agent appointed by him for that purpose, or by any probation officer, that by reason of incorrigible or vicious conduct the boy is beyond the control of his parents or guardian, and that a due regard for the material and moral welfare of the boy manifestly requires that he be dealt with as a juvenile delinquent, the Judge of the Juvenile Court may deal with such boy in the manner prescribed for dealing with juvenile delinquents in the "Juvenile Delinquents Act, 1929," being chapter 46 of the Statutes of Canada, 1929, and amendments thereto.

The information or complaint was laid by The Children's Aid Society. The learned judge took the view that The Children's Aid Society is not a "guardian" within the meaning of the above section, and consequently is not within the class of persons therein named authorized to commence proceedings. He held he was therefore without jurisdiction and this is the only point for consideration on this application.

It appears that by order of the judge of the juvenile court dated the 7th of November, 1935, made under the Infants Act, Cap. 112, R.S.B.C. 1924 and amending Acts, the infant John Riddell was committed to the care and custody of The Children's Aid Society which thereupon pursuant to that Act, became and still is the legal guardian of the infant. This child has been placed in a number of foster homes by the society, but foster-home care has not been successful, and the society being of opinion that the welfare of the child requires that other care be provided for this infant, initiated these proceedings with the object of having the infant transferred to the industrial school.

That portion of the Infants Act pursuant to which the infant was committed to the custody of the society was repealed by the Protection of Children Act, Cap. 5, B.C. Stats. 1943. The intention, purpose and object of the Infants Act was, and of the Protection of Children Act is, to provide for the welfare of the child. The word "guardian" is not defined in either Act. The word "parent," however, is defined in both Acts. In the Infants Act the definition is:

> "Parent," when used in relation to a child, includes guardian and every person who is legally liable to maintain the child.

In the Protection of Children Act the definition is:

> "Parent," when used in relation to a child, includes guardian.

In the Industrial School for Boys Act under which the present proceedings were taken there is no definition of "guardian" or

"parent" but it seems to me that this Act, which provides by section 8 for an investigation on the part of a judge of the juvenile court and if the evidence is sufficient, a finding that the child is a juvenile delinquent, contemplates that children who have been committed either to the superintendent or to The Children's Aid Society under either the Infants Act or the Protection of Children Act can be dealt with thereunder. Since the superintendent is by section 8 authorized to make the complaint, and this must include complaint with respect to children of which the superintendent is the legal guardian under the order of the Court, then it seems to me that the reasonable inference is that the society can do the same with respect to children of which it is the legal guardian. Otherwise, what can be done by the society with respect to a ward who, in the opinion of the society, cannot be cared for in a foster home or otherwise dealt with by the society? The welfare of the child would seem to require that something be done, but if the society cannot take proceedings under section 8 of the Industrial School for Boys Act, then it would appear that the child must either remain with the society or request must be made by the society to the superintendent of child welfare to take the proceedings. In my view that is not necessary, nor was it intended.

Section 8 of the Industrial School for Boys Act under which these proceedings were taken, shows that the object and intention of this Act is also to do that which is for the welfare of the child. It is not, it appears to me, as suggested by counsel, punitive legislation. It provides, it seems to me, a means whereby a child may be transferred from the control of those who, unfortunately, are not in a position to exercise that control over the child which is necessary for the child's welfare, to someone who is more likely to be in a position to exercise such control. It was also urged before me that the society as legal guardian cannot have that intimate personal knowledge of the child that one taking proceedings under section 8 should have, and for that reason the term "guardian" should be interpreted restrictively. That submission, it seems to me, loses its force when the superintendent, who cannot have any more personal intimate knowledge than the society, is authorized to take proceedings. Moreover I do not

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think that intimate personal knowledge is necessary on the part of one who lays the information. The evidence required under the section may be submitted from other sources, and probably in most cases must be.

The society is the legal guardian of this boy, and while the custody of the boy has been with foster parents in various homes from time to time, it must not be overlooked that the guardianship has never changed, and I can see no reason why the term "guardian" as used in section 8 should be construed so restrictively as to exclude the society, particularly when the purpose of the legislation is kept in mind. If the society is unable to take care of the infant, as the Act contemplates, then I think it is intended that the society should be in a position to take, and it is the duty of the society if the welfare of the child requires it, to take that further step contemplated by section 8 to have the child declared a juvenile delinquent and committed to the industrial school if in the opinion of the judge the material and moral welfare of the child manifestly requires that he be dealt with as a juvenile delinquent.

Order accordingly.

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1944
May 1, 16.

REX v. LONG.

Criminal law—Robbery with violence—Conviction—Appeal—Theft—Evidence of, insufficient — Common assault established — Conviction for lesser offence substituted—Sentence.

On the 29th of February, 1944, the complainant registered in an hotel in Victoria and at about 2 o'clock in the afternoon he went to a beer parlour in Esquimalt where he met the accused who wanted to sell him a bottle of rum, which he refused to buy. The complainant drank a number of glasses of beer until the beer parlour closed at 5 o'clock when he took a taxi back to his hotel and on arrival found the accused, who was a soldier, in the back seat with another soldier. He asked the accused with the other soldier to come to his room for a drink. In the room he opened a quart bottle of rye whisky and the other soldier, after having one drink, went away leaving complainant and accused alone. They continued drinking and complainant went along the hall to a watercloset where he stated he felt his wallet, containing $175, in his hip pocket and he buttoned the flap over the pocket for safety. On

going back to his room he and accused finished the bottle when accused suddenly attacked him and beat him to unconsciousness. He came to his senses at about 2 a.m. when he was alone, and found his wallet was gone and the door with a Yale lock was locked. He went to bed and at 9 o'clock in the morning he went to the police. He was taken to the barracks in Esquimalt where he picked out the accused in a line-up of 20 soldiers. On a charge of robbery with violence, accused was convicted and sentenced to three years in the penitentiary.

Held, on appeal, varying the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting and would dismiss the appeal), that the evidence adduced falls short of establishing the theft element in the said charge to that degree of certainty which the law requires, but there is no doubt upon the evidence that the appellant inflicted "personal violence" upon the complainant and under the circumstances of this case the ends of justice would be met by finding the appellant guilty of common assault and by substituting a conviction for the lesser offence with a sentence of six months.

APPEAL by accused from his conviction by SHANDLEY, Co. J. on the 31st of March, 1944, on a charge of robbery with violence and sentenced to three years in the penitentiary. The facts are sufficiently set out in the head-note and reasons for judgment of O'HALLORAN, J.A.

The appeal was argued at Victoria on the 1st of May, 1944, before SLOAN, O'HALLORAN and SIDNEY SMITH, JJ.A.

McKenna, for appellant: House says Long beat him up and he came to his senses at 2 a.m. He then went to bed and at 9 a.m. went to the police station. The police took him to the barracks and he picked accused out of a line-up of 20 soldiers. Complainant says he did not know what was in the wallet when he went to the watercloset. There was no proof that this man stole the wallet. There was misdirection by the learned trial judge as to the theft. There was no direct evidence of theft: see *Rex* v. *Macchione* (1936), 51 B.C. 272, at p. 287; *Frozocas* v. *Regem* (1933), 60 Can. C.C. 324; *McLean* v. *Regem*, [1933] S.C.R. 688, at pp. 690-1; *Hodge's Case* (1838), 2 Lewin, C.C. 227; *Mitchell's Case* (1852), 2 Den. C.C. 468; Archbold's Criminal Pleading, Evidence and Practice, 31st Ed., 597; Maxwell on the Interpretation of Statutes, 4th Ed., 21. The learned judge could have found him guilty of assault and nothing more: see *Reg.* v. *Woodhall and Wilkes* (1872), 12 Cox, C.C. 240; *Rex* v. *Edmon-*

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stone (1907), 13 Can. C.C. 125, at p. 129; *Harries* v. *Thomas* (1917), 86 L.J.K.B. 812; *Farrell's Case* (1787), 1 Leach, C.C. 322, n. (*b*).

Harman, for the Crown: There are two main questions: First, sufficiency of proof of the money being taken and, secondly, sufficiency of proof of personal violence. There is direct evidence that there was money in the wallet, but no direct evidence of the taking and carrying it away. The informant was knocked out. The story is not consistent with innocence and there is no other rational explanation of the loss. There is nothing to suggest that accused was drunk: see Wills on Circumstantial Evidence, 7th Ed., 314; *The King* v. *Burdett* (1820), 4 B. & Ald. 95; *Rex* v. *Jenkins* (1908), 14 B.C. 61. There was a Yale lock on the door and it would lock as accused went out. The accused has not made any explanation: see *Girvin* v. *Regem* (1911), 45 S.C.R. 167, at p. 169. The complainant was older and smaller than the accused.

McKenna, in reply, referred to *Rex* v. *Lillian Elliott* (1942), 58 B.C. 96, at p. 98; *McLean* v. *Regem,* [1933] S.C.R. 688, at p. 690; *Rex* v. *Jenkins* (1908), 14 B.C. 61, at p. 69.

Cur. adv. vult.

16th May, 1944.

SLOAN, J.A.: The appellant was convicted by SHANDLEY, Co. J. of robbery with "personal violence" and sentenced to three years' imprisonment.

After a careful consideration of the record I am of the opinion that the said conviction cannot be supported, in that the evidence adduced falls short of establishing the theft element in the said charge to that degree of certainty which the law requires.

There is, however, no doubt upon the evidence that the appellant inflicted "personal violence" upon the complainant. Respective counsel for the appellant and respondent agree that the "personal violence" charged would include "common assault." I am of the opinion that, under all the circumstances of this case, the ends of justice would be met by finding the appellant guilty of common assault and by substituting a conviction for that lesser offence for the one upon which he was convicted below.

Sentence: Six months from this date. Order accordingly.

O'HALLORAN, J.A.: The appellant was charged under Code section 446 (*a*) of robbing the complainant of $175 with violence. He is a soldier serving in a local area. He was convicted by SHANDLEY, Co. J. and sentenced to three years' imprisonment.

His counsel advanced two main points: (1) That there were no objective facts proven from which it could be legitimately inferred the appellant had robbed the complainant as charged; and (2), the learned judge did not apply the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227; 168 E.R. 1136, having ruled that the evidence of guilt was not wholly circumstantial.

The complainant, a Metchosin farm-labourer, first met the appellant at an Esquimalt beer parlour when he declined to buy a bottle of rum from him. Shortly after 5 p.m. he engaged a taxi to return to his hotel. The appellant with another soldier also in uniform and others got into the same taxi. When the complainant arrived at the hotel he invited the two soldiers up to his room for a drink, where he had a 26-ounce bottle of rye. About ten minutes after they arrived the other soldier left the appellant and complainant together. The complainant testified that in the course of their drinking together, the appellant suddenly attacked him and beat him into a state of insensibility. When he recovered consciousness about 2 a.m. the appellant had gone and the door was locked on the inside; it had an automatic Yale lock. He then discovered the loss of his wallet with the sum of $175 it contained. His knife and comb which had been in the same pocket with the wallet were lying on the bed. At about 10 a.m. he reported his loss at the Victoria city police station. He appeared there with his face badly battered. A week later he went with the police to Work Point Barracks and identified the appellant among some 20 soldiers. The complainant testified he had the wallet containing the money on his person while in his hotel room with the appellant. He swore he had felt the bills in the wallet which was in his left-hand hip pocket, and that he had buttoned the flap over the pocket, "to make sure it would not slip out." The learned judge believed that evidence. The appellant did not testify on his own behalf, nor did the defence call any evidence. Counsel for the defence submitted then as now that

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the offence was not proven. The first question is, does the evidence point to commission of the offence by the appellant?

The learned judge had before him direct evidence, (1) that the complainant had $175 in a wallet on his person when he was alone with the appellant in the hotel room; (2) that the appellant suddenly attacked him and beat him into a state of insensibility; and (3) that when the complainant recovered consciousness he was alone in the room locked from the inside, but his money was gone. Those proven facts read with the whole evidence justify inferences: (1) That the appellant wanted to obtain money since he had tried to sell the complainant a bottle of rum; (2) that he attacked the complainant and beat him into a state of insensibility in order to obtain money; and (3) that he then did take from the complainant his wallet and the sum of $175 it contained.

Proof of guilt is not insufficient because it may not be demonstrated with mathematical precision. It is enough (subject to *Hodge's* principle presently discussed), if it may be legitimately inferred from the proven facts. And it meets that requirement, if it is a natural inference which reasonable men with everyday practical knowledge of human habits and affairs would draw from the cumulative effect of the proven facts. In my judgment the inference of guilt emerges with such a compelling degree of practical certainty that in the absence of explanation by the appellant, he must be held guilty as charged, *cf. Rex* v. *McKinnon* (1941), 56 B.C. 186, at p. 192.

In *Rex* v. *Jenkins* (1908), 14 B.C. 61, IRVING, J. sitting in the old Full Court, said at p. 69 (CLEMENT, J. concurring):

> It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having enveloped a man in a strong and cogent net-work of inculpatory facts, that man is bound to make some explanation or stand condemned.

IRVING, J. then cited observations of Abbott, C.J. and Holroyd, J. in *The King* v. *Burdett* (1820), 4 B. & Ald. 95; (106 E.R. 873). The latter said at p. 140, that presumptions (inferences)

> stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true.

Abbott, C.J. added in the same vein at p. 161:

> A presumption of any fact is, properly, an inferring of that fact from

other facts that are known; it is an act of reasoning; . . . In drawing an inference . . . from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction.

Nothing there said conflicts with *Woolmington* v. *Director of Public Prosecutions* (1935), 104 L.J.K.B. 433, as is made clear by Abbott, C.J.'s further remarks at p. 161:

No person is to be required to explain or to contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction.

And also Holroyd, J. in the same connection at p. 140.

Rex v. *Jenkins, supra,* in which the cited observations from *The King* v. *Burdett* appear, was accepted by Rinfret, J. (now C.J.) in *Fraser* v. *Regem,* [1936] S.C.R. 1, at p. 2, as an authoritative application of the principle in *Hodge's Case.* And compare also the reference of MACDONALD, J.A. (with whom MARTIN and MCPHILLIPS, JJ.A. agreed) to the absence of explanation in *Rex* v. *Jones. Rex* v. *Anderson* (1933), 47 B.C. 473, at p. 480.

On the second branch of the case, the learned judge was right in saying there was "both direct and circumstantial evidence." For there was direct evidence of violence. Force is an essential ingredient of robbery with violence as distinguished from theft. And the charge here was robbery with violence under section 446 (*a*), and not theft of a wallet from the person, as it was in the materially different circumstances in *Rex* v. *Asplund,* [1943] 1 W.W.R. 757. But although there was direct evidence of the ingredient of force, there was not direct evidence of the second ingredient of taking the money. The evidence thereof is purely circumstantial, although as explained in the first branch of the case, the proven facts justify that inference.

Hence the learned judge erred in holding that it was not necessary "the circumstantial evidence should be so absolutely certain and convincing." For I take that remark in its context to mean in effect that he considered the principle in *Hodge's Case* did not apply, *cf. Rex* v. *Macchione* (1936), 51 B.C. 272, MACDONALD, J.A. (with whom MARTIN, J.A. agreed) at p. 278. However, despite that misdirection, I have satisfied myself "no substantial wrong or miscarriage of justice has actually occurred" within the meaning of section 1014, subsection 2, for reasons now stated.

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For even if he had applied the principle in *Hodge's Case,* the learned judge in my judgment ought inevitably to have reached the same judicial conclusion of guilt, *cf. Rex* v. *Harding* (1936), 25 Cr. App. R. 190, at p. 197 and *Rex* v. *O'Leary* (1943), 59 B.C. 440. It is noted that the significant concept to which the word "inevitably" attaches is recognized by its use in the next to concluding paragraph of the *Woolmington* case (1935), 104 L.J.K.B. at p. 440.

In *Hodge's Case* Alderson, B. told the jury they must be satisfied

> that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

That carefully chosen language indicates a conclusion negativing guilt or doubtful guilt must be objective and not subjective in its nature. It must be founded upon proven facts in the evidence, and not upon hypothetical, imaginary, or speculative facts not found in the evidence. And the further requirement that it be a "rational" conclusion, describes it imperatively as a reasoned inference from proven facts pictured against the background of the evidence.

It will be plain from the views expressed on the first branch of the appeal, that on the record before us, I am unable to appreciate a rational conclusion which is consistent with the appellant's innocence. I can discover no conclusion objectively reached which does not point to practical certainty of the appellant's guilt. *Harries* v. *Thomas* (1917), 86 L.J.K.B. 812 to which we were referred, is clearly distinguishable. The charge was keeping premises open for the sale of intoxicating liquors. The only witness called by the prosecution who spoke of what occurred inside the premises, testified that the accused had refused to sell intoxicating liquor to two men. That was plainly objective evidence consistent with innocence, and the Court of Criminal Appeal so held.

In the case at Bar, loss of the money could be explained no doubt by a theory that the complainant threw or dropped it out of the window, or by a theory that he gave it to the appellant, not to mention other hypothetical theories which could be suggested. But such explanations cannot be regarded as other than fanciful

or speculative, since there is not evidence with any basis of objective reality upon which they could be founded and formulated. As Holroyd, J. said in *The King* v. *Burdett, supra,* at p. 139 such explanations do not arise, "necessarily, probably, or reasonably, from the facts proved." And *cf.* Duff, J. in *Picariello et al.* v. *Regem* (1923), 39 Can. C.C. 229, at p. 237, and Mackenzie, J.A. (*per curiam*) in *Rex* v. *McQuarrie,* [1944] 1 W.W.R. 33, at p. 37.

Moreover the appellant did not go into the witness box. This Court (MARTIN, C.J.B.C., MCQUARRIE and SLOAN, JJ.A.) held in *Rex* v. *Bush* (1938), 53 B.C. 252, that failure to do so is properly taken into consideration by a Court of Criminal Appeal in deciding the paramount question under section 1014, subsection 2, as to whether or not a substantial wrong or miscarriage of justice has actually occurred so as to entitle the appellant to a new trial. In the circumstances of this case, the appellant's failure to testify justifies an appellate Court in holding that a new trial is not warranted and that the conviction must be upheld.

My conclusion is, that the cogent network of inculpatory facts which envelops the appellant in the evidence as presented, points to his guilt as charged, with such a compelling degree of practical certainty, that he stands necessarily and justly condemned.

I would dismiss the appeal.

SIDNEY SMITH, J.A. agreed with SLOAN, J.A.

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

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May 16, 19.

BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JR. *ET AL.*

Practice—Motion to vary the minutes of judgment—Whether pledge of shares as collateral security—If no pledge a simple contract debt—Application of Statute of Limitations—Application for rehearing.

On motion, the appellant alleges that the respondent's position on the appeal was that there was a pledge of the shares in question and to this they submit that the Statute of Limitations was not a defence and in consequence they did not argue that it was. He now claims that the reasons for judgment disclose that there was no pledge. If this is so, they submit the obligation of the appellant was a simple contract debt, that the Statute of Limitations would be a defence and they are entitled to a reargument of this point.

Held, that while not deciding whether or not the respondent's charge was a mortgage, the late Chief Justice indicated that he was of opinion that it was and he agreed that the judgment should be varied as set out in the reasons for judgment of O'HALLORAN, J.A., who came to the conclusion that there was a pledge. The majority of the Court held that there was a pledge. The judgment as drawn represents the opinion of the majority of the Court and the application fails.

MOTION by defendant Jones to vary the minutes of the judgment of the Court of Appeal of the 7th of March, 1944 (reported, *ante*, p. 174):

(a) By directing that the appeal herein be allowed and the action be dismissed on the ground that on the basis of the opinions of the majority of the Court the relief proposed to be given to the plaintiff (respondent) is barred by the Statute of Limitations, and that if necessary, the argument of the said appeal be reopened to permit of that defence being argued on the ground that there had been no previous opportunity or reason for the argument of said defence, and (b) In the alternative, that the last declaratory paragraph of the said judgment be amended so that the plaintiff company be declared entitled only to retain and apply all moneys representing dividends declared and paid by the said British American Timber Company Limited out of profits until the principal and interest of the said notes are fully paid, or (c) In the further alternative, that the said paragraph be in the terms of the agreement of June 1st, 1917.

The motion was heard at Vancouver on the 16th of May, 1944, by SLOAN, O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Bull, K.C., for the motion: On the appeal the respondent took the position that there was a pledge of the shares in which case the Statute of Limitations would not apply and was not argued:

see *London and Midland Bank* v. *Mitchell,* [1899] 2 Ch. 161. Our position is that by the majority judgment of this Court, it was decided that there was no pledge. That being so, this was a simple contract debt under the agreement of June 1st, 1917, and it is defeated by the Statute of Limitations. The death of the late Chief Justice requires that the case should be reheard, the final judgment not having been settled. On the legal meaning of the word "dividend" see *In re Ganong Estate. Ganong et al.* v. *Belyea et al.*, [1941] S.C.R. 125; [1942] 3 D.L.R. 785 (P.C.); *Henry* v. *The Great Northern Railway Company* (1857), 1 De G. & J. 606. Alternatively, the last declaratory paragraph of the judgment should be amended as the plaintiff company is only entitled to retain dividends of the company until the promissory notes are paid.

Farris, K.C., contra: This is a motion to vary the minutes. He cannot be heard to ask the Court to decide something which the judgment delivered did not decide. The question is whether the registrar has properly expressed what the Court has already decided. He is confined to the reasons for judgment of the Court. It is only a question of whether the intention of the Court has been properly expressed: see *South Wales Mineral Railway Co.* v. *Davies* (1886), 31 Sol. Jo. 110. The Statute of Limitations is now brought in for the first time. The statute runs against the debt, but not against a lien right. Our only remedy is an action for enforcement of what we have. We hold these shares under the agreement of June 1st, 1917, as collateral security, a form of security we are entitled to enforce.

Bull, in reply, referred to *Free Church of Scotland (General Assembly of)* v. *Overtoun (Lord),* [1904] A.C. 515, at p. 559.

Cur. adv. vult.

19th May, 1944.

SLOAN, J.A.: I agree that the motion should be dismissed.

O'HALLORAN, J.A.: On 7th March last the Court (MCDONALD, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A., the latter dissenting) delivered judgment allowing the appeal in part.

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On 29th March, counsel for the respondent company, upon notice of motion dated 28th March, moved the Court to approve the formal order for judgment in the form which by agreement between counsel was accepted as settled by the registrar. By leave of the Court that motion was then turned into a motion by counsel for the appellant to vary the minutes of the judgment. Chief Justice MCDONALD being ill, the hearing thereof was adjourned until the opening day of the May sittings of the Court. The Court directed at the same time that the formal order for judgment as submitted be filed with the registrar. It has not yet been signed, entered or otherwise perfected. It was also directed that notice of the appellant's motion as aforesaid be reduced to writing and filed. An order was taken out accordingly and has been complied with.

The appellant's notice of motion, filed accordingly on 30th March last, now comes on for hearing pursuant to our order of 29th March. Owing to the lamented death of Chief Justice MCDONALD, there are only two members of the Court (O'HALLORAN and ROBERTSON, JJ.A.) who heard the appeal which occupied four days. The Court is asked by the present motion "to vary the minutes of the judgment" pronounced on 7th March last:

(a) By directing that the appeal herein be allowed and the action be dismissed on the ground that on the basis of the opinions of the majority of the Court the relief proposed to be given to the plaintiff (respondent) is barred by the Statute of Limitations, and that if necessary, the argument of the said appeal be reopened to permit of that defence being argued on the ground that there had been no previous opportunity or reason for the argument of said defence, and (b) In the alternative, that the last declaratory paragraph of the said judgment be amended so that the plaintiff company be declared entitled only to retain and apply all moneys representing dividends declared and paid by the said British American Timber Company Limited out of profits until the principal and interest of the said notes are fully paid, or (c) In the further alternative, that the said paragraph be in the terms of the agreement of June 1st, 1917.

It would appear that a motion to vary the minutes of our judgment pronounced on 7th March last is necessarily confined to a ruling as to what was the judgment given and whether the formal order for judgment as submitted for entry correctly expresses the real decision of the Court. It does not permit a decision upon a point not decided before, *cf.* the ruling of the

Court of Appeal in *South Wales Mineral Railway Co.* v. *Davies* (1886), 31 Sol. Jo. 110. But in this case counsel express no doubt concerning what the Court decided, and the notice of motion seeks a decision upon points which counsel for the appellant contends were not argued or decided in the appeal as heard.

At the trial the plaintiff (respondent company) abandoned its claim to an equitable mortgage and consequent foreclosure. Judgment was given declaring the shares were pledged as security for payment of the amount evidenced by the promissory notes but no consequential relief was expressly given—*vide* 59 B.C. 270, at p. 281. The five main objections to that judgment taken on the appeal (see my reasons for judgment [*ante,* p. 191] were rejected by the majority of the Court. But the majority (as expressed [*ante,* at p. 201] *et seq.* of my reasons with which McDONALD, C.J.B.C. concurred) did vary the judgment appealed from, by confining the enforcement of the pledge to the methods provided in the agreement of 1st June, 1917, by which it was created.

Counsel supporting the motion seeks to interpret our judgment as holding there was no pledge, and because of that, to maintain the agreement of 1st June, 1917, is a simple contract to which the Statute of Limitations is applicable. He now wishes to argue, (a) that the Statute of Limitations does not permit the aforesaid variation of the judgment appealed from, and alternatively, (b) that "dividends" in the agreement of 1st June, 1917, is not capable of the meaning which we have given it. It would therefore appear that the motion before us, while in form one to vary minutes, is in substance a motion to reopen the hearing of the appeal and argue it further upon the merits. Counsel applied to amend it accordingly and the Court acceded.

This Court has jurisdiction to reopen the appeal before the formal order for judgment has been perfected. It was done in *Kimpton* v. *McKay* (1895), 4 B.C. 196, at p. 204; *Rithet Consolidated Ltd.* v. *Weight* (1932), 46 B.C. 345, at pp. 347-8 and *Mainwaring* v. *Mainwaring* (1942), 58 B.C. 24, at p. 29. But those decisions bear little resemblance to the present case. The question is whether we should exercise the discretion which that jurisdiction gives us. But to my mind it is not a case where that

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discretion ought to be exercised. The appellant seeks a rehearing of the whole appeal which occupied the Court for four days. If the late Chief Justice McDONALD were alive the points now raised in the notice of motion could now be considered by the Court as it was constituted when the appeal was heard. But with respect I do not think that any member of the Court who did not sit on the appeal, could safely attempt to decide those points now without having been a party to the decision which led to the judgment from which the present points arise.

However that may be, viewing the motion as if the late Chief Justice were still with us, and as if the Court were now constituted as it was on the hearing of the appeal, I am of opinion the motion ought to be dismissed. Counsel supporting the motion seeks to interpret the judgment of the majority as holding the learned trial judge erred in holding there was a pledge of the shares. That is not supported by perusal of the judgment. The judgment of the trial Court was varied by limiting the manner in which the pledge may be enforced, but it is nowhere held that the shares were not pledged. This plainly appears in my judgment [*ante*] at pp. 202-3 (McDONALD, C.J.B.C. concurring) where it is said:

> In the second place, while the shares are pledged by way of collateral security, that pledge is not enforceable by sale of the shares. The pledge continues until payment by either of the two methods specified in the agreement of June, 1917.

Moreover, the contention of counsel supporting the motion that "dividends" in the agreement of 1st June, 1917, is not capable of the meaning which the majority gave it, must be rejected in any event, in view of paragraph 36 of the statement of claim and the evidence of the witness John D. Van Kennan who was not subjected to cross-examination. The action pivoted upon the agreement of 1st June, 1917, which created the pledge. The true interpretation of that agreement with all pertinent legal consequences was vital to the decision. This Court cannot ignore the true meaning and effect of the agreement, even if it was convenient for both parties to the litigation to advance other interpretations. I may add that during the argument of the appeal, I indicated to counsel my then impression of the force of

the interpretation of the argument which the majority of the Court finally adopted.

Counsel for the appellant in the presentation of his case here and below exercised his judgment as to what might help and what might hinder a successful defence and took his chances accordingly. The defence having substantially failed, and the appeal having also substantially failed (except as to the variation of the judgment above mentioned) the appellant can hardly now assert a right to have a rehearing of the appeal to see how it would turn out, if other tactics are followed or it is argued before a differently constituted Court of Appeal.

I would therefore dismiss the motion. But so that counsel for the appellant may not be handicapped in a higher Court, I make it clear that the points raised in the notice of motion are not regarded as having been abandoned in this Court or in the Court below.

ROBERTSON, J.A.: With reference to paragraph (a) of the notice of motion, the appellant alleges that the respondent's position before this Court was that there was a pledge of the shares in question and to this they submit that the Statute of Limitations was not a defence and therefore they did not argue it was. They say that the majority of this Court found that there was no pledge. They submit that consequently the obligation of the appellant was a simple contract debt to which the Statute of Limitations which they had pleaded, would be a defence and that they are entitled to a reargument of this point or of the whole appeal. The majority of the Court dismissed the appeal. I would have allowed the appeal on the ground that the action was not properly constituted. Accordingly I did not find it necessary to deal with any other point.

As I read the reasons for judgment of our late Chief Justice, he, while not deciding whether or not the respondent's charge was a mortgage, indicated that he was of the opinion that it was, and anyway he agreed that the judgment should be varied as set out in the reasons for judgment of O'HALLORAN, J.A. O'HALLORAN, J.A. came to the conclusion that there was a pledge. So that in my view the majority of the Court held that there was a

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pledge. That being the case, the appellant's application on this ground fails.

As to paragraph (b) of the notice of motion, all I have to say is that the judgment as drawn in my opinion represents the opinion of the majority of the Court.

I further wish to say with regard to paragraph (a) that upon the hearing of the motion Mr. *Farris,* counsel for the respondent, stated that all these points upon which the appellant now wished to be heard would be open to them on the pending appeal to the Supreme Court of Canada. Of course that is a matter for that Court to determine for itself; but his statement is important, in that it makes it clear, that these points are not to be regarded as having been abandoned in this Court or in the Court below.

The application should be dismissed, but in view of the unusual circumstances I think it fair that the costs should be costs in the appeal.

SIDNEY SMITH, J.A. agreed with ROBERTSON, J.A.

Motion dismissed.

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May 25, 26, 31.

STATE OF NEW YORK v. WILBY (*ALIAS* HUME).

Extradition—Accused committed—Habeas corpus with certiorari refused—Appeal—Jurisdiction—Banking records—Photostatic copies—Admissibility in evidence—Signature of accused—Proof of by showing witness a photostatic copy—R.S.C. 1927, Cap. 37, Secs. 9, 13, 16, 18 and 19.

On appeal from the discharge of a writ in *habeas-corpus* proceedings with *certiorari* in aid, the appellant, a fugitive criminal of a foreign State, after a hearing before a county court judge under section 9 of the Extradition Act, having been committed to prison for surrender to the authorities of the foreign State, the respondent raised the preliminary objection that there was no jurisdiction to entertain the appeal, that owing to the decision of the House of Lords in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government,* [1943] A.C. 147, the decision in *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541, should not be followed.

Held, that as decided in *Ex parte Lum Lin On* (1943), 59 B.C. 106, 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 in *Ex parte Yuen Yick Jun*, the Court is of opinion that its jurisdiction to entertain the appeal cannot be questioned.

On the main appeal the appellants contended that the learned county court judge received and acted on inadmissible evidence, consisting of photostatic copies of cheques, deposit and withdrawal slips and corresponding entries in the books of several banking institutions in New York and New Jersey.

Held, that in the circumstances of this case, sufficient grounds are shown in the proceedings to justify the production of secondary evidence of the various banking records in question.

On the further contention that the signature of the accused could not be proved by the production to a witness of photostatic facsimiles of bank signature cards, cheques and other documents with his signature on them, citing in support *The King* v. *The Ship "Emma K" et al.*, [1936] S.C.R. 256:—

Held, that the *"Emma K"* case is distinguishable as the present case is not one of comparison by expert witnesses of disputed handwriting with genuine handwriting within section 8 of the Canada Evidence Act, but simply the case of a witness to whom the appellant's signature is well known. Moreover the originals of some of the signed documents were produced in Court and the judge had the opportunity of satisfying himself that the facsimile reproductions were true representations of the originals. The learned judge did not err in accepting the evidence before him as sufficient. There was ample and proper evidence before him to order the appellant to prison under the provisions of the Extradition Act.

APPEAL by defendant from the order of FARRIS, C.J.S.C. of the 4th of May, 1944, dismissing an application for a writ of *habeas corpus* with *certiorari* in aid. The appellant, a fugitive criminal of the State of New York, after a hearing before SHANDLEY, Co. J., a judge of the county court, authorized by the Extradition Act, was ordered committed to prison for surrender to the authorities of the foreign State subject to the provisions of the Act. The grounds of appeal are that there was no evidence before the extradition judge that any extraditable offence had been committed: that the extradition judge erred in that he admitted secondary evidence; that he did not comply with the mandatory provisions of section 13 of the Extradition Act, and he did not, as provided by section 686 of the Criminal Code, call upon the appellant for his defence as a prerequisite of his adjudication.

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The appeal was argued at Vancouver on the 25th and 26th of May, 1944, before SLOAN, O'HALLORAN and SIDNEY SMITH, JJ.A.

Wismer, K.C., for appellant.

C. L. Harrison, for respondent, raised the preliminary objection that there is no jurisdiction to hear an appeal in *habeas-corpus* proceedings with *certiorari* in aid. *Habeas corpus* in extradition proceedings is a criminal cause or matter: see *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832; *Rex* v. *McAdam* (1925), 35 B.C. 168; *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541; *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; *Ex parte Lum Lin On* (1943), 59 B.C. 106.

Wismer, contra: The case of *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541, decides the matter and it was held in *Ex parte Lum Lin On* (1943), 59 B.C. 106 that the decision in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147 does not affect the reasoning in the *Yuen Yick Jun* case.

Cur. adv. vult.

Wismer, on the merits: There was no evidence before the extradition judge that an extraditable offence had been committed. The learned judge did not proceed in accordance with section 13 of the Extradition Act. He must hear the case in the same manner as if he were brought before a justice of the peace charged with an indictable offence. Section 682 and the following sections of the Code must be followed. He did not carry out the provisions of sections 686 and 687. The learned judge acted on inadmissible evidence. Photostatic copies of cheques and deposit slips were allowed in. This is secondary evidence and there was no foundation laid for using secondary evidence. Even if allowed in, they could not be used as proof of Wilby's signature: see *The King* v. *The Ship "Emma K" et al.*, [1936] S.C.R 256. There is no evidence of the identity of Wilby with the man who entered the bank accounts. There is no foundation for secondary evidence and the photostatic copies cannot be used: see *Re Harsha (No. 2)* (1906), 11 Can. C.C. 62. That section

13 of the Extradition Act has not been complied with see *Re Moore* (1910), 16 Can. C.C. 264. That section 686 of the Criminal Code has not been complied with see *Rex* v. *Payne* (1919), 30 Can. C.C. 382. *In re Tiderington* (1912), 17 B.C. 81; *Rex* v. *Nesbitt* (1913), 21 Can. C.C. 251; *In re Bartels* (1907), 15 O.L.R. 205.

Harrison: Counsel for accused stated he had a watching brief only, but he interjected a number of times and at the close of the evidence for the State he was asked by the Court if he had anything to say to which he replied at length. He was representing the accused and had the opportunity of putting in evidence if he wished to do so. There was substantial compliance with the rule and it was so held in *Re Moore* (1910), 16 Can. C.C. 264. The Courts are in favour of granting extradition and technicalities should be avoided: see *In re O'Connor* (1927), 39 B.C. 271. There is ample evidence to justify the order made. Certified copies of documents are admissible in evidence: see Taylor on Evidence, 12th Ed., Vol. 1, p. 304, sec. 438. As to secondary evidence see section 16 of the Extradition Act. All the documents are identified by the proper officers: see Taylor on Evidence, 12th Ed., Vol. 1, p. 312, sec. 452 and p. 314, sec. 457. The witness Casey could not find certain cheques and so secondary evidence is admissible: see *In re Israelowitz* (1917), 25 B.C. 143; *Kennedy* v. *Husband; Kennedy* v. *Ellison,* [1923] 1 D.L.R. 1069; *Owner* v. *Bee Hive Spinning Company, Limited,* [1914] 1 K.B. 105; *In re Lee* (1884), 5 Ont. 583; *Robinson* v. *Davies* (1879), 5 Q.B.D. 26; *Rex* v. *Farrell* (1909), 15 Can. C.C. 283; *Re Rosenberg* (1918), 29 Can. C.C. 309, at p. 323.

Wismer, in reply, referred to *Re Latimer* (1906), 10 Can. C.C. 244; *M'Cullough* v. *Munn,* [1908] 2 I.R. 194; *Buck* v. *Regem* (1917), 55 S.C.R. 133; *United States* v. *Jackson* (1917), 28 Can. C.C. 290.

Cur. adv. vult.

On the 31st of May, 1944, the judgment of the Court was delivered by

SLOAN, J.A.: The appellant is a fugitive criminal of a foreign State within the meaning of the Extradition Act (R.S.C. 1927,

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Cap. 37) and was on the 11th of April, 1944, after a hearing before His Honour Judge SHANDLEY, a county court judge authorized by section 9 of the said Act to act judicially in extradition matters, ordered committed to prison for surrender to the authorities of the foreign State, subject to the provisions of the said Act.

The appellant within the 15-day period provided by section 19 of the said Act, applied for a writ of *habeas corpus,* with *certiorari* in aid. This proceeding came on for hearing before the Chief Justice of the Supreme Court who discharged the writ, and from that order an appeal is now taken to this Court.

Counsel for the respondent State of New York asked permission to argue, as a preliminary objection to our jurisdiction to entertain the appeal, that our previous decision in *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541 should be reviewed and not followed by us because of the later decision of the House of Lords in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government,* [1943] A.C. 147 and the observations thereon of the late Chief Justice of this Court (MCDONALD, C.J.B.C.) in *Ex parte Lum Lin On* (1943), 59 B.C. 106, at p. 108.

Permission to advance this submission was granted counsel for the respondent following the course adopted in *Rex* v. *Gartshore* (1919), 27 B.C. 175, at pp. 179-183 and arguments were advanced by both counsel on this jurisdictional issue. Judgment was reserved thereon and it now becomes necessary to state our views concerning the matter. At the outset it must be restated, as our brother O'HALLORAN made clear in his judgment therein, that our jurisdiction to entertain the appeal in *Ex parte Lum Lin On, supra,* was never questioned by counsel in that case. Had it been otherwise I would have concurred in the judgment of my brother O'HALLORAN at that time.

It is our present view that our brother O'HALLORAN correctly stated the position when he said in the *Lum Lin On* case (at p. 110):

> . . . 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 . . . in *Ex parte Yuen Yick Jun* . . .

In consequence we are of opinion that our jurisdiction to entertain this appeal cannot now be questioned. See also *The King* v. *Junior Judge of the County Court of Nanaimo and McLean* (1941), 57 B.C. 52, at pp. 58-9.

The preliminary objection is therefore overruled.

That brings us to a consideration of the questions involved in the appeal proper. The main attack by counsel for the appellant upon the warrant of committal issued by Judge SHANDLEY is founded upon the contention that he had no evidence before him to justify the appellant's committal to trial if the crime had been committed in Canada (section 18). This contention is based upon the submission that Judge SHANDLEY received and acted upon inadmissible evidence. The impugned evidence consisted of photostatic copies of cheques, deposit and withdrawal slips and corresponding entries in the books of several banking institutions in the States of New York and New Jersey. We are of opinion that under the circumstances of this case sufficient grounds are shown in the proceedings to justify the production of secondary evidence of the various banking records in question.

Counsel for the appellant further contended that the signature of the appellant could not be proved by the production to a witness of photostatic facsimiles of bank signature cards, cheques and other documents whereupon the signature of the appellant is reproduced. In support of this submission he relied upon the decision of the Supreme Court of Canada in *The King* v. *The Ship "Emma K" et al.*, [1936] S.C.R. 256. In our opinion that case and this are distinguishable on their facts. In the first place this is not a case of comparison by expert witnesses of disputed handwriting with genuine handwriting within section 8 of the Canada Evidence Act. It is simply a case of a witness to whom the appellant's signature is well known, testifying that the signature appearing on the photographic reproduction of the various documents is the signature of the appellant. The next distinguishing feature is that the originals of some of the signed documents were produced in Court before the extradition judge who thus had the opportunity of satisfying himself the facsimile reproductions were in fact true representations of such original documents.

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Under these circumstances, and in an inquiry of this character whatever might be the position upon a trial of an accused person —a subject upon which we find it unnecessary to comment—in our opinion the learned extradition judge did not err in accepting the evidence before him as sufficient for his purpose. It must also be remarked that in addition to the depositions he had the advantage of hearing the *viva voce* evidence of five witnesses brought here from the State of New York. In this connection too, it must not be lost to sight that the appellant is not upon his trial.

As Wurtele, J. pointed out in *Ex parte Isaac Feinberg* (1901), 4 Can. C.C. 270, at pp. 272-3:

> When a person is accused of having committed a crime in Canada, he is brought before a magistrate, who holds a preliminary inquiry, and examines the witnesses who are called before him. The magistrate does not try the accused; he hears the evidence adduced, and if he thinks, not that enough has been proved to declare him guilty, but that the evidence is at least sufficient to put him on his trial, he commits him for trial.
>
> Evidence to justify commitment, and not conviction, is sufficient, and it is not necessary that it should amount to proof of the accused's guilt and be sufficient on trial to sustain the charge. The evidence to justify the holding of an accused for trial is only such as amounts to probable cause to believe him guilty. It is not necessary that it be sufficiently conclusive to authorize his conviction. To convict there must be evidence which leaves no reasonable doubt of guilt, but to commit only requires that the circumstances proved are sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is probably guilty of the offence with which he is charged. (1 Moore, pp. 520, 521, 522). The purport of the inquiry is merely to determine whether a case is made out to justify the holding of the accused to ultimaately answer to an indictment on which he shall be finally tried upon the charge made against him and at which trial he will have the right to make a full defence. (1 Moore, p. 522).
>
> In the same manner as at a preliminary inquiry, when an accused is arrested for extradition, the commissioner takes the evidence of the witness called, but in addition to that, under the provisions of section 10 of the Extradition Act, he can receive as evidence in proceedings for extradition depositions and statements taken in the foreign State, when such documents are duly authenticated, and he may even receive in evidence duly certified copies of such documents.

And again at p. 275:

> . . . At a criminal trial the rule is for a jury to give the benefit of a reasonable doubt to the accused, but at a preliminary inquiry when there is a doubt in the case a contrary rule prevails, and it must go in favour of committal, not in favour of discharge.

Moreover, and apart from the consideration of the method of proving the signature of the appellant on the various documents,

there is evidence in the depositions of facts which, standing alone, raise a strong presumption that the fugitive was guilty of the embezzlement alleged. From the various documents themselves, the contents of which are admissible under the *"Emma K"* decision, *supra,* incriminatory circumstances are plainly evident which, when coupled with the appellant's position as assistant treasurer of the W. T. Knott Company Inc., the disappearance of relevant records under his control and his own flight when his offices were visited by auditors would, in our opinion, "warrant a cautious man in the belief that the person accused is probably guilty of the offence with which he is charged."

It is our view therefore that Judge SHANDLEY had ample and proper evidence before him upon which to found his jurisdiction to order the appellant to prison under the provisions of the Extradition Act. Compare *United States of America* v. *Gaynor,* [1905] A.C. 128.

One other point remains to be dealt with. It was argued by appellant's counsel that the learned judge below did not give any opportunity to the appellant to call evidence on the inquiry on his own behalf pursuant to the provisions of sections 684 and 686 of the Code. The appellant was represented by counsel before Judge SHANDLEY and while he stated at the outset he had a watching brief only, he did take part in the proceedings to such an extent that we think the learned judge below was justified in concluding that counsel did in reality accept the responsibility of protecting the interests of the appellant. In matters of this kind we cannot accede to the proposition that counsel can be both in and out of the case at the same time. At the close of the evidence for the State of New York the learned judge asked counsel: "Have you anything to say, Mr. *Haldane?"* to which question counsel replied:

> The only observation I have to make is that this case depends entirely upon evidence not properly put before Your Honour at all, these photostatic copies. I submit that is secondary evidence.

There the matter rested. Counsel at that time had his chance to call whatever witnesses he chose but elected not to do so. In our opinion it is now too late to complain that he was not afforded that opportunity.

In the result the appeal is dismissed.

Appeal dismissed.

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May 17, 19.

BAILEY v. BAILEY: FRASER, CO-RESPONDENT.

Divorce—Adultery of petitioner—Discretion—Exercise—Review by appellate tribunal.

On the hearing of a petition for divorce the trial judge granted the decree, but before the signing thereof discovered that the petitioner had been cited as co-respondent in another divorce action recently concluded by the grant of a decree. This was not previously disclosed and he ordered a further hearing when the petitioner denied guilt in the other suit, although it transpired that neither he nor the respondent had defended the suit. The judge did not believe him, expressed the view that he intended to deceive the Court and dismissed the petition.

Held, on appeal, affirming the decision of COADY, J., that on an appeal from the exercise of discretion, the question for the Court's consideration is whether the trial judge's judgment was erroneous because he acted on wrong or inadequate materials and not whether the Court would have exercised the discretion in the same manner he did. The discretion of the trial judge to refuse a decree of divorce when he finds that the petitioner has been guilty of adultery is "unfettered" and "at large."

Held, further, that it is the duty of every petitioner to place the facts most fully before the Court and the rule that a decree may be refused if there is failure to deal with the Court with the utmost good faith is one that is not to be relaxed.

APPEAL by plaintiff from the decision of COADY, J. of the 5th of February, 1944, dismissing a petition for a decree of divorce brought by George W. Bailey against his wife Mary Bell Bailey. They were married in Saint John, New Brunswick, in August, 1924, and lived together until April, 1938, when they separated. In August, 1938, the petitioner moved to the city of Vancouver and is now domiciled in British Columbia. The respondent and co-respondent reside in Saint John, New Brunswick. The petitioner claims that the respondent and co-respondent have been living together in Saint John for the last five years. On the hearing the learned judge granted the decree, but before it was signed he discovered that in another divorce action in which the petitioner was co-respondent, judgment had just been given, granting a decree. This not having been disclosed on the hearing, the learned judge directed that the case be reopened for further evidence. Upon the further hearing it was disclosed that in the other case the respondent and co-respondent entered an appear-

ance but did not defend the action. The learned trial judge, dismissing the petition, stated:

> The petition is dismissed. The petitioner has not been frank with the Court. In my opinion he intended deliberately to deceive the Court. I do not believe him. I am exercising my discretion and therefore I am dismissing the petition.

The appeal was argued at Vancouver on the 17th of May, 1944, before SLOAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Gillespie, for appellant.
No one, for respondent.

Cur. adv. vult.

On the 19th of May, 1944, the judgment of the Court was delivered by

SIDNEY SMITH, J.A.: This is an appeal from a judgment of COADY, J. dismissing a petition for a decree of divorce in a suit brought by the appellant George Wilfred Bailey against his wife Mary Bell Bailey upon the ground of her adultery with one Charles Fraser, who was joined as co-respondent.

The facts are the usual ones in these cases and need not be recited at length. It will be sufficient to state that the learned judge granted the decree, but before the signing thereof discovered that the petitioner had been cited as co-respondent in another divorce suit just concluded by the grant of a decree. This had not been disclosed upon the hearing and he accordingly directed that the matter be reopened for further evidence on this head.

Upon the further hearing the petitioner denied guilt in the other suit, although it transpired that he and the respondent had consulted a solicitor who entered an appearance for both, accepted service of all process on behalf of both, and that neither had defended the suit. The learned judge did not believe the petitioner and expressed his view in this language:

> The petition is dismissed. The petitioner has not been frank with the Court. In my opinion he intended deliberately to deceive the Court. I do not believe him. I am exercising my discretion, and therefore I am dismissing the petition.

The learned judge was clearly of opinion that the petitioner had been guilty of adultery, and that in view of his denial of such adultery he should not exercise his discretion in favour of

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the petitioner in the present proceedings. After a careful reading of the evidence and a consideration of all the circumstances, I cannot say that the learned judge was wrong in declining to exercise his discretion. On the contrary, I think he was quite right.

This conclusion, for my part, disposes of the appeal. But it may be helpful to note that the grounds on which judicial discretion should be exercised in divorce cases were considered recently by the House of Lords in the case of *Blunt* v. *Blunt* (1943), 59 T.L.R. 315. In that case Viscount Simon, L.C. pointed out that there then came

> before the House for the first time, 86 years after the passing of the Matrimonial Causes Act, 1857, the important question of the nature and proper exercise of the discretion which was originally conferred on the Divorce Court by the proviso to section 31 of that Act.

Under this proviso

> the Court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery.

In the same case, in the Court of Appeal, Goddard, L.J. drew attention to the fact that

> ever since the Divorce Act was passed this provision has been interpreted as meaning, not that the petitioner is entitled to a decree unless the Court sees fit to deprive him, but that he is not entitled to one unless the Court sees fit to grant one:

[1942] 2 All E.R. 613, at p. 618. The corresponding statutory enactment endowing the British Columbia Divorce Court with discretion in these cases is to be found in Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, Sec. 16.

Viscount Simon, at p. 316, stated that the discretion of the trial judge is "unfettered" and "at large" and that

> The utmost that can be properly done is to indicate the chief considerations which ought to be weighed in appropriate cases as helping to arrive at a just conclusion

whether the discretion should be exercised or not, and continued as follows:

> In *Wilson* v. *Wilson* (36 The Times L.R. 91; [1920] P. 20) Sir Henry Duke, P., in dealing with the particular case before him, mentioned four circumstances which, in his view, warranted the exercise of the judicial discretion in the petitioner's favour, and these four considerations were referred to with approval by Birkenhead, L.C., when he was sitting in the Divorce Court and deciding *Wilkinson* v. *Wilkinson and Seymour, King's Proctor*

showing cause ((1921) 37 The Times L.R. 835). These four points are:—(*a*) the position and interest of any children of the marriage; (*b*) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage; (*c*) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and (*d*) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably. To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance —namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the Court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused.

He further emphasized that it was the duty of every petitioner to place the facts of his or her case most fully before the Court; and that the rule that a decree may be refused, if there is a failure to deal with the Court with the utmost good faith, is one that is not to be relaxed.

Dealing with the circumstances in which an appeal may be successfully brought against the exercise of the Divorce Court's discretion, the Lord Chancellor said as follows (pp. 316-17):

If it can be shown that the Court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached because the Court's discretion will have been exercised on wrong or inadequate materials. But, as was recently pointed out in this House in another connexion in *Charles Osenton and Co.* v. *Johnston* (57 The Times L.R. 515 at p. 518; [1942] A.C. 130, at p. 138), "the appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the Judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way."

A little later he continued as follows:

The question for consideration by this Court is whether his judgment is erroneous, and not whether we should have exercised the discretion in the same manner as the Judge below did. There is no appeal from his discretion to our discretion, and the appellant is not entitled to succeed unless the judgment is erroneous.

In the result, on the facts of the *Blunt* case, the House of Lords restored the decree granted by the trial judge in the exercise of his discretion, which had been rescinded by the Court of

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Appeal. There has therefore been no reported case in England since the passing of the Matrimonial Causes Act, 1857, where the discretion exercised by the trial judge has been disturbed.

The appeal is dismissed.

Appeal dismissed.

Solicitor for appellant: *W. D. Gillespie.*

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May 26, 31.

REX v. HONG.

Criminal law—Theft—Sufficiency of explanation by accused—Conviction—Appeal—Judge's report and reasons for judgment—May be read together when they do not conflict.

On appeal from the conviction and sentence of accused on a charge of theft it was pointed out by counsel for accused that the learned judge said in giving judgment: "I am not sure his explanation is reasonable" and it was submitted that although he did not accept the appellant's explanation, he failed to find it was unreasonable.

Held, affirming the decision of ARCHIBALD, Co. J., that standing alone, it might bear that interpretation, but the observations immediately following make it clear that was not its meaning as in the next sentence he said "To my mind the reasonable explanation fails." This is confirmed in the judge's report when he said "the accused gave evidence on his own behalf, but I found the explanation unreasonable."

Held, further, that the judge's report and his reasons for judgment may be read together when the two do not conflict.

APPEAL by accused from his conviction by ARCHIBALD, Co. J. at Kamloops, on the 27th of March, 1944, on a charge of stealing about 325 pounds of meat of the value of approximately $86.87, the property of the Government of the Province of British Columbia. The Tranquille Sanatorium, a Government institution at Tranquille, B.C., has a farm in connection with it on which is kept beef cattle and a swine herd for supplying the institution with meat. In connection with the farm is an abattoir in which the animals are butchered and prepared for the sanatorium. The accused Sherwood was in charge of the butchering. The accused Hong, who has a store and rooming-house in Kamloops, was called on by accused Sherwood on the evening of

February 24th, 1944, and Sherwood asked him to get out his car and drive him to Tranquille in order to haul some stuff from there to another place. Hong drove Sherwood to the abattoir adjoining the farm above mentioned where they arrived about 8.20 p.m. Sherwood got out of the car and, going into the abattoir, took out the meat in question and put it into the back of the car. As Sherwood was getting into the car, Dr. Stalker, medical superintendent of the sanatorium and Abraham Deane, Government inspector, appeared with flash-lights. At Dr. Stalker's request, Hong unlocked the back of the car where they found the meat. The meat was taken back into the abattoir. Dr. Stalker and Deane testified that when the doctor asked that the back of the car be opened, Hong showed anger and said "By God, nobody's going to look in my car."

The appeal was argued at Vancouver on the 26th of May, 1944, before SLOAN, O'HALLORAN and SIDNEY SMITH, JJ.A.

Wismer, K.C., for appellant: Sherwood asked Hong to drive him to the sanatorium farm to carry some goods away. Hong consented to do so, but he knew nothing about the goods and Sherwood loaded the meat in the car. The abattoir adjoined the farm and Sherwood had been butcher there for 12 years. The facts are as consistent with innocence as with guilt: see *Rex* v. *Schama* (1914), 84 L.J.K.B. 396. He must be satisfied beyond a reasonable doubt and the learned judge said he was not sure.

A. deB. McPhillips, for the Crown, referred to *Rex* v. *Schama* (1914), 11 Cr. App. R. 45; *Rex* v. *Murphy, Kitchen and Sleen* (1931), 4 M.P.R. 158.

Wismer, replied.

Cur. adv. vult.

On the 31st of May, 1944, the judgment of the Court was delivered by

O'HALLORAN, J.A.: The substantial point in this appeal is that although the learned county judge did not accept the appellant's explanation, he failed to find it was unreasonable. Compare *Rex* v. *Davis* (1940), 55 B.C. 552, at p. 556 and cases there cited by my brother SLOAN.

The learned judge said in giving judgment "I am not sure his

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explanation is reasonable." Counsel for the appellant submitted that meant he was uncertain the explanation was not reasonable. Standing alone it might bear that interpretation, but the observations immediately following make it clear that was not its meaning. In the next sentence the learned judge said "To my mind the [reasonable explanation] fails," and then gave reasons for so holding.

That was confirmed in the learned judge's report, under Code section 1020 when he said "the accused gave evidence on his own behalf but I found his explanation unreasonable." The judge's report and his reasons for judgment may be read together when the two do not conflict. Compare *Rex* v. *Reid* (1942), 58 B.C. 20; affirmed on other grounds [1943] 2 D.L.R. 786 and applied in *Rex* v. *O'Leary* (1943), 59 B.C. 440.

The appellant also appeals his sentence to one year's imprisonment but has advanced no ground to justify our interference. Compare *Rex* v. *Zimmerman* (1925), 37 B.C. 277.

The appeal from conviction and the appeal from sentence are both dismissed.

Appeal dismissed.

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May 25;
June 5.

REX v. CODD AND BENTLEY.

Criminal law—Opium—Unlawful possession—Two accused charged jointly —Acquittal on directed verdict of "not guilty"—Appeal—Whether sufficient evidence for jury—Drug in possession of one only—Whether within "knowledge and consent" of other—Criminal Code, Sec. 5, Subsec. 2—Can. Stats. 1929, Cap. 49, Sec. 4 (1) (d).

The accused Codd under the name of Raymond went to a veterinary surgeon on February 16th, 1944, to get a prescription for a horse he said he owned on the race-track at Willows Park named Lazy May. He said that the horse had a running-ear and he wanted a prescription of tincture of opium and olive oil generally prescribed for such ailment. A prescription was made out in the name of Raymond and given to him. Other testimony showed that Raymond was the accused Codd, that he had no horse at Willows Park and that he was not known there. Next day Codd again saw the veterinary surgeon and told him he could not get the prescription filled and the veterinary surgeon told him to go to

the Modern Pharmacy where he could get it filled. On the same day one Turnbull, an employee at the Modern Pharmacy, found the prescription on his dispensing-counter, but he did not fill it as he had no olive oil. Later in the day a woman called to get the prescribed compound but Turnbull told her he had no olive oil and she left with the unfilled prescription. Later still in the same day Bentley came in with the prescription and the druggist filled the prescription, using peanut oil instead of olive oil and Bentley took the compound away with him. There was no evidence adduced to show that Bentley and Codd were acquainted or had any association with one another. Codd and Bentley were jointly charged with unlawful possession of opium and the presiding judge concluded there was no case made out against them and on his direction the jury brought in a verdict of not guilty.

Held, on appeal, reversing the decision of FARRIS, C.J.S.C. (O'HALLORAN, J.A. dissenting in part and would dismiss the appeal as against Codd) on the submission of the Crown that the connecting link between these two men is the unlawful prescription and that in the circumstances mentioned a jury might properly and reasonably draw the inference that Bentley obtained and had possession of the drug with the "knowledge and consent" of Codd, the Court is of the view that the issue is one proper to be left to the jury. If a properly-instructed jury did reach that conclusion, it could not be set aside as unreasonable. The appeal should be allowed and a new trial directed for both accused.

APPEAL by the Crown from the decision of FARRIS, C.J.S.C. of the 27th of April, 1944, on a directed verdict of "not guilty" by a jury of the two accused who were charged jointly with the unlawful possession of opium. The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Vancouver on the 25th of May, 1944, before SLOAN, O'HALLORAN and SIDNEY SMITH, JJ.A.

Wismer, K.C. (*Clearihue, K.C.*, with him), for the Crown: Codd got the prescription from veterinary surgeon Lehman on the story that he had a horse with a running-ear at the race-track named Lazy May. There was no such horse at the race-track. The prescription was filled at the Modern Pharmacy and subsequently taken away by Bentley. As to joint possession see section 5, subsection 2 of the Code. As to the action by Codd see *Rex* v. *Smith* (1924), 42 Can. C.C. 390; *Rex* v. *Viau*, [1942] 2 D.L.R. 416, at p. 419. On the question of "*mens rea*" see *Morelli* v. *Regem* (1932), 58 Can. C.C. 120; *Rex* v. *Wong Loon* (1937), 52 B.C. 326, at p. 329; *Re Au Chung Lam* (1943), 81 Can. C.C. 27. As to the duty of the learned judge to submit the

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case to the jury see *Harris* v. *Winnipeg Electric Ry. Co.* (1919), 29 Man. L.R. 306, at p. 316; *Rex* v. *Johnson* (1928), 21 Cr. App. R. 66; *Rivet* v. *Regem* (1915), 25 Can. C.C. 235; *Wilson* v. *Taylor* (1913), 11 D.L.R. 455; *Walker* v. *Regem* (1939), 71 Can. C.C. 305, at p. 306.

Henderson, for defendant Codd: Codd never had possession of the drug. In all the cases mentioned possession was admitted. Codd and Bentley were never seen together by any witness. To constitute guilt, actual knowledge by Codd that Bentley had a drug must be proved. There was no evidence whatever that Codd knew anything about it: see *Rex* v. *Comba,* [1938] S.C.R. 396; *Rex* v. *Norton* (1940), 75 Can. C.C. 299; *Rex* v. *Silverstone,* [1931] 3 D.L.R. 769; *Rex* v. *Bannister* (1936), 66 Can. C.C. 357; *Rex* v. *Probe* (1943), 79 Can. C.C. 289.

W. A. Brethour, for defendant Bentley.

Wismer, replied.

Cur. adv. vult.

5th June, 1944.

SLOAN, J.A.: I would allow the appeal and direct a new trial for the reasons given by my brother SIDNEY SMITH.

O'HALLORAN, J.A.: The appellants Codd and Bentley were jointly charged at the last Victoria Assizes with unlawful possession of opium under section 4 (*d*) of The Opium and Narcotic Drug Act, 1929. At the conclusion of the case for the prosecution the learned presiding judge ruled there was no case made out against them and directed the jury to bring in a verdict of not guilty. The jury did so and the Crown appeals.

Codd, under the name of Raymond, obtained from a duly-qualified veterinary surgeon a prescription ordinarily given in the treatment of horses, but which contained a drug within the meaning of The Opium and Narcotic Drug Act, 1929. He represented that the regular veterinary surgeon at Willows Park was ill in hospital. Codd also represented that he had a horse at Willows Park by the name of "Lazy May." Evidence was adduced to show Codd was not known at Willows Park and that there was no such horse at Willows Park. Codd returned to the veterinary surgeon the next day stating the druggist did not know

the veterinary surgeon and would not fill the prescription. The veterinary then told Codd that he had his prescriptions filled at the Modern Pharmacy and suggested he take the prescription there. On the following day an unidentified woman attended at the Modern Pharmacy with this particular prescription. The druggist was unable to fill it as he did not have a certain kind of oil mentioned in the prescription. Later on during the same day a man appeared at the Modern Pharmacy with the prescription and it was then filled, using a different kind of oil, and the man took it away. The druggist asked him for his address, but not his name. The man was later identified as Bentley.

It was admitted by prosecution witnesses that the prescription was in the ordinary form, filled in the ordinary manner, and that in accordance with the prevailing practice among druggists a prescription may be filled and delivered to any person producing the prescription without checking his identity or authority. There was no evidence adduced to show that Bentley and Codd were acquainted or had any association with each other, directly or indirectly. Nor were there any facts proven from which it could be legitimately inferred they were acting together even in some remote way.

Bentley had actual possession of the opium and an *onus* rested upon him under section 15 of The Opium and Narcotic Drug Act, 1929, to show his possession was lawful. I would allow the appeal in his case, and *cf. Rex* v. *Viau,* [1942] 2 D.L.R. 416. But Codd's case is quite different. He did not have possession of the opium and no *onus* arising out of possession rests upon him. The Crown asks us to hold that Codd had constructive possession, relying on section 5, subsections 1 (*b*) and 2 of the Code. But for those sections to avail, it must be first proven that Bentley had the opium with the "knowledge and consent" of Codd. No doubt if it had been shown that Codd and Bentley were associates an inference could have been drawn to establish a case for Codd to meet, that Bentley obtained the opium with the former's "knowledge and consent."

But on the facts presented here no such inference arises in law despite the suspicion which is created. If Codd had obtained the prescription legally and then lost it, and it had been picked

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up by an entire stranger Bentley, the latter could have presented it as he did and obtained the opium. Hence the prescription itself cannot be regarded as a connecting link between the two men as counsel for the Crown appellant sought to argue. What counsel for the Crown is really asking us to do, is to hold that because Codd obtained the prescription illegally, it is a necessary inference that whoever presented it to be filled must be connected with him in some way. That, of course, does not follow at all, as there is no circumstance to relate the two men. That the woman and Bentley went to the Modern Pharmacy is not by itself more than a suspicious circumstance.

The Crown seeks without the sanction of statute, to place an *onus* on Codd to show Bentley did not have the opium with his "knowledge and consent." That offends the long-established principle the House of Lords found it necessary to reaffirm in *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462. For the purpose of drawing an inference of "knowledge and consent," I am unable to appreciate the difference it makes whether Codd obtained the prescription legally or illegally, when there is no evidence of even the remotest association or connection between the two men.

Speaking for myself, I am unaware of any authority to extend "knowledge and consent" in section 5, subsection 2 beyond situations where the joint association, interest, or participation of the accused (*cf. Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204, at pp. 209-10) is first established as a positive fact. Unless such a fact is first established there is no basis upon which to infer "knowledge and consent." In *Caswell* v. *Powell Duffryn Associated Collieries, Ld.,* [1940] A.C. 152 Lord Wright at pp. 169-70 thus defined the essentials of inference as distinguished from conjecture:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In my judgment the case against Codd rested on speculation

and pure suspicion, and the learned judge was right in taking the course he did. A case may have been made against Codd if he had been charged with some other offence, but in my judgment the case fails entirely on a charge of possession.

I would dismiss the appeal in Codd's case, and allow the appeal in Bentley's case.

SIDNEY SMITH, J.: The respondents Codd and Bentley were charged with unlawfully having opium in their possession on the 17th of February, 1944. They came to trial before Chief Justice FARRIS and a jury at the last Victoria Assizes. At the conclusion of the Crown's case the learned Chief Justice decided that the evidence failed to disclose a *prima-facie* case against either of the accused and directed the jury to bring in a verdict of "Not guilty." The jury did so and the Crown now appeals.

At the trial the Crown called several witnesses. The testimony upon which this appeal turns was given in the main by two of them, *viz.*, Dr. Lehman, a veterinary surgeon, and Mr. Turnbull, a druggist. Dr. Lehman testified substantially as follows:

About 8 o'clock in the evening of the 16th February, 1944, a gentleman by the name of J. R. Raymond came to me wishing to get a prescription for a horse which he said he owned and which was at the Willows Park [which includes a race-track and stabling]. He claimed that the horse had a running-ear and wanted to know if he could get from me a prescription of laudanum [otherwise known as tincture of opium] and olive oil, which is generally prescribed for such an ailment. He said that the veterinary who generally looked after such things at the Willows Park was sick in the hospital and he could not get in touch with him. . . . I asked the gentleman what the name of his horse was and he gave the name of Lazy May. . . . I made out the prescription [in the name of J. R. Raymond] and gave him instructions to put a teaspoonful twice daily in the ear. . . . The next day he came around to me and he said he could not get the prescription filled as I was a stranger and unknown and I advised him to go to the Modern Pharmacy where I generally dealt and they would fill the prescription for him. . . . I knew personally that [the veterinary surgeon at Willows Park] was in the hospital at that time.

Other testimony (if accepted) showed that the gentleman referred to as J. R. Raymond was the respondent Codd, that he had no horse at Willows Park, and that he was not known there either under the name of Codd or Raymond or otherwise.

Mr. Turnbull testified that he was employed by the Modern Pharmacy, that on the 17th of February, 1944, he found on his

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dispensing counter (presumably placed there by one of his clerks) the prescription given by Dr. Lehman to Codd the previous day, but that he did not fill it as he had no olive oil on hand. Later in the day a woman called to get the prescribed compound and he explained this to her and she left with the unfilled prescription. Later still in the same day the same prescription was presented to Mr. Turnbull by the respondent Bentley. On this occasion the druggist filled the prescription, using peanut oil instead of olive oil, and Bentley took the compound away with him. Several days after Bentley again returned to the drug store. He had a parcel with him and said he had made a mistake in getting the prescription and wanted the druggist to take it back. This Mr. Turnbull refused to do and Bentley left taking his parcel with him.

The question is whether in these circumstances (assuming the jury believed the witnesses) there was sufficient evidence to call for a defence or in default of defence to go to the jury. The learned Chief Justice thought not.

Section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929, states that every person shall be guilty of an offence who

> has in his possession any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority.

It was contended by the defence that as the Crown put in as part of its case a prescription regular and lawful on its face, and as it was conceded by Crown witnesses that it was the custom for druggists to fill such prescriptions without enquiry as to the holders' right to present them, there was thus no evidence of illegal possession on the part of Bentley. But the Crown simply put the prescription in evidence as part of the narrative and it must be considered in the light of the rest of the Crown's case. I would apply here, with respect, the language of Baxter, C.J. in delivering the judgment of the New Brunswick Appellate Division in *Rex* v. *Viau*, [1942] 2 D.L.R. 416, at pp. 417-18:

> The Crown, of course, was not putting the prescriptions in evidence to show that the accused had lawful authority but simply as a link in the chain of evidence which connected the accused with the possession of heroin. The statute does not say that a prescription constitutes lawful authority. It may be evidence tending to prove lawful authority but it is not in itself sufficient to do so. The one who gives the prescription must not in giving it

violate the law. If he does so the prescription may be in some sense an authority but it cannot be a lawful authority.

And later at pp. 418-19:

The prescription and the circumstances accompanying the obtaining of it must all be taken together in determining whether it constituted a "lawful authority" for the possession of the drug or whether it was a mere sham.

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In this case under section 6 of the Act Dr. Lehman had authority to issue prescriptions for medicinal purposes and for medicinal purposes only. It would be for the jury to say, on the facts disclosed, whether this prescription was obtained for any such purpose. If it was not so obtained, then it was a "mere sham" only; and it seems to me that it could have no more efficacy in the hands of Bentley than it did in the hands of Codd. By giving it to another person it is not thereby clothed with lawfulness. He who seeks to set it up as "lawful authority" has the burden of proving it such under section 15 of the Act.

In the *Viau* case it was the accused himself who wrongfully obtained the prescription from the physician; but in view of the definite language of subsection 4 (*d*) this would not seem to make any difference. The mere fact that the drug was found in Bentley's possession is *prima-facie* proof of his guilt under the section, entirely independent of any *mens rea*. See *Rex* v. *Lee Po* (1932), 45 B.C. 503, at p. 508; *Morelli* v. *Regem* (1932), 58 Can. C.C. 120; *Rex* v. *Wong Loon* (1937), 52 B.C. 326 and *Re Au Chung Lam* (1943), 81 Can. C.C. 27. So that if Bentley were nothing more than a messenger, there was still sufficient evidence to call for his defence; and in default of such defence the jury had evidence before them upon which they could find him guilty of illegal possession.

Codd stands on a different footing. The Crown contends he had possession by virtue of section 5, subsection 2 of the Criminal Code, which (as applied to two persons) states that if one of them, with the knowledge and consent of the other, has anything in his custody or possession, it shall be deemed and taken to be in the custody and possession of each of them. The question then is this: Did Bentley, when he obtained possession of the drug from the druggist, have such possession "with the knowledge and consent" of Codd? If so, then under this section Codd also had possession. The Crown says this question is for the jury to deter-

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mine and that there is sufficient evidence to support such an inference, *viz.*, the fraud of Codd in obtaining the prescription, his return the next day to Dr. Lehman after trying in vain to have it filled, its presentation the same day by a woman at the sole and particular store designated by Dr. Lehman and its initial non-fulfilment there, its presentation the same day at the same store by Bentley and his acceptance of peanut oil as an ingredient instead of olive oil. The Crown submits that the connecting link between these two men is the unlawful prescription and that in the circumstances mentioned a jury might properly and reasonably draw the inference that Bentley obtained and had possession of the drug with the "knowledge and consent" of Codd.

It seems to me that the transaction is of the stuff of common life and that the issue is one proper to be left to the jury. I do not say that I myself would draw such an inference—still less that a jury should do so. But I am of opinion that if a properly-instructed jury did reach that conclusion it could not be set aside as unreasonable.

I would therefore, with respect, allow the appeal and direct a new trial for both accused.

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

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May 29;
June 7.

IN RE ESTATE OF BELANIE GRIMARD, DECEASED.

Practice—Application for letters probate by executors—Also application by attorney appointed by other executor (outside jurisdiction)—Refusal of latter—First granted conditionally.

On an application by way of the executors named in the will of deceased for letters probate of the estate, and also an application by the attorney appointed by the other executor named in the will (which executor is outside the jurisdiction) for letters of administration with will annexed of the estate:—

Held, that that part of the application for a grant of letters of administration with will annexed to the attorney of the executor outside the jurisdiction be refused.

Held, further, that the application of the resident executor for probate will stand adjourned for ten days in order that counsel may advise the out-

side executor that the application for a grant in favour of his attorney has been refused and that if he wishes to join in the application for probate with his co-executor he may do so. If he fails to join in the application within ten days, the grant will issue to the petitioning executor, reserving the rights of the other executor to apply at a later date.

APPLICATION by the executors named in the will of Belanie Grimard, deceased, for letters probate of the estate and also an application by the attorney appointed by the other executor named in the will (which executor is outside the jurisdiction) for letters of administration with will annexed. Heard by COADY, J. in Chambers at Vancouver on the 29th of May, 1944.

McLorg, for applicant.

7th June, 1944.

COADY, J.: This is an application by way of the executors named in the will of the above deceased for letters probate of the estate, and also an application by the attorney appointed by the other executor named in the will of the deceased (which executor is outside the jurisdiction) for letters of administration with will annexed of the estate.

On enquiry at the registry office I find that so far as can be ascertained no similar application has heretofore been made. No case has been cited to me in support of the application. It is stated in Tristram and Coote's Probate Practice, 18th Ed., at p. 196:

> If the attorney be appointed by one only of two or more executors, a grant will be made to such attorney for the use and benefit of the executor who appointed the attorney, until he or one or more of the others shall apply, but it must be shown in the oath that all the executors are abroad.
>
> If one of several executors is in England and the others are abroad, the executor in England must renounce probate or consent before a grant can be made to the attorney of one or more of the others.

From this it would seem that letters of administration with will annexed, if granted to an attorney, would be effective only until one of the executors applied for probate, and if one of the executors was resident within the jurisdiction his renunciation or his consent would be required before the grant would be issued to the attorney. I take it that this has reference to the consent of a resident executor who has not renounced but who has not yet

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applied for probate. It would seem to be a clear inference that if the resident executor was applying for probate the application to the attorney of another executor for a grant would be refused. If the grant to the attorney is only effective until some executor applies, then when that executor does apply as here, how can it be said that the attorney has any right to apply? It is clearly unnecessary for the administration of the estate since a grant of probate can be issued to one executor reserving the right to the other executors to apply at a later date. In Halsbury's Laws of England, 2nd Ed., Vol. 14, p. 273, this is stated:

> If the grant is made to the attorneys of one only of several executors, it is limited until the principal or any one of the other executors applies for probate.

That part of the application therefore for a grant of letters of administration with will annexed to the attorney of the executor outside the jurisdiction will be refused. The application of the resident executor for probate will stand adjourned for ten days in order that counsel may advise this outside executor that the application for a grant in favour of his attorney has been refused and that if he wishes to join in the application for probate with his co-executor he may do so. If he fails to join in the application within ten days the grant will issue to the petitioning executor, reserving the rights of the other executor to apply at a later date.

Order accordingly.

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May 2, 3, 4, 5; *June* 21.

Trespass—Unauthorized extraction of teeth—Damages—Third-party proceedings—Claim for indemnity.

The defendant doctor attended the plaintiff professionally before and after the birth of her child in January, 1943. During her pregnancy two upper teeth showed evidence of decay, but on the doctor's advice, treatment or extraction was left until after the birth of the child. After the birth she told the doctor that the teeth were giving her trouble and in October, 1943, she gave instructions to the doctor for tonsillectomy, which he had previously advised, when she again referred to the two upper teeth. He suggested they could be extracted at the hospital while she was under the anæsthetic and prior to the operation. To this she consented, but she thought it would be difficult to secure the services of a dentist at the hospital for the extraction of two teeth only. He said he thought it could be arranged and after discussion it was arranged that the doctor's brother, the dentist herein, be asked to do the work and the understanding was arrived at that the doctor would arrange for the attendance of the dentist at the hospital and the plaintiff would see him there prior to the operation. The doctor saw the dentist the same afternoon and advised him that the plaintiff wished his attendance at the hospital to extract some teeth. The dentist enquired of his brother on the following Sunday as to what teeth the plaintiff wished extracted and was informed it was the uppers. The dentist was at the hospital on the following Tuesday morning, but did not see the plaintiff before the anæsthetic was administered and received no instructions from her. He was not informed by the doctor of the arrangement with the plaintiff that the dentist was to see her at the hospital prior to the operation. The dentist was led to believe that the plaintiff wanted all the upper teeth extracted and the doctor admitted that that is what he thought at the time and admitted that he knew when the dentist entered the operating-room that the dentist had not seen the plaintiff and had received no instructions from her as to what extractions were to be made. The dentist extracted the twelve upper teeth and one lower one. In an action for damages for trespass arising from the unauthorized extraction of said teeth:—

Held, on the evidence, that both defendants are liable in damages.

On third-party proceedings taken by the dentist against the doctor for indemnity against any judgment recovered by the plaintiff:—

Held, that on the authorities the doctor must be held liable to indemnify the dentist.

ACTION for damages for trespass arising from an alleged unauthorized extraction of twelve of the plaintiff's upper teeth and one lower tooth. The facts are set out in the reasons for

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judgment. Tried by COADY, J. at Vancouver on the 2nd to the 5th of May, 1944.

McAlpine, K.C., and *C. F. R. Pincott*, for plaintiff.
Guild, and *Yule*, for defendant J. R. Parmley.
Tysoe, for defendant T. F. Parmley.

Cur. adv. vult.

21st June, 1944.

COADY, J.: The plaintiff sues for damages for trespass arising from what she alleges was the unauthorized extraction of 12 of her upper teeth and one lower tooth. The extraction was made by the defendant T. F. Parmley (hereinafter called "the dentist") while she was under an anæsthetic preparatory to a tonsillectomy performed by the defendant J. R. Parmley (hereinafter called the doctor).

The plaintiff is a young married woman 22 years of age. The doctor had attended her professionally prior to, at, and subsequent to the birth of her child born in January, 1943. During her pregnancy two of her upper teeth showed evidence of decay, but she was advised by the doctor to let the matter of treatment or extraction of these stand over until after the birth of the child. She had later spoken of these to the doctor some time after the birth of the child, as they were then giving her trouble, and stated that she was of the opinion they should be extracted, and referred to her fear of the dentist's chair. On or about the 9th of October, 1943, she gave instructions to the doctor for the tonsillectomy, which he had previously advised, and again referred to these two upper teeth, when he suggested they could be extracted at the hospital while she was under the anæsthetic and prior to the operation. To this she consented, but indicated that she thought it would be difficult to secure the services of a dentist at the hospital for the extraction of two teeth only. He expressed the view that he thought this could be arranged. Some discussion took place as to what dentist should be engaged, and it was agreed that the doctor's brother, the dentist herein, should be asked to do the work. There was some suggestion by the doctor that she should see the dentist that afternoon, but she advised him this was not convenient, and the understanding arrived at was that the doctor would arrange for the attendance of the dentist at the hospital

and the plaintiff would see him there prior to the operation, presumably to give her instructions. The doctor, in fact, saw the dentist the same afternoon and advised him that the plaintiff wished his attendance at the hospital on the following Monday morning to extract some teeth, but the dentist suggested that as Monday was a holiday the matter should be delayed until Tuesday morning. This was agreed, and the doctor telephoned the plaintiff accordingly. The dentist enquired from the doctor on the Sunday following as to what teeth the plaintiff wished extracted, and was informed that it was the uppers. The dentist was at the hospital on Tuesday morning but did not see the plaintiff before the anæsthetic was administered, and received no instructions from her. He was not informed by the doctor of the arrangement with the plaintiff that the dentist was to see her at the hospital prior to the operation. The dentist was led to believe that the plaintiff wanted all the upper teeth extracted. In fact the doctor admits that is what he thought at the time. He so stated to the plaintiff at the hospital on the morning following the operation. In this, of course, he was clearly wrong. He admits that he knew when the dentist entered the operating-room that the dentist had not seen the plaintiff and had received no instructions from her as to what extractions were to be made. He knew, consequently, or ought to have known, that the dentist was relying on the authorization which the doctor led the dentist to believe that he had from the patient. The dentist therefore, I find, proceeded with the extractions on the basis that the consent of the plaintiff had been given to the doctor and through the doctor to him. There was no obligation on the dentist under the circumstances to obtain any further instructions from the plaintiff although he does say that he expected to have an opportunity to examine the plaintiff's teeth prior to the administering of the anæsthetic. Clearly the doctor did not have the authority from the plaintiff that he led the dentist to believe he had. The plaintiff expected to give her own instructions to the dentist at the hospital. She was not relying on the doctor for that. But the doctor's words and conduct in my opinion constituted a representation of authority which he did not have but which the dentist was quite justified in assuming he did have.

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The doctor is, in my opinion, an honest witness, but his memory as to details is not good. He is uncertain in his evidence. The plaintiff gave her evidence in a very frank and honest manner, and where it is in conflict with the doctor's evidence I must accept hers. She did not endeavour, it seems to me, to unduly magnify the damage sustained. I must therefore find on the evidence that both defendants are liable in damages to the plaintiff. Contributory negligence on the part of the plaintiff is pleaded by the doctor, but in my view the evidence fails to establish that.

The next question, and a more difficult one, is to determine the *quantum* of damages, because this involves a consideration of the condition of the teeth extracted. It is obvious that the loss of a good tooth is greater than the loss of a poor one. Whether good or bad the plaintiff was entitled to keep them if she so wished.

Her evidence is that she had always taken good care of her teeth, that she had dental care from time to time, that they were, so far as she knew, in good condition with the exception of the two upper teeth and one lower tooth which she knew was not in good condition but which had not given her any trouble, and this she thought could be saved. However, this, too, was extracted by the dentist. She denies that there was any soreness in, or bleeding of the gums on brushing her teeth, nor was she aware of any receding of the gums. These conditions, the evidence shows, would be present in cases of advanced pyorrhea, such as the dentist says he found in this case. The dentist who looked after her teeth is now in the armed services, and was apparently not available as a witness. He had treated her up to sometime in 1940 or 1941 and had not advised her of any trouble that was apparent at that time.

The dentist says that the examination made by him immediately prior to the operation disclosed a very advanced condition of pyorrhea extending to all of her upper teeth and some of the lower teeth, and the condition was such, in his opinion, that it was necessary to remove all of the upper teeth; and one lower tooth. Obviously, if the teeth were in the condition the dentist describes, that would considerably reduce the damages to which the plaintiff is entitled, but the burden of establishing that is on the defence. The dentist further says that notwithstanding his

instructions, which he considered were sufficient for the extraction of all of the upper teeth, he would not have extracted all of them if it were possible in his opinion to save them or any of them, or if he did not think it was for the good of the plaintiff's health that they should be extracted. He says, too, that he thought the doctor had some good reason for having the teeth out, and while the dentist does not admit that he was influenced by that, he may very well have been. The dentist is not a specialist in the treatment of pyorrhea. He admits that his examination was not made under ideal conditions, but nevertheless under conditions sufficiently good, he maintains, to enable him to ascertain the true condition. No X-ray picture was taken but the dentist maintains this was unnecessary. There is evidence that the teeth, if available for inspection and examination after removal, would indicate whether the condition as stated by the dentist existed, but there is no evidence to indicate that any such examination was made or that any effort was made when the mistake was discovered the next day, to then recover the teeth so that an examination might be made. There is as against the evidence of the plaintiff as to the condition of the teeth, only the evidence of the dentist. The doctor, it should be noted, in his examinations of the teeth made previously did not observe any of the conditions which the dentist says were so apparent. On the whole of the evidence I am of the opinion that the dentist has failed to establish by a preponderance of evidence that the condition of the teeth was as he states, or if it was, that the teeth could not have been successfully treated. I have no hesitation in accepting the evidence of the plaintiff that she had no knowledge of the existence of a condition such as the dentist says he found, or of any condition other than she has described. I find it difficult to believe that a condition such as the dentist has described could have been present without her knowledge. The teeth may not have been and possibly were not in as good condition as she thought, but on the other hand I am not satisfied the condition was such as the dentist has stated. This examination was hastily made, and made, too, on the assumption that she wanted all the upper teeth out, and that the doctor for some reason wanted them all out.

I would fix the general damages to which the plaintiff is

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entitled as against both defendants at the sum of $4,800 for the unauthorized extraction of the 12 upper teeth and $200 for the lower tooth which admittedly was not in good condition, and special damages at the sum of $200. The evidence of special damages is not very satisfactory and may be further spoken to if necessary.

Third-party proceedings were taken by the dentist against the doctor for indemnity against any judgment recovered by the plaintiff against the dentist in this action, and for costs. It is not pleaded by the doctor in the third-party proceedings that the dentist showed a want of competent care or competent skill in a professional capacity, or that the dentist failed to exercise average professional skill. The doctor's defence in the third-party proceedings briefly is that he did not request, authorize or instruct the dentist to extract any of the plaintiff's teeth, or represent or warrant to the dentist that he was the agent of the plaintiff with authority from the plaintiff or on her behalf to employ, authorize or instruct the dentist to extract the plaintiff's teeth or any of them, and that nothing was done or said by him which could be so interpreted by the dentist, and that the dentist should have secured from the plaintiff, but failed to secure from her, clear and explicit instructions as to the teeth she wished extracted. I have already dealt with this defence, and my conclusion is that on the authorities the doctor must be held liable to indemnify the dentist (*Dugdale* v. *Lovering* (1875), L.R. 10 C.P. 196; *Fairbank's Executors* v. *Humphreys* (1886), 18 Q.B.D. 54; *Starkey* v. *Bank of England,* [1903] A.C. 114; *McFee* v. *Joss* (1925), 56 O.L.R. 578; *Birmingham &c. Land Co.* v. *London and North Western Rail. Co.* (1886), 56 L.J. Ch. 956; *Sheffield Corporation* v. *Barclay,* [1905] A.C. 392).

The indemnity will extend, however, only to the damages awarded against the dentist for the unauthorized extraction of the 12 upper teeth, and costs. With respect to the damages for removal of the one lower tooth, the dentist is not in my opinion entitled to be indemnified as I cannot find that there was any instruction given as to this by the doctor or any representation of authority with respect to it, though the doctor stood by, it is true, with full knowledge and permitted the dentist to proceed with its extraction.

Judgment for plaintiff.

RANJIT SINGH MATTU v. INDUSTRIAL ACCEPTANCE CORPORATION LIMITED AND THOMPSON & BINNINGTON LIMITED.

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June 6.

Practice—Pleading—Reply—Motion to strike out—New claim in reply—Rule 212.

In his statement of claim the plaintiff set out that he was at all material times the owner of the truck and equipment in question and entitled to immediate possession, that the bailiffs seized the same, acting under written authority from the Industrial Acceptance Corporation Limited, and that such seizure was illegal. On demand for particulars of the illegality, the plaintiff said the seizure was illegal because he was the owner entitled to immediate possession and that the seizure was not effected under any verbal or written authority given by him, nor under any statutory or other authority whatsoever. The defendants pleaded a conditional sale agreement in writing, under which the plaintiff agreed to purchase and one Ellis had agreed to sell to him the truck and equipment and an assignment of the agreement from Ellis to the Industrial Acceptance Corporation Limited, that under the agreement the title to the truck and equipment remained in the vendor until payment in full, that the plaintiff had fallen into default and the Industrial Acceptance Corporation Limited, through its bailiffs and pursuant to the powers contained in the agreement seized the chattels in question. In his reply the plaintiff set up that the alleged agreement was null and void because the truck and equipment had been sold for a price exceeding that which had been fixed by a certain order made by the motor-vehicle controller pursuant to certain orders in council and that such contravention rendered the vendor subject to penalties. On application for an order striking out paragraphs 1 to 7 of the reply on the ground that they raise a new ground of claim or contain allegations of fact inconsistent with the statement of claim was dismissed.

Held, on appeal, reversing the decision of COADY, J., that the plaintiff sets up in his statement of claim that he was the owner of the truck and had given no authority to seize it nor was there any authority "under any statutory or other authority whatsoever" whereby it might be seized. That is not his case. In his reply he admits the written authority but challenges its validity. The relevant allegations in the statement of claim are inconsistent with those in the reply. Paragraphs 1 to 7 of the reply must be struck out with leave to the plaintiff to amend his statement of claim.

APPEAL by defendants from the decision of COADY, J. of the 26th of April, 1944, dismissing the application of the defendants for an order striking out paragraphs 1 to 7 inclusive of the reply delivered herein on the 23rd of March, 1944. The action is for

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damages for wrongful seizure and conversion of a motor-truck. The defendants pleaded that the seizure was made under authority of a conditional sale contract assigned by the vendor to the defendants and under which contract the plaintiff was purchaser. The seizure was made by reason of the default in payment of an instalment by the plaintiff. The plaintiff in his reply alleges that the contract is null and void and of no effect for the reason that the price of the motor-truck as set out in the contract was in excess of that allowable by law and fixed by a certain order made by the motor-vehicle controller pursuant to certain orders in council and that such contravention rendered the vendor subject to penalties.

The appeal was argued at Vancouver on the 29th and 30th of May, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Bull, K.C., for appellants: The learned judge failed to strike out the reply: see rule 212. Respondent purchased a truck payable partly in cash and the balance in instalments. He was in default and the truck was seized and came back into the hands of the vendor. In his reply he pleads the War Measures Act and regulations in which a sale is prohibited except at a fair price. This is a case of pure jockeying. By the reply, they are forcing us to make good a contract when we are defendants. We are entitled to have him put forward a true claim instead of a false one. As to rule 212 see Annual Practice, 1943, p. 376. They are saying this is done under a purported contract which is illegal: see *Duckworth* v. *M'Clelland* (1878), 2 L.R. Ir. 527; *Kingston* v. *Corker* (1892), 29 L.R. Ir. 364; *Williamson* v. *London and North Western Railway Co.* (1879), 12 Ch. D. 787. A reply must not set up a new claim: see *The Lake Erie and Detroit River Railway Company* v. *Sales* (1896), 26 S.C.R. 663. The case of *Hall* v. *Eve* (1876), 4 Ch. D. 341 is distinguishable. He should not be allowed to juggle as he did here: see *Regan* v. *McConkey* (1913), 24 O.W.R. 138; *MacLaughlin* v. *Lake Erie and Detroit River R.W. Co.* (1901), 2 O.L.R. 151; *Trawford* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 132. The true case is to be found in the reply and not in the statement of claim. It is inconsistent and contradictory.

G. F. McMaster, for respondent: If the sale was void from the beginning, the contract has no legal effect. We have present possession. It was taken away without lawful authority: see Benjamin on Sale, 7th Ed., 502. The manner of acquiring possession is not a bar to the action: see *Wallis, Son & Wells* v. *Pratt & Haynes,* [1910] 2 K.B. 1003, at p. 1008; Holmested & Langton's Ontario Judicature Act, 5th Ed., 600-1; *B.C. Electric R. Co.* v. *Turner* (1914), 18 D.L.R. 430, at pp. 434 and 439.

Bull, replied.

Cur. adv. vult.

On the 6th of June, 1944, the judgment of the Court was delivered by

ROBERTSON, J.A.: The defendants appeal from the dismissal of their application to have struck out the paragraphs of the reply later mentioned. The plaintiff sued the Industrial Acceptance Corporation Limited and their bailiffs Thompson & Binnington Limited for damages for the alleged illegal seizure of his Maple Leaf truck and equipment. In his statement of claim he set up that he was at all material times the owner of the truck and equipment and entitled to immediate possession of them; that Thompson & Binnington Limited seized the same acting under written authority from the Industrial Acceptance Corporation; and that such seizure was illegal. In answer to a demand for particulars of the illegality the plaintiff said the seizure was illegal because he was the owner, entitled to immediate possession, and that the seizure was "not effected under any verbal or written authority" given by him "nor under any statutory or other authority whatsoever." The defendants pleaded a conditional sale agreement in writing, under which the plaintiff agreed to purchase, and, one Ellis had agreed to sell to him, the truck and equipment and an assignment of the agreement to the Industrial Acceptance Corporation; that under the agreement the title to the truck and equipment remained in the vendor until payment in full; that the plaintiff had fallen into default and that the Industrial Acceptance Corporation, acting through its bailiffs and pursuant to powers contained in the agreement, seized the chattels in question. In his reply the plaintiff set up that the alleged agreement was null and void because the truck

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and equipment had been sold for a price exceeding that which had been fixed by a certain order made by the motor-vehicle controller, pursuant to certain orders in council and that such contravention rendered the vendor subject to penalties.

Rule 212 reads as follows:

> No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

The rule is clear. There is to be no "departure." The cases show that the plaintiff may not in his reply set up a new ground of claim or allegation inconsistent with or contradictory to those in his statement of claim. See *Duckworth* v. *M'Clelland* (1878), 2 L.R. Ir. 527; *Kingston* v. *Corker* (1892), 29 L.R. Ir. 364 and *Breslauer* v. *Barwick* (1876), 36 L.T. 52. He need not anticipate defences or reply thereto in his statement of claim. See *The Lake Erie and Detroit River Railway Company* v. *Sales* (1896), 26 S.C.R. 663; *Hall* v. *Eve* (1876), 4 Ch. D. 341, at p. 345; *MacLaughlin* v. *Lake Erie and Detroit River R.W. Co.* (1901), 2 O.L.R. 151. In each of these three cases the plaintiff pleaded the agreement, upon which he relied, in the statement of claim.

In the case at Bar the plaintiff sets up in his statement of claim that he was the owner of the truck and had given no authority to seize it nor was there any authority "under any statutory or other authority whatsoever" whereby it might be seized. That is not his real case. He pleads it in his reply in which he admits the written authority but challenges its validity. In my opinion, with respect, the relevant allegations in the statement of claim are inconsistent with those in the reply.

The appeal should be allowed with costs; paragraphs 1 to 7 of the reply must be struck out; the plaintiff is to have leave to amend his statement of claim in ten days; the defendants to have costs of the application below and their costs resulting from such amendment.

Appeal allowed.

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

Solicitors for respondent: *Campbell, Brazier & Fisher.*

MOERT v. ABRAHAM AND JOHNSTON NATIONAL STORAGE LIMITED.

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June 7, 14.

Damages—Negligence—Families' Compensation Act—Death of husband—Widow and three children survive—Quantum of damages—R.S.B.C. 1936, Cap. 93.

The plaintiff's husband was killed when he was 53 years old, the negligence of the defendants being solely responsible for the accident. He was in good health and earning $300 per month with good prospects of substantial increases in salary. His expectancy of life was 19.1 years. His widow was 30 years old and their three children were five, three and two years old respectively. In an action by the wife under the Families' Compensation Act:—

Held, that the damages should be fixed at $25,000, to be apportioned $10,000 to the widow and $15,000 to the children to be divided equally among them.

ACTION for damages under the Families' Compensation Act by the widow as executrix of the estate of her deceased husband, the negligence of the defendants being the sole cause of the accident which resulted in his death. Tried by COADY, J. at Vancouver on the 7th of June, 1944.

Fraser, K.C., for plaintiff.
L. St. M. Du Moulin, for defendants.

Cur. adv. vult.

14th June, 1944.

COADY, J.: This is an action under the Families' Compensation Act by the widow as executrix of the estate of her deceased husband for the benefit of and on behalf of herself and three infant children whose ages are five years, three years and two years respectively. At the conclusion of the trial I found that the negligence of the defendants was the sole cause of the accident which resulted in the death of the deceased, and I reserved judgment only on the question of the amount of damages to be awarded and in what proportions as between the widow and the children. In *Royal Trust Company* v. *Canadian Pacific Ry. Co.*, 38 T.L.R. 899, at p. 900; [1922] 3 W.W.R. 24, at pp. 25-6 Lord Parmoor in speaking for the Judicial Committee said:

When a claim for compensation to families of persons killed through

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negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. It is not competent for a Court or a jury to make in addition a compassionate allowance. . . .

The difficulty arises not in the statement of the principle, but its application to a case in which the extent of the actual pecuniary loss is largely a matter of estimate, founded on probabilities, of which no accurate forecast is possible.

Lord Watson in *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800, at p. 804 says this:

It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work, and remuneration; and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.

The deceased here was 53 years of age. His expectancy of life was 19.1 years. The widow is 30 years of age. The children, considering their ages, would be dependent on the deceased for the greater part, if not all of the period of his expectancy of life. The deceased was, as husband and father, very much attached to his wife and family who had every reasonable expectation of very substantial pecuniary benefit from the deceased if he had lived. The evidence is that he was in good health. There is, of course, always the chance that the deceased might have been killed in an accident or died from some illness. The deceased's earnings went to the support of his wife and family and in addition to build up an estate for them. He was not extravagant in his manner of living, and his personal expenses were small. He was employed as a head brew-master at a salary of $300 per month. His prospects of increased earnings in this employment were excellent. The evidence is at the time of his death he would be in receipt of a salary of $400 per month were it not for the ceiling placed on wages of men employed in occupations such as his. His employer was well satisfied with his services, and substantial increases beyond the $400 would within a reasonable time have been made in his salary.

There are many elements to be taken into consideration in reaching a conclusion as to the amount of damages to which the plaintiff and her children are entitled. It must not be overlooked that increased earnings would carry with it increased income taxes. The interest on any award now made must be taken into consideration because the family gets the benefit of this. There

is also the acceleration in the payment of life insurance. There is the probability of a remarriage by the widow who is only 30 years of age. That prospect may however be reduced by the fact she has three children of tender years. I have endeavoured to take into consideration all the elements mentioned by counsel. I have only referred to some of them. The question of the amount is not an easy one to determine. While excessive damages would not be fair, yet inadequate damages on the other hand must also be avoided. It is what is fair and reasonable under all the circumstances. It is impossible to compute the loss with any mathematical accuracy, but taking into consideration all the elements and realizing that, as said by Lord Parmoor in the *Royal Trust* case, *supra,* "the actual pecuniary loss is largely a matter of estimate founded on probability," I would fix the amount at $25,000 to be apportioned $10,000 to the widow and $15,000 to the children, to be divided equally among them. The special damages amount to $761.22. The children's share will be paid into Court unless otherwise arranged.

Judgment for plaintiff.

SALAYKA AND HAINS v. WILBY (*ALIAS* HUME).

Extradition—Fugitive committed for extradition—Habeas-corpus proceedings—Order for surrender by minister before habeas-corpus proceedings disposed of—Validity of—R.S.C. 1927, Cap. 37, Secs. 19 to 26.

A fugitive was committed for extradition on the 11th of April, 1944. Within the 15-day period referred to in section 19 of the Extradition Act, he applied for a writ of *habeas corpus*. Before the decision of the Court in the *habeas-corpus* proceedings referred to in section 23 of the Act, the Minister of Justice on the 27th of April, 1944, executed an order for surrender referred to in section 25 of the Act, judgment in the *habeas-corpus* proceedings not having been pronounced until May 4th, 1944. On a second application for a writ of *habeas corpus,* it was held that the Minister acted without jurisdiction, that the detention under the order was illegal and the fugitive was discharged.

Held, on appeal, affirming the decision of MACFARLANE, J. (O'HALLORAN, J.A. dissenting), that section 23 of the Extradition Act, which provides

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that "a fugitive shall not be surrendered until after the expiration of fifteen days from the date of his committal for surrender; or if a writ of *habeas corpus* is issued, until after the decision of the Court remanding him" refers to the functions of the Minister of Justice. As his order for surrender was issued to the keeper while the decision in *habeas-corpus* proceedings was pending, the order was premature and invalid.

APPEAL by plaintiffs from the decision of MACFARLANE, J. in *habeas-corpus* proceedings heard by him in Chambers at Victoria on the 3rd of June, 1944, whereby he held that the detention of the fugitive under the order or warrant of the Minister of Justice was illegal, and discharged the fugitive from such detention. The facts are sufficiently set out in the judgment of MACFARLANE, J.

Wismer, K.C., and *Haldane*, for the application.
C. L. Harrison, contra.

Cur. adv. vult.

6th June, 1944.

MACFARLANE, J.: The point raised in these proceedings is the legality of the detention of the applicant, Wilby, under an order of the Minister of Justice, for surrender of the applicant, executed the 27th of April, 1944, described as a warrant under the Extradition Act recorded by the Deputy Registrar General of Canada on the same date. It involves the interpretation of certain sections of the Extradition Act, R.S.C. 1927, Cap. 37. The facts briefly are: The applicant was committed for extradition on the 11th of April, 1944. Within the period of 15 days referred to in section 19 of the Act, while detained under the committal order of the Extradition judge, he applied for a writ of *habeas corpus*. Before the decision of the Court referred to in section 23, and so far as I know without knowledge of the application for a writ of *habeas corpus*, the Minister of Justice executed his order for surrender referred to in section 25. The date of the order or warrant was the 27th of April, 1944. The decision of the Chief Justice of this Court who heard the application for the writ of *habeas corpus* was pronounced on May 4th, 1944. The order or warrant of the Minister of Justice was directed to the keeper of the city police lock-up at the city of Victoria. The applicant was delivered into the custody of the persons named

therein, being the holders of the *recipias* from the United States of America, immediately following the decision of the Chief Justice. A second application was then in the process of being made to me and counsel for the State of New York appeared on that application to announce that his retainer had been terminated and withdrew. I made the order for the issuance of the writ which was subsequently served on the holders of the *recipias*. The return made by them, when the matter came on for hearing, was that they held the applicant under and by virtue of the order of surrender of the Minister of Justice dated the 27th of April, 1944. The return was made on May 6th, 1944, on which day the applicant was produced before me. In the argument before me, it appeared that the Minister of Justice on learning of the writ of *habeas corpus* and the appeal therefrom had requested the return of his order for surrender, but the return was refused. The hearing was adjourned until May 11th, 1944, when it appeared that an appeal had been taken to the Court of Appeal from the order of the Chief Justice, although the return before me gave a different cause of detention, and the hearing was further adjourned from time to time until the Court of Appeal had rendered its decision. The hearing was continued on the 3rd instant. As no writ of *certiorari* in aid has been ordered, although an application was made for such on the first hearing, I have before me only the return to the writ. I can, however, take judicial notice of the proceedings in this Court before the Chief Justice and of the date of his decision.

I had, on the hearing, the benefit of a careful and interesting argument by Mr. Hunter, the representative of the State of New York dealing with the history of Extradition legislation in England and in Canada, with the object of establishing that the Act should be interpreted having in mind the factors of extent of country and means of communication as they were present in the minds of the legislators when the Act was passed. While I need not here attempt any exhaustive statement of the principles of interpretation to be applied, it may be said that such an approach is not the one, according to the decisions of our Courts, primarily to be adopted. Tindal, C.J. in *The Sussex Peerage* (1844), 11 Cl. & F. 85, at p. 143, dealing with the construction

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of Acts of Parliament according to the intent of the Parliament which passed them says:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

It has, in fact, in modern times become an accepted rule of interpretation that the Parliamentary history of a statute is not to be considered by the Court. See *Vacher & Sons, Limited* v. *London Society of Compositors,* [1913] A.C. 107.

For our purposes, here, I think we can take the words of the statute in their context and keep in mind the warning that it is well to guard against confusion between the meaning and the legal effect of the expressions used. With the application then of a few rules not open I think to controversy, we may hope to determine the question calling for an answer without reference to the external history of the Act.

The question is whether when the Minister under the provisions of section 25 has executed his order for the surrender of the fugitive, the surrender referred to in section 23, is complete within the meaning of that section. If the surrender was made then, I do not think it can be open to argument that the Minister acted without acquiring jurisdiction.

These two sections read as follow:

> 23. A fugitive shall not be surrendered until after the expiration of fifteen days from the date of his committal for surrender; or, if a writ of *habeas corpus* is issued, until after the decision of the court remanding him.
>
> 25. Subject to the provisions of this Part, the Minister of Justice, upon the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in his opinion, duly authorized to receive him in the name and on behalf of the foreign state, and he shall be so surrendered accordingly.

First, taking section 25 by itself, we have to consider the opening words—"Subject to the provisions of this Part"—to which effect must be given. Before leaving that section attention may be called to the final clause—"and he shall be so surrendered accordingly."

The provisions of this Part, which deal with matters subsequent to the committal by the Extradition judge, are set out in

the sections commencing with section 19. By section 19 the judge must inform the fugitive

> that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.

The judge is required to "transmit to the Minister of Justice a certificate of the committal," with a copy of the evidence and his report. Section 20 provides that:

> A requisition for the surrender of a fugitive criminal . . . may be made to the Minister of Justice.

Section 21 provides that no fugitive shall be liable to surrender under this Part if the offence is of a political character. Section 22 provides that if the Minister of Justice determines that the offence is of the character referred to in section 21

> he may refuse to make an order for surrender, . . . , may, . . . , cancel any order made by him, or any warrant issued by a judge under this Part, and order the fugitive to be discharged out of custody . . . ; and the fugitive shall be discharged accordingly.

Sections 23 and 25 I have already quoted. Section 24 provides that a fugitive undergoing sentence in Canada shall not be surrendered until after his sentence is served.

All these sections refer to the surrender of the fugitive. They are followed by another section which I will quote in part:

> 26. Any person to whom such order of the Minister of Justice is directed may deliver, and the person thereto authorized by such order may receive, hold in custody, and convey the fugitive within the jurisdiction of the foreign state.

This section which authorizes the act of the officer it will be noted employs not the word "surrender" but the word "deliver." In each case where the Minister acts or is required to act the word employed is "surrender." The requisition to the Minister is for the surrender (section 20). The Minister determines under section 22 the matters there to be determined and refuses to make an order for surrender. Sections 23 and 24 both provide that the fugitive shall not be surrendered until after the expiration of the times applicable to the events referred to there. In section 25 again the word employed is "surrender." I think the meaning of the language of section 25,

> the Minister of Justice, . . . , may, under his hand and seal, order a fugitive . . . to be surrendered. . . . , and he shall be so surrendered accordingly

is that when the Minister executes his order and delivers it the surrender under the Acts is complete.

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A comparison of section 22 with this section lends strength in my opinion to this construction. There it is the discharge that is dealt with. The same method of expression is employed:

> he may . . . , by order under his hand and seal, . . . order the fugitive to be discharged . . . ; and [he] shall be discharged accordingly.

I have called attention to the fact that section 26 changes the word employed for dealing with the fugitive "from surrender" to "deliver." The appropriate rule of construction is that in the same statute the same words must be interpreted in the same sense when used in different parts and different words as indicating a change of meaning.

In *Guardians of Parish of Brighton* v. *Guardians of Strand Union,* [1891] 2 Q.B. 156, at p. 167; 60 L.J.M.C. 105, at p. 112, Lord Esher, M.R. said

> it is a rule of construction that where in the same Act of Parliament, and in relation to the same subject matter, different words are used, the Court must see whether the legislature has not made the alteration intentionally, and with some definite purpose; *prima facie* such an alteration would be considered intentional.

I think it is clear that the Legislature, following the principles of interpretation referred to, distinguishes by the change in the use of words the two conceptions, the one, the act of State effectuated under the hand and seal of the Minister whereby he yields up the right to hold the fugitive to the demanding State and the other, his physical delivery to the bearers of the *recipias.*

I do not look on this as a mere technicality. It is the determination by the Minister of the very valuable right and practically the only right extended to the fugitive by the Act. I do not think that these sections contemplate or are intended to contemplate that the solemn assurance of the law, the only safeguard extended to the detained person, that he will not be surrendered until after the decision of the Court on *habeas corpus* remanding him is to be left to be administered by the keeper of the lock-up. If I may refer to the correspondence read before me on the argument the practice which has been followed appears to be that the Minister awaits the period of 15 days and I presume if he has been notified of the application for a writ of *habeas corpus,* he awaits the disposition of that application, although that is an assumption on my part. He then forwards

his warrant of extradition effectuated by his order for surrender to the Attorney-General of the Province who delivers it to the keeper of the lock-up. Perhaps I may also be permitted, without travelling too far into the surrounding circumstances, to enquire who in circumstances such as exist here where there was some doubt as to whether a right of appeal in *habeas corpus* existed is to decide whether "the decision of the Court remanding him" is final when pronounced by the judge of that Court or on delivery or entry of the judgment of the Court of Appeal. Is this to be left to the keeper of the lock-up? Without reflecting in any way on the employment of any person in connection with this matter I presume it is apparent to all that in this particular case the person who customarily advises the keeper of the city lock-up as to his duties is the same person as is legitimately employed as counsel for the State of New York in this proceeding. When all this is considered, however, the valuable provision contained in section 23 is, in point of practice, it seems to me, cut to an irreducible minimum.

Lord Macmillan in *Greene* v. *Home Secretary*, [1941] 3 All E.R. 395, at p. 397 says:

> Nothing could be more unfortunate than that, . . . , the impression should be created that the safeguards prescribed for the protection of detained persons are carelessly observed and administered.

Perusal of the warrant itself makes it clear that no discretion is left in the keeper of the city police lock-up. It is addressed both to the keeper and to the individuals I have named as the holders of the *recipias*. The keeper is ordered to deliver the fugitive into the custody of these persons and they are commanded to receive him and convey him within the jurisdiction of the United States of America " . . . for which this shall be your warrant."

In this matter it appeared by the reading of the correspondence by the counsel for the State of New York, to which correspondence I have referred above, that the Minister on being advised that an appeal had been launched from the decision of the Court remanding the fugitive requested that the order for surrender be returned to him and counsel for the State of New York took the position that the Minister had no power to recall his order or to revoke the surrender. This argument as I under-

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stood it was based on the languge of section 22. If the Minister has no power apart from special provisions contained in section 22 to recall his act the act it seems to me must be final and complete. I think that the word surrender under the Act is a term of art signifying the yielding up of the right of the surrendering State to the control of the person of the fugitive and that the Legislature has distinguished and by the language used intended to distinguish between that act and the delivery by the keeper of the lock-up. It therefore follows, in my opinion, that the Minister, when he executed his warrant of extradition before the decision of the Court remanding the fugitive on his *habeas corpus,* acted before the conditions upon which he was entitled to act came into existence and that the warrant is therefore issued without jurisdiction.

A considerable number of authorities were presented to me on the interpretation of the Extradition Act. It was strongly urged that the Act should be construed favourably to the demanding State. It was urged, first, that as the purpose of the Act is to carry out the provisions of a Treaty, a liberal construction should be placed upon its provisions with a view to the carrying out of the undertakings of the surrendering State in the most ample manner, and that the spirit of the arrangement should be preferred to the letter. I do not know that there is much to object to in this connection. There is, however, a confusion of ideas.

It is clear that the Courts will make no presumption of innocence in favour of the fugitive. It is clear also that in the hearing under the Extradition Act, the fugitive is not on trial. It is said he is not entitled to the benefit of the doubt. That is true, because in preliminary hearings to which the proceedings before the Extradition judge are similar, the Crown is required only to show that there is a case to meet. But that does not mean that in *habeas corpus,* the fugitive may not show that what is done must be done according to law. It must be remembered that the right to a writ of *habeas corpus* is not given by the Extradition Act. That is a right of the subject (or person detained) given by the common law. Bigham, J. in *Rex* v. *Holloway Prison (Governor)* (1902), 71 L.J.K.B. 935, at p. 937, says:

> The accused in this case has the right, which all persons committed by a

magistrate have, of applying for a *habeas corpus*. The Extradition Act, 1870, does not give him that right. He has it at common law. The statute merely gives him the right to be informed of the fact that he may exercise the power of applying for a *habeas corpus* if he chooses.

I do not overlook, of course, the *habeas corpus* statutes.

With regard to the phase of the argument that the interpretation of the Extradition Act shall receive a special kind of consideration because of the proximity and friendliness of the countries here involved, I think I need only quote the words of Lord Redesdale in the *The Queensberry Leases Case* (1819), 1 Bli. 339, at p. 497, when he said:

> I do not understand what right a Court of Justice has to entertain an opinion of a positive law, upon any ground of political expediency. . . . The Legislature is to decide upon political expediency; and if it has made a law which is not politically expedient, the proper way of disposing of that law is by an Act of the Legislature, and not by the decision of a Court of Justice.

As to the argument that because now an appeal lies to the Court of Appeal in *habeas corpus,* no successive application should be permitted, I do not think I need decide that point, because here, at least, the illegality or otherwise of the detention in the return before me was not as I understand it before the Court of Appeal.

For the reasons which I have given earlier in this judgment, I rule that the detention under the order or warrant before me is illegal and discharge the fugitive from such detention.

From this decision the plaintiffs appealed. The appeal was argued at Vancouver on the 14th of June, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

C. L. Harrison, for appellant: The question is the construction of sections 23 and 25 of the Extradition Act. The fugitive was chief accountant of a company operating a large number of stores in the United States and one in Canada with assets of over thirty million dollars. On the 12th of March, 1944, the fugitive was arrested and on the 11th of April following he was committed for extradition. Within the 15 days referred to in section 19 of the Act, while detained under the extradition order, he applied for a writ of *habeas corpus*. On the 27th of April, 1944, the Minister issued an order for surrender under section 25 of the Act. The second writ was served on May 5th and after five

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adjournments was heard on June 3rd, 1944. The Minister did not know of the first writ. We submit the Minister's order was perfectly valid. It is only a question of carrying it out, as the body cannot be handed over until the 15 days have expired and *habeas-corpus* proceedings are disposed of. Sections 23 and 25 are identical with the Extradition Act of 1877 which is modelled from the English Act of 1877. Technicalities are not favoured: see *In re Sieman (No. 4)*, [1930] 2 W.W.R. 412, at p. 413; *Rex* v. *Governor of Brixton Prison*, [1911] 2 K.B. 82; *Vacher & Sons, Limited* v. *London Society of Compositors*, [1913] A.C. 107.

Wismer, K.C. (*Haldane*, with him), for respondent: The objection to the Minister's order for surrender is not in the nature of a technical objection at all. This is an act in derogation of the common law. The act contemplated is the surrender of one in custody to the United States authorities. The surrender is an act of State: see *In re Bartels* (1907), 15 O.L.R. 205. The Minister is the person who surrenders. The constable delivers up in pursuance of the order. All the conditions must be dealt with before the Minister can make an order surrendering the fugitive. It makes no difference whether the Minister knew of the *habeas-corpus* proceedings or not. He cannot cancel the order once it is made; there is no authority for so doing. The Minister acted without jurisdiction owing to issuing the order before a writ of *habeas corpus* had been disposed of: see *Re Harsha (No. 2)* (1906), 11 Can. C.C. 62.

Cur. adv. vult.

16th June, 1944.

O'HALLORAN, J.A.: The respondent fugitive was committed to prison (the city of Victoria lock-up) by the Extradition judge on 11th April, 1944, being then informed, as required by section 19 of the Extradition Act, Cap. 37, R.S.C. 1927, that he would not be surrendered to the officers of the United States of America, until after the expiration of 15 days and that he had a right to apply for a writ of *habeas corpus*. He applied for a writ of *habeas corpus* with *certiorari* in aid on 25th April, 1944, attacking the validity of the committal order. On 4th May, FARRIS, C.J.S.C. refused to discharge him from the custody of the keeper

of the city of Victoria lock-up. An appeal from that decision launched on 10th May, was heard by this Court on the 26th and 27th of May and dismissed on 31st May.

Immediately following the decision of FARRIS, C.J.S.C. on 4th May, the fugitive was surrendered to the officers of the United States by the keeper of the Victoria city lock-up, pursuant to an order of the Minister of Justice dated 27th April and received by the keeper on 29th April. On the 5th of May the fugitive applied to MACFARLANE, J. for a second writ of *habeas corpus*, who on 6th June granted him his discharge from custody of the officers of the United States, on the ground that the Minister of Justice had signed and sealed the order for surrender without jurisdiction, in that he had signed it on 27th April, 1944, before FARRIS, C.J.S.C. had disposed of the first writ of *habeas corpus* on 4th May. From that order for discharge this appeal has been taken. The fugitive is now in the custody of the keeper of the city of Victoria lock-up.

It is common ground that the fugitive was not actually surrendered by the keeper of the city of Victoria lock-up into the custody of the officers of the United States until after the disposition of the first writ of *habeas corpus* by FARRIS, C.J.S.C. The substantial point in this appeal is the jurisdiction of the Minister of Justice to sign and seal the order for surrender before the decision of FARRIS, C.J.S.C. on 4th May even though the fugitive was not actually surrendered into the custody of the officers of the United States until after that decision. Section 23 of the Extradition Act reads: [already set out in the judgment of MACFARLANE, J.].

It will be observed the section does not say by whom the fugitive is to be surrendered. I accept it as obvious, however, that the actual surrender can only be made by the person who has the custody of the fugitive, that is, the keeper of the lock-up, but that he will not do so until he has received an order from the Minister and the conditions in section 23 have been complied with. This follows from the authority under which he holds the fugitive, *viz.*, the warrant of committal of the fugitive to him, which directs him (see Form Two of the Second Schedule to the Extradition Act):

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. . . and you, the said keeper to receive the said into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Act, . . .

Section 23 does not provide that:

The Minister shall not order the surrender of the fugitive until after the expiration of fifteen days, . . . ,

as it would have to read in order to deprive the Minister of jurisdiction to sign an order for surrender before the statutory time for the actual surrender had arrived. The distinction is fundamental, and I regard it as decisive of this case. By section 11 of the English Extradition Act of 1870 (33 & 34 Vict. c. 52) the power of the Secretary of State to order the surrender of the fugitive is specifically stated to arise only upon the expiration of the 15-day period and after the decision of the Court upon the return to the writ of *habeas corpus*. Our statute contains no such limitation upon the powers of the Minister of Justice. The great distances existing in Canada would alone readily explain why the English provision was not embodied in the Canadian statute.

Counsel for the respondent fugitive argued that the language in section 23, *supra,*

A fugitive shall not be surrendered until after the expiration . . .

has the same meaning as if it read:

The Minister shall not order the surrender of the fugitive until after the expiration . . . .

He submitted that the signing and sealing of the order for surrender by the Minister was the "surrender" of the fugitive contemplated by the Extradition Act and section 23 in particular, and excluded from consideration the actual delivery or surrender of the fugitive by the keeper of the lock-up. That is to say, it was the order for surrender, and not the actual surrender of the fugitive which comprised the "surrender."

To my mind that is asking the Court to write a new statute, instead of interpreting the statute Parliament has enacted. Moreover, that submission is defeated by the express language of sections 25 and 26 of the Extradition Act. Section 25 reads: [already set out in the judgment of MACFARLANE, J.].

The section draws a clear line of demarcation between the order for surrender and the actual surrender itself.

If the act of the Minister in signing the order for surrender was in itself the surrender of the fugitive, one would expect it

to be couched in such phraseology as "I hereby surrender the fugitive," or "the fugitive is hereby surrendered." But that is not the case. The Minister gives an order to the keeper of the lock-up to surrender the fugitive, and when section 25 says the fugitive "shall be so surrendered accordingly" it can only mean a "surrender" by the keeper of the lock-up. And that of course must mean that the Minister's order is not in itself the surrender, but only what it purports to be on its face, and what the statute declares it to be, *viz.*, an order to the keeper to surrender the fugitive.

That is confirmed by the form of the Minister's order to the keeper of the lock-up. After reciting that under the Extradition Act the fugitive was delivered into the custody of the keeper of the lock-up and using the indicative language "there to await surrender," it proceeds:

> Now I do hereby, in pursuance of the said Act, order you, the said keeper, to deliver the said [fugitive] into the custody of [the officers of the United States] . . .

Again section 26 reads:

> Any person to whom such order of the Minister of Justice is directed may deliver, . . . the fugitive.

One or two examples illustrate the cogency of what has been said. If the fugitive had escaped from the lock-up after the Minister had signed the order, but before it came into the hands of the keeper of the lock-up as his authority to surrender the fugitive, no one reasonably could be heard to say, that notwithstanding the fugitive's escape, the Minister had by the act of signing the order for surrender, thereby "surrendered" the fugitive to the United States authorities within the meaning of the Extradition Act. Again, if the keeper of the lock-up had refused to surrender the fugitive in defiance of the order of the Minister, the Minister of Justice could not seriously say to the United States authorities that he had surrendered the fugitive to them in compliance with the Extradition Act when he had signed the order and sent it along to the keeper of the lock-up.

There is no provision in the Extradition Act for notifying the Minister when a writ of *habeas corpus* is applied for. If the fugitive has the right to apply for *habeas corpus* to each one of the six judges of the Supreme Court of British Columbia in turn,

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and the statute were construed as compelling the Minister to withhold signing the order for surrender until the fugitive had exhausted the panel of Supreme Court judges a strange situation would arise. The lapse of time, the uncertainty, and other factors would then render the Extradition Act an unworkable and highly unsatisfactory piece of legislation. Needless to say the Courts will not assist in giving the statute an interpretation which its purpose and object plainly imply must be unreasonable. The reasonableness of legislation in its practical working out is one of the guides to its proper interpretation. Compare *Victoria City* v. *Bishop of Vancouver Island,* [1921] 2 A.C. 384.

From the foregoing analysis I am unable to reach any other conclusion than that before there can be a "surrender" within the meaning of the Extradition Act there must be: (1) The order of the Minister to the keeper of the lock-up to deliver or surrender the fugitive, and (2) actual delivery or surrender of the fugitive by the keeper of the lock-up. If that reasoning is correct, it follows that the order of the Minister was not in itself a surrender within the statute. And further, as the surrender was not complete until after actual delivery of the fugitive by the keeper of the lock-up to the officers of the United States, which was subsequent to the decision of FARRIS, C.J.S.C., the Minister of Justice must be held to have acted within his statutory jurisdiction. I must conclude therefore that section 23 and all relevant sections of the Extradition Act were complied with.

No reported case in point was brought to our attention, but during the argument I referred to a decision of this Court in *Rex* v. *Sue Sun Poy* (1932), 46 B.C. 321, which, although decided upon different statutes (*viz.,* The Opium and Narcotic Drug Act, 1929, and the Immigration Act) was founded upon reasoning equally pertinent to the decision of this appeal, in the light of what the foregoing analysis convinces me is the true interpretation of the Extradition Act. That is to say, *cf.* MARTIN, J.A. at p. 328, the Minister did not sign the order for surrender prematurely or essay to exercise his statutory power before he had acquired it. In the *Sue Sun Poy* case I think it clear, that if the Court had come to the conclusion the appellant was subject to deportation as of necessary course at the expiration

of his sentence, the jurisdiction of the Board of Inquiry to make the order for deportation prior to the expiration of his sentence would not have been questioned.

Under the Extradition Act there is no room for doubt that the fugitive is subject to surrender as of necessary course upon the expiration of the 15 days and the additional *habeas-corpus* period. Hence the reasoning of the *Sue Sun Poy* decision applies, and there is no basis upon which to question the jurisdiction of the Minister to make the order for surrender before the expiration of the statutory period for surrender. It is plain, of course, that if the surrender had been completed by delivery of the fugitive to the officers of the United States before the decision of FARRIS, C.J.S.C. had been rendered, the surrender would have been a nullity, just as in the *Sue Sun Poy* case, if deportation had been attempted before the expiration of sentence the deportation would have been a nullity.

Counsel for the respondent fugitive sought to attribute additional potency to the Minister's action in signing the order for surrender by describing it as an "act of State." The Minister of Justice, of course, is a high officer of the State. But his jurisdiction in extradition matters as well as the jurisdiction of the extradition judge and the keeper of the lock-up (who is the chief of police of the city of Victoria) is controlled and confined by the Extradition Act as enacted by Parliament and interpreted by the Courts, in the same manner as in any other public statute.

It would be unfortunate for the Court to become the victim of a loose use of the term "act of State," which in its modern sense seems to be confined to the exercise of the existing *residuum* of the prerogative, *vide* Halsbury's Laws of England, 2nd Ed., Vol. 26, pp. 246-50 and *Attorney-General* v. *De Keyser's Royal Hotel,* [1920] A.C. 508. Our law with regard to extradition depends entirely upon statute, and in my view the Minister's act in signing the order for surrender cannot be regarded as an "act of State" in its true sense. However, if it may be so regarded in that large and loose sense which also includes Acts of Parliament (*vide* Halsbury's Laws of England, 2nd Ed., Vol. 26, p. 246, foot-note (*a*)), then that submission of the respondent is not *ad rem,* and must depend wholly upon the construction of the statute.

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It is pertinent to emphasize that the rights of the fugitive have not been trenched upon in the slightest degree. No attempt was made to hand him over to the officers of the United States before the decision of FARRIS, C.J.S.C. had been rendered. The objection now relied upon by counsel for the fugitive and upheld in the Court below is of a highly technical nature and without substantial merit, since what is complained of does not and could not affect any right or privilege which the fugitive may have under the Treaty or the statute. Technical objections of that nature are frowned upon by the Courts in extradition matters.

In *In re Bellencontre,* [1891] 2 Q.B. 122 Wills, J. used this language at p. 144:

> The warrant is statutory in its form, and is not to be construed as an ordinary English common-law document, and it is not at all necessary, in my judgment, that there should be anything like the same particularity that there would be in respect of the warrant of committal to the gaols of this country under ordinary circumstances. For these reasons, I am of opinion that this *habeas corpus* ought not to issue.

That was said of the warrant of committal made by an extradition judge. While it is the statute itself we are considering here, I am of the view that the same principles of construction ought to apply, since the real merit of the fugitive's right to resist extradition has already been finally determined by this Court of Appeal, and the objection now involved is confined to what I have no hesitation in describing as purely the subsequent routine prescribed by statute for delivery of the fugitive to the officers of the United States.

In *In re Collins* (1905), 11 B.C. 436 Duff, J. (more recently Chief Justice of Canada) said at p. 445, citing *In re Bellencontre, supra,* that

> the technicalities of the criminal practice should not be allowed to smother or encumber the administration of the [extradition statute].

Mr. Justice Duff then cited two decisions of the Supreme Court of the United States to the same effect, *viz., Grin* v. *Shine* (1902), 187 U.S. 181, at p. 184 and *Wright* v. *Henkel* (1903), 190 U.S. 40, at p. 57. I call attention particularly to the observation of Mr. Justice Brown who delivered the judgment of the Court in *Grin* v. *Shine* which is equally applicable in Canada, that:

> Foreign powers are not expected to be versed in the niceties of our criminal

laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused.

And *cf. In re Sieman (No. 4)*, [1930] 2 W.W.R. 412.

Two other points also arise, *viz.*, (1) the right of the fugitive to apply for *habeas corpus* successively to each judge of the Supreme Court of this Province, and (2) the right of the fugitive to apply to MACFARLANE, J. for a second writ of *habeas corpus* after the Court of Appeal had upheld the decision of FARRIS, C.J.S.C. upon the return to the first writ.

On the first point, this Court in *Rex* v. *Loo Len* (1923), 33 B.C. 213 denied that the right of an applicant for a writ of *habeas corpus* to go from judge to judge had ever existed in England, and held the right had only extended from Court to Court, *viz.*, from the Court of King's Bench to the Court of Common Pleas, etc., and in the result that right came to an end when the various Courts were combined into one by the Judicature Act, 1873. However, since the decision of the Judicial Committee in *Eshugbayi (Eleko)* v. *Nigerian Government*, 97 L.J.P.C. 97; [1928] A.C. 459, the *Loo Len* decision can no longer prevail. In a decision, which virtually pronounced finally upon the interpretation of this relevant aspect of the common law as it existed before its introduction into British Columbia (and not since altered here in that respect by statute) their Lordships, with the *Loo Len* decision before them, held that the right existed and does now exist to go from judge to judge.

Upon the second point, it is my judgment that once the canvassing of the Supreme Court judges has been interrupted by an appeal to the Court of Appeal, the right to go from judge to judge ceases upon any point determined by, or which must be regarded as having been determined by the Court of Appeal. This is in accord with what was decided in the *Nigerian Government* case, *supra*, where the right to go from judge to judge was expressed to be "unfettered by the decision of any other tribunal of co-ordinate jurisdiction" (p. 99). Of course, once an appeal is taken to the Court of Appeal, a Court of higher jurisdiction, every Supreme Court judge is necessarily fettered by its decision.

However, I am of opinion MACFARLANE, J. was not so fettered in entertaining the second writ of *habeas corpus*. The first writ

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before FARRIS, C.J.S.C. related to the validity of the warrant of committal made by the extradition judge. The Court of Appeal upheld its validity. The second writ did not touch that issue, but related only to the validity of the surrender of the fugitive to the officers of the United States of America by the keeper of the lock-up. The first writ concerned the validity of the custody of the fugitive by the keeper of the lock-up, while the second writ concerned the validity of his custody by the officers of the United States.

For the foregoing reasons I would set aside the order made by MACFARLANE, J., declare the custody of the fugitive by the officers of the United States of America to have been regular and according to law and to have been wrongfully interfered with, and direct the keeper of the lock-up to redeliver the fugitive into their custody.

During the argument counsel for the appellant applied to amend the notice of appeal by adding the additional ground:

> In the alternative (f) that the learned judge erred in discharging the fugitive without ordering the keeper of the Victoria City lock-up to retake and hold the fugitive under the order of committal of His Honour Judge SHANDLEY, Extradition Judge, dated 11th of April, 1944, confirmed by the Court of Appeal.

I would allow the amendment, but I do not regard it as necessary to support this judgment.

I would allow the appeal accordingly.

ROBERTSON, J.A.: On the 11th of April, 1944, pursuant to section 18 of the Extradition Act, Wilby, who was accused of the crime of grand larceny committed within the jurisdiction of the United States of America, was delivered into the custody of the keeper of the city police lock-up at Victoria, B.C., by warrant of His Honour Judge SHANDLEY, there to await surrender to the United States of America. On the 25th of April, 1944, a writ of *habeas corpus* was issued, returnable on the 28th of April, 1944. The writ was dismissed on the 4th of May, 1944, by the learned Chief Justice of the Supreme Court and his decision was upheld by this Court. In the meantime, on the 27th of April, 1944, pursuant to section 25 the Minister of Justice, who was unaware of the *habeas-corpus* proceedings, had issued under

his hand and seal an order to surrender, which required the keeper above mentioned to deliver Wilby to two American police officers, representatives of the United States of America. A second writ of *habeas corpus* was taken out and the matter came before MACFARLANE, J., who decided that the order of the Minister of Justice was illegal. The appeal is from his judgment.

After a fugitive has been committed under section 18, a requisition for his surrender may be made to the Minister of Justice by any of the officials mentioned in section 20. The Minister may refuse for any of the reasons set out in sections 21 and 22 or, subject to section 23, he may issue an order under section 25, which is as follows: [already set out in the judgment of MACFARLANE, J.].

The order of the 27th of April, 1944, follows Form Three in the Second Schedule to the Act. As has been shown, the Minister's order was issued after the writ of *habeas corpus* had been issued and before its dismissal. Counsel for Wilby submits that the Minister had no power to issue his order while the *habeas-corpus* proceedings were pending, and he relies upon section 23, which reads: [already set out in the judgment of MACFARLANE, J.].

Counsel for the State of New York submits that the word "surrender" in section 23 includes the "delivery" by the keeper to the American officers. He argues this must be so because he is the person who would know if *habeas-corpus* proceedings were pending. He submits then that his duty, when he received the order, would be to satisfy himself that section 23 presented no obstacle to his obeying the Minister's order. He contends that the Minister's order could be issued at any time after the committal. I am quite unable to accept these views.

The question whether or not a person in Canada is to be surrendered to any foreign State is one for decision of the highest legal executive authority in Canada. I cannot think that it was intended that the keeper should refuse to obey his order. There should be no difficulty. The Minister would know the date of committal and could easily ascertain by telegraph or telephone whether or not any *habeas-corpus* proceedings were pending. I think section 23 applies to the Minister and not to the keeper.

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Section 25 provides that when the order has been issued the fugitive "shall be surrendered accordingly."

It was submitted that the word "may" in section 26 showed that the keeper had a discretion as to whether or not he would act under the order. I am of the opinion that the word is compulsory. See *Julius* v. *Bishop of Oxford* (1880), 5 App. Cas. 214, at pp. 223, 232, 234.

Adopting in part the language of Lord Penzance at p. 232 I am of the opinion that regard being had to the subject-matter, to the position of the person empowered, to the general objects of the statute and to the position and rights of the State for whose benefit the power is conferred, the exercise of any discretion by the keeper could not have been intended.

The appeal is dismissed.

SIDNEY SMITH, J.A.: The point raised in this appeal is a short one and may be shortly stated.

Ralph M. Wilby (*alias* Alexander Douglas Hume, but referred to hereafter simply as "Wilby") was on the 11th of April, 1944, by His Honour Judge SHANDLEY, at Victoria, B.C., duly committed for extradition under the provisions of the Extradition Act, to stand trial for grand larceny at the city, county and State of New York, United States of America.

Sections 23 and 25 of the said Act are as follows: [already set out in the judgment of MACFARLANE, J.].

On 25th April, 1944, a writ of *habeas corpus* was issued and on 4th May decision thereon was handed down by the Chief Justice of the Supreme Court, who discharged the writ.

On 27th April, 1944, the Honourable the Minister of Justice under his hand and seal issued an order directed to the keeper of the city police lock-up at Victoria, B.C. (where Wilby was confined), ordering him to deliver the said Wilby to two officers (or either of them), designated by the President of the United States of America to receive the said Wilby for the purpose of taking him to the city of New York to stand his trial. This order was sent by the Minister to the Attorney-General of British Columbia, and thence by him to the said keeper, who received it before decision had been handed down in the *habeas-corpus* proceedings.

The keeper did not act upon the order until decision had in fact been rendered when he then delivered Wilby to the two designated officers as directed by the Minister.

Thereupon a second writ of *habeas corpus* was sought and obtained. Pending the hearing of these second proceedings Wilby was held in custody by the two United States officers to abide the result. In these second proceedings the order of surrender issued by the Minister was attacked as invalid upon the ground of being premature. Mr. Justice MACFARLANE in a written judgment, after full consideration of the relevant sections, agreed with this submission, held the detention illegal and discharged Wilby. He was at once rearrested under the original warrant of committal, the conviction having in the meantime been affirmed by this Court. The present appeal is from the finding of Mr. Justice MACFARLANE.

I was at first inclined to the opinion that a literal reading of section 25 justified the Minister in signing the order of surrender at any time after the fugitive "has been committed"; and no doubt he may do so provided he does nothing more. But if, in addition to signing the warrant, he lets it out of his control for the purpose of being implemented (as was the case here), then I think he has surrendered the fugitive within the intendment of section 23. It follows that if such surrender (as was the case here) is made in a shorter time than that specified in the section (*viz.*, 15 days plus the time necessary for *habeas-corpus* proceedings, if brought) the order is invalid.

It was contended on behalf of the State of New York that the keeper of the city police lock-up at Victoria would know the facts and the law, would apply the law to the facts, and act accordingly; that he would know whether or not the specified time had elapsed, and if not he would know that under section 23 Wilby could not lawfully be delivered by him to the New York officers. That may be so, and apparently was so in this case. But I think the surrender order was invalid nevertheless. I am unable to convince myself that it was ever the intention of Parliament to entrust such an important decision to the keeper of any police lock-up. Moreover, a consideration of the relevant sections indicates, to my mind at least, that the surrender contemplated is the

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formal act of the Minister in the signing and sealing of the order and in the dispatching of it to the relevant keeper. Its execution by the keeper by delivering the fugitive to the designated officers of the foreign State is merely subsidiary and incidental. It is by the aforesaid act of the Minister that a fugitive is formally surrendered by Canada to the foreign State.

The appeal is dismissed.

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

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June 6, 27.

SCHMUNK v. BROOK *ET AL.*

Real property—Religious Institutions Act—Appointment of trustees—Registration of title of property in trustees—Refusal by registrar—Application under section 230 of Land Registry Act—Jurisdiction—R.S.B.C. 1936, Caps. 140, Sec. 230 and 244, Sec. 2.

The respondents, who were appointed trustees of a religious society known as the Pentecostal Assembly of Oliver, on the refusal of the registrar of land titles to register them as trustees for the Pentecostal Assembly in respect to certain property on which their tabernacle is situate, applied under section 230 of the Land Registry Act to the county judge, acting as local judge of the Supreme Court, and obtained an order that they be registered as trustees for the Pentecostal Assembly of Oliver in respect of said property.

Held, on appeal, affirming the decision of COLQUHOUN, Co. J., as to registration, that the learned judge had jurisdiction and the respondents availed themselves of the appropriate statutory procedure in section 230 of the Land Registry Act to enable them to obtain an early judicial decision upon the right to registration without the necessity of bringing an action.

Held, further, that the fact that religious services are held in a private house does not necessarily prevent them from being "public worship" within the meaning of section 2 of the Religious Institutions Act and a substantial compliance with said section 2 which governs the appointment of the trustees of a religious society is sufficient.

APPEAL by Schmunk from the order of COLQUHOUN, Co. J. of the 21st of April, 1943, acting as a local judge of the Supreme Court at Penticton, B.C. The property in question, being the church property of the Pentecostal Assembly, appears on the

records of the Land Registry office at Kamloops, B.C., as being registered in the names of Schmunk, Prochnau and Cook subject to a mortgage of $750. These men hold as trustees of the Pentecostal Assembly. An application was made for the registration of the new trustees as trustees of the same Pentecostal Assembly in respect of the same property, pursuant to a resolution of the said assembly of February 26th, 1943. The registrar refused to effect registration upon the ground that there was another conflicting application, namely: one to register a conveyance from Schmunk, Prochnau and Cook to the said Schmunk pursuant to a resolution of the said assembly of March 3rd, 1943. The registrar required that these conflicting interests be adjusted. From the registrar's refusal to register, a petition was launched by Messrs. Brook, Marriott and Howell under section 230 of the Land Registry Act. Upon the hearing before COLQUHOUN, Co. J. the question for decision was whether the new trustees had been appointed in accordance with the provisions of section 2 of the Religious Institutions Act and he found that there had been a sufficient compliance with the Act and that the new trustees were entitled to be registered as trustees for the Pentecostal Assembly of Oliver, B.C.

The appeal was argued at Vancouver on the 6th of June, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

J. A. MacInnes, for appellant: The order made by the learned judge does not come within the jurisdiction given by section 230 of the Land Registry Act. The proper order would have been to direct an issue between the parties. Under section 147 the registrar is prohibited from dealing with the trust. Substantial compliance with section 2 of the Religious Institutions Act is not sufficient. The statute must be literally and in reality fulfilled: see *Pacific Coast Coal Mines* v. *Arbuthnot et al.,* [1917] 3 W.W.R. 762, at p. 767. The notice for the meeting of members was not followed. The meeting was held in Brook's house and not in the tabernacle. There was no jurisdiction and the notice was not properly given.

Wismer, K.C., for respondents: The situation has been misconceived. The language of the Act is wide enough to cover the

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case. Schmunk was owed certain moneys in connection with the construction of the building. He acted as though he was owner of the building and kept it locked. When the members attempted to have their meetings in the building, they found it locked and were then compelled to have their meetings in Brook's house. Schmunk was tendered the admitted balance owing, but he refused to accept it. We fulfilled the requirements of the sections of the Religious Institutions Act and the case of *Pacific Coast Coal Mines* v. *Arbuthnot et al.* has no application whatever. The learned judge has jurisdiction to make the order he did under section 230 of the Land Registry Act.

MacInnes, replied.

Cur. adv. vult.

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O'HALLORAN, J.A.: I must conclude the learned judge had jurisdiction under section 230 of the Land Registry Act, Cap. 140, R.S.B.C. 1936, to order registration of title in the names of the respondents as the newly-appointed trustees of the Pentecostal Assembly of Oliver. I hold that the respondents availed themselves of the appropriate statutory procedure in section 230 to enable them to obtain an early judicial decision upon their right to registration without the necessity of bringing an action. The first objection urged by counsel for the appellant is overruled accordingly.

We were not referred to any decision in which this Court has considered the jurisdiction conferred upon the judge by section 230. But the section does provide a procedure referred to in section 232 under which MURPHY, J. found in *Hansen* v. *Taylor* (1933), 46 B.C. 556, at p. 560 that it was not necessary to bring an action. It will not be denied, I think, that where as here, the statute provides an expeditious procedure for the determination of questions relating to registration of title, that it must be rare indeed, not to be in the public interest that such procedure be followed in preference to an action in the Supreme Court involving delay and greater expense.

Counsel for the appellant submitted further, that the appointment of the respondent trustees was invalid for failure to comply

with the Religious Institutions Act, Cap. 244, R.S.B.C. 1936. By section 2 thereof a religious society may appoint trustees:

> . . . at any special meeting called by written notice read to the congregation by the officiating minister . . . at the close of public worship on each of the last two preceding Sabbaths, . . .

The Pentecostal Assembly has two or three dozen members at Oliver. A place of worship had recently been built there. A dispute arose with the appellant as to the amount owing him for work, money advances and services in its construction. It seems to have engendered a certain amount of feeling. On the evening when the pastor was prepared to read the notice for the appointment of the respondent trustees at the close of public worship, the members of the congregation, on arrival at the place of worship, found it had been locked by the appellant in assertion of his alleged right of personal ownership or control thereof, and the members could not gain admittance.

The congregation then moved in a body to the house of a member, where public worship was held, at the close of which the notice of the special meeting was read to the congregation. Public worship was held in the same place the following Sabbath, and pursuant thereto the special meeting was held appointing the respondents. Counsel for the appellant argued, (a) that because the services were held in the house of a member and not in the church they cannot be described as "public worship," and (b) as the special meeting was held in the same place as the services, and not in the church for which it was called, it was an invalid notice. Counsel for the appellant cited no decision in support of his proposition that religious services held in a private house cannot be "public worship." In earlier days in this Province it was not uncommon, in lack of a church, to hold public worship in a private house. I must hold that the services which were held here in the recited circumstances, constituted "public worship" within the meaning of the statute.

I am also of opinion that the objection to the special meeting must fail. No practical injustice has been shown to have resulted, as might perhaps have occurred in other circumstances. Oliver is not a large place, the membership of the religious society is small, and no point was made of lack of knowledge of what was taking place. If an irregularity did occur, it was of

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such minor character and of such insubstantial effect in the circumstances disclosed, that it did not vitiate the meeting, and *cf.* observations in *Browne* v. *La Trinidad* (1887), 57 L.J. Ch. 292.

Examination of the surrounding circumstances as they appear in the record, satisfies me there was substantial compliance with section 2 of the Religious Institutions Act. But counsel for the appellant submitted that substantial compliance is not enough. He urged that the terms of the statute must be "literally and in reality fulfilled," taking those words from *Pacific Coast Coal Mines, Lim.* v. *Arbuthnot* (1917), 86 L.J.P.C. 172, at p. 176. But that decision does not deny the sufficiency of substantial compliance. It held there was not substantial compliance because the notice failed to inform the shareholders of the very things the Judicial Committee ruled they ought to have been told (p. 177). That is not this case.

The learned judge—no doubt in a well-meant endeavour to settle finally all the differences between the parties—was led to exceed his jurisdiction by including in the last paragraph of his order a direction relating to the amount and payment of the appellant's claim against the religious society. As counsel for the parties do not agree to accept that direction, and counsel for the respondents readily admits it was beyond the learned judge's jurisdiction under section 230, that paragraph ought to be struck out of the order.

In all other respects the appeal is dismissed.

ROBERTSON, J.A.: The registrar, pursuant to section 229 of the Land Registry Act, refused an application by Messrs. Brook, Marriott and Howell to register them as trustees of the Pentecostal Assembly, of lot 5 (the church property), in lieu of the registered owners, Messrs. Schmunk, Prochnau and Cook because of an application by Schmunk to register a conveyance of the same lot from the registered owners to himself and required "these conflicting interests to be adjusted." The applicants then applied under section 230 of the Land Registry Act, which reads as follows:

230. (1.) The applicant may, within twenty-one days after the receipt by him of the notice of the Registrar's refusal, apply to a Judge of the Supreme Court in Chambers in a summary way by petition, which shall be supported

by affidavit of the applicant and of other persons if necessary, stating fully and fairly all the material facts of the case, and that to the best of the information, knowledge, and belief of the deponents all facts and things material to the title have been fully and fairly disclosed.

(2.)) All parties interested, including the Registrar, shall be served with the petition, together with copies of all material and exhibits proposed to be used on the hearing.

(3.) At least ten days' notice shall be given of the time and place of hearing, and at that time and place all parties interested (whether served with the petition or not) may appear and be heard.

(4.) The Judge may make any order he sees fit as to the notification of other parties of the hearing, and upon the hearing may make such order in the premises as the circumstances of the case require, . . .

The petition came before COLQUHOUN, Co. J. as local judge of the Supreme Court. The petitioners' affidavit verifying the petition set out that to the best of their information, knowledge and belief all facts and things material to the title had been fully and fairly disclosed. All parties interested appeared before the learned county court judge. The petitioners and Schmunk were represented by counsel. Full opportunity was given to all parties to present their case. Considerable evidence was called by the petitioners and Schmunk. The learned judge decided in favour of the petitioners. Then this appeal was taken. It was submitted (1) that the learned judge had no power under section 230 to determine the questions of fact set out in the petition but "should have directed that the matters in question should be determined either by action in a Court of competent jurisdiction or by the trial of a proper issue or issues before a Court of competent jurisdiction," and (2) further that there was no "jurisdiction or competence" in the local judge of the Supreme Court to determine in a summary manner the questions in dispute between the respective applicants for registration.

I cannot see the object of the petitioners being required to state fully and fairly all the material facts of the case and that to the best of their information, knowledge and belief all facts and things material to the title have been fully disclosed, and of providing for a hearing by all parties interested unless the intention was to provide a "summary way" for a speedy determination of all questions arising out of the registrar's refusal. The section makes provision for a full and complete inquiry. I have no doubt the judge had power to determine the questions which

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arose. He also had the power, if he thought fit, "to make such order in the premises as the circumstances of the case required," which would include power to order that an issue be tried or that the rights of the parties be determined by action—see subsection (4) of section 230. I think the appellant fails on this ground.

The other substantial point taken by the appellant was that the alleged new trustees were not appointed or elected in accordance with the provisions of the Religious Institutions Act, Cap. 244, R.S.B.C. 1936. The property in question was held by the registered owners in trust for the Pentecostal Assembly, a religious society or congregation of Christians within the meaning of the Religious Act. The conveyance to these registered owners did not provide the manner in which their successors might be appointed.

Section 2 of the Act provides the society or congregation may appoint trustees to whom a conveyance may be taken of land for the site of a church or other purposes therein mentioned and that in default of the conveyance specifying the manner in which successors to the trustees may be appointed, the society or congregation may appoint or elect successors to the trustees (*inter alia*) at any special meeting called by a written notice read to the congregation by the officiating minister or other person appointed to read the same, at the close of public worship, on each of the last two preceding Sabbaths, which notice may be given at the request of five members of the congregation. Five members of the congregation signed a request for a special meeting to be held on the 26th of February, 1943, at 8 p.m. for the purpose of electing "three new trustees to hold the church premises, in trust for the assembly in lieu of the present trustees." The officiating minister was a Mr. Howell. When the members of the congregation arrived at the church at the appointed hour for public worship on the 14th and 21st days of February, 1943 (the two preceding Sabbaths), they found the church locked. They were then told by the minister to go and they did go on each occasion to a house in the neighbourhood, which belonged to Brook, one of the members of the congregation, where service was conducted, and after these services the notice of the intended meeting was

read by the officiating minister. The same thing happened on the 26th of February. Again the church was locked when the members of the congregation assembled at the appointed hour, and again they repaired to Brook's house where the resolution was duly passed appointing the petitioners as successors to the registered owners. The only attack made is that the meetings were not properly held.

Section 2 of the Religious Institutions Act does not say that the notice of the special meeting must be read to the congregation in a church. The only requirement is that it should be read at the "close of public worship."

Under the circumstances I am of the opinion the congregation engaged in public worship at Brook's house on the 14th and 21st of February, 1943. There is no suggestion that anyone who attended at the church on those occasions was debarred from going to Brook's house. I therefore think the notice was properly read to the congregation and the new trustees properly appointed.

The appellant objected that the learned judge had no jurisdiction to order that upon delivery to the petitioners of a registerable release of the Farrow mortgage the petitioners should pay $1,270 to Schmunk. That was not before the registrar. It had nothing to do with either of the applications. To this extent the appeal should be allowed and the last paragraph of the order struck out. Otherwise the appeal should be dismissed.

SIDNEY SMITH, J.A.: This appeal comes to us from COLQUHOUN, Co. J. acting as a local judge of the Supreme Court at Penticton, B.C. The question for our decision is whether the learned judge was right in holding that the respondents (afterwards herein referred to as the "new trustees") were entitled to be registered as trustees of the Pentecostal Assembly of Oliver, B.C., in respect of certain real property situate at Oliver, British Columbia.

The said property appears on the records of the Land Registry office at Kamloops, B.C., as being registered in the names of Reginald John Schmunk, Samuel Prochnau and Andrew Cook "in trust" subject to a mortgage in favour of one Guy Farrow for $750 and interest. These men held as trustees of the said

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Pentecostal Assembly. An application was made for the registration of the new trustees as trustees of the same Pentecostal Assembly, in respect of the same property, pursuant to a resolution of the said assembly, dated February 26th, 1943. The contest therefore is as to the right to registration between two sets of trustees. The learned registrar refused to effect registration upon the ground that there was another conflicting application, *viz.,* one to register a conveyance from the said Schmunk, Prochnau and Cook to the said Schmunk, pursuant to a resolution of the said assembly dated 4th March, 1943. The registrar properly required "these conflicting interests to be adjusted."

From this refusal to register an appeal was taken under section 230 of the Land Registry Act, which is as follows: [already set out in the judgment of ROBERTSON, J.A.].

Upon the hearing the learned judge had before him the depositions made by the respondents and in addition heard oral evidence from 19 witnesses. The neat question for decision was whether the new trustees had been appointed in accordance with the provisions of section 2 of the Religious Institutions Act. He found that there had been a sufficient compliance with the Act and that the new trustees were entitled to be registered as trustees for the Pentecostal Assembly of Oliver, British Columbia, in respect of the property. I cannot find that he came to the wrong conclusion. The only authority cited to us was *Pacific Coast Coal Mines* v. *Arbuthnot et al.,* [1917] 3 W.W.R. 762. In my opinion there is nothing in this case in conflict with this finding of the learned judge.

But it was argued before us that the learned judge had no jurisdiction to go into this question at all; that he should have directed the parties to solve their dispute by way of an action, or that he should have directed an issue to be tried.

I cannot accept this view. It seems to me that the learned judge was doing exactly what this summary procedure was designed to enable him to do, *viz.,* he was making "such order in the premises as the circumstances of the case required." He had all available evidence before him for this purpose and the sole issue was to determine whether the new trustees had been lawfully appointed. I entertain no doubt that this was a question

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which was properly before him for his decision and that he had the jurisdiction to determine it.

Unfortunately the learned judge went further and gave certain directions with respect to the release of the mortgage registered against the property and the payment of certain moneys by the new trustees to Schmunk. In doing so I think he exceeded his jurisdiction under the section. The mortgagee had been served, upon instructions from the learned judge, with notice of the hearing, but was not represented. The learned judge was concerned with whether or not the registrar was right in his refusal to register. He had nothing to do with the rights of the parties *inter se* and still less with the rights of a mortgagee who was not even a party. To this extent the appeal is allowed.

Appeal allowed in part.

Solicitor for appellant: *W. J. Murdock.*
Solicitor for respondents: *H. W. McInnes.*

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Landlord and tenant—Rental regulations of Wartime Prices and Trade Board—Orders 294 and 358 of the Board—Premises containing suites sub-let by tenant—"Housing accommodation"—Multiple-family building.

The premises in question, leased by the plaintiff to the defendant, consisted of 12 suites sub-let by the defendant to various persons for dwelling purposes. The tenant did not live on the premises but her husband "looked after" them for her and "for the purpose of heating and carrying on other duties," slept in the basement. It was held on the trial that the premises were "housing accommodation" within the meaning of orders 294 and 358 of the Wartime Prices and Trade Board, that the notice to vacate given by the landlord to the tenant became a nullity by virtue of subsection (3) of section 15A of said order 358 and the landlord's application for possession of the premises was dismissed.

Held, on appeal, affirming the decision of HARPER, Co. J. (O'HALLORAN, J.A. dissenting), that the premises in question are a "place of dwelling" and for the reasons given by the learned trial judge the appeal should be dismissed.

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APPEAL by the landlord from the decision of HARPER, Co. J. of the 26th of May, 1944, dismissing the appellant's application under section 19 of the Landlord and Tenant Act for an order for possession of premises known as 1256 Comox Street, city of Vancouver, against Ada Smith, tenant, claiming that she was overholding the said premises. By written lease of April 4th, 1941, the premises were demised by J. H. Law to Ada Smith for three years from the 1st of May, 1941, at $55 per month. The lease expired on the 30th of April, 1944. On the 7th of October, 1943, written notice was given to Ada Smith that she was required to vacate the premises on the termination of the lease. After the termination of the lease, possession was retained by the respondent and on the 3rd of May, 1944, a written demand for possession was made, but not complied with and proceedings under section 19 of said Act were then brought. Argued before HARPER, Co. J. at Vancouver on the 12th of May, 1944.

D. J. McAlpine, for landlord.
Maguire, for tenant.

Cur. adv. vult.

26th May, 1944.

HARPER, Co. J.: In my opinion, on the facts here, these premises are a multiple-family building. The building was used as a place of dwelling, being sub-let to various persons for residential purposes. Consideration of subsections (*c*) and (*g*) of section 1 of order 294 convinces me that the Wartime Prices and Trade Board, in the enactment of this order, drew a clear distinction between business and dwelling purposes and the category into which any particular structure should be placed would be determined by the nature of the use to which the building would be put. These premises were used exclusively for dwelling purposes. The fact that the lessee derived either profit or loss from such an operation would not convert it into a commercial accommodation as defined in subsection (*c*) of section 1 of order 294. No part of this building was used either by the lessee, or any sub-tenant to carry on any business. The notice given the

tenant on October 7th, 1943, became a nullity by virtue of section 15A, subsection (3) of order 358 of the Wartime Prices and Trade Board. By section 15C of order 358 the explanation to the giving of the six months' notice, in the case of a lease for a term certain, is maintained in express language by the insertion of the words "and except as provided in subsection (3) of section 15A."

The enactment of order 358 on January 15th, 1944, changed the legal *status* of the landlord to his detriment and would necessitate the giving of a second notice under subsection (3) of section 15A of order 358.

I am of the opinion the application should be dismissed with costs taxed at $10 and disbursements.

From this decision the landlord appealed. The appeal was argued at Vancouver on the 9th of June, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

D. J. McAlpine, for appellant: This appeal involves the interpretation of orders 294 and 358 of the Wartime Prices and Trade Board regarding the termination of the tenancy of Ada Smith. A notice to vacate was not necessary because the premises in question as between appellant and respondent were "commercial accommodation" (section 1 (*c*) of order 294) and not "housing accommodation" (subsection (*g*)). The respondent operates a business on the premises, namely, a rooming-house business. She rents or sub-lets the individual rooms to various sub-tenants or roomers. She lives elsewhere and the occupancy of part of the basement by her husband is incidental to the management of the premises on her behalf. No part of the premises may be considered "a place of dwelling" by Ada Smith. To Ada Smith the building is a "place of business." Part II. of the said order 294, providing for the termination of a lease is confined to "housing accommodation" solely by section 12 of said order. It is submitted that the premises in question are "commercial accommodation." Part II. of said order does not apply and consequently no notice was required. Secondly; if a notice was required to terminate the tenancy, then a notice was properly given. The notice was given to the respondent on the

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7th of October, 1943. This notice complies with the regulations provided by order 294 under section 15, subsections (1) and (2) (*c*). The notice follows the form set out in Form No. 1 of the Appendix to said order. It was held the notice was null and void by reason of a more recent order, being order 358. It is submitted order 358 does not apply as the appellant is not endeavouring to get possession of any "housing accommodation" and the notice under section 15 of order 294 is a valid notice.

Maguire, for respondent: In all orders of the Wartime Prices and Trade Board covering maximum rentals and termination of leases there are four different types of premises: 1. Commercial accommodation; 2. hotel accommodation; 3. housing accommodation; 4. shared accommodation. The tenant maintains that the premises herein are "housing accommodation," the definition being in subsection (*g*) of section 1, order 294 as follows:

(*g*) "housing accommodation" means any place of dwelling and any land upon which a place of dwelling is situated, but shall not include commercial accommodation, shared accommodation or any room in a hotel or clubhouse.

The said lease of these premises should be classed as a lease of "housing accommodation." That the premises are not "shared accommodation" see *Chickering* v. *Welton,* [1944] 1 W.W.R. 144. This building contains two or more housing accommodations and must be classed as a "multiple-family building," as defined in section 1 of amending order 358 of the Wartime Prices and Trade Board. It is as follows:

15A. (1) For the purposes of this section, "multiple-family building" means a building containing two or more housing accommodations but shall not include any semi-detached or attached house not containing more than one housing accommodation.

Subsection (3) of section 15A of said order 358 provides as follows:

Any notice to vacate given under section 15 on or after October 1, 1943, and before January 6, 1944, to the tenant of any housing accommodation situated in a multiple-family building shall be null and void.

In this case the notice to vacate relied on by the landlord is dated October 7th, 1943, and comes within the above section. The notice is therefore null and void. Under said subsection (3) the landlord should have given a second notice but did not do so. The amending order 358 was intended to cover tenancies under

similar circumstances as evidenced by the preamble of said amending order.

McAlpine, replied.

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O'HALLORAN, J.A.: The respondent refused to give up possession of the premises when her three-year lease from the appellant owner expired on 30th April, 1944. The appellant then applied for a writ of possession under section 19 *et seq.* of the Landlord and Tenant Act, Cap. 143, R.S.B.C. 1936. HARPER, Co. J. denied the application on the ground that the premises were "housing accommodation" and not "commercial accommodation," within the meaning of orders Nos. 294 and 358 of the Wartime Prices and Trade Board.

In order 294, "commercial accommodation" is defined, *inter alia,* as "any place of business," while "housing accommodation" is described as "any place of dwelling . . , but shall not include commercial accommodation, shared accommodation or any room in a hotel or clubhouse." The above definitions have not been altered by order 358 which replaces section 15 (1) of order 294 relating to "dispossession for purpose of personal residence." The notice the appellant gave in October, 1943, requiring the house for his own residence was rendered nugatory by order 358 which came into force on 6th January, 1944. The present application is based upon a demand for possession given under section 19 of the Landlord and Tenant Act.

The house in question is occupied by some 22 lodgers who pay room rent to the respondent. The respondent does not reside in the house as her home or dwelling-place. She lives elsewhere, but her husband looks after the heating and carries out other duties arising in a building with 22 lodgers. He sleeps in the basement. It seems plain that the respondent is carrying on a rooming-house business. The premises are not utilized by her for residential purposes but for business purposes only. Her husband acts as her agent for the purpose of that business. On these facts, in my judgment, it is, as between the appellant owner and the respondent non-resident lessee, a "place of business"

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within the meaning of "commercial accommodation" in order 294.

The learned judge held that because the building is used exclusively for dwelling purposes it must be regarded as "housing accommodation." No doubt that may be true so far as the lodgers and their right of occupation is concerned, but that is not the question involved here. What a lodger may rightly claim to be "housing accommodation" as against his immediate landlord may quite easily be "commercial accommodation" as between that landlord and the owner from whom he leases.

It is common knowledge that order 294 *et seq.* were passed to protect lodgers and resident tenants, and that purpose must guide their interpretation. We have to consider what it was Parliament intended to redress. The orders must be construed according to their "occasion and necessity" and "according to that which is consonant to reason and good discretion"; *cf. Stradling* v. *Morgan* (1560), 1 Plowd. 199, at pp. 203 and 205; 75 E.R. 305, at pp. 311 and 315 applied in principle by Sir Lyman Duff, C.J. in *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood Ltd. and the Board of Review for B.C.*, [1941] S.C.R. 601, at p. 610. In my opinion the legal relations between a lessor and his non-resident lessee under Provincial law are not affected by orders 294 and 358 so long as the security of tenure of any lodger or resident tenant is not disturbed. The jurisdiction of the Dominion to father such orders may be seriously questioned if their scope is interpreted to extend beyond the alleviation of conditions which relate to the effective carrying on of the war.

One may conclude with reasonable certainty that it was not a purpose of the orders of the Wartime Prices and Trade Board to place the owner of house property in the curious predicament that he cannot obtain possession of his own property on the expiration of his lease to a non-resident lessee who has been renting all the rooms to lodgers at a handsome profit. If, on obtaining possession, the owner should attempt to evict the lodgers, then he encounters orders 294 and 358 designed to protect the lodgers. But if he does not attempt to evict them, the only difference is, that he, the tax-paying owner, instead of the

non-resident lessee, receives the rent from the lodgers. The number of rooms available for war-workers has not been decreased, the lodgers' security of tenure has not been imperilled, and no lodger or resident tenant is deprived of housing accommodation.

I am therefore of opinion that as against the respondent the appellant's right to possession under the Landlord and Tenant Act was not affected by order 294 *et seq.* of the Wartime Prices and Trade Board. I would make the order I think the judge appealed from ought to have made, and therefore direct a writ of possession to issue. I make it clear that this order does not affect the rights of the lodgers in the house, governed as they are by orders 294 and 358, *supra.*

I would allow the appeal accordingly.

ROBERTSON, J.A.: This is an appeal from HARPER, Co. J. who held that the premises in question consisting of some 12 suites sub-let by the respondent to various persons were "housing accommodation" in a multiple-family building and not "commercial accommodation."

The relevant parts of the definition of "commercial accommodation" and "housing accommodation" are as follows:

1. (*c*) "commercial accommodation" means (iii) any place of business; (*g*) "housing accommodation" means any place of dwelling . . , but shall not include commercial accommodation, shared accommodation or any room in a hotel or clubhouse;

The tenant does not live in the premises. Her husband "looks after" them for her and "for the purpose of heating and carrying on other duties" . . . sleeps in the basement of the premises.

The appellant makes a profit out of the sub-leases. It is submitted by the appellant that this constitutes the premises "a place of business" and therefore commercial accommodation. The question is whether or not the premises are a "place of business" or a "place of dwelling." Assuming that the tenant was carrying on a business of a lodging-house keeper she was doing it by operating a "place of dwelling."

I agree with the learned judge that the premises were a place of dwelling.

The appeal should be dismissed.

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SIDNEY SMITH, J.A.: I agree with HARPER, Co. J. and would dismiss the appeal for the reasons he gave.

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

Solicitor for appellant: *D. J. McAlpine.*
Solicitor for respondent: *J. S. Maguire.*

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June 15, 27.

IN RE THE MARRIAGE ACT AND *IN RE* H.

Husband and wife—Petition by minor for leave to marry—Objected to by parents—Pregnancy of minor—Petition dismissed—Appeal—Discretionary order — Duty of Court of Appeal — R.S.B.C. 1936, Cap. 166, Sec. 25 (2).

A girl, 17 years of age, petitioned the Court under section 25 (2) of the Marriage Act for leave to marry, despite her parents' opposition, a certain man who is 24 years old, a gunner in the Royal Canadian Artillery, and by whom she was pregnant. The petition was dismissed.

Held, on appeal, affirming the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting), that the learned judge below had all the parties before him and came to the conclusion that the consent of the parents was not unreasonably withheld when they thought first of the safety of their child rather than the fact that her child would be illegitimate if she did not marry. The Court is unable to say that the learned judge below was wrong and the appeal is dismissed.

APPEAL by Beverley Margaret Horne from the order of SHANDLEY, Co. J. of the 9th of May, 1944, dismissing the petition for a declaration that the proposed marriage between the said Beverley Margaret Horne and one Leo Menard is proper under the provisions of the Marriage Act.

The appeal was argued at Vancouver on the 15th of June, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

McKenna, for appellant: The girl is 17 years old and desires to marry Leo Menard, who is 24 years old. The parents object to the marriage. The application is under section 25 (2) of the Marriage Act. There is an amendment to this section in 1937. The father is a contractor. As to the objection that the girl is a

Protestant and the boy a Roman Catholic see *Re A. B.* (1905), 25 N.Z.L.R. 299. The girl is pregnant and she desires to make the child legitimate. The learned judge would make the order on the facts, but concluded there was want of jurisdiction. The Court can take judicial notice of the state of the girl. In the circumstances the marriage should be allowed. The judge's notes are very fragmentary. Only notes of the cross-examination were taken down: see *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629, at p. 630; *Welch* v. *Grant* (1920), 28 B.C. 367, at p. 371. This Court may exercise its discretion in a case such as this: see *Evans* v. *Bartlam,* [1937] A.C. 473, at p. 480.

Clearihue, K.C., for respondent: The father objects on account of the religion of the boy. It is only in case of errors in law that action will be taken by the Court.

McKenna, replied.

Cur. adv. vult.

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O'HALLORAN, J.A.: Beverley Margaret Horne who will be 17 years of age in September next, petitioned the Court under section 25 (2) of the Marriage Act, Cap. 166, R.S.B.C. 1936, by her next friend Leo Menard for leave to marry the said Leo Menard despite her parents' opposition. He is 24 years old and a gunner in the Royal Canadian Artillery stationed in the Victoria area. The learned judge refused to declare the proposed marriage to be proper and dismissed the petition, but without giving reasons. The appeal lies from that dismissal.

It is advisable at the outset, to rule upon the objection taken by counsel for the respondent parents that an appellate Court ought not to disturb a discretionary order unless it is shown the judge of first instance has acted upon a wrong principle. This Court's power is not so fettered by statute or practice. The rule which prevails in this Court is that stated by Lord Wright in *Evans* v. *Bartlam* (1937), 106 L.J.K.B. 568, at p. 574:

> . . . the Court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle.

And further:

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The Court must, if necessary, examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order.

Lord Wright's foregoing observations were again applied by the House of Lords in *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130 and *cf.* also *Murdoch* v. *The Attorney-General of British Columbia* (1939), 54 B.C. 496, at pp. 501-2. It is also of importance that the order in this case finally disposed of the subject-matter, and was not as in *Evans* v. *Bartlam* and *Charles Osenton & Co.* v. *Johnston* an appeal from an interlocutory order or from an order made in the course of the litigation before trial. Our duty therefore is to decide if the judge of first instance reached what in our view as an appellate Court is the right conclusion. It is our duty to reverse that order if we are satisfied it was not justified upon the facts, or that an injustice has been done, *cf. Evans* v. *Bartlam, supra,* Lord Wright at pp. 574-5.

Counsel for the appellant took exception to the fragmentary character of the judge's notes and referred to *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629, and *Welch* v. *Grant* (1920), 28 B.C. 367. It was brought to our attention that by an amendment of the County Courts Act in 1943 (Cap. 12, Sec. 2 of that year) the judge is now required to have "full notes of the verbal testimony." The learned judge appears to have overlooked that 1943 amendment. In the circumstances we applied *Kyle* v. *Taylor* (1926), 38 B.C. 72, and allowed the judge's notes, which were manifestly defective, to be supplemented by affidavits of the two young people and the father.

Upon the merits, it appears the parents objected to their daughter's marriage on three main grounds, *viz.*: (1) Her youth; (2) her health, and (3) alleged inability of the young man to support her. A difference in religious belief seems to have hovered in the background but it was not pressed as an objection in this Court. The three stated objections must be examined in the light of the facts, that (a) the girl is pregnant, (b) the young man desires to marry her, and (c) they both swear they are in love with each other. I must conclude, with respect, that these last mentioned fundamental considerations were minimized or disregarded by the judge of first instance to a degree

which makes it correct to say that he did not exercise his discretion judicially.

Bearing these last mentioned basic considerations in mind, no difficulty need be had in the disclosed circumstances with the objections to her youth and the young man's ability to support her. She is nearly 17. She has been working for a year and buys her own clothes. She is no longer a mere school-girl. She has known the young man well for one year and loves him. It is my judgment in the special circumstances that there is no reasonable objection on the score of youth, more particularly since the girl is pregnant. According to the memorandum supplied by counsel, if they should marry, she will receive (when the child is born) $73 per month under the army regulations. Many soldiers marry and have children.

As to the health objection, the father testified that the girl is a diabetic and needs special treatment. But no medical evidence was adduced, as one would expect it would have been, if that ground had been advanced as a real objection to marriage. The objection does not seem to have been put forward on that ground, but rather on the ground that the young man cannot afford the special treatment. But if the girl should receive $73 per month as an army wife, and is also available for allowances from the "Dependants Board of Trustees," she will be in a better financial position than a great many people in this country. Moreover, the Court can hardly assume that if she marries the man of her choice, her parents will no longer regard her as their daughter.

The fact that the parents object is not as important as their reasons for objecting. The duty of the Court is to weigh those reasons judicially. The Marriage Act expressly empowers the Court to override unreasonable objections on the part of the parents, and *cf. Re A.B.* (1905), 25 N.Z.L.R. 299, where the Court (Stout, C.J.) found itself fettered by a statute which did not do so. The Court has been placed by our statute in the position of "*parens patriæ*," and in the circumstances before us, must, in my judgment, regard the girl's pregnancy as a dominating consideration in favour of marriage which both young people desire. Illegitimate unions and illegitimate births are contrary to public policy. The Court can hardly place itself in the impos-

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sible position of compelling this girl to have an illegitimate child by refusing her and her child the protection of the Legitimation Act, Cap. 152, R.S.B.C. 1936.

In my opinion the objections to the marriage cannot be regarded as reasonable in the circumstances which appear, and this Court should now make the order the Court of first instance ought to have made, and declare the proposed marriage to be proper as asked for in the petition.

I would allow the appeal accordingly.

ROBERTSON, J.A.: This is an appeal from SHANDLEY, Co. J. who refused the petition of B.M.H. under subsection (2) of section 25 of the Marriage Act. The facts are that the petitioner was born on the 24th of September, 1927. It appears she is pregnant and that the father of her child is one Leo Menard, a soldier stationed at Work Point Barracks, Victoria, B.C. He is 24 years of age. The girl's father gave a number of reasons for her parents' refusal to her marriage which are as follows: That his "daughter was too young to know her own mind"; that she was of the Protestant religion and Leo Menard was of the Catholic religion" and he did not believe "that mixed marriages were successful." "That she had been suffering from diabetes for years and that her case was a very bad case and that he had to supply insulin for her daily use which, with other medicine, cost him nearly $30 per month"; that this was exclusive of doctors' fees and cost of special diet. That Leo Menard, a private in the army, could not afford to keep his daughter and provide her with the necessary medicine required. That his daughter was subject to insulin shock and could not be left alone at night; that she had had a bad shock within the last two or three months. He also stated that Menard was unable to support his daughter and he gave reasons for this. Menard submitted that if the petitioner became his wife he would assign to her half his pay and this, together with her separation allowance, would be sufficient to support her. It is clear, however, that owing to his enforced absence as a soldier, the petitioner would not receive the constant care which her parents would be able to give her. No reasons were given by His Honour.

Under section 25 of the Marriage Act no marriage is to be celebrated by any person under 21 years of age unless the consent in writing to the marriage is first given (*inter alia*) "(*a*) By both parents of that person. . . ." In case the consent is refused "unreasonably or from undue motives . . . , the person in respect of whose marriage consent is required may apply by petition to a Judge . . . for a declaration" that the marriage appears to be proper.

While the petition says that the consent of her parents was "unreasonably and/or from undue motives refused," there is no evidence to suggest any undue motives. The question then is whether or not the parents' consent was unreasonably refused. The learned judge below had all the parties before him and he must have come to the conclusion that the consent was not unreasonably withheld. There is no suggestion made against the character of Menard other than his action which caused the present difficulty. No doubt the judge below was pressed with the argument that if the marriage did not take place the child would be illegitimate. He then had to decide whether or not under all these circumstances the parents' attitude because of the health of the girl, was unreasonable.

Can it be said to be unreasonable of the parents under the conditions as they saw them to think first of the safety of their child rather than the fact that her child will be illegitimate if she is not allowed to marry Menard? After long and careful consideration, I am unable to say that the learned judge below was wrong.

For these reasons I would dismiss the appeal.

SIDNEY SMITH, J.A.: In the unusually distressing circumstances of this case I do not feel justified in reversing the decision of SHANDLEY, Co. J. He saw the parties and their witnesses; and I have no doubt gave due and anxious consideration to all the relevant factors involved.

With these considerations in mind I would dismiss the appeal.

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

Solicitor for appellant: *Joseph McKenna.*

Solicitor for respondent: *J. B. Clearihue.*

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June 16, 28.

REX v. MIHALCHAN.

Criminal law — In possession of housebreaking tools by night — Whether lawful excuse shown—Criminal Code, Sec. 464 (a).

Accused was convicted under section 464 (*a*) of the Criminal Code on a charge of being in possession of house-breaking instruments by night. *Held*, on appeal, affirming the conviction by WHITESIDE, Co. J. (O'HALLORAN, J.A. dissenting), that the accused had not discharged the *onus* on him of showing a lawful excuse for his possession of the tools and a piece of celluloid which was found in his car and the appeal should be dismissed.

APPEAL by accused from his conviction by WHITESIDE, Co. J. on the 22nd of May, 1944, on a charge of having housebreaking instruments in his possession by night. On the 13th of April, 1944, at about 10.15 p.m. a policeman, patrolling at Port Coquitlam, found a car on Dewdney Road as it turned from the main street a short distance beyond the railway track and near a house and a garage known as Wally's Garage. He found the motor running and just then the accused came up from the direction of the garage with one Smylski and told him it was his car. The car was taken to the police station and on a search being made a number of tools were found in the rear compartment and some in the glove compartment with a piece of celluloid. He stated he was taking his friend to Haney to see a tailor he knew there from whom he was to buy some clothes, that the tools, which were ordinary tools used by a workman, he kept in his car as he and his wife lived in a small room in Vancouver where there was no room for the tools. The celluloid was in the car when his wife bought it.

The appeal was argued at Vancouver on the 16th of June, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Wismer, K.C., for appellant: Accused was charged under section 464 of the Criminal Code. The motor of the car was found running on Dewdney Road a short distance past the railway track near the main road at Port Coquitlam when accused and his friend came up from the garage near by. They thought the garage was a store where they could buy cigarettes, as there was a light in the window. They were going to Haney where the

other man wanted to buy a suit of clothes. We say there was a reasonable explanation. The tools found were not burglar's tools in the ordinary sense: see *Rex* v. *Ward* (1915), 11 Cr. App. R. 245, at p. 248. Statements made to the police were used in evidence without warning. They were taken into custody and never got out until bail was granted: see *Gach* v. *Regem*, [1943] S.C.R. 250. There was a proper explanation of the tools: see *Rex* v. *Anderson* (1942), 58 B.C. 88; *Rex* v. *Ellis* (1943), 59 B.C. 393. The judgment was based on the finding of another crime. The large bar in the car, the learned judge said was stolen. There is no evidence of this.

Clyne, for the Crown: It is common ground that even if the instruments may be used for ordinary purposes, it comes within the section and creates liability. There was no excuse offered in this case. The *Ward* case has no application. The judge was justified in not believing the excuse offered by the accused.

Cur. adv. vult.

28th June, 1944.

O'HALLORAN, J.A.: The appellant and Smylski were charged jointly under Code section 464 (*a*) with possession of housebreaking instruments by night. They testified in their own defence. WHITESIDE, Co. J. acquitted Smylski but convicted the appellant and sentenced him to six months' imprisonment.

The implements consisted of a substantial assortment of tools found in the locked trunk of the car the appellant was driving. A few ordinary tools were also found in the car glove pocket, together with a piece of celluloid which is later considered separately. The appellant explained he had been driving a truck in Northern British Columbia until his arrival in Vancouver, and that the tools in question were a necessary part of his equipment in those isolated areas; that there was no space for the tools in the single room which was all the housing accommodation he and his wife could find in Vancouver, so he kept them locked in the trunk of his wife's car. He testified also that he had been working as a truck-driver in Vancouver and was due at work as such the morning following his arrest.

I am of opinion the learned judge failed to apply the principle

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in *Rex* v. *Ward* (1915), 85 L.J.K.B. 483. Inasmuch as the alleged housebreaking instruments (except the celluloid) were admittedly tools a truck-driver in Northern British Columbia might reasonably require, the appellant must be held to have established *prima facie* that he had a lawful excuse within section 464 (*a*) for the tools being in his possession, and it then lay upon the prosecution to prove from "other circumstances in the case" that the tools were not in his possession for an innocent purpose, but for the purpose of housebreaking. His explanation for having the tools in the car is not far-fetched in the light of the well-known scarcity of room and housing accommodation in Vancouver during the war.

The learned judge seems to have excluded the *Rex* v. *Ward* principle because the appellant was not engaged at the time in his business as a truck-driver. But in doing so, the learned judge failed to pay any consideration at all to the explanation the appellant gave for his possession of the tools, and consequently, the other circumstances in the case were approached as if the burden were still upon the appellant to prove he had no intention of using the tools for felonious purposes. In my judgment, the learned judge thus mistakenly allowed himself to be convinced that the appellant had possession of the tools for the purpose of housebreaking. And that conclusion, in turn, prompted him to regard the subsequent events in the case as if they were corroborative of guilt already established, and to treat the explanation of those events which was offered by the appellant as so far-fetched that it could not reasonably be true.

The subsequent events must, however, be examined in their own setting, uninfluenced by any inference of guilt which does not properly arise out of those events (now referred to) when considered by themselves. At 10.15 p.m. a police officer in Port Coquitlam noticed two men in front of a garage, and about 100 yards away a parked car with a Vancouver licence. While he was examining the car the two men (Smylski and the appellant) came up and the appellant told him he owned the car. The officer suspected them of planning to rob the garage or the owner's house only a few steps away, and his suspicion was increased when he found the tools in the car. The men explained

to him that the appellant was driving Smylski, at the latter's request, out to Port Haney (some ten minutes distant) where Smylski wished to see a tailor by the name of Mostrencko. In passing through Port Coquitlam they noticed a light in what seemed to be a confectionery store and they stopped and went over to the place to buy cigarettes and chocolates, but found it was a closed garage with a light showing through the window.

They so testified at the trial. In explanation of the trip to Port Haney (30 miles from Vancouver) Smylski gave evidence that Mostrencko was a tailor and a personal friend from whom he had bought clothes before. In explanation of a visit to Mostrencko at that hour of night, Smylski said that he operated the Carlton Hotel in Vancouver, but had no help and he and his wife did all the work, and he did not finish on the day in question until late in the evening. He also explained he had asked the appellant, a friend of his, to drive him to Port Haney and had paid him $3 for the gasoline, etc., it would take, which the appellant had been loath to accept.

The learned judge accepted Smylski's explanation and acquitted him. If that explanation was good enough to acquit Smylski, it ought to have been good enough to acquit the appellant in the identical circumstances. It must be clear, I think, that the reason the learned judge did not accept it in the appellant's case, was because, as already found, he did not evaluate the subsequent events on their own merits, but owing to his rejection of the applicability of the *Rex* v. *Ward* principle, he allowed his unwarranted conclusion that the appellant had possession of the tools for the purpose of housebreaking, to colour and influence his judgment to a degree which denied the appellant the benefit of the reasonable doubt which the explanation created, and which was readily accepted in Smylski's case.

Then as to the piece of celluloid found in the glove pocket of the car. Celluloid is well known for its use as a housebreaking instrument. The explanation offered by the appellant was that it was in the glove pocket of the car when it came back into his possession some six months before. The learned judge said:

> Is there any explanation for the celluloid in the car, and which was there when he bought the car? He knew it was there.

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I interpret that to be an acceptance of the appellant's statement that the celluloid was in the car when he got it back into his possession, but a refusal to regard that fact as an explanation of innocent possession of the celluloid.

If the celluloid incident is regarded by itself, the statement ought to have been accepted as indicating innocent possession, when the judge himself accepted that statement as true. It was not, of course, conclusive of innocent possession. But an explanation by an accused is sufficient if it arises "probably or reasonably, from the facts proved." Compare *The King* v. *Burdett* (1820), 4 B. & Ald. 95, at p. 139; 106 E.R. 873, at p. 890, *Picariello et al.* v. *Regem* (1923), 39 Can. C.C. 229, Duff, J. at p. 237, and *Rex* v. *McQuarrie,* [1944] 1 W.W.R. 33, Mackenzie, J.A. at p. 37.

When a statute places an *onus* on an accused to show "lawful excuse" as Code section 464 (*a*) does, the accused discharges the burden thus imposed upon him if he establishes the probability of that lawful excuse. But he is not called upon to establish his "lawful excuse" beyond reasonable doubt. Compare *Rex* v. *Carr-Braint,* [1943] 2 All E.R. 156 and also *Rex* v. *Lawson* (1944), 59 B.C. 536, at p. 546. The previous conclusions which find the surrounding circumstances point to innocence, read together with the statement which the learned judge accepted as true, convince me that such a reasonable doubt has been created by the evidence that the benefit of it should have been given to the accused.

The young man went into the witness box and gave his evidence. He has no previous record and his conduct throughout appears to have been frank and free from evasion. In my opinion he was not given the benefit of the reasonable doubt which a careful examination of the evidence demands. As the foregoing conclusions require the conviction to be quashed, I do not need to consider the alternative submissions for a new trial.

I would allow the appeal accordingly.

ROBERTSON, J.A.: The appellant was convicted under section 464 (*a*) of the Criminal Code of being found on the 13th of April, 1944, having in his possession by night without lawful

excuse, instruments of housebreaking. The section provides that the proof of lawful excuse shall be upon the accused. There is no doubt the things which were found in the possession of the accused on the night in question were instruments capable of being used for housebreaking. They also, with the exception of a piece of celluloid, might be used by the appellant in his work as a truckman. The learned judge accepted the evidence of the appellant that the celluloid was in the car when he bought it.

In *Rex* v. *Ward,* [1915] 3 K.B. 696 the facts were that the appellant had been found in possession by night of certain tools which were capable of being used for housebreaking, but were used by him in his trade as a bricklayer. The statute under which he was prosecuted was similar to 464 (*a*). The Court of Criminal Appeal held that when the appellant had shown these things were such as might be used in his trade, he had established *prima facie* that he had a lawful excuse for being in possession of them and had thereby satisfied the *onus,* which was then

shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from the other circumstances of the case that the appellant was not in the possession of the tools for an innocent purpose but for the purpose of housebreaking.

They held that the appellant did not have to prove in addition to what he had established, *prima facie,* that he had no intention of using the tools for housebreaking.

Now assuming that the accused in the case at Bar had established *prima facie* that these tools were used by him in his work as a truckman and had therefore a lawful excuse for being in possession of them, did the Crown prove by other circumstances that he was not in possession of the tools for innocent purposes, but for the purpose of housebreaking? The appellant stated that one Smylski had paid him $3 to pay for gasoline to take him in his motor-car from Vancouver to Haney where Smylski wished to order a suit of clothes from a tailor named Mostrencko, who lived there. Smylski said that Mostrencko had made three suits of clothes for him before this; that he had last seen Mostrencko at Haney in 1938; and that he had not seen him since "last summer before Christmas he was in Vancouver." He had not made any appointment with Mostrencko.

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The appellant and Smylski left Vancouver about 9 p.m. in the appellant's car, drove through the city of New Westminster and the town of Port Coquitlam, where they could have purchased cigarettes and chocolates, to a point about 500 yards beyond Port Coquitlam and 100 yards beyond a garage where they left the car about 10.15 p.m. They went back to the garage because the appellant wished to buy cigarettes and Smylski said he thought he would get some chocolates. The garage was closed. The only light in it was a dim light in the office.

Although the police checked up and found there was a tailor named Mostrencko in Haney, the judge did not believe these statements of the accused. He says in his report, which must be read with his reasons for judgment—see *Rex* v. *O'Leary* (1943), 59 B.C. 440—that he "thought the excuse about the cigarettes was not very convincing," and that the evidence that he was taking Smylski to Haney seemed "rather flimsy."

I think these "other circumstances" warranted the learned judge in finding the appellant guilty.

The appeal is dismissed.

SIDNEY SMITH, J.A.: I would dismiss this appeal. I think the combination of circumstances was such as not to be susceptible of an innocent construction, but pointed irresistibly to the guilt of the accused. I do not think the learned trial judge misdirected himself, but even if he did, I would be prepared to apply the provisions of section 1014, subsection 2 of the Criminal Code.

The appeal is therefore dismissed.

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

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* ESTATE OF POLLY DUNN, DECEASED.

S. C. 1944

June 23, 30.

Testator's Family Maintenance Act—Will—Two sons only next of kin—Estate of $13,000—Three legacies of $200 to three grandchildren—Legacy of $300 to petitioner—Residue to other son—Petitioner suffering from industrial accident—Heart condition—R.S.B.C. 1936, Cap. 285.

A testatrix was survived by two sons. Of her estate of $13,000 she bequeathed legacies of $200 to each of three grandchildren and a legacy of $300 to her son F. the petitioner. The residue she bequeathed to the executor named in the will in trust to invest and pay to her son W. the sum of $35 per month until the residue and income derived from such investment be disbursed with a direction that upon the death of W. to divide the balance equally among the grandchildren. The petitioner complained that because of his many years of unemployment, his brother is better circumstanced than himself, that he is suffering from an industrial accident for which he received compensation which has been discontinued but left him suffering from a heart condition which prevents him from resuming his former occupation as a shipyard-worker. The evidence disclosed that W. was at all times a steady worker and responsible person, whereas the petitioner was the ne'er-do-well of the family. The petitioner had not communicated with his family since the death of his father in 1941.

Held, that the petitioner has now become to a degree physically disabled, although not accepting petitioner's evidence that his physical disability wholly prevents him from earning a livelihood; this is the only factor which serves to bring this application within the terms of the Act. A direction that payment by the executor to the petitioner during his lifetime of the sum of $35 per month until the sum of $2,000 is thereby paid to him would be in the circumstances an adequate, just and equitable provision for the petitioner.

PETITION under the Testator's Family Maintenance Act by Frank Dunn, one of two sons, the only next of kin of Polly Dunn, deceased. The facts are set out in the reasons for judgment. Heard by BIRD, J. at New Westminster on the 23rd of June, 1944.

Branca, for petitioner.

J. A. Grimmett, for Willard Dunn, a beneficiary.

Cur. adv. vult.

30th June, 1944.

BIRD, J.: This application arises by way of a petition under the Testator's Family Maintenance Act presented by Frank

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Dunn, one of the two sons, the only next of kin of the late Polly Dunn, relict of the late William Dunn.

The petitioner seeks an order for such provision as may be just and equitable in the circumstances out of the estate of his deceased mother the late Polly Dunn, who died in the month of March, 1944.

By her last will made June 5th, 1942, the testator disposed of an estate of approximately $13,000 and thereby bequeathed legacies of $200 to each of three grandchildren, being one child of the petitioner and two children of her second son Willard who opposes the petition as well as a legacy of $300 to the petitioner. The residue of the estate is bequeathed to the executor named in the will in trust to invest the same and pay to her son Willard the sum of $35 per month until the residue and income derived from such investment has been so disbursed, with a direction upon the death of Willard to divide any balance there remaining of such residue and accumulated income equally among the three grandchildren before mentioned.

It appears from evidence adduced by petitioner that William Dunn, deceased, by his last will made provision for his two sons, bequeathing equal legacies to each of them, the amount of which was not disclosed, and gave the residue of his estate to his widow the testatrix.

I conclude from perusal of the petition and from the evidence led by the petitioner that the gravamen of his complaint as to the terms of his mother's will lies in the fact that to quote the petition,

> Willard . . . has been working continuously and is better circumstanced than the petitioner . . . that because of many years of unemployment . . . petitioner is less comfortably circumstanced than Willard . . . and is in greater need of . . . support and maintenance . . . further that petitioner is suffering from some industrial accident for which he received compensation which has now been discontinued but which has left petitioner suffering from a heart condition which prevents him from resuming his former occupation as a shipyard-worker.

The evidence satisfies me that the petitioner is the ne'er-do-well of the family, and was so regarded by his parents; nevertheless, his late father as well as his brother Willard responded to petitioner's calls for money from time to time when he appeared to be in difficulties, although on some such occasions

at least the petitioner was apparently thought by his father to be in receipt of a greater income than either his father or his brother. On the other hand it is clearly established that the son Willard has been at all times a steady worker and a reliable and responsible person.

In such circumstances a reasonable explanation, in my opinion, is found for the provisions of the testator's will and the preference thereby shown for the son Willard, more particularly since it appears that the petitioner had not communicated with either his mother or brother subsequent to the date of his father's death in 1941 and until after the mother's death. In view of this latter circumstance it is apparent that the testatrix cannot have known prior to her death in March, 1944, of the then existing circumstances of the petitioner. Having in mind the attitude which appears to have been adopted towards the petitioner by his late father and the testatrix on numerous earlier occasions, and notwithstanding what the petitioner describes as the testatrix's coolness toward him, I conclude that the testatrix, if she had had knowledge prior to her death of petitioner's physical incapacity, would probably have made some additional provision for the petitioner by her will.

The fact that he has now become to a degree physically disabled, which I find to be the case, although I do not accept the petitioner's evidence that his physical disability wholly prevents him from earning a livelihood; is in my opinion the only factor which serves to bring this application within the terms of the Act.

In those circumstances I have less hesitation in "[interfering] with [testatrix's] liberty . . . to bequeath [her] property [to whom she] pleases" to use the language of Rinfret, J. (now C.J.C. in *Walker* v. *McDermott*, [1931] S.C.R. 94, at p. 99.

I would adopt the language of my brother the Chief Justice in his judgment interpreting the decision in the *Walker* case in *In re Testator's Family Maintenance Act and In re Estate of Isabella Caroline Dickinson, Deceased*, [*ante*, 214, at p. 216]; [1944] 2 W.W.R. 1, at p. 3, where he says:

> . . . , it would seem to me that the word "proper" is the governing word, and therefore the Court only can interfere when the circumstances

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Bird, J.

are "special" and are such that the testator taking them into consideration has not made a "proper" provision for maintenance.

Here I consider that there are shown to be special circumstances, namely, the indisposition of the petitioner.

Taking into consideration those special circumstances of which, as I have said, the testator was unaware, I do not consider that there was made by the will "proper provision for maintenance" as defined by Duff, J. in the *Walker* case.

I am of opinion that payment by the executor of the testatrix to the petitioner during his lifetime of the sum of $35 per month until the sum of $2,000 is thereby paid to him would be in the circumstances an adequate, just and equitable provision for the petitioner.

I direct that the executor shall set aside out of the residue of the testator's estate the sum of $2,000 and shall pay thereout to the petitioner the sum of $35 per month until the full sum of $2,000 has been so paid to him or until the date of the petitioner's death, whichever event shall first occur.

The costs of the petitioner and of Willard Dunn to be taxed under Appendix N and payable out of the estate. The costs of the executor to be taxed under Appendix M and payable out of the estate.

Order accordingly.

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In Chambers
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May 29;
July 3.

SCOTT v. ANGLO-CANADIAN INVESTMENTS LIMITED AND BAKER.

Practice—Action dismissed against one defendant—Application to introduce new evidence on claim against said defendant—Discretion—Refused.

Judgment was delivered dismissing the plaintiff's action against B. for money lent by the plaintiff to B. at the request of S. B. in his defence specifically denied that S. had any authority from him to make the loan. The matter of agency or authority of S. was clearly in issue between the parties. In order to succeed against B., the plaintiff had to establish that S. was B.'s agent authorized by B. to secure this loan for him. On examination for discovery, B. denied the agency of S. so that the plaintiff then had further notice of the position B. would take at the trial. S. was not called as a witness on the trial and it is the

evidence of S. that the plaintiff now seeks to introduce. On the plaintiff's application to introduce new evidence on the claim against B.:—*Held*, that while the authorities show it is a matter of discretion with the trial judge, yet under the circumstances here and on the authorities, it is not a discretion that should be exercised in favour of the applicant and the application for admission of further evidence must be refused.

APPLICATION by plaintiff to introduce new evidence on the claim against the defendant Baker after judgment had been delivered in the action dismissing the claim against Baker and allowing the claim against the defendant company. The facts are set out in the reasons for judgment. Heard by COADY, J. in Chambers at Vancouver on the 29th of May, 1944.

McAlpine, K.C., for plaintiff.
Fraser, K.C., and *Locke, K.C.*, for defendants.

Cur. adv. vult.

3rd July, 1944.

COADY, J.: Judgment was delivered by me in this action on May 11th, dismissing the claim against the defendant Baker but allowing the claim against the defendant company. The plaintiff now applies to introduce new evidence on the claim against Baker. The action against Baker was for money lent by the plaintiff to Baker at the request of Walter Seligman. It is the evidence of Seligman that the plaintiff now seeks to introduce. The defendant Baker in his defence specifically denied that Seligman had any authority from him to make the loan. The matter of agency or authority of Seligman therefore was clearly in issue between the parties. In order to succeed against Baker the plaintiff had to establish that Seligman was Baker's agent authorized by Baker to secure this loan for him. On the examination for discovery Baker denied the agency of Seligman, so that the plaintiff had then further notice of the position which the defendant Baker would take at the trial.

The plaintiff knowing this, saw fit to go down to trial without calling Seligman as a witness or securing his evidence on commission. Affidavits are now filed on this application, one by counsel for the plaintiff and the other by *R. S. Stultz*, a solicitor in the office of the plaintiff's solicitors referring to some indefin-

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ite understanding or arrangement alleged to have been made with the solicitor for Baker that he would call Seligman as a witness at the trial. This is denied on affidavit by Baker's solicitor. If such understanding or arrangement was made and any importance was attached to it, it is significant that on the trial when counsel for the defendant Baker closed his case no protest was then made by counsel for the plaintiff to the effect that Seligman was not called as a witness pursuant to the understanding or arrangement, or that the plaintiff's counsel was in any way misled by any breach of such understanding. Comment was made by counsel for the plaintiff in the course of his argument when he stated that from the failure of the defendant Baker to call Seligman as a witness an inference might reasonably be drawn that there was an agency as alleged. But there was no obligation on Baker to call Seligman as a witness. The burden of proving the agency was clearly on the plaintiff. Counsel for the plaintiff no doubt felt that he had sufficient evidence to establish the agency, and on this he relied. In my opinion the evidence was insufficient, and I so held.

This is not a case therefore in my opinion where counsel is taken by surprise or where there is a failure to prove some particular point in the course of a trial, a failure arising through inadvertence or misconception of the burden of proof. There is nothing before me to indicate that the evidence of Seligman could not have been secured before trial on a commission issued for that purpose. In fact, I think it is common ground it could have if steps were taken to that end. If under these circumstances an order is now made for the admission of the evidence of Seligman that would, it seems to me, be going beyond anything which the authorities would seem to justify. A party cannot, it seems to me, where the issue is clearly defined as here, and the burden of proof obvious, go down to trial on evidence which he considers sufficient and then having found it is insufficient, secure an order for the admission of further evidence which was available to him and of which he had full knowledge but failed to submit in the first instance.

While the authorities show it is a matter of discretion with the trial judge, yet under the circumstances here, and on the author-

ities it seems to me it is not a discretion that should be exercised in favour of the applicant. In the case of *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28, MACDONALD, J.A. (later C.J.B.C.) who upheld the order made by the trial judge in admitting further evidence under the particular circumstances of that case, said at p. 66:

> My view has always been that the trial judge might resume the hearing of an action apart from rules until entry of judgment, but as it was vigorously combatted I have given it careful consideration. The point, so far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care, fraud and abuse of the Court's processes would likely result.

In the case of *Guarascio* v. *Porto* (1939), 54 B.C. 297, MCDONALD, J. (later C.J.B.C.), said:

> While I am bound by the decisions of the majority of the Court in *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28, to hold that a trial judge in this Province does possess the power which I am now asked to exercise, one cannot read the judgments in that case or the authorities referred to, without realizing that the power to reopen a case after judgment is, as it always was, one which ought to be exercised with the very greatest care, and, under circumstances which must be rare indeed.

The application for admission of further evidence must be refused.

Application refused.

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Criminal law—Summary conviction—Three years in penitentiary—Jurisdiction of magistrate as to place of imprisonment—Habeas corpus—Appeal—Criminal Code, Secs. 2, Subsec. 29, 205A and 705 (b)—R.S.C. 1927, Cap. 154, Secs. 6 and 41.

Section 41 of the Penitentiary Act recites: "Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the Province in which the conviction takes place." Section 705 (*b*) of the Criminal Code recites: "In this Part, unless the context otherwise requires, (*b*) 'common gaol,' or 'prison' for the purpose of this Part means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody." The accused was tried under Part XV. of the Criminal Code and convicted by a police magistrate in the city of Vancouver for a violation of section 205A of the Criminal Code and sentenced to three years in the penitentiary. On *habeas corpus* he was discharged from custody on the ground that the magistrate's jurisdiction on a summary-conviction proceeding is limited to committing a convicted person to the common gaol and does not extend to sentencing such person to the penitentiary even if the sentence imposed exceeds two years.

Held, on appeal, reversing the decision of COADY, J., that the submission that said section 705 (*b*) of the Criminal Code is to be regarded as effective to abrogate the plain and imperative language of sections 6 and 41 of the Penitentiary Act is one without merit, devoid of substance and the appeal should be allowed with consequential directions including the rearrest of the respondent.

APPEAL by the Crown from the decision of COADY, J. of the 30th of June, 1944, on an application heard by him in Chambers at Vancouver on the 22nd of June, 1944, by way of *habeas-corpus* proceedings by the accused who was convicted by police magistrate Wood in Vancouver on a charge of "while nude being found in a public place" contrary to section 205A of the Criminal Code.

Hodgson, for the application.
Pepler, K.C., D.A.-G., and *A. W. Fisher*, for the Crown.

Cur. adv. vult.

30th June, 1944.

COADY, J.: This is an application by way of *habeas corpus* by Fred Storgoff who was convicted before magistrate Wood at the

city of Vancouver under section 205A of the Criminal Code and sentenced to three years in the penitentiary where he is now detained. The offence is one triable by summary conviction.

The warrant of commitment is attacked on the ground that under Part XV. of the Code dealing with summary convictions the magistrate had no jurisdiction to sentence the prisoner to the penitentiary, his only jurisdiction being to commit him to the common gaol. The point does not seem to have arisen before, and counsel have searched diligently for some authority directly on the point without success.

"Prison" is defined by section 2, subsection (29) of the Criminal Code as follows:

> In this Act, unless the context otherwise requires, "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or other place in which persons charged with the commission of offences are usually kept or detained in custody.

"Prison" is defined under Part XV. relating to summary convictions as follows (705 (*b*.)):

> In this Part, unless the context otherwise requires, (*b*) "common gaol" or "prison" for the purpose of this Part means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody.

These appear to be the only definitions of "prison" appearing in the Criminal Code. It seems clear that the general definition of "prison"—section 2, subsection (29)—cannot have application to Part XV. where Parliament has seen fit to define "prison" for the purpose of that Part, and has there given it a restrictive meaning which specifically excludes a penitentiary. The term "for the purpose of this Part" as used in the definition of prison in Part XV. can, it seems to me, only mean for the purpose of dealing with offences that are triable summarily, to which that Part relates. Does this restrictive definition then mean that a magistrate, in a summary conviction under Part XV., has no jurisdiction to sentence the convicted person to the penitentiary, where the conviction is for more than two years?

Counsel for the Crown draws my attention to sections 6 and 41 of the Penitentiary Act, which are as follows:

> 6. . . . British Columbia Penitentiary, . . . shall each be maintained as a prison for the confinement and reformation of persons lawfully convicted of crime before the courts of criminal jurisdiction of the province,

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territory or district for which it is the penitentiary and sentenced to confinement for life or for any term not less than two years.

41. Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the province in which the conviction takes place.

He argues that these sections apply to and are binding upon the magistrate in summary convictions matters notwithstanding the restrictive definition of "prison" under Part XV. On the face of it there would appear to be a conflict between these sections of the Penitentiary Act and Part XV. If there is conflict, does the Penitentiary Act override Part XV., or does the Penitentiary Act apply only where convictions are made by other tribunals under the Code before which accused persons are tried?

Some assistance, I think, can be obtained by referring to the history of this legislation. In the statutes of 1869, what is now substantially Part XV. of the Code, appeared as a separate statute, Cap. 31. Section 95 of Cap. 31 of the statutes of 1869 dealing with summary convictions defines "prison" as follows:

95. The words "Common Gaol" or "Prison," whenever they occur in this Act, shall be held to mean any place other than a Penitentiary where parties charged with offences against the law are usually kept and detained in custody.

Throughout the Act reference is repeatedly made to the jurisdiction of the justice or justices to commit the accused to the common gaol or other prison, and the forms appearing in the schedule to the statute provide for committal to the common gaol or lock-up house.

In Cap. 29, Sec. 1, Subsec. 4, of the statutes of 1869 the word "penitentiary" is defined as follows:

The word "Penitentiary" shall be understood to mean the Penitentiary for the Province in which the conviction takes place; and any person sentenced to imprisonment in the Penitentiary shall be subject to the provisions of the statutes relating to such Penitentiary, . . .

Section 96 of that Act reads as follows:

Each of the Penitentiaries in Canada shall be maintained as a Prison for the confinement and reformation of persons, male and female, lawfully convicted of crime before the Courts of Criminal Jurisdiction of that Province for which it is appointed to be the Penitentiary, and sentenced to confinement for life or for a term not less than two years; and whenever any offender is punishable by imprisonment, such imprisonment, if it be for life or for two years or any longer term, shall be in the Penitentiary; . . .

We have, therefore, in these sections of Cap. 29 what is equivalent

to sections 6 and 41 of the present Penitentiary Act to which I have referred. The restrictive definition of "prison" under Cap. 31 of 1869 is substantially the definition we find today under Part XV. of the Code, except that instead of the words " 'common gaol' or 'prison' wherever they occur in this Act" we find the words " 'common gaol' or 'prison' for the purposes of this Part." It seems to me that under these separate statutes of 1869 it could not be contended that those sections of chapter 29 to which I have referred were intended to apply to chapter 31 dealing with summary convictions where "prison" is restrictively defined, in the absence of some express provision making them applicable and which would have the effect of extending the jurisdiction of the justice acting in summary-conviction matters under chapter 31. Can it be maintained then that the corresponding sections of the Penitentiary Act to which I have referred are applicable to Part XV. or that they confer any extended jurisdiction on the justice sitting in summary convictions under Part XV. of the Code? I do not think it can. The jurisdiction of the magistrate to impose sentence under Part XV. is a jurisdiction that is limited by the definition of "prison" appearing in that Part and is not affected or extended by the definition of "prison" appearing elsewhere, and cannot be affected or extended by the provisions of any other Act unless by express language.

It is worthy of note that the forms appearing in the Criminal Code, Part XV., and in the appropriate Acts prior thereto for convictions and commitments under the summary convictions, all provide for imprisonment in a "common gaol" whereas in the forms supplied for convictions and commitments under the other Parts of the Code, and in the appropriate Acts prior thereto, these words do not appear, but blank spaces appear, leaving the place of confinement to be filled in, depending on the place fixed by the tribunal before which the accused was convicted. This while not conclusive, is significant, it seems to me, as indicating that convictions and commitments under Part XV. of the Code are and have always been intended to be restricted to the common gaol, whereas convictions and commitments under the other portions of the Code and corresponding prior legislation are not so

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restricted and imprisonment may be either in the common gaol or in the penitentiary.

The sections of the Penitentiary Act above referred to do not therefore in my opinion override and are not in conflict with Part XV. relating to summary convictions, for the reason that these sections of the Penitentiary Act have no application to offences triable by summary convictions, but relate to offences tried before other tribunals under the Code.

It seems to me that Parliament had good reason for withholding from magistrates the jurisdiction to commit one convicted under the summary-convictions provisions of the Code to a penitentiary, inasmuch as Parliament by making offences triable summarily was depriving the accused person of his right to be tried by a jury and likewise depriving him of his right to object to summary trial before the magistrate. This being so, Parliament has said, it seems to me, that while an accused person shall be tried summarily he shall not, if found guilty, be sent to a penitentiary and thus be made a convict.

I am of the opinion therefore that the learned magistrate in this case had no jurisdiction to commit the accused to the penitentiary. The only jurisdiction he had was to commit him to the common gaol. That being so, the warrant of commitment is bad and must be quashed and the accused discharged. I have sought for some way by which this warrant might be amended, as I have no doubt the prisoner was properly found guilty of the offence with which he was charged, and it is regretable that on an error of this kind he should be released, but it seems on the authorities no amendment can be made.

From this decision the Crown appealed. The appeal was argued at Victoria on the 18th of July, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Pepler, K.C., D.A.-G., and *A. W. Fisher*, for appellant.
Hodgson, for respondent.

SLOAN, J.A.: The respondent Storgoff was convicted by magistrate Wood at the city of Vancouver for a violation of section

205A of the Criminal Code and sentenced to three years in the penitentiary. The offence is one triable under Part XV. of the Code and the neat question for determination is whether the learned magistrate had jurisdiction to sentence him to serve the term of three years in the penitentiary. The length of the sentence is not an issue but it was successfully contended below on behalf of the respondent that the magistrate's jurisdiction on a summary-conviction proceeding is limited to committing a convicted person to the common gaol and does not extend to sentencing such person to the penitentiary even if the sentence imposed exceeds two years.

We were asked to review this determination of the question in issue.

Section 205A of the Code, in its relevant aspects, reads as follows:

> Every one is guilty of an offence and liable upon summary conviction to three years' imprisonment who, while nude,
>
> (*a*) is found in any public place whether alone or in company with one or more other persons who are parading or have assembled with intent to parade or have paraded in such public place while nude; or
>
> (*b*) is found in any public place whether alone or in company with one or more other persons;

As noted above the magistrate imposed herein the maximum sentence of three years. Code section 205A does not specify in what penal institution the three-year sentence is to be served but on turning to the Penitentiary Act, we find that question settled by sections 6 and 41 thereof. Said section 41 reads as follows: [already set out in the judgment of COADY, J.].

Counsel for the respondent conceded that if the matter rested at this point no basis for his argument would exist but he submitted that by reason of section 705 (*b*) of the Criminal Code, said section 41 of the Penitentiary Act must relate only to persons convicted on indictment and was not intended to apply to persons convicted upon a trial under Part XV. I am unable to give effect to this submission.

Section 705 (*b*) reads as follows: [already set out in the judgment of COADY, J.].

In my opinion said section 705 (*b*) is merely definitive and means no more and no less than just what is says, *i.e.*, in Part XV. and for the purpose of that Part, unless the context other-

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wise requires, whenever and wherever "common gaol" or "prison" appears those words do not mean the penitentiary, but some place else. As far as I can ascertain on a reasonably careful reading of Part XV. the word "common gaol" or "prison" only appear in three sections, *i.e.*, 722, subsection 4, 744, and 759, subsection 2, none of which has any relevancy herein.

The genesis of section 705 (*b*) is found in the Summary Convictions Act of 1869 (Can. Stats. 1869, Cap. 31) and from a reading of that Act it will be seen that "common gaol" and "prison" are liberally sprinkled throughout various sections dealing with matters of collateral procedure. These sections were in most part deleted when the Summary Convictions Act was absorbed into the Code as Part XV., but I suppose from an abundance of caution the definitive section escaped destruction.

The submission that said section 705 (*b*), a vestigial remanent, is to be regarded as effective to abrogate the plain and imperative language of sections 6 and 41 of the Penitentiary Act is, in my opinion, one without merit and devoid of substance.

With great deference to the learned judge below, I would allow the appeal with all consequential directions, including the rearrest of the respondent.

O'HALLORAN, J.A.: Fred Storgoff was charged under Code section 205A with, while nude being found in a public place, *viz.*, in Stanley Park, Vancouver, in company with other persons. He was convicted upon summary conviction by magistrate Wood, and sentenced to three years' imprisonment in the British Columbia Penitentiary.

He was discharged from custody upon *habeas corpus* by COADY, J., on 30th June last on the ground the learned magistrate lacked jurisdiction in summary-conviction proceedings to order imprisonment in the penitentiary. The Attorney-General for the Province appealed to this special sittings of the Court convened pursuant to section 13 of the Court of Appeal Act.

The summary-convictions Part of the Criminal Code (Part XV.) is found in sections 705 to 770 both inclusive. Section 705 reads in material part: [already set out in the judgment of COADY, J.].

The learned judge of first instance reached the conclusion that the wide meaning given "prison" in Code section 2 (29) to include penitentiary was cut down by section 705 (*b*), thus depriving the magistrate exercising summary-conviction jurisdiction, of the power to order the respondent to be imprisoned in a penitentiary. This is the only point in the appeal.

Section 41 of the Penitentiary Act, Cap. 154, R.S.C. 1927 (the statute was re-enacted by Cap. 6 of the statutes of 1939, but counsel agree that it has not yet been brought into force by proclamation as stipulated in section 84 thereof) reads: [already set out in the judgment of COADY, J.].

This section was relied upon by counsel for the warden of the penitentiary to justify his detention of the respondent, but the learned judge held it had no application to offences triable by summary conviction.

Although counsel for Storgoff supported that ruling in an ingenious argument, I am forced to the conclusion that the embracing language of section 41 is too plain and precise to admit of doubt. I read it to say definitely and without qualification that every person, no matter how tried, shall be sent to the penitentiary if the sentence exceeds two years. I conclude that if it had been the intention of Parliament not to include in section 41, summary-conviction sentences under Part XV. of the Code for not less than two years, apt language would certainly have been employed to give effect to that intention. Compare Code section 1056. Section 27 of the Interpretation Act, Cap. 1, R.S.C. 1927 provides for imprisonment in the common gaol, if no other place is mentioned or provided by law. But section 41 of the Penitentiary Act imperatively designates the penitentiary as the place provided by law if the term of imprisonment is not less than two years.

Again, quite apart from the mandatory and embracing character of section 41, it is to be observed that the "common gaol" and "prison" to which section 705 (*b*) refers, is not a place where convicted persons are imprisoned to serve their sentences, but is described as a place in which "persons charged with offences are usually kept and detained in custody"; (that is to say) before trial or sentence. The use of "charged" instead of "convicted"

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and "detained in custody" instead of "imprisoned," signifies a prison where persons are kept in custody before and not after sentence. So construed as its language demands, in my opinion section 705 (*b*) cannot conflict with section 41.

Study of sections 722, subsection 4, 731, subsection 1, 739 (*a*) and (*b*), 744, 747, subsection 2 and 748, subsection 2 of Part XV. will assist in understanding why "common gaol" and "prison" were generally limited by section 705 to a place for imprisonment of an accused before sentence or for failure to obey an order of the justice. On the other hand, "prison" as used in section 746, may require a wider meaning than section 705 contemplates. But if this is so as the context of section 746 provides, section 705 permits the wider meaning found in section 2 (29). Part XV. is not a complete code on the subject of summary convictions. As Sir Joseph Chisholm, Chief Justice of Nova Scotia (then Chisholm, J.) said in *Rex* v. *Smith* (1923), 38 Can. C.C. 327, at p. 330:

> It is only a part of the Cr. Code, and many sections outside of Part XV. are obviously applicable to cases of summary conviction, although not in express terms made so applicable, . . .

For the foregoing reasons I am of opinion the learned magistrate had jurisdiction to order Storgoff to be imprisoned for three years in the penitentiary upon summary conviction under Code section 205A. That was the only point argued in the appeal. I would allow the appeal accordingly and order the rearrest of Storgoff to serve his sentence in the terms of his conviction pursuant to the power given by section 6 (*d*) of the Court of Appeal Act.

The appeal is allowed accordingly.

ROBERTSON, J.A. agreed that the appeal be allowed.

Appeal allowed.

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Criminal law—Murder—Verdict—"Guilty of murder with a strong recommendation to mercy owing to temporary insanity"—Impossible to say what the jury meant—New trial—Criminal Code, Secs. 966 and 1016, Subsec. 4.

The accused was married on October 22nd, 1943, and thereafter lived with his wife in a room in a boarding-house in Vancouver. Their relations appeared to be normal until they retired to their room at about 11 o'clock on the evening of the 3rd of December, 1943. At about 2 o'clock on the following afternoon accused was seen on the landing above the stairs in the house, covered with blood, his throat having been cut and his wife was found dead in the bed in their room. Medical evidence showed that she had been dead for about 12 hours caused by a stab in her abdomen and a cut in her throat. A knife was found in the room covered with blood. On the trial for murder the jury brought in the verdict of "guilty of murder, with a strong recommendation for mercy owing to temporary insanity." Accused was sentenced to be hanged.

Held, on appeal, reversing the conviction by FARRIS, C.J.S.C., that from the wording of the verdict it is impossible to say what the jury meant and there should be a new trial.

Held, further, that the jury should have been asked to reconsider their verdict with such further instructions from the trial judge as may have been necessary and directed to bring in a verdict of "guilty" or if they acquitted because of insanity to "find" and "declare" as provided by section 966 of the Criminal Code.

APPEAL by accused from his conviction by FARRIS, C.J.S.C. and the verdict of a jury at the Spring Assize at Vancouver on the 16th of June, 1944, for murder. The accused and the deceased were married on the 22nd of October, 1943, and went to live in a boarding-house kept by a Mrs. Taylor at 66 West 17th Avenue in Vancouver. The rooming-house is a two-story building with a basement and the Logans occupied the north-east front room of the second story. The deceased had lived in the Taylor residence for about a month previous to her marriage and was 34 years old. On the evening before the fatality a nurse, a Miss Powell, a friend of the deceased, had dinner with the Logans and after dinner the three went to a theatre. Nothing unusual happened during the visit to the theatre and afterwards Miss Powell went home and the Logans arrived home at about 11 o'clock. At

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about 2 a.m. a crash was heard emanating from the Logan room. Nothing further happened until about 2 o'clock in the afternoon of the same day (the 4th of December) when a Mrs. Perry, who lived in the basement suite of the house, came up to use the telephone when she saw the accused standing on the landing with considerable blood about his person. She told him to go back to bed and she would call a doctor which she did. She then went to the room to see what was wrong and on seeing the condition of the woman in the bed, she immediately called up the police. The police arrived at about 2.30 p.m. They found the accused with a gashed throat and the deceased was in the bed dead. The bed was in great disorder and there was a quantity of blood on the bed clothing. Near the bed was found a butcher knife covered with blood. The deceased came to her death by a stab-wound cutting the sternum and bursting the stomach, cutting the liver and spleen and the instrument lodged in the back-bone. At the trial the jury brought in a verdict of "guilty of murder with a strong recommendation for mercy, owing to temporary insanity." He was sentenced to be hanged.

The appeal was argued at Victoria on the 28th and 29th of September, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Hurley, for appellant: There is the defence of insanity at the time of the commission of the act and secondly, the defence of accident. The verdict is inconsistent and ambiguous. The jury should have been sent back. When 11 years old he had a fall that rendered him unconscious and when 21 years old he was rendered unconscious by a horse falling on him. When he went to bed on the night of the 3rd of December he cut his throat twice and everything went black. An experienced psychiatrist was called who said he was insane and two doctors for the prosecution said he was not insane. Doctor Manchester, an experienced psychiatrist, decided he was sub-normal. Our submission is that this verdict with the recommendation is really a verdict of not guilty on the ground of insanity: see *Rex* v. *Lloyd* (1927), 20 Cr. App. R. 139; *Reg.* v. *Gray* (1891), 17 Cox, C.C. 299. In any case the verdict is ambiguous and should not operate to the prejudice of the appellant: see *Rex* v. *Woodfall* (1770), 5 Burr.

2661. The verdict must be considered as a whole: see *Rex* v. *Charlton* (1911), 6 Cr. App. R. 119. He did not send the jury back: see *Rex* v. *Harding* (1908), 1 Cr. App. R. 219. The learned judge did not point to any evidence upon which the jury might infer accident. While cutting himself, his wife came to his assistance and by accident he might have killed her with the knife. He cut his own throat first.

O'Brian, K.C., for the Crown: The charge was put fairly under section 19 of the Criminal Code. Apart from sanity the jury found murder: see *Rex* v. *Jessamine* (1912), 19 Can. C.C. 214; *Rex* v. *Brockenshire* (1931), 56 Can. C.C. 340. The jury found him guilty of murder and the recommendation cannot be extended to such insanity as would render him incapable of realizing his act. Doctor Dobson says he was 75 per cent. normal. A finding of guilty is not affected by a rider to the verdict: see *Rex* v. *Millward* (1931), 23 Cr. App. R. 119; *Rex* v. *Harding* (1908), 1 Cr. App. R. 219; *Rex* v. *Aldred* (1914), 33 N.Z.L.R. 926. Temporary insanity is not a defence in English law: see *Rex* v. *Crisp* (1912), 7 Cr. App. R. 173; Archbold's Criminal Pleading, Evidence and Practice, 24th Ed., 234. It was never the jury's intention to acquit the prisoner: see *Rex* v. *Charlton* (1911), 6 Cr. App. R. 119. The whole question is what effect you are to give to the recommendations: see *Rex* v. *Lloyd* (1927), 20 Cr. App. R. 139. The only evidence of insanity was given by Dr. Manchester. The accused was perfectly conscious and knew what he was doing when he committed the act. He remembers everything except what happened as to the death of his wife: see Crankshaw's Criminal Code, 5th Ed., 23; Tremeear's Criminal Code, 4th Ed., 92.

Hurley, replied.

Cur. adv. vult.

10th October, 1944.

SLOAN, C.J.B.C.: I agree with my brother ROBERTSON.

O'HALLORAN, J.A.: The jury returned a verdict "guilty of murder, with a strong recommendation for mercy, owing to temporary insanity." It was not referred back to the jury for reconsideration as I think it ought to have been, but was recorded as

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a verdict of guilty. I am in such substantial agreement with my brother ROBERTSON that there is little for me to add.

Counsel for the appellant submitted that the verdict is equivalent to the statutory verdict of "not guilty on account of insanity" within Code section 966. There is much to be said for his argument that the expression "temporary insanity" (not found in the summing-up) may quite easily have been used by the jury to describe a condition of legal insanity existing at the time of the killing, but not at the time of the trial.

Counsel for the Crown respondent submitted ponderable reasons why that argument ought to be rejected. But it is not for an appellate Court to speculate upon what the jury might have meant by interjecting into their verdict an ambiguous expression such as "temporary insanity" undoubtedly is. *Rex* v. *Crisp* (1912), 7 Cr. App. R. 173 is an example of a verdict "guilty but of unconscious mind" which appeared to be one of not guilty, but the jury reconsidered it at the invitation of the judge and returned a verdict of guilty. A death penalty can hardly be upheld if the verdict is not plain and unequivocable. Any reasonable doubt ought to be resolved in favour of the accused *propter favorem vitæ*.

It remains to decide whether we should direct a new trial, or as we were pressed to do by counsel for the appellant, proceed under section 1016, subsection 4 and substitute the statutory verdict of "not guilty on account of insanity." The fundamental issue is the legal insanity of the appellant at the time of the killing. The jury returned what I must regard as an inconclusive verdict, for I find it impossible to say with certainty what the jury really did mean. It could easily reflect an unsuccessful attempt to compromise between conflicting views for and against legal insanity.

There ought to be a new trial in order to secure a conclusive verdict, and I would so direct.

ROBERTSON, J.A.: In June, 1944, the appellant was tried by the learned Chief Justice and a jury for the murder of his wife on or about the 4th of December, 1943. The main defence was that the appellant was insane at the time the crime was com-

mitted. The jury's verdict was "guilty of murder, with a strong recommendation for mercy, owing to temporary insanity." The learned judge received the verdict and sentenced the appellant to hang. The appellant submits, *inter alia,* (1) that the verdict is contradictory, inconsistent and ambiguous, and (2) that it amounts to a verdict of "not guilty by reason of insanity." He asks the Court to quash the sentence and order the appellant to be kept in strict custody under the powers contained in section 1016, subsection 4 of the Code, or alternatively, that there should be a new trial. When we are asked to substitute a verdict under section 1016, subsection 4 "there is a positive duty imposed upon us, the duty namely, of being ourselves satisfied," that although the appellant was guilty of the act charged against him, he was insane at the time the act was done so as not to be responsible according to law for his actions: see *Rex* v. *Lloyd* (1927), 20 Cr. App. R. 139. I am not so satisfied, and therefore I think the Court should not quash the sentence.

In the learned judge's report he said that upon receiving the verdict of the jury, his first thought was that it was inconsistent, but upon consideration he thought it was not ambiguous or inconsistent. I am of the opinion that his first thought was correct and that he should have asked the jury to reconsider their verdict and make it clear what they meant, which is the usual course: see *Rex* v. *Hutchinson* (1911), 7 Cr. App. R. 19; *Rex* v. *Philpot* (1912), *ib.* 140; *Rex* v. *Crisp* (1912), *ib.* 173; *Rex* v. *Hawkes* (1931), 22 Cr. App. R. 172; *Rex* v. *Moore* (1931), 23 Cr. App. R. 138; and Archbold's Criminal Pleading, Evidence and Practice, 31st Ed., 195.

In *Rex* v. *Howell* (1938), 27 Cr. App. R. 5 the facts were that the accused was charged with manslaughter. The jury found him not guilty of manslaughter but guilty of dangerous driving owing to an error of judgment. The trial judge then said to the jury that they had heard his direction and the question was whether he was guilty or not guilty of dangerous driving and the jury said "guilty of dangerous driving."

The Court of Criminal Appeal were of the opinion that the jury really meant that the prisoner was guilty of a mere error of

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judgment and therefore was not guilty; that the jury meant to say (pp. 7-8):

> We know, when we look at the consequences and see the results of the event, that the driving was in fact dangerous, but, so far as the driver is concerned, we impute to him no more than a mere error of judgment.

Under these circumstances the Court thought the verdict of the jury was really free from ambiguity and the accused entitled to be acquitted.

Again in *Rex* v. *Charlton* (1911), 6 Cr. App. R. 119 the jury found a final verdict of guilty with a strong recommendation to mercy, and the foreman, when asked for the grounds of the recommendation, said:

> Our grounds is because there seems so much conflicting evidence and doubt about the case, and the things in one particular,

and in answer to a further question:

> There is various doubts in our minds as to various points of evidence that has been brought forward, that that is the reason we have arrived at it.

The Court of Criminal Appeal were able to say that the jury meant that (pp. 120-1)

> the evidence of appellant, in opposition to some of the witnesses for the prosecution, produced in their minds some doubt as to the small points in which the evidence conflicted, . . . , but on the main question of the prisoner's guilt . . . they had no doubt.

Accordingly they did not interfere with the verdict.

I refer also to *Reg.* v. *Gray* (1891), 17 Cox, C.C. 299. The prisoner was charged with obtaining food and money by false pretences, the false pretence alleged being that the prisoner was a bank clerk and received his salary once a fortnight. The jury found the following verdict (pp. 300-1):

> Guilty of obtaining food and money under false pretences, but whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy.

Upon a case reserved, it was argued in support of the conviction that the verdict was separable, the latter portion of it being merely the reasons given by the jury for their recommendation. It was held that the verdict was not separable and that inasmuch as the latter part of it negatived the intent to defraud, without proof of which the previous portion of the verdict could not have been found, the conviction could not have been supported.

Lord Coleridge, C.J. said at p. 302:

> It is difficult, here, no doubt, to say that if the pretences were false they

could have been otherwise than false to the prisoner's knowledge; but it may be that the jury thought—I do not mean to say that the jury were quite beyond the pale of reasonable beings if they so thought—but it is possible that they may have thought that there was not sufficient evidence that the prisoner knew the pretence was false.

Denman, J. said at p. 302:

If the verdict had been guilty merely, no question could have arisen. But when the jury go beyond the mere verdict of guilty or not guilty and add words, they at once give rise to the question whether their verdict is sufficient.

Matthew, J. said the verdict was inconsistent and therefore could not stand.

These cases show that if the jury, instead of bringing in a verdict of "guilty," bring in a verdict of guilty with additional words added and the Court can be sure what the jury really meant, it may quash or affirm the conviction.

Bearing this in mind, I now proceed to set out what occurred in the case at Bar. As I think there should be a new trial I shall refer to the evidence as little as possible. It appears that the appellant was married on the 22nd of October, 1943, and thereafter lived with his wife in a room in Mrs. Taylor's house in Vancouver. Their relations appear to have been harmonious up until the time they retired on the evening of the 3rd of December, 1943.

About 2 o'clock the next afternoon, Logan appeared on the landing in the house, covered with blood, his throat having been cut. His wife was dead in their bed. Medical evidence showed that she had been dead about 12 hours and that her death had been caused by a stab in her abdomen and a cut in her throat.

Now, as I have said, the main defence was legal insanity. In support of this the appellant called a psychiatrist, Dr. Manchester, who said that in his opinion the appellant was, at the relevant time, suffering from a form of insanity known as schizophrenic, more commonly known as *dementia præcox*. He quoted, and it was his opinion it was a correct statement, from a standard book on psychiatry to show the course of the disease, as follows:

Suddenly without any warning the picture may change at any time so that the patient begins to speak, answer questions, and even gives a detailed account of everything that has occurred. A state of extreme frenzy may alternate with the period of stupor during which the patient behaves with extraordinary impulsiveness and assaults whoever comes into contact with

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him. During this stage he may not only be homicidal but impulsively suicidal. Such episodes of excitement usually come from a clear sky and there are no premonitory symptoms.

He thought that could be an explanation of the conditions that developed in this case and that it was the only explanation he could see of the actions of the accused. Then he said that while the appellant was in this state of "frenzy" he would not "appreciate the nature and quality of his act" and that he would not know at the time while in this state that what he was doing was wrong and finally that "he would not have any conscious intent to do anything."

His opinion was that the appellant was suffering from the type of frenzy which he had mentioned when he stabbed his wife.

Two psychiatrists, Doctors Dobson and Mackay were called by the Crown, in rebuttal. They said that in their opinion the appellant was sane at all material times. Dr. Dobson said that "insanity is a more or less continuous condition; a frenzy is a brief episode" and that a person might be in a state of frenzy and be either insane or sane.

The words "temporary insanity" were not used by the learned judge in his charge or by the psychiatrists.

The verdict of temporary insanity could only refer to the time of the killing.

As was said in *Rex* v. *Woodfall* (1770), 5 Burr. 2661, at p. 2669:

> It is impossible to say, with certainty, "What the jury really did mean." Probably, they had different meanings.

I am unable to say what the jury meant. The jury should have been asked to reconsider their verdict, with such further instructions from the trial judge as may have been necessary, and directed to bring in a verdict of "guilty" or, if they acquitted because of insanity, to "find" and "declare" as provided by section 966.

For these reasons I think the only safe course is to allow the appeal against conviction and to direct a new trial.

Appeal allowed; new trial ordered.

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Feb. 1, 3.

Criminal law—Charge of breaking and entering—Circumstantial evidence—Conviction—Failure to present defence adequately—Appeal.

Where the charge, when considered as a whole, failed in substantial respects to present adequately and fairly to the jury the defence of the accused and the evidence in support thereof, a new trial will be ordered.

APPEAL by accused from his conviction before FARRIS, C.J.S.C. and the verdict of a jury at the Fall Assize at Vancouver on the 7th of October, 1943, on a charge

that at Finn Bay, in the county of Vancouver, Province of British Columbia, on or about the 3rd day of June, in the year of our Lord 1943 . . . unlawfully did break and enter the warehouse of Canadian Fishing Company, there situated, and a quantity of liver cans and about 593 pounds of dog-fish livers of the value of $153.99, the property of the Canadian Fishing Company then and there being found therein, did then and there steal, against the form of the statute in such case made and provided, . . .

The Canadian Fishing Company have a packing-house at Finn Bay, where they purchase liver at that place. There is another little bay there called Second Bay, three-quarters of a mile from Finn Bay and on the evening or night of the 2nd of June, 1943, a boat called the "Annabell," the boat of the accused, was at that time at Second Bay. At said warehouse of the Canadian Fishing Company there were about 596 pounds of dog-fish livers which they had purchased some time during the night. Some time before the following morning somebody broke into the Canadian Fishing Company's premises there, knocked off the padlock and took those livers. About noon the next day accused sold 309 pounds of dog-fish livers at Cape Mudge about 20 miles away and he sold another amount at Quathiaski Cove, which is about the same distance away. Two witnesses, one a fisherman, saw this boat in Second Bay the night before. There was evidence that the livers sold at Cape Mudge and Quathiaski Cove were not fresh caught. Accused was found guilty and sentenced to one year with hard labour. Accused appealed.

The appeal was argued at Victoria on the 1st of February, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Banton, for appellant, on motion for introduction of new evidence not available at the trial: The charge was breaking and

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entering. The padlock on the complainant's premises was broken during the night. This was a floating cannery.

Wismer, K.C., for the Crown: Five hundred and ninety-six pounds of dog-fish livers were taken; they were three or four days old. The defence is that they had fresh-caught fish from 10 p.m. to 4 in the morning. The evidence is inconsistent.

SLOAN, J.A.: Question of new evidence reserved.

Banton, on the merits: Deterioration of livers is different depending whether it is on the ice, in the sun or in the hold. They say it was unusual to catch so many in two days, but two-thirds of them were caught the first day. The fresh evidence applied for applies to the question of time.

Wismer: The 596 pounds of livers showed the majority of the fish were large and net-caught. They are from four to five days old when you find many broken livers. It is not a case within section 1014 of the Criminal Code. On the duty of the judge in summing-up see *Rex v. West* (1925), 44 Can. C.C. 109. No objection was taken to the charge: see *Melyniuk and Humeniuk* v. *Regem* (1930), 58 Can. C.C. 106. The learned judge put the case fully to the jury.

Banton, replied.

Cur. adv. vult.

3rd February, 1944.

SLOAN, J.A.: The appellant does not make any attack on the charge of the learned trial judge in point of law alone, but does complain that the facts were not adequately and properly dealt with therein by him.

A perusal of the charge as a whole, considered in the light of the evidence, satisfies me that the learned trial judge, having repeatedly told the jury they were the sole judges of the facts, left the relevant issues for their decision with a sufficient and proper direction in that behalf.

I would therefore dismiss the appeal.

O'HALLORAN, J.A.: The appellant was convicted in October at the Vancouver Assizes of breaking and entering the warehouse of Canadian Fishing Company at Finn Bay and stealing therefrom a number of liver cans and 593 pounds of dog-fish livers.

Counsel for the appellant took several objections to the learned judge's charge to the jury. I confine myself to two aspects of that charge (after having considered it as a whole in the light of the facts), since they are enough in my judgment, with respect, to constitute a substantial miscarriage of justice within the meaning of section 1014 of the Code, and consequently to justify a new trial. I express no opinion upon other objections to the charge.

The prosecution evidence was entirely circumstantial. There was no evidence identifying the liver cans, or identifying the livers sold by the appellant with the livers stolen from the Canadian Fishing Company. As I read the record, it ought to have become apparent as the case unfolded itself, that without evidence that the quantity of livers sold by the appellant could have been "net-caught" as distinguished from "line-caught," there was missing an essential link in the circumstantial chain of incidents which embraced the appellant's proximity to Finn Bay, age of livers sold, ability to catch that quantity in the time, quantity sold, and other happenings upon which the prosecution relied to establish guilt.

Reference to some of the evidence cannot be escaped. But as a new trial has been directed, I shall not particularize more than can be avoided. The prosecution witness Silva in charge of the warehouse which was broken into, testified that all the stolen livers were large. He explained that by saying that net-caught dog-fish are usually larger than those which are line-caught. The appellant testified that there was only one size of mesh net, and that a 7-inch mesh net would catch the larger dog-fish, while the smaller fish would go through the net. He also explained that the bigger dog-fish may also be caught by line. From the evidence of Silva and the appellant read together there was but one reasonable implication, *viz.*, that large livers come mostly from dog-fish caught in a net, whereas small livers come entirely from dog-fish caught by line, since the latter are too small to be caught in the 7-inch mesh net.

Once it appeared that all the stolen livers were large, as Silva testified, the only reasonable hypothesis was that they were mostly net-caught. But the appellant's evidence that all his

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livers were line-caught, carried a corresponding reasonable hypothesis that they were mostly small. The latter hypothesis is supported by evidence. For the appellant testified, corroborated by the prosecution witness Idiens, that six cans (almost half the total) were quite small for the most part. The appellant testified the remaining eight cans were both large and small. There was therefore clear-cut evidence, for the prosecution, that all the stolen livers were large and therefore mostly net-caught, and for the defence, that a large quantity of the livers sold, certainly approximating one-half, if not more, were small, and therefore not net-caught.

But unfortunately the learned judge did not put that aspect of the defence to the jury. He charged the jury (the relevant portion of the charge is cited later) and emphasized it by repeating it, that no evidence had been adduced to show whether the livers sold by the accused-appellant could or could not have come from the net-caught dog-fish. This was manifest error, since it overlooked the real point in the evidence of Silva and of the appellant to which I have referred. The learned judge further charged the jury that if the livers sold by the appellant could have been caught in a net "then the question of 'large' or 'small' means nothing." No doubt this observation was the natural consequence of misconceiving the effect of the evidence which I have mentioned, for it betrayed a misappreciation of the true nature and real weight of a defence which might easily be decisive of the case.

In view of the foregoing analysis the only conclusion open to me is that the trial judge omitted to place before the jury essential evidence upon a vital branch of the defence. It was a failure to bring home to the jury with full effect considerations weighing strongly in the accused's favour, *vide* Sir Lyman P. Duff, C.J. in *Markadonis* v. *Regem*, [1935] S.C.R. 657, at p. 662; [1935] 3 D.L.R. 424, at p. 425; 64 Can. C.C. 41, at p. 42. In *Rex* v. *Krawchuk*, [1941] 2 D.L.R. 353; 75 Can. C.C. 219, Kerwin, J. (with whom Taschereau, J. agreed) said in part at p. 376, D.L.R.; p. 223, Can. C.C.:

> A trial Judge need not refer to every piece of evidence but to omit to mention the only evidence upon one branch of the defence is an omission to place that defence before the tribunal of fact.

Crocket, J. to the same effect at p. 375, D.L.R., p. 222 Can. C.C., and also *Rex* v. *Raney* (1942), 29 Cr. App. R. 14, at p. 17.

No doubt each judge should be left to sum up a case to the jury in his own way, so long as he does not misdirect the jury in law or in fact. But that does not absolve him from presenting to the jury the material evidence related to the case for the prosecution and the defence respectively, and from doing so in a manner which will enable the jury to appreciate its full significance as related to the essential questions of fact upon which guilt depends, *vide Rex* v. *McKenzie* (1932), 58 Can. C.C. 106, at p. 115; *Rex* v. *Nicholson* (1927), 39 B.C. 264, at p. 270; 49 Can. C.C. 228; *Rex* v. *George* (1936), 51 B.C. 81, at pp. 93-5; 66 Can. C.C. 365, at pp. 373-5; *Rex* v. *Krawchuk* (1940), 56 B.C. 7, at pp. 11 and 15; [1941] 2 D.L.R. 353, at pp. 354 and 358; 75 Can. C.C. 16, at pp. 18 and 22, and in the Supreme Court of Canada as cited *supra* and *Rex* v. *Hughes, Petryk, Billamy and Berrigan,* 57 B.C. 521, at pp. 541-2; [1942] 3 D.L.R. 391, at p. 404; 75 Can. C.C. 1, at pp. 15-6.

But in my view there is another fatal aspect to this portion of the charge. For even if it were correct as the learned judge thought it was, that there was no evidence that the livers sold by the appellant could or could not have been net-caught, then in the light of Silva's evidence that the stolen livers were all large and mostly net-caught, he ought to have instructed the jury of the *onus* resting on the prosecution to show that the livers appellant sold could have been net-caught. But instead of doing so he instructed the jury upon the "weakness in the defendant's position" owing to this alleged lack of evidence, and commented upon the failure of defence counsel to cross-examine prosecution witnesses upon whether the livers the appellant sold could or could not have been net-caught.

It appears with respect that the learned judge unwittingly allowed himself to apply a test of guilt foreign to that permitted in a criminal case. The reference to "the defendant's position," as if the accused were a defendant in a civil case, lends additional colour to the present criticism of this portion of the charge. The *onus* was on the prosecution to prove with practical certainty, that the livers which the appellant sold could come from net-

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caught dog-fish. If the prosecution did not do so, there was no *onus* upon the defence to prove they came from dog-fish too small to be net-caught.

The *onus* of proving the guilt of the accused rests on the prosecution to the very end of the case, *cf. Woolmington* v. *Director of Public Prosecutions* (1935), 104 L.J.K.B. 433, at pp. 439-40, and this is not weakened by anything said in *Mancini* v. *Director of Public Prosecutions* (1941), 28 Cr. App. R. 65. The jury might easily have been misled by the judge's language into the impression, that there was a burden resting on the accused to prove his innocence by showing the livers he sold were not net-caught.

In a civil action, the plaintiff is said to have made out a *prima-facie* case 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, *vide Cooper* v. *Slade* (1858), 6 H.L. Cas. 746; 10 E.R. 1488, Willes, J. in his opinion to the Lords at p. 1498, and *Rex* v. *Carr-Braint,* [1943] 2 All E.R. 156.

But in a criminal prosecution, as the late Chief Justice MARTIN often remarked, there is no such thing as a *prima-facie* case as that term is understood by civil lawyers. Before it may be said there is evidence upon which a jury may convict, the prosecution must advance beyond the stage of greater probability which suffices in a civil case, and have adduced evidence which is capable of compelling practical certainty of guilt: *vide* Pollock, C.B., quoted in *Reg.* v. *Kohl* (1865), 4 F. & F. 930 n.; 176 E.R. 854. That is to say, evidence of guilt which, to the legal mind of the judge envisioning it as having been submitted to the jury and accepted by them, would not merely be consistent with guilt, but would necessarily exclude any reasonable hypothesis of innocence, *cf. Clark* v. *Regem* (1921), 61 S.C.R. 608, Duff, J. at pp. 616-8; 59 D.L.R. 121, at p. 126; 35 Can. C.C. 261, at p. 267: and Anglin, J. at pp. 626-7 S.C.R.; p. 274 D.L.R. and pp. 133-4 Can. C.C.

Subjoined is that portion of the learned judge's charge which has occasioned the foregoing review:

Now counsel for the defence, and I think it is just as well to deal with that point at this moment—counsel for the defence has made a great deal of the fact that these large livers must have been caught in a net, and that is the evidence, and he has given you his recollection of the evidence and he is probably correct in that, that the evidence of the witness Silva was that the livers were large and net-caught. The weakness, if I may say so, in the defendant's position in regard to the large and small livers is this, that so far as I can recollect, and it is for you, gentlemen of the jury, to consider and use your own recollection that no evidence was given showing what a large liver was and a small liver was, and what livers might have been caught in a net or might not have been caught in a net, and there was no evidence adduced or questions asked by defence counsel of witnesses for the Crown whether or not the livers found or sold by the accused on the morning in question could have been caught in a net. That question was not asked. It was never asked whether or not those livers could have been caught in a net. If they could have been caught in a net, then the question of "large" or "small" means nothing, because it is only a relative term; they might be in some person's view large, and another person's small. The real importance of that, according to my view, is that the livers were so small that they could not have been caught in a net. As I say my recollection is that there was no evidence of that at all, or no question directed to that particular point.

In my judgment the charge when considered as a whole, failed in substantial respects to present adequately and fairly to the jury the defence of the accused and the evidence in support thereof. As I must regard it, the actual direction to the jury disabled them from reaching a true conclusion upon the matters which required their decision. I would direct a new trial and allow the appeal accordingly.

ROBERTSON, J.A.: With all respect, I am of the opinion that the appeal should be allowed and a new trial ordered. The main ground upon which I would allow the appeal is that I think the learned Chief Justice was mistaken when he said that no evidence was given; and that his recollection was wrong when he said that "there was no evidence given of that at all." I think there was evidence on these points. See *Rex* v. *Dawkins*. *Rex* v. *Toone* (1942), 28 Cr. App. R. 151 and *Rex* v. *Savidge* (1911), 7 Cr. App. R. 17.

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

S. C.
1944
May 23;
June 26.

DOIG v. B.C. MOTOR TRANSPORTATION LTD.

Negligence—Motor-bus turning corner at an intersection—Pedestrian lane—Pedestrian struck by motor-bus in lane—Evidence—Damages.

On the 19th of November, 1941, the plaintiff was walking easterly on the south side of Hastings Street in Vancouver and approaching its intersection with Carrall Street. At the same time the defendant's motor-bus was being driven easterly on Hastings and approaching said intersection intending to turn south on Carrall Street. The motor-bus stopped at the intersection to wait for the traffic light to change. When the light changed, the driver sounded his horn and turned to his right (south) around the corner into Carrall Street. As the motor-bus reached the pedestrian lane (going east and west on the south side of the intersection) the plaintiff stepped off the kerb and when about three feet off the kerb was struck by the right front of the motor-bus and thrown to the ground, the right front wheel passing over his leg. There was conflict of evidence as to whether the plaintiff was struck by the front of the car or whether he walked blindly into the car at its centre, but it was found he was struck by the front of the car, as the car stopped before the rear wheel reached him.

Held, that the accident was the result of the combined negligence of the plaintiff and the motor-bus driver. The plaintiff stepped blindly off the kerb into the path of the oncoming and plainly visible vehicle. The motor-bus driver failed to see him. They were equally to blame for the accident and the defendant must be held liable for one-half the damage suffered by the plaintiff.

ACTION for damages resulting from the plaintiff being struck by a motor-omnibus, owned by the defendant, at the south-west corner of the intersection of Hastings and Carrall Streets in the city of Vancouver. The facts are sufficiently set out in the head-note and reasons for judgment. Tried by WILSON, J. at Vancouver on the 23rd of May, 1944.

E. A. Burnett, for plaintiff.
Tysoe, for defendant.

Cur. adv. vult.

26th June, 1944.

WILSON, J.: On November 19th, 1941, the plaintiff was struck by a motor-omnibus owned by the defendant at the south-west corner of the intersection of Hastings and Carrall Streets, in Vancouver. He suffered serious injury.

The plaintiff was walking east on the sidewalk on the south side of Hastings Street. The accident occurred in the pedestrian lane which runs from west to east across Carrall Street at its intersection with Hastings. The omnibus, having come east on Hastings Street to the corner of Carrall, had turned south into Carrall and was crossing the pedestrian lane at the time of the accident.

The plaintiff at the time of the accident was about three feet east of the kerb on the west side of Carrall Street and almost at the south boundary of the pedestrian lane.

I find that the omnibus coming from the west on Hastings had stopped at the Carrall Street intersection to wait for the traffic light, which was red, to change. When the light changed to green the driver sounded his horn and started around the corner into Carrall Street. He must have done this very quickly, as none of the pedestrians waiting on the west kerb to cross Carrall Street started into the pedestrian lane before the omnibus arrived there. Presumably the sound of the horn restrained them. The omnibus had entered into the pedestrian lane before the plaintiff did, and the plaintiff was the only pedestrian to enter into the lane from the west until after the omnibus had passed.

The plaintiff says that he also had waited at the south-west corner of Carrall and Hastings until the red light changed to green, that he then stepped into the pedestrian lane across Carrall and was struck by the omnibus, after which he remembers nothing. He says he did not hear or see the omnibus.

Sergeant Major Haines, a witness for the plaintiff, was standing at the south-west corner of Carrall and Hastings at the time of the accident waiting for the green light so he could cross Carrall. When the light changed he heard the omnibus horn sound and saw the omnibus come around the corner and into the pedestrian lane. Just then the plaintiff passed him on his right, stepped into the pedestrian lane and came into contact with the right front of the omnibus. He was thrown to the ground, the right front wheel of the omnibus passed over his leg, and the bus came to a stop at a time when its right rear wheel was a few feet from the plaintiff.

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The driver of the omnibus did not see the plaintiff until after the accident. He first knew there had been an accident from passengers who screamed at him to stop.

Two passengers, both of whom were sitting in a central position on the right side of the omnibus, saw the accident. They say that the plaintiff walked blindly into the side of the omnibus at about its centre. This evidence is corroborated by another witness who was standing on the west Carrall Street sidewalk some six feet south of the Hastings Street intersection. He also relates that the plaintiff came into contact with the omnibus at about its centre.

After consideration, I have concluded that these three witnesses, the two passengers and the sidewalk observer, are wrong in placing the centre of the omnibus as the point of impact and that Haines was right in stating that the plaintiff was struck by the right front of the bus, about where its right head-light is located. Haines was an excellent witness and, since he was only a few feet from the plaintiff at the time of the accident, was in the best position to observe. He was the first man to reach the plaintiff after the accident, which confirms his nearness. He says the front wheel of the bus passed over the plaintiff's left leg. It is difficult for me to understand how the plaintiff could have sustained the injuries he did sustain in any other manner. The omnibus was going not more than five miles per hour. There would be no great impact if the plaintiff walked into the side of it. His leg was so badly fractured that a bone graft was necessary and the skin on his shin has not yet healed, despite a skin graft. The nature of the injury is consistent with Haines' story that the omnibus ran over the plaintiff's leg and for that reason, combined with my own belief in Haines' truthfulness, powers of observation and position to observe, I accept his story as correct.

This being the case, I find that the plaintiff was struck by the right front of the omnibus. Therefore I must hold that the driver, who did not see him, was not keeping a proper look-out. In view of the peculiarly hazardous nature of the manœuvre he was executing, perhaps the most perilous a motorist can carry out, he should have kept a meticulous look-out.

I do not accept the plaintiff's story that he was on the kerb prior to the accident waiting for the light to change. I think that, as related by Haines, he came from behind the people standing at the kerb and stepped into the intersection. I think he had observed the green light but had not heard the omnibus which must have been well into the pedestrian strip, probably eight feet into it, when the plaintiff left the kerb. The witnesses are unanimous in stating that he had his head down and was not looking. He did not see the omnibus, which was plainly visible and therefore he, like the driver of the omnibus, was not keeping a proper look-out, and cannot be held blameless for the accident which ensued.

Under a bylaw of the city of Vancouver the plaintiff, as a pedestrian, had the right of way over the defendant's motor-vehicle on this intersection and under the circumstances related. It was suggested to me by counsel for the defendant that this right of way might be displaced by a motor-vehicle which had made, as this one had, a substantial entry into the pedestrian strip before the pedestrian entered the strip. I do not think this is good law. I do think, however, that no regulation conferring a right of way can relieve a person of the duty of keeping a proper look-out. It is always negligence to fail to see what can plainly be seen.

It appears to me that this accident was the result of the combined negligence of the plaintiff and the omnibus-driver. The plaintiff stepped blindly off the kerb into the path of the oncoming and plainly visible vehicle. The omnibus-driver failed to see him. I think they are equally to blame for the accident and that the defendant must be held liable for one-half the damage suffered by the plaintiff.

Costs will be apportioned as set out in section 4 of the Contributory Negligence Act.

Special damages are allowed as follows: Hospital expenses $1,254.90; Dr. Neilson $500.

The plaintiff has had a long and painful hospital confinement, has suffered entire loss of normal earnings, admittedly not great, for two-and-a-half years, and a permanently open and unhealed

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sore on his leg in addition to a permanent and awkward limp, which will, since he is a labourer, seriously affect his future earning capacity. I fix general damages at $5,000.

Judgment accordingly.

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In Chambers
1944
July 25, 27.

LEVI AND LEVI v. MACDOUGALL *ET AL.*

Practice—Application for leave to appeal to Supreme Court of Canada—Approval of security—Notice of appeal out of time—Application to extend time—R.S.C. 1927, Cap. 35, Secs. 39 (a), 41, 64, 66, 68 and 70.

Judgment of the Court of Appeal was pronounced on April 26th, 1944, and entered May 8th, 1944. Notice of appeal to the Supreme Court of Canada was served July 5th, 1944; $500 security was deposited July 17th, 1944, and the present motion to approve the security and to allow an appeal to the Supreme Court of Canada was launched July 17th, 1944. Section 64 of the Supreme Court Act requires an appeal to be brought within 60 days from the signing or entry or pronouncing of the judgment appealed from.

Held, that as the settling of the judgment gave no difficulty here, the time is properly computed from the date of "pronouncing," namely, April 26th, 1944. The appeal is therefore out of time.

On the application to extend the time to allow an appeal under section 66 of the Supreme Court Act:—

Held, that although section 66 does not in plain language confer jurisdiction upon a judge of the Court appealed from to extend the time for bringing an appeal, it does give power to "allow an appeal although the same is not brought within the time hereinbefore prescribed in that behalf." This must mean the judge may extend the time for bringing the appeal even after the 60 days have expired. It follows that if "special circumstances" exist here, section 66 gives jurisdiction to "allow" the appeal now, although it is out of time, and also all necessary extensions of time are implicitly included. Whether there are "special circumstances" present within section 66 depends upon the "interests of justice" as reflected in the particular case. Having regard to the preparations made for the appeal, as well as when they were made, the *bona-fide* intention to appeal when the right existed, the confusion easy to arise from different rules prevailing in the running of time, in appeals respectively to the Court of Appeal and to the Supreme Court of Canada and the circumstance that the 60 days from the date of entry have not yet expired, it cannot be said that the appellants are now asking for anything so "evidently unjust" that it ought to be refused. The appeal is allowed within the meaning of section 66 and the time is extended within which to bring an appeal now out of time.

MOTION to a judge of the Court of Appeal to settle the security and for leave to appeal to the Supreme Court of Canada. Heard by O'HALLORAN, J.A. in Chambers at Victoria on the 25th of July, 1944.

Tufts, for the motion.
Sheppard, contra.

Cur. adv. vult.

27th July, 1944.

O'HALLORAN, J.A.: This is a motion before me as a Justice of the Court appealed from, under sections 66, 68, and 70 of the Supreme Court Act, Cap. 35, R.S.C. 1927, to approve the security, settle the case and to "allow" an appeal to the Supreme Court of Canada. The action—one by minority shareholders alleging fraud in company affairs—was dismissed at the trial, and an appeal therefrom to the Court of Appeal was also dismissed.

I conclude that my jurisdiction to entertain this motion is conditioned upon the appeal being one of right within section 39 (*a*) of the Supreme Court Act, *supra,* since no motion has been made to the Court of Appeal for special leave under section 41, *cf.* the judgment of the Court of Appeal in *Guenette* v. *British Columbia Electric Ry. Co. Ltd.* [*ante,* p. 242]; [1944] 2 W.W.R. 33. While the affidavit material does not disclose that the amount of the matter in controversy exceeds the sum of $2,000, counsel do not question that an appeal lies of right. Moreover, the Supreme Court of Canada seems to have accepted it as such, when, in this same litigation as reported in [1941] 4 D.L.R. 340, it heard an appeal upon a question of amendment of pleadings. That appeal reached the Supreme Court of Canada without special leave from the Court of Appeal.

Section 64 of the Supreme Court Act requires an appeal to be "brought" within 60 days from the "signing or entry or pronouncing" of the judgment. The judgment of the Court of Appeal was pronounced in Victoria on 26th April and entered at Vancouver on 8th May. The notice of appeal was served 5th July, $500 security was deposited on 17th July, and the

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present motion launched on 17th July. If the time does not run from the entry of the judgment, then the appeal has not been brought within time, and the provision in section 64 that the months of July and August are not to be included in the computation of the time does not help the appellants. Counsel for the respondents submitted the time runs from "pronouncing" of the judgment, and counsel for the appellants being frankly doubtful that he is in time, the motion was argued as one to extend the time by "allowing" the appeal now.

In *Alropa Corporation* v. *Holdcroft et al.*, [1938] O.W.N. 498 Middleton, J.A. (in Chambers) said section 64 is ambiguous, and *cf.* also the recent decision of the Manitoba Court of Appeal in *In re Ferguson Estate (No. 2)*, [1944] 2 W.W.R. 465. In *County of Elgin* v. *Robert* (1905), 36 S.C.R. 27, after an examination of the decisions, it was held by the learned registrar that the time runs from the pronouncing of judgment in all cases except those in which there is an appeal from the registrar's settlement of the minutes, or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly disposed of by the judgment. That decision was approved by the then Chief Justice of Canada (p. 33) following *Martin* v. *Sampson* (1897), 26 S.C.R. 707. The Ontario Court of Appeal applied that construction in *Hyman* v. *Kinkel*, [1938] O.W.N. 135. Since settlement of the judgment gave no difficulty here, I find that the time is properly computed from the date of "pronouncing," *viz.*, 26th April.

The foregoing decision makes the appeal out of time, and occasions an examination of my jurisdiction to extend the time by "allowing" the appeal now. Section 66 does not in plain language confer jurisdiction upon a judge of the Court appealed from, to extend the time for bringing an appeal, but it does give power to

> . . . allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf.

That is to say the judge may "allow" an appeal even though it is not brought within 60 days after the "signing or entry or pronouncing of the judgment." This must mean the judge may extend the time for bringing the appeal even after the 60 days have expired.

If it were not so, how could the judge "allow" an appeal which can no longer be brought? The jurisdiction to "allow" an appeal after time has expired, is not capable of exercise, in my judgment, unless an integral element of that jurisdiction is the power to extend the time for bringing the appeal. The latter is an essential foundation for the exercise of the power given to "allow" the appeal. In *Re Moose Jaw Electric Ry. Co. Street* v. *British American Oil Co. Ltd. et al.*, [1936] S.C.R. 544, the learned registrar, reading sections 67 and 70 with section 64, described an appeal as "brought," when the appellant, within the 60 days, had served a proper notice of appeal, given the security required, and obtained the allowance of the appeal. The Court dismissed an appeal from the registrar's order.

In *Alropa Corporation* v. *Holdcroft et al., supra* (Middleton, J.A. in Chambers), the motion is referred to as one for an order "extending the time for appealing to the Supreme Court of Canada" as well as to approve the security. The jurisdiction of the judge of the Court appealed from to extend the time for bringing the appeal was not questioned, but the motion was refused on other grounds, and *cf.* also *In re Ferguson Estate (No. 2), supra.* In *Re Moose Jaw Electric Ry. Co. Street* v. *British American Oil Co. Ltd. et al., supra,* the present Chief Justice of Canada at p. 549, said that although the security was not approved within the time in section 64, if special circumstances were present the appellant could secure the allowance of the appeal, by applying under section 66 to the Court proposed to be appealed from or any judge thereof. It follows that if special circumstances exist here, section 66 gives jurisdiction to "allow" the appeal now, although it is out of time, and also that all necessary extensions of time are implicitly included, and *cf. Marentette* v. *Stonehouse* (1921), 20 O.W.N. 480.

Affidavits of Sam Levi the plaintiff appellant, his solicitor and his printer were read in favour of the motion. It appears therefrom, that instructions to appeal were given on 7th June, the printing was contracted for on 8th June, the printing commenced on 12th June, and the printed case of approximately 425 pages is now about 70 per cent. completed. The delay until 5th July in giving notice of appeal is ascribed by the solicitor to

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his belief that the time ran from the entry of the judgment and not from its "pronouncing." The affidavits disclose a *bona-fide* intention to appeal while the right of appeal existed, *cf. Smith* v. *Hunt* (1902), 5 O.L.R. 97, and *Leslie* v. *Canadian Credit Corporation Ltd.* (1927), 61 O.L.R. 334.

Are "special circumstances" present within the meaning of section 66? That must depend upon the "interests of justice" as reflected in the particular case, *cf. In re Manchester Economic Building Society* (1883), 24 Ch. D. 488; 53 L.J. Ch. 115. In my opinion, having regard to the preparations made for the appeal, as well as when they were made, the *bona-fide* intention to appeal when the right existed, the confusion easy to arise from different rules prevailing in the running of time in appeals respectively to the Court of Appeal and to the Supreme Court of Canada, and the circumstance that 60 days from the date of entry (which the solicitor mistakenly thought applied) has not yet expired, I am unable to say the appellants are now asking for anything so "evidently unjust" (Bowen, L.J. in the *Manchester* case at p. 503), that it ought to be refused. (It is noted that in the Law Journal report Bowen, L.J. is reported as having said "eminently unjust").

Counsel for the respondents took the bold position that the "interests of justice" require the motion to be dismissed because the appeal cannot succeed, and relied on *Burland* v. *Earle*, [1902] A.C. 83, at p. 93 applied in *Rose* v. *B.C. Refining Co.* (1911), 16 B.C. 215. I must hesitate to accept that submission in the pertinent circumstances. When the matter came before the Court of Appeal on the question of amendment of pleading, *vide* (1941), 56 B.C. 81, the majority of the Court refused to allow an amendment because (p. 101) they were satisfied there was no amendment to the statement of claim the appellants could properly ask for which would enable them to succeed. However, the Supreme Court of Canada in [1941] 4 D.L.R. 340 overruled that view, and directed that the appellants be at liberty to amend and proceed to trial. These proceedings stem from that trial.

The motion is granted. I would allow the appeal within the meaning of section 66, but as in doing so I must extend the time within which to bring an appeal now out of time, I impose $250

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additional security as a term. Security to the amount of $750 is approved accordingly and ordered to be deposited by 11th August next—*cf. Marentette* v. *Stonehouse* (1921), 20 O.W.N. 480.

After argument upon the motion had proceeded for some time counsel for the appellants asked for an adjournment to submit further affidavits. This was granted but upon the term that the appellants should forthwith pay the costs of the motion and the adjourned motion, which were then fixed at $75 by agreement between counsel. The affidavits were filed subsequently and argument upon the motion then concluded.

Motion granted.

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Criminal law—Conviction—Appeal against sentence—Bail—Leave to appeal must first be obtained — Leave to appeal granted — Exceptional or unusual circumstances wanting—Bail refused—Criminal Code, Secs. 115, 1013, Subsec. 2, and 1019.

A prisoner, upon his conviction under section 115 of the Criminal Code and pending the hearing of a motion to the Court of Appeal for leave to appeal against sentence, applied to be admitted to bail. Upon the Court intimating that bail would not be granted unless leave to appeal against sentence was first obtained, counsel for the prisoner obtained an adjournment and then moved under section 1013, subsection 2 for leave to appeal against sentence which was granted. On proceeding with the application for bail:—

Held, that even in an appeal from conviction the granting of bail is conditioned upon the presence of exceptional or unusual circumstances so that in the case of an appeal extending only to severity of sentence and in no wise questioning the conviction, the grounds for granting bail must be more closely restricted. No exceptional or unusual circumstances have been advanced in this case and it is not one in which judicial discretion ought to be exercised in favour of granting bail.

APPLICATION under section 1019 of the Criminal Code to admit a prisoner to bail pending the hearing of a motion to the Court of Appeal for leave to appeal against his sentence. Heard

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by O'HALLORAN, J.A. in Chambers at Victoria on the 23rd of August, 1944.

Moresby, K.C., for the application.
Martin, K.C., contra.

O'HALLORAN, J.A.: An application was made to me as a judge designated under section 1019 of the Criminal Code to admit the prisoner to bail pending the hearing of an existing motion to the Court of Appeal at its next session on 12th September, for leave to appeal against his sentence.

I intimated I would not grant bail in any event, unless leave to appeal against sentence was first obtained as provided in section 1013, subsection 2. Until that leave has been obtained, in my opinion no appeal can exist, and hence none can be "pending," as section 1019 requires before the power to admit to bail may be exercised, and *cf.* the reasoning in *Rex* v. *Guinness* (1939), 54 B.C. 12 (MARTIN, C.J.B.C.). Counsel for the prisoner obtained an adjournment and then moved before me under section 1013, subsection 2 for leave to appeal against sentence, as a preliminary to the motion for bail.

The prisoner was convicted under section 115 of the Code for unlawfully having in his possession an offensive weapon, *viz.*, a club, for a purpose dangerous to the public peace. He was sentenced to six months' imprisonment with hard labour. From the transcript of the evidence at the trial, it appears that when arrested, the prisoner had the club over his shoulder and was one of a milling crowd of two thousand persons some of whom were shouting "We want the merchant marine men."

I was at first inclined to conclude that no adequate reasons had been advanced in favour of granting leave to appeal against sentence, *cf. Rex* v. *Molland* (1937), 52 B.C. 240 (MARTIN, C.J.B.C.). However, consideration of the judgment of the Ontario Court of Appeal in *Rex* v. *Yaskowich et al.* (1938), 70 Can. C.C. 15, makes me doubt if it is wise to follow that first inclination. In the *Yaskowich* case (an appeal from conviction under section 115 in which the sentence was reduced), it appears that there had been an open conflict between two groups (in which it was not shown the appellants had taken part), and that

bad blood still existed between the two groups at the time of the Court of Appeal judgment.

Nevertheless, after "some doubt and hesitation" the sentences of the three appellants were reduced from six months to two weeks. Of course each case must be decided on its own facts. But in view of the apparent comparability of some important circumstances in the two cases, I think it the better exercise of judicial discretion, to grant leave to appeal from sentence, so that when the appeal comes on to be heard the Court of Appeal will be in the position (in which a single judge of the Court is not), to decide whether the sentence ought or ought not to be reduced in the light of the circumstances as they may then be regarded.

The motion for bail was opposed by counsel for the Crown. I cannot accede to the first objection that there is no jurisdiction to grant bail on an appeal against sentence only. The definition of "appellant" in section 1012 (*a*) compels me to hold that "appellant" as employed in section 1019 necessarily includes an appellant against sentence under section 1013, subsection 2. No decision in point was cited. However, the circumstances existing here lead me to sustain the second objection that this is not a case in which judicial discretion ought to be exercised in favour of granting bail.

Even in an appeal from conviction, the granting of bail is conditioned upon the presence of exceptional or unusual circumstances, *cf.* observations of Sir Joseph Chisholm, C.J. of Nova Scotia in *Rex* v. *Henry* (1940), 73 Can. C.C. 347 when citing *Rex* v. *Fitzgerald* (1923), 17 Cr. App. R. 147, *Rex* v. *Davidson* (1937), 20 Cr. App. R. 66, and *Rex* v. *Starkie* (1932), 24 Cr. App. R. 1. In the case of an appeal extending only to severity of sentence and in no wise questioning the conviction, it must be obvious that the grounds for granting bail must be even more closely restricted.

No exceptional or unusual circumstances have been advanced. I may add that the next session of the Court of Appeal is on 12th September, some five weeks after the conviction and not quite three weeks hence. There is no danger of the six-month sentence period elapsing before the appeal may be heard.

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In the result leave to appeal against sentence is granted, but bail is refused.

Application granted in part.

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June 19, 22, 27.

STATE OF NEW YORK v. WILBY (*ALIAS* HUME). (No. 3).

Criminal law—Extradition—Fugitive released from custody—Rearrest under original warrant in Court house—Habeas corpus—R.S.C. 1927, Cap. 37.

By warrant of a county court judge sitting as commissioner under the Extradition Act, a fugitive was committed into the custody of the keeper of the city police lock-up for surrender in due course to the State of New York. Pursuant to an order of surrender issued by the Minister of Justice directed to said keeper the fugitive was delivered by the keeper to the officers of the State of New York. On *habeas-corpus* proceedings, it was held that the order of the Minister was a nullity with the result that he was released from custody. He was thereupon forthwith apprehended in the Court house under the original warrant. On further application by way of *habeas corpus*, it was held that the fugitive could be again taken into custody on the original warrant on which he was held prior to delivery, and the subsequent arrest and present detention is legal.

APPLICATION by way of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by COADY, J. in Chambers at Vancouver on the 19th and 22nd of June, 1944.

Wismer, K.C., and *Haldane*, for the application.
C. L. Harrison, contra.

Cur. adv. vult.

27th June, 1944.

COADY, J.: This is an application by way of *habeas corpus* by Ralph M. Wilby who was on April 11th, 1944, by warrant of SHANDLEY, Co. J. sitting as commissioner under the Extradition Act, R.S.C. 1927, Cap. 37, duly committed into the custody of the keeper of the city police lock-up at Victoria, B.C., for surrender in due course to the State of New York.

Wilby applied for a writ of *habeas corpus* within the time

limited by the Act, and this came on for hearing on May 4th, 1944, before the Chief Justice of this Court, when the writ was discharged. This judgment was subsequently confirmed by the Court of Appeal [*ante*, p. 370]; [1944] 2 W.W.R. 356. Pursuant to an order of surrender issued by the Minister of Justice, dated April 27th, 1944, directed to the said keeper, Wilby was on May 4th, following the hearing of the *habeas-corpus* application, delivered by the keeper to the officers of the State of New York designated to receive him for the purpose of taking him to the foreign jurisdiction to stand his trial.

This order of surrender was then attacked in *habeas-corpus* proceedings taken by Wilby before MACFARLANE, J. who held (affirmed *sub nom. Salayka and Hains* v. *Wilby* [*ante*, p. 407]; [1944] 2 W.W.R. 362) that the order of the Minister was invalid with the result that Wilby was released. He was thereupon forthwith apprehended under the said warrant of SHANDLEY, Co. J. and is still detained thereunder in the custody of the keeper. Application is now made in these proceedings for his release on the ground that his arrest and detention under the said warrant is unlawful.

Counsel for Wilby argues that, since the keeper delivered Wilby to the authorized officers pursuant to and in compliance with the order of the Minister of Justice, this exhausted the force and effect of the warrant of committal under and pursuant to which the keeper held Wilby up to that time, and that the subsequent arrest and detention under that warrant is illegal. This delivery by the keeper, he submits, was a voluntary release of Wilby on the keeper's part, and he could not be legally rearrested under the warrant. He cited in support of his submission *Rex* v. *O'Hearon* (1901), 34 N.S.R. 491; 5 Can. C.C. 531; *Rex* v. *Leadbetter* (1928), 51 Can. C.C. 66; *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 60 L.J.Q.B. 89.

These authorities do not in my opinion support the submission of counsel. The release, it must be noted, was made pursuant to the order of the Minister which the keeper was bound to obey. Can it be said under the circumstances that this was a voluntary abandonment of the arrest or voluntary escape, as the cases describe it? I think not. The order of the Minister pursuant

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to which the prisoner was delivered being a nullity, it seems to me that Wilby could be again taken into custody on the original warrant on which he was held prior to delivery. I must therefore hold the subsequent arrest and present detention legal, and discharge the writ.

Application dismissed.

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Sept. 24, 27, 28; *Nov.* 2.

WILLIAMSON v. SLATER AND SLATER.

Company — Hunting-club—Assets — Accounting — Division of stock—Two actions consolidated—Appeal.

In 1935 the defendant Slater purchased the charter of the New Blackburn Club for $200 and shortly after had the name of the company changed to British Columbia-California Hunting Club Limited. The club owned property on Quesnel Lake, Cariboo. In 1937, Mrs. Slater obtained an option on the Hooker farm for $4,000 which included 160 acres on Quesnel Lake with a 12-room lodge, cabins, barns and a sawmill. Williamson and Slater had been friends for many years and they entered into a verbal agreement that they would operate a hunting-club; that Williamson should pay the purchase price of the Hooker farm and it be transferred to the company; that Slater would transfer 40 acres on Quesnel Lake to the company and Williamson would furnish the company with moneys necessary for operating the club for which he was to receive 2,250 shares in the company. The company functioned for some time until trouble arose through Williamson's son and his friends monopolizing the club lodge, and in May, 1941, Williamson brought action for a *mandamus* to hold a meeting of the company and an accounting and a second action in June, 1942, for further relief. The actions were consolidated and it was held on the trial that Slater owed $1,600 to Williamson for money loaned; that Slater and Williamson were each entitled to 2,500 shares in the company; that all club properties held by the Slaters were held as trustees for the company, including any mortgage, and must be transferred and the first action was dismissed with costs.

Held, on appeal, varying the decision of SIDNEY SMITH, J., that the appeal should be dismissed as regards the $1,600 and the appeal should be allowed as to the mortgage held by Mrs. Slater for $1,300 on the company's automobile. As to the division of the capital stock of the company, the judgment below was varied (MCDONALD, C.J.B.C. and FISHER, J.A. dissenting), that the basic agreement was that Williamson and Slater should each have one-half of the issued share capital of the company, Mrs. Slater to have eight shares out of her husband's half-interest in the stock.

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APPEAL by defendants from the decision of SIDNEY SMITH, J. of the 1st of June, 1943. Two actions were consolidated and ordered to be tried together. In the first action, commenced on the 3rd of May, 1941, the defendants were sued personally and as directors of British Columbia-California Hunting Club Limited. The prayer is for a *mandamus* compelling the defendants to hold a meeting of the shareholders and to lay before the meeting a statement of the income and expense account of the company. The defendants pleaded that the right of action did not lie to the plaintiff but lay in the company only. At a meeting of the company held on March 21st, 1942, Slater produced a financial statement of the affairs of the company which was received and adopted. The second writ was issued June 26th, 1942. The statement of claim claimed: (a) An accounting from Slater of all moneys received from the plaintiff; (b) an order that the said defendant be declared a trustee of plaintiff for all moneys received and all property acquired by the defendants; (c) a declaration that plaintiff is entitled to one-half of the shares of the company; (d) a *mandamus* compelling Slater to convey all property he acquired to him; (e) a declaration that Slater wrongfully transferred 2,258 shares of the company to his wife; (f) a *mandamus* compelling Mrs. Slater to transfer all shares to Mr. Slater; (g) a *mandamus* compelling Slater to transfer to the plaintiff 250 shares of the company; (h) a declaration that one share in the name of J. R. Thompson was wrongly transferred to Mrs. Slater. The judgment of the trial judge was as follows: (a) Against Slater for $1,600, being sums loaned him by the plaintiff; (b) that the plaintiff and Slater are each entitled to 2,500 shares of the company; (c) any company property held by the defendants is held as trustee for the company and (d) the first action is dismissed with costs up to the time of consolidation.

The plaintiff and Slater had been friends for many years prior to the first action and various financial transactions took place between them. The plaintiff claimed there was owing to him $300 on these transactions, which is included in the $1,600 judgment. Early in 1935 Slater purchased the issued share capital of the New Blackburn Club Limited for $150 and in July, 1935,

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the club's name was changed to British Columbia-California Hunting Club Limited. In 1936 one Hooker gave an option to Slater to purchase the Hooker farm buildings and equipment for $10,000, but Hooker died soon after and the option expired. In May, 1937, Mrs. Slater obtained an option from Mrs. Hooker on the farm for $4,000. Shortly after a verbal agreement was entered into between the plaintiff and defendants whereby the company should operate a hunting-club in Cariboo district. The option from Mrs. Hooker should be exercised, the plaintiff to pay the purchase price and the property be transferred to the company; Mrs. Slater should transfer the lease of land and cabins at Hobson Creek to the company; Slater should transfer 40 acres at Quesnel Lake to the company. The company would, by purchase, staking or by lease from the Government, acquire lands adjacent to the Hooker farm. The plaintiff would furnish the company with all moneys necessary for the purposes aforesaid and for operating the club and would receive 2,250 shares in the company and the defendant would receive 2,250 shares in the company. The agreement was carried out and the company continued to function. Annual meetings were held from 1938 to 1941, but the plaintiff was not present. Slater avers he sent notice of the meetings to the plaintiff. The returns each contained particulars that the defendants were directors and that the shareholders were plaintiff 2,250 shares, Slater 1 share, Mrs. Slater 2,258 shares. Slater was manager of the company and Slater claims his salary was fixed at $150 per month. This was paid by the plaintiff by cheque for two months, then the salary was reduced to $125 per month and was paid by the plaintiff up to July, 1938. In August, 1938, Slater objected to the plaintiff's son and his family and their friends occupying the club premises to the exclusion of prospective members and insisted the plaintiff should recall them. This precipitated a quarrel between them and plaintiff would not allow any further salary to Slater. The plaintiff claimed the monthly payments were loans to Slater. He then brought the first action as mentioned.

The appeal was argued at Victoria on the 24th, 27th and 28th of September, 1943, before MCDONALD, C.J.B.C., SLOAN, O'HALLORAN, FISHER and ROBERTSON, JJ.A.

Hamilton Read (*Edith L. Paterson,* with him), for appellants: There were two items of $300 each. The first was for various payments made by the plaintiff to Slater from time to time as loans, but plaintiff's evidence as to the items is very unsatisfactory and contradictory. The second $300 was paid by cheque, but Slater contends this was for salary for two months. As to the eight $125 payments, there is conflict in that Slater says these sums were paid to him as salary. These payments were stopped in August, 1938, when they had a row over the plaintiff's son and family using the club premises. No claim was made for this money until the writ was issued some four years afterwards. The plaintiff says he did not know that Amy Slater was interested in the club, or that she had any shares until 1941. He signed the history and particulars of the company without reading it or having it read to him. In the early part of 1941, when he found Amy Slater had more shares than himself, he said he saw he was "stung" and he immediately saw his lawyer. He says it was understood that Mrs. Slater was to have no shares, but it must be presumed the solicitors carried out their instructions. He states he paid $164 for acquiring a charter in 1935 or 1936, but the company was not formed until 1937. Slater says he never borrowed any money from the plaintiff and all their transactions were settled in 1937. Slater says the $300 promissory note was given at the request of the plaintiff for book purposes and there was no claim for this money until trouble arose between them. The plaintiff never took promissory notes for the $125 payments. Slater's evidence is consistent with the documentary evidence. The plaintiff admitted that Mrs. Slater had one piece of property in her name. The appeal is a rehearing and the Court may exercise its jurisdiction when satisfied that the Court below has erred on a question of fact: see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243, at p. 256; *S.S. Hontestroom* v. *S.S. Sagaporack,* [1927] A.C. 37, at pp. 47 and 49-50; *Galdeira* v. *Gray,* [1936] 1 All E.R. 540; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.,* [1936] A.C. 206; *Lawrence* v. *Tew,* [1939] 3 D.L.R. 273; *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462; *L.* v. *L.,* [1943] 2

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W.W.R. 308, at pp. 310-11. The defendants are entitled to the costs of first action to finality.

Castillou, K.C., for respondent: The learned trial judge accepted the evidence of the plaintiff and his son and refused to accept Slater's evidence and the evidence of Mr. *McKay*, the plaintiff's solicitor was accepted. The appellant received his costs up to consolidation, but no costs in respect to the first action were incurred after consolidation. After consolidation no relief was asked for by the respondent in respect of the first action. The costs were in the discretion of the trial judge. As to the personal judgment against Slater, the trial judge accepted the plaintiff's evidence and his son's. This is corroborated by the cheques. The evidence shows clearly that the plaintiff and Slater only were to hold the shares equally. If the defendants hold property of the company it is to be transferred to the company. The shareholders may sue the directors without adding the company: see *Cockburn* v. *Newbridge Sanitary Steam Laundry Co., Ltd.*, [1915] 1 I.R. 237, at p. 249; English and Empire Digest, Vol. 9, p. 666, note g; *Robinson* v. *Imroth*, [1917] W.L.D. 159; *Jehangir Rastamji Modi* v. *Shamji Ladha* (1867), 4 Bom. O.C. 185; *Stone* v. *Theatre Amusement Co.* (1913), 25 W.L.R. 905; (1914), 50 S.C.R. 32; *Hayes* v. *Stirling* (1863), 14 Ir. C.L.R. 277; 10 Ir. Jur. 308.

Read, replied.

Cur. adv. vult.

2nd November, 1943.

MCDONALD, C.J.B.C. (*per curiam*): We are all agreed that George E. Slater's appeal as to $1,600 be dismissed with costs.

With respect to Mrs. Amy Slater, we are all agreed that her appeal must be allowed with respect to the finding below that any mortgage she holds on the assets of the company is held by her as trustee for the company. That finding in our view cannot be sustained.

With respect to the shares in the company held by Mrs. Amy Slater, a division of opinion exists. My brother FISHER and I would allow the appeal in that regard for reasons which we are filing today.

My brothers SLOAN, O'HALLORAN and ROBERTSON are of the

opinion that as between Williamson and George Slater their basic agreement was that they were each to be entitled to half of the issued share capital of the company acquired to carry out their joint venture. Mrs. Slater in their view is entitled to eight shares out of those of her husband's half interest. A difficulty, of course, is, that the present issued share capital consists of 4,509 shares, of which number an equal division is impossible. The Court will hear counsel as to the form of the judgment necessary to effectuate the view of the principle of the division of the shares agreed to by the majority.

In view of the divided success of Mrs. Slater's appeal costs in that respect may also be spoken to.

MCDONALD, C.J.B.C.: In these consolidated actions the learned judge below gave judgment against appellant George E. Slater for $1,600 for money loaned in sums of $300, a further $300, and $1,000. He also stated in general terms that he accepted the evidence of the respondent and rejected the evidence of the appellant George E. Slater. As there was a direct conflict in regard to these alleged loans, I do not think we would be justified in reversing the finding, even though the evidence is not very satisfactory. The rules to guide us in such cases are to be found in *S.S. Hontestroom* v. *S.S. Sagaporack,* [1927] A.C. 37, at pp. 47, 49 and 50, and *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243, at p. 256.

Coming now to the further matters dealt with in the judgment, I have endeavoured to apply these same rules, and here I am constrained to say, and with all respect, that in my view the learned judge fell into error. There are three items to be considered. Firstly, there is a declaration that appellant George E. Slater and respondent are each entitled to 2,500 shares in the British Columbia-California Hunting Club Limited. But this finding is directly in conflict with the documents produced. These documents make it clear beyond peradventure that the shares belonged as to 2,250 shares, to respondent, and as to 2,258 shares, to appellant Amy Slater. I see no purpose in reviewing the evidence. The documents speak for themselves, and in no uncertain terms. On this item I would reverse the judgment.

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Secondly, it is ordered that any property held by either appellant in his or her own name is held as trustee for the company and must be transferred to it; and it is stated that "this includes any mortgage on [company] property held by either appellant." The difficulty here is that there is no allegation and there is no evidence that any such mortgage is not rightfully held by either appellant. There are vague suggestions, of course, but in my view there is nothing to found a judgment upon. This may not be of any great importance, so far as property in general is concerned, except in so far as costs may be affected. But it is of vital importance to appellant Amy Slater in so far as her mortgage for some $1,300 on the company's automobile is concerned. On the pleadings and the evidence her rights in this regard I think have been wrongly interfered with. For all that appears, this mortgage, made some four months after action was brought, was to secure a loan honestly made by this appellant to the company.

Thirdly, there is the question of the costs of the first action. That action was dismissed with costs only up to the date of consolidation. I see no ground for so limiting these costs, and would award to the appellants the costs of the consolidated action except in so far as directly attributable to the claim on which the respondent has succeeded.

I think judgment should be entered on the appeal in accordance with the above findings.

SLOAN, J.A.: I am in agreement with my brothers O'HALLORAN and ROBERTSON that this appeal should be determined in the terms of the memorandum of the Chief Justice filed herein.

O'HALLORAN, J.A.: Supplementing the memorandum of judgment handed down by the Chief Justice on behalf of the Court, it is desirable to add a few observations.

According to the evidence believed by the learned trial judge, the appellant Slater prevailed upon the respondent Williamson to join with him on the basis of an equal interest in the venture to which the evidence refers. It appears that Williamson was not a businessman and had no experience of clubs or companies, and had little if any knowledge of the legal formalities which sur-

round their inception and operation. He seems to have trusted Slater implicitly, relying upon the one thing he knew and understood, *viz.*, the basic agreement existing between them, whereby the two of them went into partnership in the sense that they were equally and jointly interested together.

The learned trial judge did not believe that their agreement included Slater's wife as an additional interested party, let alone in the role of the largest shareholder and director of an incorporated company. Nor did he believe it contemplated that permanent preponderance of voting power in this private company and virtual control thereof, should be vested in Slater and his wife. In the absence of convincing evidence to the contrary, it is difficult to believe that Williamson, who was called on to advance some $12,000 for the operations of this common venture, was not to have at least an equal voice in its control with Slater, who had not invested any money in it whatever, and who seems to have depended for his livelihood largely upon moneys Williamson might advance for what he believed to be the purposes of that common venture.

In substance and reality the venture was a partnership between Williamson and Slater in the guise of a private company. Observations are found in *Loch* v. *John Blackwood, Lim.* (1924), 93 L.J.P.C. 257 and cases there cited, which would indicate that the formation of a private company is not in itself an answer to one partner's allegation that he has been overreached by the other. In my view neither the acquisition of a corporate entity to carry out the venture, nor the mechanical observance of requirements of company law, may be successfully invoked in this case to alter the character of the basic agreement between Williamson and Slater, nor may those things be used as a shield to prevent that basic agreement being now examined to determine the substantial issues between the parties. Use of legal machinery to do an illegal act will not purge its illegality, nor will the indirection of the means rid the act of its illegality, *vide* the Earl of Halsbury in *Daimler Co.* v. *Continental Tyre &c. Co., Lim.* (1916), 85 L.J.K.B. 1333, at p. 1338.

The disposition of the appeals follows the view of the majority

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(SLOAN, O'HALLORAN and ROBERTSON, JJ.A.) outlined in the memorandum of judgment already handed down.

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

ROBERTSON, J.A.: These reasons are supplementary to the memorandum handed down today.

It was not shown that Mrs. Slater was a party to any negotiations with Williamson. With respect, there does not appear to be any reason for depriving her of her shares. Then as to the mortgage held by Mrs. Slater, the allegation in paragraph 10 of the statement of claim is that Slater wrongfully borrowed money on mortgage. There is no claim in paragraph 17 in respect of the mortgage. There is no evidence upon which the allegation can be supported. Mrs. Slater's appeal with regard to these eight shares and the mortgage should be allowed.

There is conflicting evidence with regard to the $1,600. Upon this the learned trial judge believed the plaintiff. His findings should not be disturbed. The respondent is entitled to his costs against Slater.

I now consider the appeal as to the share holdings Williamson and Slater were to have. Williamson's evidence is that he and Slater were to have an equal number of shares. When his counsel appeared before the company he said that the verbal agreement between Slater and Williamson was that they were both to have an equal number of shares, and that now he found that Mrs. Slater had 2,258 shares, Slater one share and Williamson 2,250 shares, giving the Slaters the controlling interest. It is apparent Williamson never contended he was to have half of all the shares in the company. It is clear that this was his understanding because he says that when he received the share certificate for 2,250 shares Slater told him that he had 2,250 shares and there were 500 shares in the treasury, and he did not object.

The fact that Williamson and Slater were to have an equal number of shares is confirmed by the figures of the "History" dated 4th October, 1937.

With respect, I can see no justification for an order that another 500 shares of the company's capital be issued. There could be no consideration to the company for them. It might be

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suggested that it might be taken out of the Slaters' share so that Williamson would have half the entire capital of the company, but this would not be in accordance with their agreement that they were to be equal shareholders.

Decision of Sidney Smith, J. varied.

Solicitors for appellants: *Hamilton Read & Paterson.*
Solicitor for respondent: *Henry Castillou.*

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Sept. 18, 19, 20; *Oct.* 10.

Criminal law—Murder—Appeal from conviction—Evidence—Self-defence—Jury not charged on manslaughter — Misdirection — Substitution of verdict of manslaughter for jury's verdict of murder—Criminal Code, Sec. 1016, Subsec. 2.

Dist
R v. Shannon
59 CCC (2d) 229
B.C.C.A.

The scene of the alleged murder was two adjoining rooms with communicating door (Nos. 108 and 109) in the Graycourt Hotel at Vancouver. One Martin lived in 108 with his mistress Betty Williams and one Rea and his wife in 109. A door led into the hall from room 109. On April 1st, 1944, a drinking-party started in the rooms at about 9.30 p.m. During the evening when Martin, Betty Williams and Rea were in the rooms Rea wanted to take Betty Williams out with him. She was willing to go but Martin objected and later on, while the argument was still going on Barilla (accused) came into the rooms and joined in the argument on Martin's side. Barilla then drew a revolver and fired three shots into the floor trying to frighten Rea. In the meantime, the witnesses Hawley, Tyvand and Ruth Pratt came into the rooms and joined in the drinking. After the shots were fired, Rea went out into the hall. About five minutes later (between 12.30 and 2 o'clock) there was a loud knocking at the door into the hall and the witness Hawley testified that he heard someone call out "Who wants to fight?" Barilla with the revolver in his hand opened the door and stepped back about eight feet. Wallace (deceased) and one Ferguson came in in a threatening manner towards Barilla with Rea and another man behind them. Barilla said "Back up or I will let you have it." Wallace moved on and Barilla shot him in the stomach. Wallace, holding his stomach, said, "I am hurt" and walked out into the hall where he fell near the stairs leading below. He died in the hospital at about 7 o'clock in the morning. Of the seven persons in the rooms at the time of the shooting, only the witness Tyvand testified that Barilla shot Wallace. On the finding of the jury on the trial Barilla was convicted of murder.

Refd to
R v. Basarabas et al
62 CCC (2d) 13
BCCA

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Held, on appeal, varying the conviction by FARRIS, C.J.S.C. (SLOAN, J.A. dissenting and would order a new trial), that a verdict of manslaughter be substituted for that of murder and a sentence of 15 years be imposed with hard labour.

Per O'HALLORAN, J.A.: In his summing-up the learned judge divided the testimony into two heads: (a) the evidence of the witnesses present in the rooms at the time of the killing but who did not see the shooting and (b) the evidence of Tyvand who was the only person who testified he saw the fatal shooting. He instructed the jury upon the second head that if they accepted the evidence of Tyvand "*in toto*" there could be only one verdict, *viz.*, murder. He excluded self-defence entirely from Tyvand's evidence. Manslaughter was referred to in relation to provocation and acquittal was referred to in relation to self-defence, but nowhere in the summing-up did the learned judge direct the jury upon manslaughter in relation to self-defence, *i.e.*, that excessive self-defence would justify a manslaughter verdict, but not acquittal. A verdict of manslaughter should be substituted for that of murder under section 1016, subsection 2 of the Criminal Code.

APPEAL by accused from the conviction by FARRIS, C.J.S.C. and the verdict of a jury at the Spring Assize at Vancouver on the 1st of June, 1944, on a charge of murder. The facts are sufficiently set out in the head-note and in the judgment of O'HALLORAN, J.A.

The appeal was argued at Victoria on the 18th, 19th and 20th of September, 1944, before SLOAN, O'HALLORAN and SIDNEY SMITH, JJ.A.

Henderson, for appellant: The jury was defective in that there were only three men on the jury from the original panel of 43: see *The King* v. *Stewart*, [1932] S.C.R. 612. The alleged shooting took place in the early morning of April 2nd, 1944, in room 109 of the Graycourt Hotel, Vancouver. At the time of the shooting there were seven persons in the room and much liquor had been consumed. One Tyvand was the only one who said the accused shot Wallace, who died in the morning. Tyvand gave different evidence from that which he gave on the preliminary hearing. He admitted that what he said on the first hearing was not true and excused himself by saying he did not want to give evidence and did not want to convict accused: se *Manchuk* v. *Regem*, [1938] S.C.R. 341; *Rex* v. *Harris* (1927), 20 Cr. App. R. 144; *Rex* v. *White* (1922), 17 Cr. App. R. 60. The evidence

of a witness who perjured himself on the preliminary hearing should not be accepted on the trial. The fact that he admitted he committed perjury should have been placed before the jury in the charge: see *Rex* v. *Francis and Barber* (1929), 23 Sask. L.R. 517. The jury were not properly instructed: see Best on Evidence, 12th Ed., 242, par. 263; *Rex* v. *Kadeshevitz et al.*, [1934] O.R. 213. In the last-mentioned case there was ample evidence to convict outside of the witness who perjured himself: see also *Rex* v. *MacDonald,* [1939] 4 D.L.R. 60; *Rex* v. *Dawley* (1943), 58 B.C. 525; *Rex* v. *Bookbinder* (1931), 23 Cr. App. R. 59; *Rex* v. *Carter* (1931), *ib.* 101; *Rex* v. *Rennie* (1939), 55 B.C. 155; *Rex* v. *Forsyth,* [1942] 2 W.W.R. 580. Tyvand's evidence is uncorroborated and is tainted evidence as he perjured himself: see *Rex* v. *Comba,* [1938] O.R. 200. The question of self-defence is of the utmost importance in this case and it was not properly dealt with in the charge.

Campbell, K.C., for the Crown: As to the fairness of the charge, no objection was taken to it on the trial and there is a fair presumption in favour of the charge when no objection is taken: see *Rex* v. *Hill,* [1928] 2 D.L.R. 736; *Rex* v. *Melyniuk and Humeniuk,* [1930] 4 D.L.R. 462; *Rex* v. *Armstrong* (1933), 59 Can. C.C. 172; *Rex* v. *Munroe,* 54 B.C. 481; [1939] 3 W.W.R. 128. The charge was fair and clear. Our submission is that the learned judge was correct in not instructing the jury to disregard the evidence of Tyvand: see *Rex* v. *McIntosh* (1937), 52 B.C. 249, at p. 256; *Rex* v. *Harris* (1927), 20 Cr. App. R. 144; *Rex* v. *Disano,* [1944] 3 D.L.R. 528, at p. 532; *Rex* v. *Joseph,* [1939] 3 D.L.R. 22, at p. 27; *Rex* v. *Hughes, Petryk, Billamy and Berrigan* (1942), 57 B.C. 521. There is nothing in Tyvand's evidence to support self-defence: see sections 353 and 354 of the Criminal Code.

Henderson, replied.

Cur. adv. vult.

10th October, 1944.

SLOAN, C.J.B.C.: In my opinion the verdict of the jury must be set aside for the reasons given by my brother O'HALLORAN with which I am in substantial agreement.

With deference, however, I do not agree that this is a case in

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which we should substitute for the murder verdict one of manslaughter.

In my opinion another jury should be permitted to determine the relevant issues of fact as it is my view of the evidence that a murder verdict might be properly entered upon a second trial.

In consequence and with respect I would allow the appeal and order a new trial.

O'HALLORAN, J.A.: It is my judgment that the verdict of murder cannot stand. Without expressing an opinion upon any other point, it is enough that the defence of self-defence which made a verdict of manslaughter open to the jury as a matter of law, was presented to the jury in a way which prevented them considering or returning that verdict.

In his summing-up to the jury the learned judge virtually divided the testimony into two heads, (a) the evidence of the witnesses present in the rooms at the time of the killing but who did not see the shooting, and (b) the evidence of Tyvand who was the only person who testified he saw the fatal shooting. His evidence as to what occurred immediately before the shooting and during the shooting is quite different from that given by the others. The learned judge instructed the jury upon the second head that if they accepted the evidence of Tyvand *"in toto"* there could only be one verdict, *viz.*, murder. He excluded self-defence entirely from Tyvand's evidence.

The jury were instructed that they could find provocation or self-defence upon the evidence under the first head. Manslaughter was referred to in relation to provocation, and acquittal was referred to in relation to self-defence. But nowhere in the summing-up did the learned judge direct the jury upon manslaughter in relation to self-defence, that is to say, that excessive self-defence would justify a manslaughter verdict but not acquittal. Counsel for the appellant pressed for an acquittal in this Court, as he did in the Court below, but I am satisfied this is not a case in which a jury could properly return a verdict of acquittal. Even if counsel did not press the point now regarded as decisive neither the Court below nor this Court can ignore it, if the evidence supports it, *cf. Rex* v. *Hughes, Petryk, Billamy and*

Berrigan (1942), 57 B.C. 521, at pp. 542-3, and decisions there examined. The importance of the point emerges from a study of the evidence.

Albert James Rea lived with his wife in room 109 Graycourt Hotel at Vancouver. This room had a communicating door with room 108 in which Joseph Frederick Martin lived with his mistress. A drinking-party had started in the two rooms about 9.30 p.m. In the course of the evening Rea wanted Martin's mistress to go out with him. She was willing but Martin objected, and Barilla, who had come in later in the evening, joined in the argument on Martin's side. During the argument Barilla drew a revolver and fired three shots into the floor of room 108, where they then were. Rea testified, as did another witness, that the purpose of the shooting was to frighten Rea. Rea then left the room. Tyvand who had arrived in room 109 about 1 a.m. gave evidence that he heard several shots in the adjoining room 108, and that Rea (whom he did not then know) came through room 109 from 108 on his way out to the hallway. Tyvand seemed to know nothing about the argument to which I have referred, at least he gave no evidence concerning it.

Rea testified he went upstairs to get help ("I wanted help") and persuaded Wallace and Ferguson to come back with him. According to the testimony of several witnesses, Wallace, Ferguson and Rea made considerable noise in the hallway and came with a rush into room 109 where Barilla then happened to be, and in the course of a general fight which ensued, Wallace was shot in the stomach. Strangely enough no one appears to have seen the shot fired except Tyvand who was then seated in room 109. According to Tyvand, Rea and his two companions made no noise in the hallway and did not burst into the room. On the contrary he testified, there was a knock at room 109 and Barilla, with a gun in his hand went to the door to open it. Barilla must have stepped back immediately before the shooting, for when the shot was fired, Tyvand stated Barilla was eight to ten feet back from the door, and that Wallace and Ferguson were then side by side some four feet in front of him and some three feet inside the room.

According to Tyvand, Barilla with the revolver pointed at

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Wallace four feet away said "Get out or I will let you have it," or "Back up or I will let you have it." When Wallace disregarded that warning and moved forward toward him, Barilla shot him in the stomach. Ferguson brought Barilla down by a flying tackle, and Rea began fighting with Martin in room 108. Upon this evidence of Tyvand who appears to have been the most respectable and sober of the lot, the learned judge instructed the jury toward the end of his summing-up, that if they accepted Tyvand's evidence *in toto,* murder was the only verdict open to them. Given when it was, that direction could not escape exerting a powerful and lasting influence upon the minds of the jury.

But Tyvand knew nothing of the argument between Barilla, Martin and Rea over Martin's mistress, or of Barilla firing three shots into the floor to scare Rea, or of Rea going upstairs to get Wallace and Ferguson to come back with him. Tyvand's evidence gives no clue to the reason for the three men (Rea, Wallace and Ferguson) coming into room 109, or for Barilla meeting them with a pointed revolver and telling them to get out of the room. Entirely apart from anything that Tyvand could tell them, it was clearly open to the jury to conclude that Rea went upstairs to get Wallace and Ferguson or others to come back with him to attack Barilla and Martin in retaliation for Barilla's attempt to frighten him by shooting into the floor and for Martin's refusal to allow his mistress to go out with him, and that Barilla's actions were governed by these circumstances.

Tyvand's evidence has to be related to its background, from which it was open to the jury to conclude that Rea, Wallace and Ferguson came into the room in order to give Barilla and Martin a severe beating, that Barilla knew that was their purpose, and for that reason in self-defence he told them at the point of his gun to get out and fired as he did in self-defence when Wallace advanced upon him. With respect the learned judge ignored this background and the force of his language would easily lead the jury to ignore it also. For in the course of emphasizing that acceptance of Tyvand's evidence demanded a verdict of murder, he said "Where was there any provocation? Where was there any threat?" Evidence of both provocation and threat (and particularly of self-defence which was not then mentioned) is plain in

Tyvand's evidence when it is read with antecedent testimony with which it does not conflict. The jury ought to have been instructed accordingly and told that a verdict of manslaughter on the plea of self-defence was open to them upon Tyvand's evidence related to the antecedent testimony which furnished the real meaning to the acts which Tyvand described.

The jury were not instructed that if they found that firing the revolver as Barilla did was an unnecessarily violent act of self-defence in the circumstances of the attack then launched, that it was open to them to find a verdict of manslaughter. In so far as Tyvand's evidence was concerned the jury were told self-defence was not open. In so far as the evidence of the other witnesses was concerned, self-defence was held out as permitting acquittal but not manslaughter. That consideration of manslaughter is very much *ad rem* in a case of this nature is exemplified by the reasoning found in such decisions (although resting on different facts) as *Meade's and Belt's Case* (1823), 1 Lewin, C.C. 184; *Regina* v. *Smith* (1837), 8 Car. & P. 160; *Regina* v. *Odgers* (1843), 2 M. & Rob. 479 and *Rex* v. *Hussey* (1924), 89 J.P. 28.

For the foregoing reasons, I am of opinion the verdict of murder cannot stand. But Barilla is plainly not entitled to escape any punishment. In 1 East, P.C. it is said at p. 272, to be read in its context:

> . . . for if one come to beat another, or to take his goods, merely as a trespasser; though the owner may justify the beating of him so far as to make him desist; yet if he kill him, it is manslaughter.

This Court has jurisdiction under Code section 1016, subsection 2 to substitute a verdict of manslaughter, and *vide Manchuk* v. *Regem,* [1938] S.C.R. 341, at pp. 349-50. That course seems particularly appropriate here, where an analytical examination of the evidence has been required to explain why the verdict of murder cannot be upheld. It is done frequently in England, *cf. Rex* v. *Cobbett,* [1940] 28 Cr. App. R. 11; *Rex* v. *Roberts,* [1942] 1 All E.R. 187, and *Rex* v. *Prince* (1941), 28 Cr. App. R. 60. It is said the English Court of Criminal Appeal has not jurisdiction to grant a new trial, as we have, but I do not think it is arguable that fact gives the English Court any greater jurisdiction than we have to substitute manslaughter for murder.

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In my opinion we should not shrink from the exercise of the jurisdiction Parliament has conferred upon us in section 1016, subsection 2. Where the circumstances warrant it, as I think they do in this case, instead of directing a new trial and thus compelling the accused again to stand trial for his life, we ought to hold that the interests of justice have been satisfied by one unsuccessful attempt to convict him of murder, and accordingly now substitute a verdict of manslaughter. I am convinced by the evidence that no jury properly instructed and not acting perversely, could reasonably acquit Barilla of manslaughter.

I would substitute a verdict of manslaughter for that of murder and impose a sentence of 15 years' imprisonment with hard labour.

SIDNEY SMITH, J.A.: I agree with my brother O'HALLORAN.

Conviction varied; verdict of manslaughter substituted for that of murder, Sloan, C.J.B.C. dissenting, and would order a new trial.

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May 30, 31; *June* 12.

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Forest Act—Right of way—Notice pursuant to section 54—Compensation—Order appointing arbitrators to determine—Interpretation of Act—Discretion—Appeal—R.S.B.C. 1936, Cap. 102, Secs. 50, 54 and 55; Cap. 241, Secs. 52, 53 and 55—B.C. Stats. 1912, Cap. 17, Sec. 32.

The respondent company, desiring to obtain a right of way over the appellant's lands to carry and transport its timber, served notice on the appellant pursuant to section 54 of the Forest Act and sections 52 and 53 of the Railway Act. The appellant, not having accepted the sum offered, the respondent applied under section 55 of the Railway Act and obtained an order appointing three arbitrators to determine the compensation to be paid for the right of way. On appeal, the appellant submitted that section 50 of the Act does not apply to timber taken from privately-owned lands, and that it is implicit in the Act that the learned judge should decide whether or not the application was reasonable and as the material showed another and better right of way over unoccupied lands, the learned judge should have in his discretion refused the application.

Held, affirming the decision of BIRD, J., that in construing the Act, the history of the legislation is important and in view of its history, there is no reason for cutting down the general language of section 32 of the Forest Act of 1912, nor is there anything ambiguous in the section, which is the same as section 50 of the present Act.

Held, further, as to whether or not the application is reasonable under the circumstances there are two answers: (1) The learned judge was justified on the evidence in coming to the conclusion that the application was reasonable and (2) it was not open to him for if it had been intended to give any such power, the Act would have so provided as it did previous to 1912.

APPEAL by Lily J. Laverock from the order of BIRD, J. of the 23rd of March, 1944, appointing three arbitrators to determine the compensation payable by Kapoor Sawmills Limited to said Lily J. Laverock for the right of way over lot 40 in the Malahat District over a strip of land 40 feet wide for the transportation and carriage of timber and products of the forest and for the taking by Kapoor Sawmills Limited of the said strip of land for use as a right of way under Part VI. of the Forest Act.

The appeal was argued at Vancouver on the 30th and 31st of May, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

C. Ann Sutherland, for appellant: Three arbitrators were appointed in the Court below. There should be a limitation and should apply to Crown lands only: see sections 4 and 5 of the Forest Act. One must always bear in mind the intention of Parliament: see Craies's Statute Law, 4th Ed., 176-8. Words are more or less elastic and the title of the Act is of importance: see *O'Connor* v. *The Nova Scotia Telephone Company* (1893), 22 S.C.R. 276, at p. 292; *Muller* v. *Shibley* (1908), 13 B.C. 343; *Workmen's Compensation Board* v. *The Bathurst Co.*, [1924] S.C.R. 216; *Stephenson* v. *Parkdale Motors* (1924), 55 O.L.R. 680, at p. 682. The whole object of the Act is revenue from timber: see *Kerley* v. *London and Lake Erie Railway and Transportation Co.* (1913), 13 D.L.R. 365; *The King* v. *Lloyd Cameron Williams*, [1943] Ex. C.R. 193; Maxwell on the Interpretation of Statutes, 8th Ed., 156. By section 89 of the Taxation Act they excluded the railway land from Provincial legislation. It was never intended in a compulsory purchase such as this that it can be done without some government authority.

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There is no power under the Act to divert across an established road: see *Webb* v. *The Manchester and Leeds Railway Company* (1839), 4 Myl. & Cr. 116; *Boland* v. *C.N.R.*, [1926] 4 D.L.R. 193, at p. 201; *Flower* v. *London, Brighton, and South Coast Railway Company* (1865), 2 Dr. & Sm. 330. There is another available route across the river that will not interfere with anyone. The learned judge should decide whether the application is reasonable in face of there being another available route.

Donaghy, K.C., for respondent: This is an application under section 50 of the Forest Act followed by section 52 *et seq.* of the Railway Act. The land in question is the property of the appellants and subject to the laws of the Province. The railway is a provincial railway and its lands are subject to provincial laws: see *Wilson* v. *Esquimalt and Nanaimo Ry. Co.*, [1922] 1 A.C. 202. They can give a right of way through her land and give her compensation for it. Sections 8, 9 and 10 of the Highway Act sets out the powers of the Minister to take lands. These are lands that the Province has plenary jurisdiction over and the Minister can expropriate the lands, there being jurisdiction over them under the British North America Act, 1867. The case of *Flower* v. *London, Brighton, and South Coast Railway Company* (1865), 2 Dr. & Sm. 330; 62 E.R. 647 has no application on the facts.

Sutherland, in reply, referred to *Lees* v. *The Toronto and Niagara Power Company* (1906), 6 Can. Ry. Cas. 128.

Cur. adv. vult.

12th June, 1944.

SLOAN, J.A.: I agree with my brother ROBERTSON and for the reasons given by him would dismiss the appeal.

O'HALLORAN, J.A.: In my judgment no ground has been advanced to justify a reversal of the order under appeal.

While I accept the submission of counsel for the appellant that a "rule of reason" is implicit in sections 50 through 55 of the Forest Act, Cap. 102, R.S.B.C. 1936, yet, study of the evidence satisfies me of what was stressed by counsel for the respondent,

viz., that the right of way sought by the respondent is reasonably and necessarily required in the public interest.

When a statute seems to give a particular class almost unrestricted power to override rights and privileges which have been long recognized by the common law, it is my view, that harmony between an objective interpretation of the statute and its practical application to real conditions, forces the conclusion, that under our method of representative government, it was the "intent of the Legislature" that the grant and exercise of those overriding powers are inherently limited by the test of their reasonableness and necessity in the public interest.

I would dismiss the appeal.

ROBERTSON, J.A.: Sections 50, 54 and 55 of the Forest Act, Cap. 102, R.S.B.C. 1936, read as follows:

50. For the carriage and transport of timber and products of the forest, any land may be taken and used for a right-of-way for, or by, or on behalf of any person desiring to transport any timber or product of the forest, without the consent of the owner of such land, or of any person having or claiming any estate, right, title, or interest in, to, or out of such land, subject always to the provisions of this Part. With the consent of the Minister, Crown lands may be taken and used under this Part.

54. Before entering upon any land for use as a right-of-way, the person desiring to obtain the right-of-way shall serve upon the owner of the land a notice of desire to obtain the right-of-way, together with a plan showing the intended location and direction of the desired right-of-way; and in the case of Crown lands, the person desiring to obtain the right-of-way shall, in addition to serving any notice required by this section, obtain the consent of the Minister in writing.

55. Sections 52 to 73 of the "Railway Act" shall, *mutatis mutandis*, apply in respect of the taking of lands by any person for use as a right-of-way under this Part.

The respondent, the Kapoor Lumber Company, being minded to obtain a right of way over the lands of the appellant Miss Laverock, to carry and transport its timber, served on the appellant a notice pursuant to section 54 of the Forest Act and sections 52 and 53 of the Railway Act. As the appellant did not give notice that she accepted the sum offered, the respondent applied for the appointment of an arbitrator, and BIRD, J., before whom the application came, appointed three arbitrators, as he was entitled to do. See section 55 of the Railway Act. The appellant takes two grounds: (1) That the Act does not apply to

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timber taken from privately-owned lands; and (2) that it is implicit in the Act that the learned judge should decide whether or not the application was reasonable and as her material showed another and better right of way over unoccupied lands, the learned judge should have in his discretion refused the application.

Miss *Sutherland* submitted that there must be some limitation as to the general words in section 50 of the Forest Act; that the words "carriage and transport" in the section refer only to the transfer of Crown timber as defined in the Act and cannot therefore refer to the timber in question, which was acquired, and was privately owned, by the Esquimalt & Nanaimo Railway Company for the construction of the Esquimalt & Nanaimo Railway under the circumstances set out in Cap. 14 of 47 Vict., B.C. Stats., and Cap. 6 of 47 Vict., Can. Stats. She submitted alternatively that the section is ambiguous because it is not clear that it applies to timber taken off privately-owned lands, and therefore it is permissible in construing section 50 to look at the title of the Act, which is "An Act respecting Crown Timber and the Conservation and Preservation of Forests."

It seems to me the history of the legislation is most important. See Craies on Statute Law, 4th Ed., 119. The first Forest Act of British Columbia was passed in 1912 (see Cap. 17 of the statutes of that year). Prior to that the provisions with relation to the acquisition of timber lands from the Crown and the right to enter upon private lands for the purpose of transporting timber were contained in the Land Act.

Section 19 of Cap. 24, B.C. Stats. 1906, for the first time gave the right to acquire a right of way. That section provided that any holder of a timber leasehold or of a special timber licence who might desire to secure a right of way across any Crown-granted lands for the purpose of constructing, *inter alia,* a road or roads for use in getting out timber from the limit covered by his lease or licence, might give notice of his intention to apply for authority, and in the event of the owner and the applicant not being able to agree, provision was made for arbitration. The section provided that title obtained by the applicant should only be an easement. Clearly this section did not give the right to

the holder of privately-owned land to acquire a right of way. Section 7 of Cap. 28, B.C. Stats. 1910 substituted a section for section 19 of the 1906 Act. It provided that any holder of a timber leasehold, timber land in fee simple, or of a special timber licence might secure a right of way across any lands for use in getting out timber covered by his lease or licence. Although it will be noticed the right of way was "for use in getting out timber covered by lease or licence" and did not mention "timber land in fee simple," the intention must have been to give a like right to the owner of timber land in fee simple. It provided for notice being given of his intention to apply to the Chief Commissioner and empowered the Chief Commissioner to grant or refuse upon such terms and conditions as the circumstances might warrant; that the title obtained by the applicant should be only an easement; and in the event of the parties being unable to agree as to the amount of compensation, arbitration was to be resorted to. This gave the right to a private owner of land to secure a right of way across any land. Any doubt about this was cleared up by the Act next mentioned.

The Land Act, Cap. 129, R.S.B.C. 1911, Sec. 103, provided that

> Any holder of timber land in fee simple, a timber leasehold, or of a special timber licence who might desire to secure a right-of-way across any lands for . . . use in getting out timber from the limit covered by his grant, lease, or licence [should]—Give (*a.*) . . . notice . . . to the Minister for authority to construct such road

by certain advertisements and should also give notice to the owner of the land. Section 104 empowered the Minister to grant or refuse the application and provided that any title obtained by the applicant should be only an easement.

Then came the Forest Act, Cap. 17 of the statutes of 1912. Section 32 of the 1912 Act is exactly the same as the present section 50 except that the words "of this Act" where they appear in two places in section 32 are not in section 50.

Sections 33, 34 and 35 of the 1912 Act are, to all intents and purposes, practically the same as sections 52, 53 and 54 of Cap. 102.

Section 36 *et seq.* of the 1912 Act contained provisions as to the procedure to be adopted by the person desiring a right of way

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and for the fixing of the compensation by arbitration. These sections do not appear in the present Act. Sections of the Railway Act to the same effect now apply. See section 55 of Cap. 102, *supra*. No power was reserved to the Minister or anyone else in the 1912 Act to refuse or grant the application. The only power given to the Court was in certain circumstances to appoint an arbitrator or arbitrators. No discretion was given to the Court to consider whether or not the application was reasonable. So that since 1912 Ministers have had no discretion to grant or refuse an application. In view then of the history of the legislation I can see no reason for cutting down the general language of section 32. I cannot see anything ambiguous about the section; it seems perfectly clear.

Then, as to the alternative suggestion that it is implicit in the legislation that the Court should consider whether or not the application is reasonable under the circumstances, I think there are two answers: (1) The learned judge was quite justified upon the evidence in coming to the conclusion that the application was reasonable, and (2) I do not think this was open to him for if it had been intended to give any such power, the Act would have so provided, just as it did previous to 1912. The application was made then to the Minister to whom power was given to refuse the application.

For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *C. Ann Sutherland.*
Solicitor for respondent: *Dugald Donaghy.*

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June 15.

Courts — Jurisdiction — Children of Unmarried Parents Act — Complaint against putative father—Whether made within one year from birth—Proof of—R.S.B.C. 1936, Cap. 36, Secs. 7 and 8 (a); Cap. 271, Secs. 14 (1), 27, 28 (1), 35 (1) and 36 (1) and (2).

Summary proceedings are the creature of statute. When a statute expressly provides that certain things must be proven, then they must be proven in an open and fair way. A person charged is entitled to know exactly what he is charged with and that he shall be tried on that charge and upon no subsequent variation of that charge made without his knowledge. The elements the statute require to be proven against him shall be proven in Court with opportunity for cross-examination.

On complainant's charge under the Children of Unmarried Parents Act that the defendant is father of a child born to her on the 9th of December, 1942, out of wedlock, an affiliation order was made against the defendant on the 5th of January, 1944, by a stipendiary magistrate for the county of Yale. On appeal by way of case stated, the said order was set aside. An item submitted in the case stated for decision recites: "[Whether] there was no evidence, . . . , before me [the magistrate] . . . that such a complaint on oath [as mentioned in the previous paragraph, *viz.*, that the respondent had become a mother of the child by Wheeler] was made within one year after the birth of the child." Section 8 (*a*) of said Act reads: "No affiliation order shall be made upon a complaint under this Act unless the complaint is made within one year after the birth of the child." Attached to the case stated is the evidence adduced, the summons, the affiliation order and the original complaint. The original complaint was not produced, read or stated in Court before the magistrate at the trial and in making the affiliation order he treated the original complaint as if it had been before him on the trial, although defendant's counsel did not know he was doing so. The charge on the summons differs from the charge in the original complaint in that it does not contain the date upon which the complaint was made and it was the summons upon which Wheeler appeared, was charged and tried.

Held, on appeal, affirming the decision of SIDNEY SMITH, J. (SLOAN, J.A. dissenting), that nowhere in the evidence adduced on behalf of the complainant nor in the case stated itself does it appear that the complaint was made within one year after the birth of the child. The statute makes this an essential element in deciding whether an affiliation order can be made.

APPEAL by the Crown from the order of SIDNEY SMITH, J. of the 17th of March, 1944, allowing an appeal by way of case stated from the decision of George Wainwright, Esquire, stipendiary magistrate in and for the county of Yale on the complaint of

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Hazel Gertrude Armstrong under the Children of Unmarried Parents Act that one Peter Wheeler was the father of an illegitimate child born to Hazel Gertrude Armstrong of Hedley, B.C., on the 9th of December, 1942. The case stated recited:

There was no evidence, other than the complaint itself, before me at the hearing of this case on the 5th day of January, 1944, that Hazel Gertrude Armstrong had made a complaint on oath to a magistrate as required by section 7, subsection (1) of the "Children of Unmarried Parents Act," and the fact that such complaint was made before me was not made known to the said Peter Wheeler or his counsel on the hearing nor was the said complaint put in evidence as an exhibit or brought to the notice of the accused on the hearing;

There was no evidence, other than the said complaint itself, before me at the said trial that such a complaint was made within one year after the birth of the child pursuant to section 8 (*a*) of the said Act or at all;

On the basis of the evidence adduced before me as aforesaid, I found as follows:

1. That Hazel Gertrude Armstrong was the mother who had been delivered of an illegitimate child pursuant to the definition of "mother" in section 2 of the said Act.

2. That Peter Wheeler was the father of said illegitimate child which was born . . . on the 9th day of December, 1942.

The appeal was argued at Vancouver on the 30th of May, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

H. W. McInnes, for appellant: No reasons for judgment were given on the appeal from the magistrate. By virtue of the complaint and complainant's evidence she resided in Yale county: see *Rex* v. *Zarelli* (1931), 43 B.C. 502; *Rex* v. *Irwin* (1919), 27 B.C. 226. The date of November 29th, 1943, appears on the face of the complaint and the complaint is before the magistrate on the hearing. This is sufficient proof of the complaint being made within one year from the birth of the child: *Rex* v. *Lewis* (1941), 57 B.C. 83; *The Queen* v. *Berry* (1859), 28 L.J.M.C. 86; *The Queen* v. *Fletcher* (1871), 40 L.J.M.C. 123.

Farris, K.C., for respondent: There are two grounds why the appeal should be dismissed: first, there must be jurisdiction territorially. When the magistrate takes the complaint and when he hears the case. The principle is there must be affirmative proof of where the mother resides. There is no proof where the Nickel Plate Mine is and no proof of the residence of the mother or that she resided in Hedley: see 14 Can. Abr. 70 as to

jurisdiction and must be affirmatively proved. Secondly, the complaint must be made within one year after the birth of the child under section 8 (*a*) of the Children of Unmarried Parents Act: see *Rex* v. *Lewis* (1941), 57 B.C. 83. There is no proof that this section has been complied with.

McInnes, replied.

Cur. adv. vult.

15th June, 1944.

SLOAN, J.A.: With deference to the contrary views of my brothers I have reached the conclusion that this appeal should be allowed. The case stated, while complicated in form, may be taken as raising two distinct questions for determination, *i.e.,* (a) whether or not the magistrate could take judicial notice that Hedley is in the county of Yale, and (b) whether or not the magistrate could take judicial notice of a complaint made to him under oath and within the time limited by the Children of Unmarried Parents Act, Cap. 36, R.S.B.C. 1936, and amendments.

It is my view the first question must be answered in the affirmative by reason of the principle enunciated in *Rex* v. *Zarelli* (1931), 43 B.C. 502, and cases of a like character.

With reference to the second question the following statement appears in the case stated:

> There was no evidence, other than the complaint itself, before me at the hearing of this case on the 5th day of January, 1944, that Hazel Gertrude Armstrong had made a complaint on oath to a magistrate as required by section 7, sub-section (1) of the "Children of Unmarried Parents Act," and the fact that such complaint was made before me was not made known to the said Peter Wheeler or his counsel on the hearing nor was the said complaint put in evidence as an exhibit or brought to the notice of the accused on the hearing;
>
> There was no evidence, other than the said complaint itself, before me at the said trial that such a complaint was made within one year after the birth of the child pursuant to section 8 (*a*) of the said Act or at all.

It seems to me in a proceeding of this character when the magistrate himself takes the complaint and it is before him at the trial he may take judicial notice that it was made under oath and within the statutory time period. In my opinion the principle of *Rex* v. *Lewis* (1941), 57 B.C. 83 should be applied to the circumstances herein.

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I would therefore, with respect, answer the second question in the affirmative and allow the appeal.

O'HALLORAN, J.A.: This is an appeal from an order of SIDNEY SMITH, J., as he then was, setting aside an affiliation order made against the respondent Wheeler at Penticton by George Wainwright, Esquire, a stipendiary magistrate in and for the county of Yale. The matter came before the learned judge on appeal by way of a case stated, and the fourth point for decision therein was whether

> there was no evidence, . . . , before me [Magistrate Wainwright] that such a complaint on oath [as mentioned in the last paragraph 3, *viz.*, that the respondent had become a mother of a child by Wheeler] was made within one year after the birth of the child.

In view of the conclusion against the affiliation order which I must reach on this point, it is unnecessary for me to refer to other points in the case stated. Attached to the case stated is the evidence adduced, the summons, the affiliation order, and also the original complaint. Inclusion of the evidence became necessary because the stated questions of law involved consideration of whether there is or is not evidence of the date of the complaint, *cf. Rex* v. *Dubois* (1919), 30 B.C. 394; *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431; and *Rex* v. *McDonnell,* [1935] 1 W.W.R. 175; *cf.* also *Dunham* v. *Bradner* (1934), 48 B.C. 503.

The original complaint is the centre of controversy. It was not produced, read or stated in Court before the magistrate at the trial, and without it there is no reference to the date of the complaint which the statute makes an essential element in deciding whether an affiliation order can be made. The magistrate in making the affiliation order treated the original complaint as if it had been before him on the trial although Wheeler's counsel did not know and had no reason to know that he was doing so.

Under the Children of Unmarried Parents Act, Cap. 36, R.S.B.C. 1936, upon complaint to him on oath, the magistrate may issue a summons requiring the putative father to appear at a time and place stated therein to answer the complaint (section 7 (1)). But under the statute it is to be noted, (1) the complaint on oath need not be in writing; (2) the persons who may make the complaint on oath are defined in section 7 (2); (3) it is pro-

vided in section 8 that "No affiliation order shall be made upon a complaint under this Act" unless the complaint on oath has been made (*inter alia*) "Within one year after the birth of the child;" and (4) by section 13 (1) the provisions of the Summary Convictions Act, Cap. 271, R.S.B.C. 1936 are made applicable except where the statute provides otherwise.

Wheeler was served with a summons under the Children of Unmarried Parents Act, *supra,* dated 29th December, 1943, commanding him to appear on the 5th of January, 1944, to show cause why an affiliation order should not be made against him in that

> . . . complaint has been made before the undersigned, a stipendiary magistrate within the meaning of the above Act. For that you are alleged to be the father of an illegitimate child born to Hazel Gertrude Armstrong of Hedley, B.C. on the 9th day of December, 1942, at Vancouver, B.C. The said Hazel Gertrude Armstrong being a mother within the meaning of the Act.

If Wheeler took that summons to his solicitor, no doubt he would have been advised (1) that it did not disclose the complaint was made, (a) on oath, or (b) by a person section 7 (2) prescribes, and more important, (2) that the summons did not disclose the complaint was made within one year after the birth of the child, but in fact carried a strong inference to the contrary, since it stated the date of birth at 9th December, 1942, while the summons itself was dated three weeks after the year expired, *viz.,* 29th December, 1943.

Wheeler appeared in answer to the summons accompanied by his counsel. The complaint as set forth in the summons was read to him as above quoted, and on the conclusion of the evidence for the complainant, his counsel moved to dismiss on the ground there was no evidence to support the complaint, and rested his defence on that ground. Nowhere in the evidence adduced on behalf of the complainant and attached to the case stated nor in the case stated itself, does it appear that the complaint was made within one year after the birth of the child.

The date of the complaint appears for the first time in the affiliation order as drawn up and signed. Its opening lines read:

> Be it remembered that on the 29th day of November A.D. 1943, complaint was made by Hazel Gertrude Armstrong . . . , before George Wainwright, Esq., . . . Magistrate. . . .

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It is not disputed that the date of the complaint did not emerge in Court at the trial, for it is said in the case stated:

> . . . , and the fact that such complaint was made before me was not made known to the said Peter Wheeler or his counsel on the hearing nor was the said complaint put in evidence as an exhibit or brought to the notice of the accused on the hearing.

It was argued that because the complaint was made to the magistrate who granted the affiliation order, he had the right to treat the original complaint as evidence that it had been made within one year after the birth of the child, in the same way as if evidence thereof had been tendered on oath during the trial and subjected to cross-examination. There are fatal objections to that submission. For it was admittedly done without the knowledge of Wheeler and his counsel. Being left in ignorance that the magistrate had accepted an essential element of affirmative proof in this fashion, Wheeler was denied the opportunity of full answer and defence and was also denied the opportunity of cross-examination, *cf.* section 28 (1) of the Summary Convictions Act, *supra.*

By section 14 (1) of the Summary Convictions Act the magistrate may issue a summons (as he did here), if he is of opinion that a case for doing so is made out by the complaint. The complaint is then set out in the summons. While the trial by section 27, is a trial of the complaint, that means the complaint as set out in the summons and stated to the person charged (see section 35 (1)), unless the original complaint is produced at the trial and the accused is charged therewith by stating it to him. If the charge in the summons as stated to the accused at the trial differs from the charge in the original complaint, then the accused is tried on the charge set out in the summons and not upon the charge in the original complaint. That is what happened here, where the charge in the summons was read to Wheeler, and the original complaint was not produced in Court at the trial.

But in drawing up the affiliation order the magistrate treated the original complaint as if it was the complaint which had been read to Wheeler in Court and upon which he was tried. It must be regarded as an attempt to amend the complaint upon which he was tried outside of Court and after trial and without the

knowledge of the person tried. The charge upon which Wheeler was tried did not disclose that a complaint had been made within the year. And the supporting evidence equally failed to disclose that essential element of proof.

It was submitted that because the original information formed part of his record of the case, the magistrate could look at it, and, behind Wheeler's back so to speak, accept the date of that original complaint as evidence in itself that the complaint was made within one year after the child's birth. *Rex* v. *Lewis* (1941), 57 B.C. 83 does not extend to proof of an evidential fact such as has been made an essential element of proof by section 8 of the Children of Unmarried Parents Act, *supra*. In my view affirmative proof by testimony at the trial subject to cross-examination that the complaint was made within the time specified by section 8 was as vital an element of proof as proof that a child was born. Compare sections 28 (1) and 36 (1) and (2) of the Summary Convictions Act.

In my judgment section 8 of the Children of Unmarried Parents Act, *supra*, reading in relevant part:

> No affiliation order shall be made upon a complaint under this Act unless the complaint is made . . . (*a*.) Within one year after the birth of the child; or . . .

is not an "exception, exemption, proviso, excuse, or qualification," within the meaning of section 30 (1) of the Summary Convictions Act. It is to be observed that the section is expressed in language which makes it an essential element of affirmative proof, without which an affiliation order cannot be made. The word "except" is not used as it is in section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929, as was emphasized by the Appellate Division of Alberta in *Rex* v. *Daniels*, [1942] 1 D.L.R. 199. Nor is section 8 "phrased in the form of an exception" as the Nova Scotia Appellate Court held was the case in the Maximum Prices Regulations under consideration in *Rex* v. *Staviss* (1943), 79 Can. C.C. 105.

But to avoid the danger of too much emphasis on its purely verbal aspect, if the character of section 8 as reflected by the expressed object of the statute is studied, it is found to be without any of the attributes of an exception or qualification. The

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statute does not make the paternity of an illegitimate child an offence in itself, such as was the case in the acts charged in the *Daniels* and *Staviss* decisions. There is nothing for it to qualify or except. On the contrary, the making of the complaint within the year, appears as a distinct and independent ingredient of proof which the section describes in plain language as an essential to the making of an affiliation order. As such it is necessarily affirmative proof, the *onus* whereof may not be cast upon the person charged, but must be assumed by the complainant.

The actual date of the complaint does not appear in the case stated. It could not, because it does not appear in the evidence. Nor does it appear in the summons upon which Wheeler appeared, was charged and tried. Moreover, if Wheeler had been charged in the terms of the original complaint as it is produced to this Court in the appeal book, its date when compared with the date of the issuance of the summons which was delayed until one month later (and after the year had expired), would have invited cross-examination, not only upon that point, but upon other points, some of which are touched on in Paley on Summary Convictions, 9th Ed., 185-6, and *cf.* section 28 (1) of the Summary Convictions Act.

On its face the summons indicated it was out of time. And in the absence of affirmative testimony in Court at the trial and subject to cross-examination, that the complaint was in fact made within the statutory time, the charge ought to have been dismissed. Where, as here, the statute fixes a time, it is imperative to show that the complaint was made within that time. And if that be not shown by positive proof of the date of the complaint, or by express reference in the evidence to a date previously mentioned, the conviction cannot be supported, *cf.* Paley on Summary Convictions, 9th Ed., 319 and *Rex* v. *Woodcock* (1806), 7 East 146; 103 E.R. 56 and *Cathcart* v. *Hardy* (1814), 2 M. & S. 534; 105 E.R. 480. Of course such considerations would not arise if the trial takes place within the statutory time limits, *cf.* section 63 (2) of the Summary Convictions Act.

Summary proceedings are the creature of statute. When a statute expressly provides that certain things must be proven, then they must be proven in an open and fair way. It need

hardly be said that a person charged is entitled to know exactly what he is charged with, and that he shall be tried on that charge and upon no subsequent variation of that charge made without his knowledge; and further that the elements the statute requires to be proven against him shall be proven in Court with opportunity for cross-examination. What occurred in this case was an unfortunate departure from the observance of a fundamental principle. If Wheeler is in fact the father of the child he cannot be proven so by a disregard of the safeguards with which the Legislature has seen fit to surround a person so charged.

Moreover, it is noted that in the affiliation order the complaint is not described as a "complaint on oath" as section 7 (1) of the statute requires, but simply as a "complaint." Without a complaint on oath the magistrate had no jurisdiction. The proceedings of an inferior Court must show jurisdiction on their face, for the jurisdiction cannot be presumed, *cf. In re Nowell and Carlson* (1919), 26 B.C. 459 and *Kennedy* v. *MacKenzie* (1941), 57 B.C. 94. That alone was sufficient to justify quashing the affiliation order.

I would dismiss the appeal.

ROBERTSON, J.A.: Proceedings were taken by the complainant Hazel Gertrude Armstrong against Peter Wheeler under the Children of Unmarried Parents Act. Sections 7 (1) and 8 of the Act provide in part as follows:

> 7. (1.) Upon complaint on oath made to a Magistrate that any woman has become a mother within the meaning of this Act, . . . , the Magistrate may issue a summons requiring the putative father to appear at a time and place . . . to answer the complaint.
>
> 8. No affiliation order shall be made upon a complaint under this Act unless the complaint is made . . .
>
> (*a*.) Within one year after the birth of the child.

The magistrate found against Wheeler who obtained a case stated, which came before SIDNEY SMITH, J. who set aside the affiliation order. The complainant now appeals.

The case stated shows that at the close of the case of the complainant, Wheeler's counsel objected to the magistrate's jurisdiction to hear and determine the case, on the ground that there was no evidence that any complaint mentioned in section 7 (1) had been made. No evidence was called for the defence.

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The case contains this statement of facts: [already set out in the statement and in the judgment of SLOAN, J.A.].

The magistrate should have told counsel when the objection was taken that there was a complaint and that he proposed to use it in evidence, in which case counsel might have asked leave to recall the complainant to cross-examine her upon it. If counsel had been told of the complaint and of the magistrate's intention to use it in evidence at the hearing and did nothing, the complaint might have been admissible as a record of the Court (although I do not so decide), even though there is no provision in the Act (or in the Summary Convictions Act which is applicable to proceedings under the Act (section 13)) for keeping a record or minute of complaints. (*Rex* v. *Lewis* (1941), 57 B.C. 83). But under the circumstances as disclosed in the extract, *supra,* from the case, I am of the opinion that the complaint was not admissible as evidence.

The appeal should be dismissed.

Appeal dismissed, Sloan, J.A. dissenting.

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Sept. 28;
Oct. 10.

REX v. DILLABOUGH.

Criminal law—Robbery with violence—Conviction—Evidence—Cross-examination of accused as to previous complaints that were dismissed—Admissibility—Whether substantial miscarriage of justice—Criminal Code, Sec. 1019.

The accused was convicted on a charge of robbery with violence. On appeal objection was taken to evidence admitted on cross-examination of accused as to previous charges that were dismissed.

Held, affirming the decision of police magistrate Wood, that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

APPEAL by accused from his conviction by police magistrate H. S. Wood, Vancouver, on the 1st of June, 1944, on a charge of robbery with violence. The complainant had a room in the

Rainier Hotel at Vancouver. As he was going to his room at about 7 o'clock in the evening, he was followed by the accused. When he went into the room the accused following up, struck him in the eye. Complainant broke the window with his hand to attract attention and accused then hit him again on the other eye. Complainant had about $40 in his vest pocket and a little over $20 in a pocket-book. The $40 in his vest pocket was taken, but the money in the pocket-book was left with him. As they ran down the stairs in the hotel, the accused was seized by the police and although they found the registration card and liquor permit of complainant on him, they did not find the $40. In breaking the window the complainant cut his hand badly and he was taken to the hospital.

The appeal was argued at Victoria on the 28th of September, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Hurley, for appellant: On cross-examination the accused was asked questions as to previous charges against him that were dismissed. Objection was taken at the time without effect: see *Rex* v. *Barbour,* [1938] S.C.R. 465; *Koufis* v. *Regem* (1941), 76 Can. C.C. 161. He cannot be asked of other charges unless he has been convicted of them. When acquitted, it is not evidence and might create prejudice: see *Rex* v. *Wadey* (1935), 25 Cr. App. R. 104; *Rex* v. *Fisher,* [1910] 1 K.B. 149; *Allen* v. *Regem* (1911), 44 S.C.R. 331.

R. A. Wootton, for the Crown: The accused put in issue the character of the complainant. Complainant denies that he was drunk and he is supported by the hotelkeeper and the police officer. In such a case the accused can then be cross-examined by the prosecutor as to his own record in a wide way. It appeared from the evidence that accused was often in drunken brawls: see *Maxwell* v. *Director of Public Prosecutions* (1934), 24 Cr. App. R. 152; *Rex* v. *Waldman* (1934), *ib.* 204, at p. 207.

Hurley, in reply: The *Waldman* case does not apply to the facts here.

Cur. adv. vult.

10th October, 1944.

SLOAN, C.J.B.C.: The facts of this case are of a special and

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peculiar character and upon consideration thereof I am of the opinion that no substantial wrong or miscarriage of justice has occurred in the conduct of the trial.

I would therefore dismiss the appeal.

O'HALLORAN, J.A.: The one point involved in the appeal is the admissibility of certain evidence admitted during the cross-examination of the appellant regarding similar acts upon which he had been previously charged but not convicted. As I understand the record before us, the learned magistrate admitted the evidence notwithstanding the dismissal of the charge to which it related because in his view it concerned the credibility of the appellant.

In my opinion it is not now necessary to pass upon that question. The appellant is plainly guilty as charged, and proof of his guilt is conclusively established, quite apart from the impeached testimony. In the circumstances I am satisfied no substantial wrong or miscarriage of justice can be said to have actually occurred, even if the point taken on behalf of the appellant were decided in his favour, *cf. Rex* v. *Haddy* (1944), 29 Cr. App. R. 182.

I would dismiss the appeal.

ROBERTSON, J.A.: I concur.

Appeal dismissed.

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Oct. 10; *Nov.* 7.

LAWSON v. W. R. CARPENTER OVERSEA SHIPPING LIMITED.

Contract—Terms of—Evidence—Positive and negative—Relative value.

The plaintiff, a master mariner, signed articles of agreement at Port Alberni, B.C., on November 27th, 1941, to serve as chief officer of the steamer "Admiral Chase," owned by the defendant, to sail on a voyage to Sydney, New South Wales. There was a term in the agreement that at Sydney he would be promoted to the command of the vessel and sail as her master. His wages for the voyage south were to be £42 per month, made up as follows: £25 standard wage; £7 as war bonus, and £10 extra allowance owing to ship carrying two officers only instead of the usual

three. On arrival at Sydney he was told by Rabone (master of the ship) that a change had been made in arrangements and he (Rabone) would be returning on the ship as master. It was then agreed that Lawson would release the owner from its agreement with him and in return would obtain accommodation at Sydney, transportation to Vancouver, B.C., and "full pay" until his arrival there. This arrangement was carried out, except as to the £10 per month item above mentioned from the 29th of January, 1942, when they arrived in Sydney until reaching Vancouver on the 14th of June, amounting to $203.25. Lawson testified that "full pay" included all three items, totalling £42. Rabone testified the £10 was not included as this was an extra for overtime work which had no application to the return voyage. The evidence of the two witnesses differed in that Lawson stated the words "full pay" were used in the agreement, whereas Rabone stated he used the word "wages," but on cross-examination he admitted it was possible he used the word "pay." It was conceded the word "pay" means all remuneration whereas "wages" would mean a man's wages without extras. The plaintiff's action to recover $203.25 was dismissed.

Held, on appeal, reversing the decision of WILSON, Co. J., that the principle as to the weight that should be given to a positive statement of fact as set out in *Lane* v. *Jackson* (1855), 20 Beav. 535, should be given effect to, namely, "that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it," it should be accepted "that the words were said, and that the person who denies their having been said has forgotten the circumstance." The case at Bar is even stronger because Rabone says "it is possible" that the word "pay" was used. The appeal is allowed and the plaintiff is entitled to recover the amount claimed.

APPEAL by plaintiff from the decision of WILSON, Co. J. of the 24th of February, 1944, in an action for balance of pay for service under contract as chief officer of the ship "Admiral Chase" between the 27th of November, 1941, and the 14th of June, 1942. On the 27th of November, 1941, the plaintiff was engaged as chief officer of said ship upon a voyage to commence at Port Alberni, B.C. The salary was fixed as follows: (a) £25 sterling per month wages; (b) £7 sterling as a war bonus; (c) £10 sterling for duties in respect of extra watches on said ship. The voyage commenced on November 27th, 1941, from Port Alberni and on the 29th of January, 1942, at the Port of Sydney, New South Wales, it was agreed that if the plaintiff would put an end to the agreement the defendant would: (a) Provide the plaintiff with transportation from the said Port of Sydney to the

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Port of Vancouver, Province of British Columbia; (b) pay the plaintiff his full rate of pay until his arrival at said Port of Vancouver; (c) pay all hotel expenses of plaintiff during detention of plaintiff awaiting such transportation to said Port of Vancouver. The plaintiff entered into the said agreement and cancelled said engagement. Transportation was provided from Sydney, New South Wales, to Vancouver, B.C. The action was dismissed.

The appeal was argued at Victoria on the 10th of October, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Edith L. Paterson, for appellant: The plaintiff's right to the £10 item is the whole issue in the appeal. There is a distinction between "wages" and "pay." By section 2 (109) of the Canada Shipping Act, 1934, " 'Wages' includes emoluments": see *Shelford* v. *Mosey,* [1917] 1 K.B. 154, at p. 159. They say he is not entitled to the £10 because there was no extra watches. It is not necessary to define amounts because "wages" includes "amounts."

Walter S. Owen, for respondent: The arrangement was made between Captain Rabone, master of the ship and Captain Lawson. The arrangement was that Captain Lawson was to get transportation back and hotel expenses in Sydney. Lawson returned as a passenger and he cannot get the extras. "Full pay" cannot include "extras." A letter of March 26th, 1942, from superintendent of mercantile marine at Sydney to commander of ship as to extras was tendered in evidence, but is not admissible. The extras are not included in wages: see *Goodwin* v. *Sheffield Corporation* (1902), 71 L.J.K.B. 492; *The Queen* v. *The Postmaster-General* (1878), 47 L.J.Q.B. 435. He consented to discharge of his articles.

Paterson, replied. *Cur. adv. vult.*

7th November, 1944.

O'HALLORAN, J.A.: I would allow the appeal for the reasons given by our brother SIDNEY SMITH.

ROBERTSON, J.A.: I think the appeal should be allowed for the reasons given by my brother SIDNEY SMITH.

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SIDNEY SMITH, J.A.: The plaintiff Captain Robert G. Lawson, a master mariner, on the 27th of November, 1941, at Port Alberni, B.C., signed articles of agreement undertaking to serve as chief officer of the Australian steamer "Admiral Chase." This vessel was owned by the defendant and was about to sail on a voyage to Sydney, New South Wales. It was a term of the agreement, although apparently not mentioned in the articles, that at Sydney the plaintiff would be promoted to the command of the vessel and would thenceforth sail as her master. His wages for the voyage south were to be £42 per month, made up as follows: £25 as the standard wage; £7 as war bonus; and £10 as an extra allowance on account of the ship carrying two officers only instead of the usual three.

Captain M. S. Rabone, the master, testified that in these circumstances it is customary to divide the wages of the absentee third officer between the other two as compensation for the extra watch keeping thereby entailed. It is not clear whether this extra sum of £10 was set out in the articles, which were not produced. On the whole I think not.

The vessel duly arrived at Sydney and was paid off in the shipping office there on 29th January, 1942, before Mr. F. J. Reynolds, the deputy superintendent of the Mercantile Marine. Captain Lawson was then informed by Captain Rabone (acting on behalf of the owner) that a change had been made in the arrangements and that he (Captain Rabone) would be returning on the vessel as master. It was then agreed that Lawson would release the owner from its agreement with him and in return would obtain accommodation at Sydney, transportation to Vancouver, B.C., and "full pay" until his arrival there. The terms of this arrangement were carried out except as to one detail which is the sole issue now in dispute. Captain Lawson testified that by "full pay" he meant all three aforesaid items of pay of the voyage south, totalling £42 per month. Captain Rabone, on the other hand, testified that the item of £10 per month was not included, as this was an extra for overtime work which could have no application to Lawson's return voyage as a passenger on another vessel. The amount involved is $203.25.

The trial came before His Honour Judge WILSON, as he then

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Sidney Smith,
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was, who dismissed the action. He expressed sympathy with Lawson and thought that he made his claim in good faith and with honest conviction. But he felt constrained to hold that the minds of the parties were never *ad idem* on this point and dismissed the action.

I agree that there was never any doubt in Lawson's mind that his full pay was £42 per month. What he was concerned with as a seaman was not how his wages were made up, but their total amount. In his mind "full pay" would mean all the moneys he received for his services, regardless of whether they came by way of extras or otherwise.

I agree too that Captain Rabone may never have directed his mind to the precise question of whether Lawson was to be paid the extra £10 on the return voyage. But I think he used language which led Lawson to believe that he was to be so paid. In his evidence, taken *de bene esse,* and read at the trial, he says this:

> What, exactly, did that agreement [*i.e.*, the agreement of 29th January, 1942] provide for? The agreement was absolutely the usual thing under similar circumstances. Mr. Lawson left the ship by mutual consent, which entitled him to accommodation, transportation home, and wages until such time as he arrived at his home port. That was the agreement I made with him—the verbal agreement I had with Mr. Lawson.
>
> Did you use the word "wages"? As far as I understand, yes.
>
> . . . .
>
> You think you used the word "wages." Might you have used the word "pay"? It is possible.
>
> Do you make any distinction between the words? Oh, certainly.
>
> What is the difference? I would say pay would mean all remuneration, whereas, wages would mean a man's wages without anything more for keeping extra watch.

So that in the minds of these two men the word "pay" had a special significance, *viz.,* all moneys, however earned. Lawson is emphatic that the words "full pay" were used. Rabone thinks it possible the word "pay" was used. In view of the judge's favourable finding on Lawson, I think his evidence on this point must be accepted.

It follows that Rabone used language which led Lawson to believe that, in consideration of Lawson's release of the shipowner from liability for breach of the contract between them, Lawson was to receive the full pay he received on the voyage south, £42 per month, until his return to Vancouver. Neither

Rabone nor the shipowner can now be heard to say that their intention was otherwise.

The principle as to the weight that should be given to a positive statement of fact is set out in *The King* v. *Stewart* (1902), 32 S.C.R. 483, at p. 501. There Taschereau, J. quotes as follows from Sir John Romilly, M.R. in *Lane* v. *Jackson* (1855), 20 Beav. 535, at pp. 539-40:

> I have frequently stated, that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstance. By this means I give full credit to both parties.

The case at Bar is even stronger because Rabone says that "it is possible" that the word "pay" was used. See also on this point *Chowdry D. Persad* v. *Chowdry D. Sing* (1844), 18 E.R. 531, at p. 534; *Dunphy* v. *Cariboo Trading Co.* (1915), 21 B.C. 484; *Hallett* v. *Bank of Montreal* (1918), 43 D.L.R. 115; and *Monarch Lumber Co. Ltd.* v. *Perry,* [1927] 3 W.W.R. 71, at p. 75.

Applying this principle I think the learned judge should have found that Rabone did in fact use the word "pay." Then the further principle applies as stated by Luxmore, J. in *Sullivan* v. *Constable* (1932), 48 T.L.R. 267, at p. 270, quoting from *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597, at p. 607, as follows:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

There was a ruling on evidence to which a short reference should be made. The plaintiff sought to adduce in evidence a letter from the aforesaid Mr. Reynolds, dated at Sydney, 26th March, 1942, and dealing with the terms of the agreement made in his office on the 29th of January, 1942. The learned judge properly held this letter was not admissible in evidence. It was hearsay and we were referred to no principle of law or statutory provision which would relieve it from the hearsay rule.

I would allow the appeal with costs.

Appeal allowed.

Solicitors for appellant: *Hamilton Read & Paterson.*

Solicitors for respondent: *Campney, Owen & Murphy.*

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Sept. 22; *Nov.* 7.

ROBBINS v. WILSON & CABELDU LIMITED.

Contract—Sale of automobile—Part of purchase price to be applied on sale of new car to seller—Wartime restrictions—Seller unable to obtain permit to buy new car—Action for balance of purchase price—Frustration—Terms of contract—Effect of on right to recover.

The parties entered into a written agreement whereby the plaintiff sold to the defendant his motor-car for $725. Of this sum the defendant was to pay $392.71 to the Commercial Credit Corporation (to whom the plaintiff owed this sum) and the balance of $332.29 he was to retain to be applied on the purchase price of a new car by the plaintiff within five years from the date of the agreement. Under the terms of the agreement, the plaintiff expressly agreed that he would not be entitled to any repayment of the same or any part thereof at any time or under any circumstances whatsoever. He delivered the car to the defendant who sold it and paid the financing company the amount owing it. On the plaintiff applying for a new car, he was unable to obtain from the motor-vehicle controller the permit to purchase which the latter's order No. M.V.C. 17 made pursuant to the order in council P.C. 1121 of February 13th, 1941, required him to have. The plaintiff then brought action for the balance of the purchase price of the car and at the trial the defendant contended that under the law of frustration the plaintiff could not recover. The trial judge held that under the law of frustration the plaintiff was entitled to judgment. On appeal the appellant raised the point that there was a term in the contract whereby the plaintiff agreed that he was not entitled to any repayment at any time or under any circumstances but that the money was to remain a perpetual credit on account of a new car.

Held, on appeal, reversing the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting), that assuming there was frustration, one must look to the express terms of the contract which remain for the purpose of giving effect to the rights and wrongs which have already come into existence at the time of frustration. The agreement provides that the plaintiff is not entitled to payment in cash or otherwise, that he is only entitled to credit for the amount in question to be used towards the purchase of a new car within five years and he is not entitled to any repayment of this amount or any part thereof under any circumstances whatever, the true intent of the agreement being that said sum should remain and be a perpetual credit to which he should be entitled only as and when he purchases a new car. The judgment, if enforced, would result in the plaintiff getting repayment in cash which is what the parties expressly agreed he should not be entitled to. The right that the "sum shall remain a perpetual credit" is an accrued legal right. It may be conceded that it will work a hardship on the plaintiff if he cannot recover the amount claimed, but on the other hand, if the defendant were compelled

to pay the sum claimed, it would suffer hardship in being deprived of the commission to which it would be entitled in the case of a sale of a car to the plaintiff.

APPEAL by defendant from the decision of SHANDLEY, Co. J. of the 19th of June, 1944, in an action to recover the sum of $332.29. By a contract in writing the plaintiff sold to the defendant his motor-car for $725. This sum was to be paid by the defendant assuming and agreeing to pay the Commercial Credit Corporation the sum of $392.71, being an indebtedness of the plaintiff to the Commercial Credit Corporation and as to the balance of the purchase price, namely, $332.29, the defendant agreed to give the plaintiff credit towards the purchase price of a new car at any time within five years from the date of said agreement. The plaintiff applied to the defendant for the purchase of a new car, but the defendant stated that owing to war conditions it is unable to sell the plaintiff a new car without a permit from the motor-vehicle controller and the plaintiff was unable to get a permit. The plaintiff recovered judgment in an action for the balance of the purchase price of the car.

The appeal was argued at Victoria on the 22nd of September, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Bull, K.C. (*Haldane,* with him), for appellant: Reconditioning the car for sale by the defendant cost $68.43. The agreement was that the balance of the purchase price, namely, $332.29, would be applied in the purchase of a new car. He has five years within which to purchase. Unfortunately there is the difficulty of getting a permit. The law lies where it falls. The case of *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.,* [1943] A.C. 32, does not apply to this case as there was frustration in that case. Here there is no frustration as it is not impossible to carry out the contract: see *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited,* [1916] 2 A.C. 397; *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404, at p. 410; *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz,* [1921] 2 A.C. 494. It is quite clear from the contract that under no cir-

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cumstances is the cash payment to be made. He has five years to purchase a car and if he does not do that he cannot recover the money. The purchase of this car was a substantial consideration for the seller. There was no failure of consideration.

Whittaker, K.C., for respondent: It is all based on the supposition that the car could be purchased within five years. That there was no consideration see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.*, [1943] A.C. 32, at pp. 48-9. That there was frustration see Can. Abr. 1943, p. 162; *Stanford* v. *Nicolau*, [1943] R.L. 154; *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397; 60 L.Q.R. 160.

Bull, in reply: The word "whatsoever" in the contract excludes all possible contingencies and in no circumstances can the money be refunded.

Cur. adv. vult.

7th November, 1944.

O'HALLORAN, J.A.: I agree with the learned judge that the contract between the parties was frustrated in the legal sense of that term, *cf.* the decisions referred to in *Australian Dispatch Line* v. *Anglo Canadian Shipping Co. Ltd.* (1939), 55 B.C. 177, at p. 182 *et seq.* and also the more recent decisions of the House of Lords in the *Constantine* and *Fibrosa* cases, to which I will refer again.

The parties entered into a written agreement whereunder the respondent sold his motor-car to the appellant motor-dealers at a stated price. The latter were to retain the net balance—some $332—to his credit, to be applied on the purchase of a new car when he wished to buy one. But Government wartime regulations intervened, which in their effect prohibited the respondent from buying a new car. The regulations swept away the whole basis of the contract for its performance became virtually impossible owing to a change in the law. As the credit of $332 could not be utilized for the purpose for which it was agreed it was to be held by the appellant, the respondent naturally desired the return of his money.

It is essential to a true understanding of the case we have to decide, to realize that when frustration of a contract occurs, it

does not merely suspend the contract, but it automatically determines the contract itself, *cf. Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.*, [1942] A.C. 154; "It kills the contract itself and discharges both parties automatically": *Per* Viscount Simon, L.C. at p. 163. Viscount Maugham, pp. 170-2, and Lord Wright at pp. 183 and 187 spoke to the same effect. It follows from what was decided in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.*, [1943] A.C. 32 (overruling *Chandler* v. *Webster*, [1904] 1 K.B. 493) that the money ought to be returned to the respondent unless the contract upon its true construction had stipulated that would not be done if frustration should occur.

In the *Fibrosa* case there was no term in the contract dealing with the matter: see Viscount Simon, L.C. at p. 43. The short point in this appeal is whether the contract did or did not contain such a term. Hence the *Fibrosa* case cannot assist us directly on that point. Counsel for the appellant invoked the following clause of the contract to mean that the money should not be returned if frustration occurred, *viz.*:

> I FURTHER EXPRESSLY AGREE that I shall not be entitled to any repayment of the same or any part thereof at any time or under any circumstances whatsoever; it being the true intent of this agreement that such sum shall remain and be a perpetual credit to which I shall be entitled only if, as and when I purchase such new car from you as above mentioned.

It was submitted that the phrase "at any time or under any circumstances whatsoever" was wide enough to include and was intended by the parties to include determination of the contract by frustration. But the Court is unable to peer into the minds of the parties. In construing that clause it must ascertain their intentions objectively by reference to the purpose of the agreement, the fact of frustration, its cause, the ultimate disposition of the money involved, and what the Court, personifying the reasonable man, must regard as reasonable intentions of the parties in relation to those factors.

I am wholly unable to accept the view that the clause in question has the legal effect counsel for the appellant seek to give it. I am of opinion that the language of the agreement, construed as it must be in the light of the purpose of the agreement, can reasonably mean but one thing, *viz.*, that the money would be

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retained as a credit only while the contract remained in existence. That is to say, if the contract could not be performed because of frustration, there was no further reason for the money to be retained as a credit, and its ultimate disposition then depended upon the principle first authoritatively enunciated in the *Fibrosa* case. That interpretation is confirmed in my opinion, by the concluding words of the clause, *viz.*, "to which I shall be entitled only if, as and when I purchase such new car from you as above mentioned." The right of the appellant to retain the money as a credit necessarily rested upon the right of the respondent to buy a new car from them. If, for example, frustration had not occurred and the respondent were permitted now by law to buy a new car from the appellant, and the latter refused to sell it to him, it must be obvious the law would compel them to do so, or to pay damages or return the money.

But the law does not now permit the respondent to buy a car. The whole basis of the agreement is thus swept away. It is important that the parties did not use the term frustration, or employ language in the agreement which must unequivocally include what is expressed legally by the term frustration. The parties used general language, which may be very wide in some aspects and very narrow in others. A contract which appears absolute in terms is not necessarily absolute in effect. It must be interpreted objectively. To gather the true meaning of the language used in the clause it is to be assumed the parties intended to stipulate for that which is fair and reasonable having regard to their mutual interests and to the main objects of the contract, *per* Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38, at p. 59. It must be obvious the parties never intended that if the contract itself were determined by events for which neither party was responsible, that the respondent and others like him would not get their money back either in cash or in money's worth, but that the motor-dealers were in effect to receive a present of that money. No motor-car owner in his rational senses would agree to such a one-sided and unfair proposition.

Other considerations would doubtless arise if the contract were merely suspended and not determined by frustration as it is here.

What has been said is consistent with the *rationale* of the principles which caused the House of Lords in the *Fibrosa* case to overrule *Chandler* v. *Webster* which had stood for nearly 40 years. "The loss no longer lies where it falls" as the latter case had decided, because in the absence of unequivocal contractual provisions for frustration, the law has come to recognize that the right of the respondent to the return of his money, arises not out of contract but out of the remedy the law now gives in *quasi*-contract to the party who has not got what he bargained for, and see particularly the latter part of the head-note of the *Fibrosa* case, [1943] A.C. at p. 33, epitomizing the seven speeches of the Law Lords who heard the appeal. In my opinion the respondent did not get what he bargained for in his contract.

I would dismiss the appeal.

ROBERTSON, J.A.: The respondent Robbins signed and delivered to the appellant an "agreement," which in part is as follows:

To Messrs. Wilson & Cabeldu Limited, Victoria, B.C.

I, The Undersigned, hereby set over and assign unto you a certain motor vehicle . . . for the price . . . of Three Hundred and Thirty-two Dollars and Twenty-nine Cents, made up as follows:

By Allowance for Motor Vehicle	$725.00
Amount owing to Finance Company (Commercial Credit Corpn.)	392.71
Net Credit	$332.29

. . . . .

In consideration of your purchasing the said motor vehicle for the price above mentioned, I further agree that I am not entitled to payment, of all or any portion of such price in cash or otherwise but that I am entitled only to credit for the said sum of Three Hundred Thirty-two Dollars and Twenty-nine Cents ($332.29), to be used or exercised by me hereafter towards the purchase of a new car from you, within five years of date hereof. I further expressly agree that I shall not be entitled to any repayment of the same or any part thereof at any time or under any circumstances whatsoever; it being the true intent of this agreement that such sum shall remain and be a perpetual credit to which I shall be entitled only if, as and when I purchase such new car from you as above mentioned.

Dated this 10th day of November, A.D. 1941, at Victoria, B.C.

CLIFFORD ROBBINS.

He duly delivered the motor-vehicle to the appellant, who sold it and paid the $392.71 to the finance company. The respondent applied to the appellant for a new car, and was told that it could not sell one to him unless and until he obtained a permit from

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the motor-vehicle controller. This permit was necessary by reason of an order (M.V.C. 17) of the motor-vehicle controller, dated 28th March, 1942, made pursuant to an order in council P.C. 1121, dated 13th February, 1941, which in part provided as follows:

2. No person shall purchase or otherwise acquire a reserve passenger motor vehicle unless he has obtained a permit in writing issued by the Controller, authorizing the purchase or acquisition of such passenger motor vehicle.

3. No dealer or storing dealer shall sell or deliver any reserve passenger motor vehicle except on the delivery to him of a permit issued by the Controller, authorizing the sale or delivery of such passenger motor vehicle.

4. The Controller may before issuing a permit to purchase or acquire a reserve passenger motor vehicle, require such evidence of the necessity of such purchase or acquisition as he from time to time, or in any case, may determine.

The appellant is a "storing dealer" within the meaning of the order. As the respondent was unable to show to the controller "the necessity of such purchase" his application for a permit was refused. The respondent then brought this action and obtained judgment for the $332.29 mentioned in the agreement. The learned judge below held that the contract had become impossible of performance because of such refusal; that there had been a total failure of consideration, neither party being to blame; and that the respondent was entitled to recover in view of the decision in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.*, [1943] A.C. 32. In that case the plaintiffs entered into a contract in writing dated July 12th, 1939, with the defendants, a company carrying on the business of manufacturing textile machinery, whereby the defendants agreed to supply the plaintiffs with certain machinery. The machinery was to be erected, packed and delivered at Gdynia, Poland, within three to four months from the settlement of final details. The plaintiffs although under the contract obligated to pay £1,600 with the order, in fact, only paid £1,000. On 1st September, 1939, Germany invaded Poland and on the 3rd of September, 1939, England declared war against Germany. The plaintiffs then wrote, pointing out that, owing to the war, the machines could not be delivered and asking for a return of the £1,000. The defendants refused, stating considerable work had been done on the machines.

The plaintiffs then issued a writ. The action was dismissed. The Court of Appeal affirmed the trial judge. The plaintiffs then appealed to the House of Lords. The House of Lords held the contract had become frustrated and that, no longer, was either party to the contract bound to perform any of its provisions; that as there was nothing in the contract express or implied to provide for such a contingency, and as the consideration had wholly failed the plaintiffs were entitled to the £1,000 as a debt or obligation, imposed or arising by construction of law. The doctrine of discharge from liability by frustration is based upon the Court implying a term or exception in, and treating that as part of, the contract of the parties that in the event of the performance of the contract becoming impossible, owing to supervening circumstances, without blame or fault of either party, the contract is at an end so far as future performance by either party is concerned. See the speeches of Viscount Simon, L.C., at p. 43, and of Lord Macmillan at p. 59 in the *Fibrosa* case and of Viscount Simon in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.*, [1942] A.C. 154, at p. 163, and of Lord Wright in the same case at pp. 186-7 and of Viscount Simon in *Heyman* v. *Darwins, Ld.*, *ib.* 356, at p. 367. The contract although "killed" or "automatically discharged" as to future performances by both parties, remains only to enforce accrued rights. In the *Constantine* case Viscount Maugham in his speech stated four propositions bearing upon the doctrine of frustration. The last of these (p. 170) deals with the effect of frustration as follows:

> Fourthly, each party is left in the position he was in when the event occurred, and legal rights already accrued under the contract are unaffected.

Lord Wright at p. 65 of the *Fibrosa* case refers to what Lord Sumner said in delivering the judgment of the Judicial Committee in *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497, at p. 510:

> So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them.

Lord Atkin said at p. 50:

> . . . , and it is well settled that when a contract which is still executory on one or both sides is subject to frustration the law is that when

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the event happens the parties are excused from further performance, but have to give effect to rights under the contract already accrued before the happening of the event.

At p. 58 Lord Macmillan said:

My Lords, every system of law has had to face the problem of defining the consequences of a contract becoming impossible of fulfilment owing to some external supervening event for which neither of the parties is responsible. That such an eventuality releases both parties from further performance of any of the stipulations of the contract is agreed on all hands. Each must fulfil his contractual obligations up to the moment when impossibility supervenes, for the contract is not avoided by becoming impossible of fulfilment, but the duty of further performance ceases.

Where there is frustration and total failure of consideration, unless there is some express or implied provision in the contract to the contrary money paid, for which no consideration has been given, may be recovered upon "a notional or imputed promise to repay."

Viscount Simon in his speech in the *Fibrosa* case said at p. 47:

Once it is realized that the action to recover money for a consideration that has wholly failed rests, not on a contractual bargain between the parties, but, as Lord Sumner said in *Sinclair* v. *Brougham*, [1914] A.C. 398, 452, "upon a notional or imputed promise to repay," or (if it is preferred to omit reference to a fictitious promise) upon an obligation to repay arising from the circumstances, the difficulty in the way of holding that a prepayment made under a contract which has been frustrated can be recovered back appears to me to disappear.

Lord Macmillan in the same case said at p. 59:

To leave matters as they stood when the contract became impossible of fulfilment may result in great gain to one of the parties and great loss to the other and to a grave infringement of the maxim *nemo debet locupletari aliena jactura.*

And further:

The parties have made no provision in their contract for the event which has frustrated it, so the law implies for them what it assumes they would have agreed on if they had had the unforeseen contingency in contemplation when they entered into their contract. On another view, restitution is regarded as a separate principle of the law independent of contract.

Lord Wright at p. 61, said:

My Lords, the claim in the action was to recover a prepayment of 1000*l.* made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in a contract or in tort, and are

now recognized to fall within a third category of the common law which has been called *quasi*-contract or restitution.

and at p. 62, referred to a claim for money paid upon a consideration which failed:

Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort. This statement of Lord Mansfield has been the basis of the modern law of *quasi*-contract, notwithstanding the criticisms which have been launched against it.

And at p. 64 he said:

The phrase "notional or implied promise" is only a way of describing a debt or obligation arising by construction of law.

And at p. 65 he said:

The claim for repayment is not based on the contract which is dissolved on the frustration but on the fact that the defendant has received the money and has on the events which have supervened no right to keep it. The same event which automatically renders performance of the consideration for the payment impossible, not only terminates the contract as to the future, but terminates the right of the payee to retain the money which he has received only on the terms of the contract performance.

So that if there had been nothing in the contract to affect the position the plaintiff might have recovered in this action upon an obligation created by law. The law will not create an obligation which the parties have expressly agreed should not exist. Lord Wright points out in the *Fibrosa* case that this implied obligation does not apply where by the express or implied terms of the contract the payment is not recoverable. He says at p. 67:

These principles, however, only apply where the payment is not of such a character that by the express or implied terms of the contract it is irrecoverable even though the consideration fails. The contract may exclude the repayment.

And further down the same page he says:

In other cases likewise a particular contract may effectively make a prepayment irrecoverable.

In the case at Bar the amount for which the respondent recovered judgment, while not money paid by him, yet was money's worth and therefore it seems to me that the same principles above mentioned in regard to frustration should apply to this contract if, in fact, it has been frustrated.

However, assuming it to have been, one must look to the express

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terms of the contract which, as Lord Sumner says, remain for the purpose of giving effect to the rights and wrongs which had already come into existence at the time of frustration. The agreement provides that the respondent is not entitled to payment in cash or otherwise; that he is only entitled to credit for the amount in question to be used towards the purchase of a new car within five years; and, that he is not entitled to any repayment of this amount, or any part thereof at any time or under any circumstances whatsoever; it being the true intent of the agreement that the said sum should remain and be a perpetual credit to which he should be entitled only as and when he purchases a new car, as mentioned in the agreement.

The judgment if enforced would result in the respondent getting repayment in cash which is what the parties expressly agreed the respondent should not be entitled to. The right that the "sum shall remain in perpetual credit" is, in my opinion, an accrued legal right.

It may be conceded that it will work a hardship on the respondent if he cannot recover the amount claimed in this action. On the other hand, if the appellant were compelled to pay the sum claimed it would suffer hardship because in such case it would not be selling a car to the respondent and thereby earning a commission which might to a great extent, if not entirely, offset the credit. It must be borne in mind that the act which produced frustration was not that of either party. As was pointed out in the *Fibrosa* case at pp. 49, 54, 72 and 76, hardship does result from frustration. It remains therefore only to administer the law as it is without regard to the hardship that may result.

With respect, I think the appeal should be allowed.

SIDNEY SMITH, J.A.: I have had the benefit of reading the judgment of my brother ROBERTSON herein and am in complete agreement with what he has there said. But it may be useful if I add a few words of my own to indicate the considerations that have had most weight on my mind.

I base my view upon what seems to me to be the actual scope and content of the agreement. In other words, assuming that the agreement has been frustrated by the events that happened, I

think the sole point in the case is whether its language provided either expressly or by implication for such a contingency. If it did, then the agreement must be construed in accordance with its terms, which means that in the circumstances of this case the plaintiff (respondent) cannot recover. If it did not, the plaintiff is entitled to recover the amount involved, upon the authority of *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.*, [1943] A.C. 32. That case reverses the rule established by *Chander* v. *Webster*, [1904] 1 K.B. 493, *viz.*, that in the event of frustration of a contract the "loss lies where it falls," and lays down the juster rule that money paid in advance may be recovered upon the ground of a total failure of consideration.

But in the agreement now before us it seems clear that the parties used language amply wide enough to include frustration of the contract by whatever means. Indeed it would be difficult to find wider or more definite language that could have been used for this purpose.

It is true that the word "frustration" was not used, but it seems to me that the parties employed language which was intended to include frustration; for otherwise their use of such words as "whatsoever," "perpetual" and "if" could have no meaning. Giving these words their plain and natural meaning in the context in which they are used, I can reach no other conclusion than that the parties intended to provide, amongst other contingencies, for the frustration of the contract by superior authority, and agreed that in that event the plaintiff should have no legal right of recovery. If the plaintiff did not intend it to be so he should have added a term to secure him the protection he desired.

An interesting case which, while not quite in point, throws some light on the matter is *Larsen* v. *Sylvester & Co.*, [1908] A.C. 295. There the words "of what kind soever" were held to exclude the *ejusdem-generis* doctrine.

I would therefore allow the appeal with costs.

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

Solicitors for appellant: *Haldane & Campbell.*
Solicitors for respondent: *Whittaker & McIllree.*

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Nov. 9, 20.

REX v. MARTIN.

Criminal law—Charge of retaining goods knowing them to have been stolen—Conviction—Appeal—Application for leave to adduce new evidence—Refused.

An application to admit further evidence which might have been adduced at the trial should be supported by the affidavit of the applicant. The affidavit should (a) indicate the evidence desired to be used; (b) set forth when and how the applicant came to be aware of its existence; (c) what efforts, if any, he made to have it adduced at the trial; and (d) in a criminal case, that he is advised and believed that if it had been so adduced it might reasonably have induced the jury or the tribunal of fact to change its view regarding the guilt of the accused.

The appellant, convicted on a charge of retaining goods knowing that they were stolen, applied for leave to adduce the evidence of one McLeod. He did not file an affidavit, but chose to rely on the evidence adduced at the trial and the affidavit of the proposed witness McLeod who, according to his affidavit, proposed to corroborate the appellant's evidence that the latter received the two fur coats in question from one Joe Bailey as security for a loan of $25.

Held, that it is apparent from examination of defence witnesses not only that the defence was aware of the evidence which could be given by McLeod, but that McLeod was known to the accused to have left Vancouver for Winnipeg and no effort was made to procure his attendance on the trial, nor was application made for adjournment on account of his absence. It is reasonable to infer that the defence elected to proceed to trial without his evidence. Furthermore, there is lack of reasonable possibility that the evidence proposed to be introduced might substantially sway the trial Court one way or the other. The application is dismissed.

MOTION by accused for leave to appeal from his conviction by HARPER, Co. J. on the 29th of June, 1944, on a charge of retaining in his possession stolen goods knowing the same to have been stolen, to wit, a lady's fur coat of the value of over $25. On the motion the accused applied to introduce new evidence, namely, that of one McLeod who went to Winnipeg, Manitoba, shortly before the trial.

The motion was heard at Vancouver on the 9th of November, 1944, by SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Richmond, for the motion, applied to introduce new evidence

of one McLeod to corroborate the accused's evidence that accused received the two fur coats in question from one Joe Bailey as security for a loan of $25.

Remnant, for the Crown: This man McLeod was in Vancouver two weeks before the trial and there was lack of diligence on the part of the accused in not having him at the trial as a witness. Secondly, McLeod's evidence would not affect the result. The owner of the coat paid $85 for it three months previously and accused sold it for $35. The second coat was found in the basement of the hotel where accused lived, in a suit-case in which articles of the accused were found.

Richmond, replied.

Cur. adv. vult.

20th November, 1944.

SLOAN, C.J.B.C. agreed with BIRD, J.A.

O'HALLORAN, J.A.: At the conclusion of the argument I was inclined to the opinion that the application came within what the late Chief Justice MARTIN said in *Rex* v. *Cumyow* (1925), 36 B.C. 435, at p. 440, namely, that McLeod's testimony now sought to be introduced, might reasonably induce the trial judge to change his view regarding the guilt of the accused. But subsequent study of the evidence satisfies me that it is not so.

The learned judge gave several unrelated grounds why he could not regard the appellant's explanation of his possession of the two fur coats as reasonable. One of these grounds was the appellant's denial to a detective that he had sold a fur coat. But when he was faced with the purchasers he at once admitted the sale. Another ground concerned the finding of the Suprey fur coat in the Graycourt Hotel basement with other things admittedly belonging to the appellant. He said his room had been entered in his absence and the fur coat stolen therefrom; the inference being that the thief had placed it in the basement. The learned judge held it was most unlikely in all the circumstances in evidence that a thief would have hidden the fur coat in the Graycourt Hotel basement along with other articles owned by the appellant. On these two grounds alone in my opinion the

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learned judge was justified in rejecting the explanation, even if the McLeod testimony were before him and accepted as true.

All McLeod proposes to do, according to his affidavit, is to corroborate the appellant's evidence that the latter received the two fur coats from one Joe Bailey as security for a loan of $25. But that evidence does not assist the appellant in discharging the *onus* on him to show he did not know the goods were stolen, even though that *onus* may not extend beyond showing reasonable probability. In my opinion the proposed McLeod testimony does not go that far.

The evidence discloses that the Graycourt Hotel was frequented by many criminals at the time the appellant, on his own admission, was carrying on a bootlegging business there. It also appears that Joe Bailey was a complete stranger to the appellant, although there is evidence that he told one of the detectives later, that Bailey was coming out of the penitentiary or going to gaol. With this background, when a complete stranger walked into the appellant's bootlegging place in the Graycourt Hotel with two ladies' fur coats over his arm and asked the appellant for a loan of $25 on them, the realistic conclusion necessarily is, in my opinion, that all the circumstances mentioned spelt theft of those coats in large letters. And it is distinctly improbable that the appellant, being who he is, and where he was, could have had any reasonable doubt about it.

This application has been made in almost complete disregard of the long-established practice of this Court which surrounds applications for the introduction of fresh evidence. Reading the decision of the old Full Court in *Marino* v. *Sproat* (1902), 9 B.C. 335, together with the observations of the late Chief Justice MARTIN in *Rex* v. *Cumyow, supra,* an application to admit further evidence which might have been adduced at the trial should be supported by the affidavit of the applicant. That affidavit should (a) indicate the evidence desired to be used; (b) set forth when and how the applicant came to be aware of its existence; (c) what efforts, if any, he made to have it adduced at the trial; and (d) in a criminal case, that he is advised and believed that if it had been so adduced, it might reasonably have

induced the jury or the tribunal of fact to change its view regarding the guilt of the accused.

Here the applicant did not file an affidavit but chose to rely on the evidence adduced at the trial and the affidavit of the proposed witness McLeod. Read together they establish the applicant did not show due diligence in investigating the facts when he had the opportunity. Such investigations as the evidence indicated he did make were of a very haphazard character, and were made almost four months before his trial. McLeod's affidavit shows he was in Vancouver during the time these cursory enquiries were alleged to have been made.

For the foregoing reasons I must hold that no sufficient reasons have been advanced to enable the Court to grant the motion.

ROBERTSON, J.A. concurred with BIRD, J.A.

SIDNEY SMITH, J.A. agreed with BIRD, J.A.

BIRD, J.A.: I would refuse the appellant's application for leave to adduce the evidence of the witness McLeod.

It is apparent from examination of the evidence of defence witnesses taken at the trial including that of the accused himself, not only that the defence was then aware of the evidence which could be given by McLeod, but also that McLeod was known to the accused to have left Vancouver for Winnipeg.

No effort was then made to procure McLeod's attendance at the trial, nor was application made for an adjournment on account of his absence.

In these circumstances it is reasonable to infer that the defence elected to proceed to trial without that evidence. Indeed, I understood counsel for appellant to concede before us that such was the case.

The Court of Criminal Appeal in England refused such an application in what appears to me to be a parallel case, *viz.*, *Rex* v. *Weisz* (1920), 15 Cr. App. R. 85, wherein the Earl of Reading, C.J. said (pp. 86-7):

> The appellant's legal advisers knew the case they would have to meet, and no application was made to adjourn the trial. . . . The policy was delib-

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erate of resting the defence upon the evidence of the accused . . . and no precedent could be cited for calling a fresh witness in those circumstances. And see *Reg.* v. *Hewitt* (1912), 7 Cr. App. R. 219, at p. 222.

Furthermore, after perusal of all the evidence introduced at the trial, I am by no means satisfied that there is a reasonable possibility that the evidence proposed to be introduced "might substantially sway the trial Court one way or the other"—to adopt the language of MARTIN, J.A. in *Rex* v. *Cumyow* (1925), 36 B.C. 435, at p. 440.

Since counsel for the appellant has abandoned all other grounds of appeal, I would refuse the application for leave to appeal and dismiss the appeal.

Motion refused.

S. C.
In Chambers
1944
June 21;
July 26.

IN RE APPLICATION BY NANAIMO COMMUNITY HOTEL LIMITED FOR WRIT OF *CERTIORARI* DIRECTED TO THE BOARD OF REFEREES.

Practice—The Excess Profits Tax Act, 1940—Order of board of referees—Certiorari—Jurisdiction—Can. Stats. 1940, Cap. 32, Sec. 14—R.S.C. 1927, Cap. 97, Sec. 66.

Section 66 of the Income War Tax Act provides in part as follows: "66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act. . . ."

The Nanaimo Community Hotel Limited moved for a writ of *certiorari* to remove into the Court the decision of the board of referees appointed by the Minister of National Revenue pursuant to the provisions of The Excess Profits Tax Act, 1940, whereby the said board purported to ascertain the standard profits of Nanaimo Community Hotel Limited pursuant to said Act and for an order absolute for the writ to be issued forthwith and that the decision be quashed.

Held, that said section 66 of the Income War Tax Act is sufficient to oust the jurisdiction of this Court to deal with a decision on which an assessment is subsequently made and the motion was dismissed.

MOTION for a writ of *certiorari* to remove into the Court the decision of the board of referees appointed by the Minister of National Revenue pursuant to the provisions of The Excess

Profits Tax Act, 1940, whereby the said board purported to ascertain the standard profits of Nanaimo Community Hotel Limited pursuant to said Act with the purpose in view of quashing the said order. The facts are set out in the reasons for judgment. Heard by MACFARLANE, J. in Chambers at Victoria on the 21st of June, 1944.

Cunliffe, for the motion.
Clearihue, K.C., contra.

Cur. adv. vult.

26th July, 1944.

MACFARLANE, J.: This is a motion for a writ of *certiorari* to remove into this Court the decision of the board of referees, appointed by the Minister of National Revenue, pursuant to the provisions of The Excess Profits Tax Act, 1940, Cap. 32, Can. Stats. 1940, whereby the said board purported to ascertain the standard profits of Nanaimo Community Hotel Limited pursuant to the said Act, which said decision bears date the 15th day of May, 1943, with the purpose in view of quashing the said order.

Counsel for the board raises the preliminary objection that there is no jurisdiction in this Court to deal with the decision of the board and refers to sections 65 to 67 of the Income War Tax Act, made applicable by section 14 of The Excess Profits Tax Act, 1940,

> to matters arising under the provisions of this Act to the same extent and as fully and effectively as they [sections 40 to 87, both inclusive] apply under the provisions of the Income War Tax Act.

The board of referees is appointed pursuant to section 13 of the said The Excess Profits Tax Act, 1940. The proceedings in respect of which the complaint herein is made were those envisaged by section 5 of the said Act. The complaint is that the proceedings were taken before an incomplete board and without due hearing of the representations of the hotel company. Following the alleged decision, which the applicant now asks this Court to quash, an assessment was made and from that assessment notice of appeal was filed. When the application was made the board, according to the material filed, was sitting in Vancouver, British Columbia.

S. C.
In Chambers
1944

IN RE NANAIMO COMMUNITY HOTEL LTD.

Macfarlane, J.

Section 66 of the Income War Tax Act reads in part as follows:

66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act. . . .

Mr. *Cunliffe* argues that that section presupposes that an assessment has been made, and that as I understand him, the words "in connection with" mean "consequent upon." I do not think that is the correct construction to be put upon these words. One of the very generally accepted meanings of "connection" is "relation between things one of which is bound up with or involved in another"; or again "having to do with." The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase "having to do with" perhaps gives as good a suggestion of the meaning as could be had.

I think section 66 is sufficient to oust the jurisdiction of this Court to deal with a decision on which an assessment is subsequently made.

It is not necessary, therefore, for me to deal with the other phases of the very interesting and instructive argument presented on behalf of the motion.

The motion must be dismissed with costs.

Motion dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

MAY *et al.* v. HARTIN *et al.* (p. 14).—Reversed by Supreme Court of Canada, 20th December, 1944. See [1945] 1 D.L.R. 417.

REX v. MIHALCHAN (p. 450).—Affirmed by Supreme Court of Canada, 20th November, 1944. See [1945] S.C.R. 9; [1945] 1 D.L.R. 202; 82 Can. C.C. 306.

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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 or 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 the 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. It was held on the trial that at the time of his death, deceased was indebted to the plaintiff in the sum of $120,865.98 and that prior thereto he had deposited with the plaintiff by way of pledge share certificate for 753 shares of the capital stock of the plaintiff issued in his name to secure repayment of the debt, that the indebtedness has not been paid and the plaintiff holds said shares as security by way of pledge for repayment of the debt. *Held*, on appeal, varying the decision of BIRD, J. (ROBERTSON, J.A. dissenting, who would allow the appeal and dismiss the action), that there are two essential conclusions, which are not as clearly implicit in the judgment appealed from as they ought to be: first, the sum of $120,865.98 evidenced by the promissory notes is not in the true legal sense an indebtedness of the Ray W. Jones, Sr. estate to the respondent company. Its collectibility is governed entirely by the agreement of June 1st, 1917. It is not enforceable by suit against Jones or his personal representative in person. In the second place, while the shares are pledged by way of collateral security, that pledge is not enforceable by sale of the shares. The pledge continues until payment by either of the two methods specified in the agreement of June, 1917. BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JUNIOR, *et al.* - - - - - - - - - - **174**

2.——*Action by shareholders — Request for company to bring action — Refused— Mortgage given as security—Whether right*

of foreclosure—Conspiracy to defraud company—Negligence by solicitor for company.] The plaintiffs Sam and Dora Levi sued on behalf of themselves and all other shareholders of Pacific Coast Distillers Limited, save the defendants *MacDougall* and Trites, alleging that the defendant *MacDougall*, acting in his capacities as president, director and solicitor of the company in breach of his fiduciary duty, connived with defendant Trites with the result that Trites, through the failure of the company to defend an action brought by Trites to foreclose a mortgage held by him upon the assets of the company, obtained a final order for foreclosure and having obtained title to such assets, sold them at a large personal profit. In 1936 the defendant company had an offer to purchase the assets of Scottish Distillers Limited. The company did not have a distiller's licence and to get a licence it was necessary that a bond of a guarantee company for $50,000 be deposited with the Minister. Levi, who was a large shareholder in the company, told Trites that if he could arrange with the guarantee company to give the guarantee, he would give him 40,000 shares in the company. Trites arranged the guarantee, received the 40,000 shares and put them in the name of *MacDougall* (his nephew and general solicitor). At the request of Levi, *MacDougall* was made a director and later president of the company. Shortly after $3,000 was required to release the liquor in bond and Trites paid $3,000 for 3,000 shares in the company and received 3,000 more shares for so doing. In August, 1936, the company was again in financial difficulties and Trites paid $15,000 for 15,000 shares, receiving a bonus of 10,000 shares. In November, 1936, the company was again in difficulties and Levi asked Trites to guarantee a loan from the Bank of Nova Scotia for $20,000. Trites did so upon receiving from the company as security a mortgage over all the assets of the company, the company to pay in addition to the bank charges 5 per cent. on the $20,000 as a bonus. In 1937 Trites guaranteed three more loans from the bank for in all $7,500. In May, 1938, a judgment creditor issued execution and the sheriff went into possession of the company's assets. The company had lost money steadily since March, 1936, and was hopelessly insolvent. Trites took foreclosure proceedings on May 11th, 1938, and obtained final order September 29th, 1938. *MacDougall* entered an appearance for the company, called a meeting of the directors and a meeting of the share-

holders, resulting in no further action by the company. Trites then sold all the assets of the company for $32,500, paid off the bank loan and other liabilities of the company in an amount exceeding the proceeds from the sale. It was held on the trial that the security given Trites by the company was a mortgage and there is no satisfactory evidence to show that the assets of the company were worth more than what Trites received. There is no evidence to support the allegation of conspiracy or of negligence on the part of *MacDougall*. *Held*, on appeal, affirming the decision of ROBERTSON, J., that the appeal should be dismissed. *Per* SLOAN, J.A.: The defendants made an effective and complete answer to the plaintiffs' right of action not only as pleaded, but as presented on the merits at the trial. *Per* O'HALLORAN, J.A.: I am not satisfied the appellants have shown they requested the respondent company to take the action upon which the appeal is founded, nor am I satisfied they have shown that it would have been futile to have done so. Even if the action were properly brought the appeal fails. *Per* SIDNEY SMITH, J.A.: The main point urged was that the mortgage in question was really a conveyance in trust for sale and did not carry the right to sue for foreclosure, and this should have been brought to the attention of the Court when the order *nisi* was obtained. It contains an express proviso for redemption and the right of foreclosure is incident to it. When a mortgage is in default, the mortgagor's right to redeem and the mortgagee's right to foreclose go hand in hand. In any case, on the facts of this case, the evidence discloses neither fraud nor negligence nor breach of trust and the appeal must be dismissed. LEVI AND LEVI v. MACDOUGALL *et al.* - **273**

COMPENSATION — Right of way—Notice pursuant to section 54 of Forest Act—Order appointing arbitrators to determine. - - - **518**
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CONDITION PRECEDENT—Lease—Option to purchase—Terms and conditions to be complied with—Failure to comply with terms. - - **48**
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CONSTITUTIONAL LAW — *"Public harbour"—Foreshore—Right to—Crown grant of waterfront lot "with appurtenances"—Whether foreshore included—British North America Act, 1867 (30 & 31 Vict., c. 3), Sec. 108.*] By section 108 of the British North America Act, 1867, "The public works and property of each Province, enumerated in the Third Schedule to this Act, shall be the property of Canada." The Schedule includes "public harbours." The action involves the title to the foreshore adjoining lot 6, block 64, of district lot 185 of the city of Vancouver on Coal Harbour, an indentation of Burrard Inlet at its south-west corner. The Dominion claims title to the foreshore as against the owner of the lot fronting thereon. It was held on the trial that Coal Harbour is a part of Burrard Inlet, a "public harbour," and as such the foreshore is the property of the Dominion by virtue of section 108 of the British North America Act, 1867, and further that the Dominion and Provincial orders in council passed in May and June, 1924, were effective to vest title to Burrard Inlet and the foreshore thereof in the Crown in the right of the Dominion. *Held*, on appeal, reversing the decision of MANSON, J., that the matter must be considered reasonably and it is not unreasonable to question whether the indentation known as Coal Harbour was in fact a part of the main harbour. It must be judged on its own characteristics and conditions and so considered it was not in 1871 a public harbour or a part of one. *Held*, further, SLOAN, J.A. dissenting), that the objection that the Executive Council could not dispose of Provincial lands to the Dominion unless the order in council is supported by Provincial legislation is well founded and there being no such legislation, the Provincial order in council is of no effect. Neither the Dominion nor the Province can divest itself of the ownership of such land without some statutory authority of the Legislature or Parliament as the case may be. ATTORNEY-GENERAL OF CANADA v. WESTERN HIGBIE AND ALBION INVESTMENTS LTD. - - - **123**

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See SHIP.

2.——*Oral agreement to make will in plaintiff's favour — Action against executor for specific performance—Statute of Frauds —Part performance — Sufficiency — Evidence.*] In an action against the executor for specific performance of an oral agreement between the plaintiff and the testatrix whereby she was to make a will leaving him a life interest in her home property in consideration of his continuing to board with her and look after her and do what was needed about the place, the evidence discloses that from 1934 until the death of the testatrix in 1943,

the plaintiff resided with deceased, paid $40 per month board and as she became less able to look after herself, cooked for her, looked after her and the house and made improvements on the property. He paid another woman for assistance when he was away at work; in his spare time he planted fruit trees in the garden; put in new sills beneath the house; installed a furnace, paying for the material and for redecoration. The evidence of the plaintiff is corroborated by a sister of deceased and three neighbours. *Held*, that the acts above mentioned are sufficient evidence of the fact that the plaintiff was acting in pursuance of the arrangement alleged with the deceased. Equities have arisen in favour of the plaintiff resulting from acts done in execution of the contract and deceased did not assume that he was doing them otherwise. The doctrine of part performance should be given effect to and judgment given for specific performance of the contract. COYLE v. MCPHERSON. **149**

3.——*Sale of automobile—Part of purchase price to be applied on sale of new car to seller—Wartime restrictions—Seller unable to obtain permit to buy new car—Action for balance of purchase price—Frustration—Terms of contract—Effect of on right to recover.*] The parties entered into a written agreement whereby the plaintiff sold to the defendant his motor-car for $725. Of this sum the defendant was to pay $392.71 to the Commercial Credit Corporation (to whom the plaintiff owed this sum) and the balance of $332.29 he was to retain to be applied on the purchase price of a new car by the plaintiff within five years from the date of the agreement. Under the terms of the agreement, the plaintiff expressly agreed that he would not be entitled to any repayment of the same or any part thereof at any time or under any circumstances whatsoever. He delivered the car to the defendant who sold it and paid the financing company the amount owing it On the plaintiff applying for a new car, he was unable to obtain from the motor-vehicle controller the permit to purchase which the latter's order No. M.V.C. 17 made pursuant to the order in council P.C. 1121 of February 13th, 1941, required him to have. The plaintiff then brought action for the balance of the purchase price of the car and at the trial the defendant contended that under the law of frustration the plaintiff could not recover. The trial judge held that under the law of frustration the plaintiff was entitled to judgment. On appeal the appellant raised the point that there

was a term in the contract whereby the plaintiff agreed that he was not entitled to any repayment at any time or under any circumstances but that the money was to remain a perpetual credit on account of a new car. *Held*, on appeal, reversing the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting), that assuming there was frustration, one must look to the express terms of the contract which remain for the purpose of giving effect to the rights and wrongs which have already come into existence at the time of frustration. The agreement provides that the plaintiff is not entitled to payment in cash or otherwise, that he is only entitled to credit for the amount in question to be used towards the purchase of a new car within five years and he is not entitled to any repayment of this amount or any part thereof under any circumstances whatever, the true intent of the agreement being that said sum should remain and be a perpetual credit to which he should be entitled only as and when he purchases a new car. The judgment, if enforced, would result in the plaintiff getting repayment in cash which is what the parties expressly agreed he should not be entitled to. The right that the "sum shall remain a perpetual credit" is an accrued legal right. It may be conceded that it will work a hardship on the plaintiff if he cannot recover the amount claimed, but on the other hand, if the defendant were compelled to pay the sum claimed, it would suffer hardship in being deprived of the commission to which it would be entitled in the case of a sale of a car to the plaintiff. ROBBINS v. WILSON & CABELDU LIMITED. **542**

4.——*Terms of—Evidence—Positive and negative—Relative value.*] The plaintiff, a master mariner, signed articles of agreement at Port Alberni, B.C., on November 27th, 1941, to serve as chief officer of the steamer "Admiral Chase," owned by the defendant, to sail on a voyage to Sydney, New South Wales. There was a term in the agreement that at Sydney he would be promoted to the command of the vessel and sail as her master. His wages for the voyage south were to be £42 per month, made up as follows: £25 standard wage; £7 as war bonus, and £10 extra allowance owing to ship carrying two officers only instead of the usual three. On arrival at Sydney he was told by Rabone (master of the ship) that a change had been made in arrangements and he (Rabone) would be returning on the ship as master. It was then agreed that Lawson would release the owner from its agreement with him and

he is advised and believed that if it had been so adduced it might reasonably have induced the jury or the tribunal of fact to change its view regarding the guilt of the accused. The appellant, convicted on a charge of retaining goods knowing that they were stolen, applied for leave to adduce the evidence of one McLeod. He did not file an affidavit, but chose to rely on the evidence adduced at the trial and the affidavit of the proposed witness McLeod who, according to his affidavit, proposed to corroborate the appellant's evidence that the latter received the two fur coats in question from one Joe Bailey as security for a loan of $25. *Held*, that it is apparent from examination of defence witnesses not only that the defence was aware of the evidence which could be given by McLeod, but that McLeod was known to the accused to have left Vancouver for Winnipeg and no effort was made to procure his attendance on the trial, nor was application made for adjournment on account of his absence. It is reasonable to infer that the defence elected to proceed to trial without his evidence. Furthermore, there is lack of reasonable possibility that the evidence proposed to be introduced might substantially sway the trial Court one way or the other. The application is dismissed. REX v. MARTIN. - **554**

5.——*Conviction — Appeal against sentence—Bail—Leave to appeal must first be obtained—Leave to appeal granted—Exceptional or unusual circumstances wanting—Bail refused—Criminal Code, Secs. 115, 1013, Subsec. 2, and 1019.*] A prisoner, upon his conviction under section 115 of the Criminal Code and pending the hearing of a motion to the Court of Appeal for leave to appeal against sentence, applied to be admitted to bail. Upon the Court intimating that bail would not be granted unless leave to appeal against sentence was first obtained, counsel for the prisoner obtained an adjournment and then moved under section 1013, subsection 2 for leave to appeal against sentence which was granted. On proceeding with the application for bail:—*Held*, that even in an appeal from conviction the granting of bail is conditioned upon the presence of exceptional or unusual circumstances so that in the case of an appeal extending only to severity of sentence and in no wise questioning the conviction, the grounds for granting bail must be more closely restricted. No exceptional or unusual circumstances have been advanced in this case and it is not one in which judicial discretion ought to be exercised in favour of granting bail. REX v. NINO CAVASIN. - - - - - **497**

6.——*Extradition — Fugitive released from custody—Rearrest under original warrant in Court house—Habeas corpus—R.S.C. 1927, Cap. 37.*] By warrant of a county court judge sitting as commissioner under the Extradition Act, a fugitive was committed into the custody of the keeper of the city police lock-up for surrender in due course to the State of New York. Pursuant to an order of surrender issued by the Minister of Justice directed to said keeper the fugitive was delivered by the keeper to the officers of the State of New York. On *habeas-corpus* proceedings, it was held that the order of the Minister was a nullity with the result that he was released from custody. He was thereupon forthwith apprehended in the Court house under the original warrant. On further application by way of *habeas corpus*, it was held that the fugitive could be again taken into custody on the original warrant on which he was held prior to delivery, and the subsequent arrest and present detention is legal. STATE OF NEW YORK v. WILBY (*alias* HUME). (No. 3). - - **500**

7.——*False pretences — Conviction—Appeal—Unusual circumstances—Sentence reduced—Criminal Code, Secs. 405 and 1035.*] Accused sold her rooming-house business and furniture to complainant for $1,547.70. In the course of negotiations, she told the complainant that the rooming-house was not leased to anyone, whereas, in fact, it was under lease to accused's husband and she stated that the landlord was out of town when he was not. On a charge of false pretences, accused was sentenced to 15 months' imprisonment with hard labour. On appeal from sentence, the evidence disclosed that the complainant took possession at once and for more than four months remained in undisturbed possession of the rooming-house and received a satisfactory extension of the lease; further, was unwilling to sell her interest for the amount she paid and was satisfied with her bargain. Accused was in gaol for one month. *Held*, varying the decision of police magistrate Wood, that the sentence should be reduced and in the unusual circumstances of this case, the interests of justice would be adequately served by reducing the term of imprisonment to the time already spent in gaol and by imposing a fine of $250. REX *v.* MACKIE. - - - - - **293**

8.——*False pretences—Evidence of similar acts—Admissibility—Course of conduct*

or system.] The accused, a building contractor, was convicted of false pretences. There was evidence that he obtained the sum of $1,000 from the complainant to build a house for her on the representation that he had bought and paid for and had available the necessary material to do so. The representation was false. Evidence was tendered in chief that he had made similar representations to several other people. *Held*, on appeal, affirming the conviction, that similar acts, if they tend to prove identity, intent or system or are relevant to any issue before the Court, should be allowed in evidence. REX v. PENNEY. - - - - - - - **348**

9.——*In possession of housebreaking tools by night—Whether lawful excuse shown—Criminal Code, Sec. 464 (a).*] Accused was convicted under section 464 (*a*) of the Criminal Code on a charge of being in possession of house-breaking instruments by night. *Held*, on appeal, affirming the conviction by WHITESIDE, Co. J. (O'HALLORAN, J.A. dissenting), that the accused had not discharged the *onus* on him of showing a lawful excuse for his possession of the tools and a piece of celluloid which was found in his car and the appeal should be dismissed. REX v. MIHALCHAN. - - - - - - - - **450**

10.——*Incest—Plea of guilty—Sentenced to two years—Waiver of appeal—Appeal by Crown from sentence—On hearing counsel for accused asks leave to appeal from conviction—Ground that indictment "bad" in law.*] On the 5th of February, 1944, the accused pleaded guilty to a charge "That he the said Herbert Wyatt between Friday, January 21st, 1944, and Monday, January 24th, 1944, A.D., at or near Alberni, county of Nanaimo, and at divers other times during the years 1944 and 1943 did unlawfully cohabit with and have sexual intercourse with one Doreen Wyatt knowing her to be the daughter of him the said Herbert Wyatt, and did thereby commit incest contrary to the form and statute in such case made and provided." He was convicted and sentenced to two years' imprisonment. On the 8th of February, 1944, he signed a waiver of appeal under section 44 of the Penitentiary Act, Cap. 154, R.S.C. 1927, and amending Acts, and was imprisoned. The Crown appealed on the ground that the sentence was inadequate. On the hearing of the appeal on the 29th of March, 1944, counsel for accused sought leave to appeal from his conviction on the ground that the indictment was "bad" in law and the conviction should be quashed. *Held*,

that the indictment, although inaptly drawn, if regarded in a purely verbal aspect, is not a nullity because it is couched in popular language. The severest criticism to which the indictment may be properly subjected is that it is defective because it lacks precise particularity in one circumstance, but that does not vitiate it. Since the present objection was not taken before plea when the defect could have been cured, section 898 of the Code does not permit it to be taken now. Moreover, a defect of this nature is cured by the verdict. Even if it could be held Wyatt was not properly convicted on the part of the indictment his counsel attacked, it is not in doubt he was properly convicted on the part not attacked. It has not appeared that the defect caused Wyatt to be misled or prejudiced. Nor does it appear that any miscarriage of justice has actually occurred. The conclusion is convincing that no exceptional circumstances have been disclosed such as would properly warrant granting leave to appeal from conviction. *Held*, further, that imprisonment for a term of five years more adequately fits the crime. REX v. WYATT. - - - - - - - - - **255**

11.——*Indecent assault — Evidence by accused—Previous conviction admitted on examination in chief—Cross-examination as to previous conviction—Admissibility.*] The accused was convicted on a charge of indecent assault. His main defence was that of identity. He gave evidence and in his examination in chief admitted he had been previously convicted of indecent exposure. He was then cross-examined by Crown counsel as to the circumstances surrounding his conviction. *Held*, on appeal, affirming the conviction by HARPER, Co. J., that where, as here, the defence set up was mistaken identity, evidence was admissible which tended to show the accused was a person with an abnormal criminal propensity of the nature disclosed by the offence with which he was charged. *Thompson* v. *Director of Public Prosecutions*, 87 L.J.K.B. 478; [1918] A.C. 221, followed. REX v. LYONS. - - - - - **250**

12.——*Intoxicating liquors—Government Liquor Act—Keeping for sale—Evidence of frequenters purchasing liquor — Men seen under the influence of liquor coming from premises — On search no liquor found on premises—R.S.B.C. 1936, Cap. 160, Secs. 91 (2) and 95.*] On appeal by accused to the county court from his conviction for keeping liquor for sale, a number of frequenters of the accused's premises testified that they had

CRIMINAL LAW—*Continued.*

purchased liquor from the accused and two police officers testified that they had the premises under observation for six months and saw men coming and going from the premises, some of whom were partly under the influence of liquor. One of the officers further testified that he entered the premises on one occasion. He found no liquor, there being only a few empty beer bottles on the premises. It was held that the evidence goes far enough to bring the case within the ambit of subsection (2) of section 91 of the Government Liquor Act, but the further evidence is lacking to warrant a conviction of "keeping liquor for sale." REX *ex rel.* SPIERS v. GRIS. - - - - - **238**

13.——*Murder—Appeal from conviction—Evidence—Self-defence—Jury not charged on manslaughter — Misdirection—Substitution of verdict of manslaughter for jury's verdict of murder—Criminal Code, Sec. 1016, Subsec. 2.*] The scene of the alleged murder was two adjoining rooms with communicating door (Nos. 108 and 109) in the Graycourt Hotel at Vancouver. One Martin lived in 108 with his mistress Betty Williams and one Rea and his wife in 109. A door led into the hall from room 109. On April 1st, 1944, a drinking-party started in the rooms at about 9.30 p.m. During the evening when Martin, Betty Williams and Rea were in the rooms Rea wanted to take Betty Williams out with him. She was willing to go but Martin objected and later on, while the argument was still going on Barilla (accused) came into the rooms and joined in the argument on Martin's side. Barilla then drew a revolver and fired three shots into the floor trying to frighten Rea. In the meantime, the witnesses Hawley, Tyvand and Ruth Pratt came into the rooms and joined in the drinking. After the shots were fired, Rea went out into the hall. About five minutes later (between 12.30 and 2 o'clock) there was a loud knocking at the door into the hall and the witness Hawley testified that he heard someone call out "Who wants to fight?" Barilla with the revolver in his hand opened the door and stepped back about eight feet. Wallace (deceased) and one Ferguson came in in a threatening manner towards Barilla with Rea and another man behind them. Barilla said "Back up or I will let you have it." Wallace moved on and Barilla shot him in the stomach. Wallace, holding his stomach, said, "I am hurt" and walked out into the hall where he fell near the stairs leading below. He died in the hospital at about 7 o'clock in the morning. Of the seven

CRIMINAL LAW—*Continued.*

persons in the rooms at the time of the shooting only the witness Tyvand testified that Barilla shot Wallace. On the finding of the jury on the trial Barilla was convicted of murder. *Held*, on appeal, varying the conviction by FARRIS, C.J.S.C. (SLOAN, J.A. dissenting and would order a new trial), that a verdict of manslaughter be substituted for that of murder and a sentence of 15 years be imposed with hard labour. *Per* O'HALLORAN, J.A.: In his summing-up the learned judge divided the testimony into two heads: (a) the evidence of the witnesses present in the rooms at the time of the killing but who did not see the shooting and (b) the evidence of Tyvand who was the only person who testified he saw the fatal shooting. He instructed the jury upon the second head that if they accepted the evidence of Tyvand "*in toto*" there could be only one verdict, *viz.*, murder. He excluded self-defence entirely from Tyvand's evidence. Manslaughter was referred to in relation to provocation and acquittal was referred to in relation to self-defence, but nowhere in the summing-up did the learned judge direct the jury upon manslaughter in relation to self-defence, *i.e.*, that excessive self-defence would justify a manslaughter verdict, but not acquittal. A verdict of manslaughter should be substituted for that of murder under section 1016, subsection 2 of the Criminal Code. REX v. BARILLA. - - - - - - **511**

14.——*Murder — Verdict — "Guilty of murder with a strong recommendation to mercy owing to temporary insanity"—Impossible to say what the jury meant—New trial—Criminal Code, Secs. 966 and 1016, Subsec. 4.*] The accused was married on October 22nd, 1943, and thereafter lived with his wife in a room in a boarding-house in Vancouver. Their relations appeared to be normal until they retired to their room at about 11 o'clock on the evening of the 3rd of December, 1943. At about 2 o'clock on the following afternoon accused was seen on the landing above the stairs in the house, covered with blood, his throat having been cut and his wife was found dead in the bed in their room. Medical evidence showed that she had been dead for about 12 hours caused by a stab in her abdomen and a cut in her throat. A knife was found in the room covered with blood. On the trial for murder the jury brought in the verdict of "guilty of murder, with a strong recommendation for mercy owing to temporary insanity." Accused was sentenced to be hanged. *Held*, on appeal, reversing the conviction by FARRIS, C.J.S.C., that from the

CRIMINAL LAW—*Continued.*

wording of the verdict it is impossible to say what the jury meant and there should be a new trial. *Held*, further, that the jury should have been asked to reconsider their verdict with such further instructions from the trial judge as may have been necessary and directed to bring in a verdict of "guilty" or if they acquitted because of insanity to "find" and "declare" as provided by section 966 of the Criminal Code. REX v. LOGAN. - - - - - - - - - - **473**

15.——*Opium — Unlawful possession— Two accused charged jointly—Acquittal on directed verdict of "not guilty"—Appeal— Whether sufficient evidence for jury—Drug in possession of one only—Whether within "knowledge and consent" of other—Criminal Code, Sec. 5, Subsec. 2—Can. Stats. 1929, Cap. 49, Sec. 4 (1) (d).*] The accused Codd under the name of Raymond went to a veterinary surgeon on February 16th, 1944, to get a prescription for a horse he said he owned on the race-track at Willows Park named Lazy May. He said that the horse had a running-ear and he wanted a prescription of tincture of opium and olive oil generally prescribed for such ailment. A prescription was made out in the name of Raymond and given to him. Other testimony showed that Raymond was the accused Codd, that he had no horse at Willows Park and that he was not known there. Next day Codd again saw the veterinary surgeon and told him he could not get the prescription filled and the veterinary surgeon told him to go to the Modern Pharmacy where he could get it filled. On the same day one Turnbull, an employee at the Modern Pharmacy, found the prescription on his dispensing-counter, but he did not fill it as he had no olive oil. Later in the day a woman called to get the prescribed compound but Turnbull told her he had no olive oil and she left with the unfilled prescription. Later still in the same day Bentley came in with the prescription and the druggist filled the prescription, using peanut oil instead of olive oil and Bentley took the compound away with him. There was no evidence to show that Bentley and Codd were acquainted or had any association with one another. Codd and Bentley were jointly charged with unlawful possession of opium and the presiding judge concluded there was no case made out against them and on his direction the jury brought in a verdict of not guilty. *Held*, on appeal, reversing the decision of FARRIS, C.J.S.C. (O'HALLORAN, J.A. dissenting in part and would dismiss the appeal as against Codd)

CRIMINAL LAW—*Continued.*

on the submission of the Crown that the connecting link between these two men is the unlawful prescription and that in the circumstances mentioned a jury might properly and reasonably draw the inference that Bentley obtained and had possession of the drug with the "knowledge and consent" of Codd, the Court is of the view that the issue is one proper to be left to the jury. If a properly-instructed jury did reach that conclusion, it could not be set aside as unreasonable. The appeal should be allowed and a new trial directed for both accused. REX v. CODD AND BENTLEY. - - **384**

16.——*Robbery with violence — Conviction—Appeal—Theft—Evidence of, insufficient—Common assault established—Conviction for lesser offence substituted—Sentence.*] On the 29th of February, 1944, the complainant registered in an hotel in Victoria and at about 2 o'clock in the afternoon he went to a beer parlour in Esquimalt where he met the accused who wanted to sell him a bottle of rum, which he refused to buy. The complainant drank a number of glasses of beer until the beer parlour closed at 5 o'clock when he took a taxi back to his hotel and on arrival found the accused, who was a soldier, in the back seat with another soldier. He asked the accused with the other soldier to come to his room for a drink. In the room he opened a quart bottle of rye whisky and the other soldier, after having one drink, went away leaving complainant and accused alone. They continued drinking and complainant went along the hall to a watercloset where he stated he felt his wallet, containing $175, in his hip pocket and he buttoned the flap over the pocket for safety. On going back to his room he and accused finished the bottle when accused suddenly attacked him and beat him to unconsciousness. He came to his senses at about 2 a.m. when he was alone, and found his wallet was gone and the door with a Yale lock was locked. He went to bed and at 9 o'clock in the morning he went to the police. He was taken to the barracks in Esquimalt where he picked out the accused in a line-up of 20 soldiers. On a charge of robbery with violence, accused was convicted and sentenced to three years in the penitentiary. *Held*, on appeal, varying the decision of SHANDLEY, Co. J. (O'HALLORAN, J.A. dissenting and would dismiss the appeal), that the evidence adduced falls short of establishing the theft element in the said charge to that degree of certainty which the law requires, but there is no doubt upon the evi-

dence that the appellant inflicted "personal violence" upon the complainant and under the circumstances of this case the ends of justice would be met by finding the appellant guilty of common assault and by substituting a conviction for the lesser offence with a sentence of six months. REX v. LONG. **356**

17.——*Robbery with violence — Conviction—Evidence—Cross-examination of accused as to previous complaints that were dismissed—Admissibility—Whether substantial miscarriage of justice—Criminal Code, Sec. 1019.*] The accused was convicted on a charge of robbery with violence. On appeal objection was taken to evidence admitted on cross-examination of accused as to previous charges that were dismissed. *Held,* affirming the decision of police magistrate Wood, that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. REX v. DILLABOUGH. - - - - - - - - - - **534**

18.——*Summary conviction—Three years in penitentiary—Jurisdiction of magistrate as to place of imprisonment—Habeas corpus —Appeal—Criminal Code, Secs. 2, Subsec. 29, 205A and 705 (b)—R.S.C. 1927, Cap. 154, Secs. 6 and 41.*] Section 41 of the Penitentiary Act recites: "Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the Province in which the conviction takes place." Section 705 (*b*) of the Criminal Code recites: "In this Part, unless the context otherwise requires, (*b*) 'common gaol,' or 'prison' for the purpose of this Part means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody." The accused was tried under Part XV. of the Criminal Code and convicted by a police magistrate in the city of Vancouver for a violation of section 205A of the Criminal Code and sentenced to three years in the penitentiary. On *habeas corpus* he was discharged from custody on the ground that the magistrate's jurisdiction on a summary-conviction proceeding is limited to committing a convicted person to the common gaol and does not extend to sentencing such person to the penitentiary even if the sentence imposed exceeds two years. *Held,* on appeal, reversing the decision of COADY, J., that the submission that said section 705 (*b*) of the Criminal

Code is to be regarded as effective to abrogate the plain and imperative language of sections 6 and 41 of the Penitentiary Act is one without merit, devoid of substance and the appeal should be allowed with consequential directions including the rearrest of the respondent. REX v. STORGOFF. - **464**

19.——*Theft—Sufficiency of explanation by accused — Conviction—Appeal — Judge's report and reasons for judgment—May be read together when they do not conflict.*] On appeal from the conviction and sentence of accused on a charge of theft it was pointed out by counsel for accused that the learned judge said in giving judgment: "I am not sure his explanation is reasonable" and it was submitted that although he did not accept the appellant's explanation, he failed to find it was unreasonable. *Held,* affirming the decision of ARCHIBALD, Co. J., that standing alone, it might bear that interpretation, but the observations immediately following make it clear that was not its meaning as in the next sentence he said "To my mind the reasonable explanation fails." This is confirmed in the judge's report when he said "the accused gave evidence on his own behalf, but I found the explanation unreasonable." *Held,* further, that the judge's report and his reasons for judgment may be read together when the two do not conflict. REX v. HONG. - - - - - - - - - - **382**

20.——*The Opium and Narcotic Drug Act, 1929—Unlawful possession—Sentence—Jurisdiction exceeded—Habeas corpus with certiorari in aid—Right to examine depositions—Power of Court—Criminal Code, Sec. 1124.*] On an application by way of *habeas corpus* with *certiorari* in aid to quash a conviction which is defective on its face, the magistrate having sentenced accused to a term of imprisonment at hard labour in default of payment of the fine imposed, thereby exceeding his jurisdiction, the Court is entitled and is under a duty to examine the depositions to see whether an offence in the nature of that described in the conviction has been committed as a condition precedent to invoking the curative provisions of section 1124 of the Criminal Code, and to quash the conviction if there is no evidence to support it. In the present case it was held that there was no evidence to support the conviction and it was therefore directed that the conviction be quashed and the applicant released from custody. REX v. LILLIAN ELDRIDGE. - - - - - - - - - - **28**

EXECUTORS AND TRUSTEES—*Remuneration—Commission paid to real-estate agents—Whether allowed as a disbursement—Not a disbursement where executor is partner in agent firm.*] The deceased's estate, valued at about $152,000, consisted largely of land holdings, mortgage investments and other interests in real property. He had carried on a real-estate business in Vancouver for some years under the name of W. H. Gallagher & Company. Since his death, the business was carried on by Fred Gallagher, one of the executors, who was the sole owner thereof. Sales of lands of the estate were made from time to time by the executors, chiefly through the agency of the firm owned and operated by the executor Gallagher and to a lesser extent by other real-estate agents. These agents were paid the usual commission of five per cent. In addition, the Gallagher firm was paid a commission on collections of principal and interest on deferred payments under the sales contracts and on collection of rents and mortgage interest. On an application by the executors to confirm the report of the district registrar on the passing of accounts and to fix the remuneration to be allowed the executors, two questions arose: First, should the payment of commission made to the real-estate agents other than Gallagher & Company be allowed as a disbursement and if allowed, what remuneration, if any, should be allowed the executors? Secondly, should the commissions paid Gallagher & Company on sales and collections be allowed as disbursements? *Held*, as to the first, that the commission should be allowed as a disbursement and as certain additional services are rendered by the executors, some remuneration should be allowed them, depending on the particular circumstances in each case. In the present case two and one-half per cent. of the amount received for such sales is allowed. As to the second, no commission can be allowed as a disbursement where the sales are made through the agency of one of the executors or through a firm in which one of the executors is a partner. *In re* ESTATE OF WILLIAM HENRY GALLAGHER, DECEASED. - **269**

EXTRADITION — *Accused committed—Habeas corpus with certiorari refused—Appeal — Jurisdiction — Banking records —*

EXTRADITION—*Continued.*

Photostatic copies — Admissibility in evidence—Signature of accused—Proof of by showing witness a photostatic copy—R.S.C. 1927, Cap. 37, Secs. 9, 13, 16, 18 and 19.] On appeal from the discharge of a writ of *habeas-corpus* proceedings with *certiorari* in aid, the appellant, a fugitive criminal of a foreign State, after a hearing before a county court judge under section 9 of the Extradition Act, having been committed to prison for surrender to the authorities of the foreign State, the respondent raised the preliminary objection that there was no jurisdiction to entertain the appeal, that owing to the decision of the House of Lords in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147, the decision in *Ex parte Yuen Yick Jun* (1938), 54 B.C. 541, should not be followed. *Held*, that as decided in *Ex parte Lum Lin On* (1943), 59 B.C. 106, 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 in *Ex parte Yuen Yick Jun*, the Court is of opinion that its jurisdiction to entertain the appeal cannot be questioned. On the main appeal the appellants contended that the learned county court judge received and acted on inadmissible evidence, consisting of photostatic copies of cheques, deposit and withdrawal slips and corresponding entries in the books of several banking institutions in New York and New Jersey. *Held*, that in the circumstances of this case, sufficient grounds are shown in the proceedings to justify the production of secondary evidence of the various banking records in question. On the further contention that the signature of the accused could not be proved by the production to a witness of photostatic facsimiles of bank signature cards, cheques and other documents with his signature on them, citing in support *The King* v. *The Ship "Emma K" et al.*, [1936] S.C.R. 256:—*Held*, that the *"Emma K"* case is distinguishable as the present case is not one of comparison by expert witnesses of disputed handwriting with genuine handwriting within section 8 of the Canada Evidence Act, but simply the case of a witness to whom the appellant's signature is well known. Moreover the originals of some of the signed documents were produced in Court and the judge had the opportunity of satisfying himself that the facsimile reproductions were true representations of the originals. The learned judge did not err in accepting the evidence before him as sufficient. There

JUVENILE DELINQUENT — *Children's Aid Society—Juvenile court—Application under section 8 of the Industrial School for Boys Act — "Guardian" — Construction — Mandamus—R.S.B.C. 1924, Cap. 112—B.C. Stats. 1937, Cap. 32, Sec. 8; 1943, Cap. 5.*] By order of the judge of the juvenile court of November 7th, 1935, made under the Infants Act, John Riddell, an infant, was committed to the care and custody of The Children's Aid Society, which thereupon pursuant to said Act became the legal guardian of the infant. The child was placed in a number of foster homes by the society, but foster-home care was not successful and the society laid a complaint under section 8 of the Industrial School for Boys Act with the object of having the infant transferred to the industrial school. The judge of the juvenile court held that The Children's Aid Society is not a "guardian" within the meaning of said section 8 and that he was without jurisdiction to make the order. On proceedings by The

JUVENILE DELINQUENT—*Continued.*

Children's Aid Society by way of *mandamus* directed to the judge of the juvenile court to have said infant brought before him and dealt with as a juvenile delinquent under said section 8 of the Industrial School for Boys Act:—*Held*, that section 8 of the Industrial School for Boys Act, under which these proceedings were taken, shows that the object and intention of this Act is to do that which is for the welfare of the child. The society is the legal guardian of this boy and while the custody of the boy has been with foster parents in various homes from time to time, it must not be overlooked that the guardianship has never changed and there is no reason why the term "guardian" as used in section 8 should be construed so restrictively as to exclude the society, particularly when the purpose of the legislation is kept in mind. It is the duty of the society, if the welfare of the child requires it, to take that further step contemplated by section 8 to have the child declared a juvenile delinquent and committed to the industrial school if in the opinion of the judge the material and moral welfare of the child manifestly requires that he be dealt with as a juvenile delinquent. JOHN RIDDELL, AT THE PROSECUTION OF THE CHILDREN'S AID SOCIETY OF VANCOUVER v. JUDGE OF THE JUVENILE COURT OF VANCOUVER. - - - - - **352**

LANDLORD AND TENANT—*Lease "for the duration of the war" — Validity — Parol agreement — Tenancy from year to year—Terms of holding—Presumption.*] By written agreement of March 22nd, 1943, one Barnes agreed to rent the O'Sullivan farm in New Westminster District to the plaintiff for pasture purposes only for the duration of the war at an annual rental of $150, payable $25 per month, commencing April and ending September, 1943. By memorandum in writing signed by the parties on May 27th, 1943, Barnes agreed to sell the farm to the defendant Evanocke and on November 20th, 1943, an agreement for sale of the farm was entered into between Barnes and the defendant. No reference was made to the lease to the plaintiff in either the memorandum of May 27th, 1943, or in the agreement for sale, but it was found on the evidence that Evanocke bought the farm with full knowledge of the lease and subsequent to the purchase Evanocke received payment from the plaintiff the balance of the rent payable for the year commencing March 22nd, 1943, under

the terms of the lease. Soon after the purchase, at the request of the defendant, the plaintiff agreed to exclude from the leased land five acres where buildings were situated and in consideration thereof the annual rental was reduced by $25. In December, 1943, and prior to the registration of the agreement for sale from Barnes to the defendant, the plaintiff procured from Barnes and caused to be registered a lease of said farm in the same terms as the agreement for lease of March 22nd, 1943. In November, 1943, the defendants denied the plaintiff the use of the farm by removing a plank bridge, being the only means of approach to the farm. In an action to recover possession of the farm (less the five acres referred to) and for damages for being wrongfully dispossessed:—*Held*, that a tenancy for the duration of the war could not be considered a valid lease, since the certainty of the lease as to its continuance is not ascertainable either by the express limitation of the parties or by reference to any collateral act which might with equal certainty measure the continuance of it. *Held*, further, on the evidence that when the bargain was made between the plaintiff and the defendant Evanocke in June, 1943, providing for exclusion from the lands subject to the Barnes lease of the five-acre portion and reduction of the annual rental, that it was the intention of both parties that the plaintiff should become tenant of the defendants for a term of years under the provisions of the Barnes lease, varied as to area and rental as above mentioned. A tenancy from year to year, commencing March 22nd, 1943, was thereby created. There has been a breach of the plaintiff's right of occupation by the defendants and the plaintiff in consequence of the defendants' act had been denied that right of occupation for a period in excess of six months. Damages allowed in the sum of $250. TRERISE v. EVANOCKE. - **301**

2.——*Rental regulations of Wartime Prices and Trade Board—Orders 294 and 358 of the Board — Premises containing suites sub-let by tenant—"Housing accommodation"—Multiple-family building.*] The premises in question, leased by the plaintiff to the defendant, consisted of 12 suites sub-let by the defendant to various persons for dwelling purposes. The tenant did not live on the premises but her husband "looked after" them for her and "for the purpose of heating and carrying on other duties," slept in the basement. It was held on the trial that the premises were "housing accommodation" within the meaning of orders 294 and 358 of the Wartime Prices and Trade Board, that the notice to vacate given by the landlord to the tenant became a nullity by virtue of subsection (3) of section 15A of said order 358 and the landlord's application for possession of the premises was dismissed. *Held*, on appeal, affirming the decision of HARPER, Co. J. (O'HALLORAN, J.A. dissenting), that the premises in question are a "place of dwelling" and for the reasons given by the learned trial judge the appeal should be dismissed. LAW v. SMITH. - **437**

LEASE—"For the duration of the war"—Validity — Parol agreement—Tenancy from year to year—Terms of holding—Presumption. - **301**
See LANDLORD AND TENANT. 1.

2.——*Option to purchase — Terms and conditions to be complied with—Condition precedent—Failure to comply with terms.* - - - - - - - - - **48**
See REAL PROPERTY. 2.

LEGACIES—Duty—"All the proceeds of my estate"—What it includes. - **312**
See WILL. 4.

LIBEL—*Newspaper comment on plaintiff's arrest on charge of murder—Fair comment—Privilege.*] The following article was published in The Victoria Daily Times of the 19th of June, 1943: "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 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 that this led to uncovering Justice murder facts." The plaintiff was subsequently tried for murder and acquitted. In an action for damages for libel the plaintiff alleges that the article was defamatory of him in that it meant and was understood to mean that: (1) The plaintiff was the person who in fact murdered Molly Justice; (2) that the plaintiff had been a fugitive from justice. *Held*, that the article is defamatory of the plaintiff in its ordinary and natural meaning. It imputes to the plaintiff not only that he has been suspected or accused, but is in fact guilty of the crime

LIBEL—*Continued.*

of murder. Further, there is implied in it that Mitchell has been evading the police. Reasonable men who read the article would have understood it in a libellous sense. *Held*, further, that fair and reasonable latitude should be given to newspapers in reporting Court proceedings, otherwise there would be no safety for them in publishing any such reports. The privilege to which newspapers are entitled under the law does not extend to cover such an article as that under consideration here, one which assumes the guilt of the person accused and includes untrue statements set up as statements of fact to which no reference was made in the course of the proceedings. The defence of fair comment does not extend to protect the defendant against liability for publication of this defamatory article. MITCHELL v. THE VICTORIA DAILY TIMES. (No. 3). - **39**

LOCAL UNION—*Expulsion of members by parent body—Special meeting of local union called—Resolution passed reinstating members expelled—Further resolution expelling other members—Action attacking validity of meeting—Interim injunction.*] The Amalgamated Shipwrights, Joiners, Boatbuilders and Caulkers, Local No. 2, Amalgamated Building Workers of Canada (called Local No. 2) is one of several branches of a national union known as Amalgamated Building Workers of Canada (called National Union) and is governed by the constitution and rules adopted by the National Union and by-laws adopted by Local No. 2. The parties to this action were members of Local No. 2. At the time of the events mentioned, the plaintiff Bruce was president and the plaintiff Bray was secretary-treasurer of Local No. 2 with three others holding minor offices. They were also members of the executive committee (consisting of ten members). On February 11th, 1944, the general executive board of the National Union ordered the expulsion from the union of the defendants Anderson and Smith. Certain members of the executive committee endeavoured to persuade the president Bruce to call a general meeting of Local No. 2 "to deal with the expulsion." Having failed in this, the vice-president (one Woolgar), assuming to act on the authority of the executive committee at an informal meeting attended by four members of the committee, caused a notice to be given to all members of Local No. 2 of a special meeting of the local to be held on Sunday, February 20th, 1944. The meeting was attend by 600 of a total membership of about 1,800. Resolutions were passed unanimously: (1) Reinstating Anderson and Smith as members; (2) expelling from membership and office the plaintiffs Bruce and Bray; (3) expelling certain other members who were active in relation to charges against Anderson and Smith and (4) electing Baker and Brown as president and secretary-treasurer respectively of Local No. 2. The plaintiffs attacked the validity of the notice calling the meeting of February 20th, 1944, and the proceedings thereat as unconstitutional and sought an injunction to restrain the defendants from assuming to act in the several offices to which they were elected. Upon an application for an *interim* injunction:—*Held*, that upon the material filed, the plaintiffs had made out a *prima-facie* case in support of their attack upon the validity of the calling of and proceedings taken at the meeting of February 20th, 1944. The plaintiffs had the right to maintain this action. An *interim* injunction was granted in terms of the notice of motion upon the condition that the action be set down for trial for a date after April 15th, but not later than April 30th, 1944. BRUCE *et al.* v. BAKER *et al.* - - - - - **246**

MANDAMUS. - - - - - **352**
See JUVENILE DELINQUENT.

MANSLAUGHTER—Jury not charged on—Misdirection—Substitution of verdict of manslaughter for jury's verdict of murder—Criminal Code, Sec. 1016, subsec. 2. - - **511**
See CRIMINAL LAW. 13.

MARRY—Petition by minor for leave to—Objected to by parents—Pregnancy of minor—Petition dismissed—Appeal—Discretionary order—Duty of Court of Appeal. - - **444**
See HUSBAND AND WIFE. 2.

MENS REA. - - - - - - **241**
See CRIMINAL LAW. 21.

MINERAL CLAIMS — *Action to recover—Claims transferred by former owner to a company — Action against company — Res judicata.*] In 1942 the plaintiffs applied for leave to bring this action. The application was refused by MANSON, J., who held that the matters sought to be litigated were *res judicata*. On appeal, it was held that so far as then appeared, the real question in issue had never been decided in any Court, that the appeal be allowed and that the action do proceed. The action was tried by COADY, J. on the 17th of December, 1943, when he dismissed it on the ground that the

cation to extend time—R.S.C. 1927, Cap. 35, Secs. 39 (a), 41, 64, 66, 68 and 70.] Judgment of the Court of Appeal was pronounced on April 26th, 1944, and entered May 8th, 1944. Notice of appeal to the Supreme Court of Canada was served July 5th, 1944; $500 security was deposited July 17th, 1944, and the present motion to approve the security and to allow an appeal to the Supreme Court of Canada was launched July 17th, 1944. Section 64 of the Supreme Court Act requires an appeal to be brought within 60 days from the signing or entry or pronouncing of the judgment appealed from. *Held,* that as the settling of the judgment gave no difficulty here, the time is properly computed from the date of "pronouncing," namely, April 26th, 1944. The appeal is therefore out of time. On the application to extend the time to allow an appeal under section 66 of the Supreme Court Act:—*Held,* that although section 66 does not in plain language confer jurisdiction upon a judge of the Court appealed from to extend the time for bringing an appeal, it does give power to "allow an appeal although the same is not brought within the time hereinbefore prescribed in that behalf." This must mean the judge may extend the time for bringing the appeal even after the 60 days have expired. It follows that if "special circumstances" exist here, section 66 gives jurisdiction to "allow" the appeal now, although it is out of time, and also all necessary extensions of time are implicitly included. Whether there are "special circumstances" present within section 66 depends upon the "interests of justice" as reflected in the particular case. Having regard to the preparations made for the appeal, as well as when they were made, the *bona-fide* intention to appeal when the right existed, the confusion easy to arise from different rules prevailing in the running of time, in appeals respectively to the Court of Appeal and to the Supreme Court of Canada and the circumstance that the 60 days from the date of entry have not yet expired, it cannot be said that the appellants are now asking for anything so "evidently unjust" that it ought to be refused. The appeal is allowed within the meaning of section 66 and the time is extended within which to bring an appeal now out of time. LEVI AND LEVI v. MACDOUGALL *et al.* - **492**

6.——*Application for letters probate by executors — Also application by attorney appointed by other executor (outside jurisdiction)—Refusal of latter—First granted conditionally.*] On an application by way of the executors named in the will of deceased for letters probate of the estate, and also an application by the attorney appointed by the other executor named in the will (which executor is outside the jurisdiction) for letters of administration with will annexed of the estate:—*Held,* that that part of the application for a grant of letters of administration with will annexed to the attorney of the executor outside the jurisdiction be refused. *Held,* further, that the application of the resident executor for probate will stand adjourned for ten days in order that counsel may advise the outside executor that the application for a grant in favour of his attorney has been refused and that if he wishes to join in the application for probate with his co-executor he may do so. If he fails to join in the application within ten days, the grant will issue to the petitioning executor, reserving the rights of the other executor to apply at a later date. *In re* ESTATE OF BELANIE GRIMARD, DECEASED. - - - - - - - - - - **392**

7.——*Discovery—Examination for—Parties subject to—Rules 370c, 370d (1) and 1041—Testator's Family Maintenance Act, R.S.B.C. 1936, Cap. 285.*] Discovery is obtainable only from parties between whom and the applicant there is an issue defined by the pleadings. Where, therefore, on a petition under the Testator's Family Maintenance Act, there were no pleadings filed on behalf of the parties served with notice of the proceedings, an order cannot be made for the obtaining of discovery from them. The purpose of rule 370d is to declare that a person who comes within its terms and who is not otherwise a party, shall be regarded as such for the purpose of examination. It has no application to persons who are themselves parties to the proceedings. *In re* TESTATOR'S FAMILY MAINTENANCE ACT AND ESTATE OF CHARLES HENRY HITCHEN, DECEASED. - - - - - - **117**

8.——*Garnishee—Order—Affidavit in support—Stating that the defendant is "justly indebted"—Sufficiency—R.S.B.C. 1936, Cap. 17, Secs. 3 and 6.*] The defendant applied to set aside a garnishee order on the ground that the affidavit in support is insufficient in that the affidavit states that the defendant is "justly indebted" to the plaintiff, whereas section 3 of the Attachment of Debts Act requires the affidavit to state that the "amount of the debt, claim or demand," is "justly due and owing." *Held,* that an affidavit in support of a garnishing order, if it

follows the form supplied in the Schedule, is sufficient as determined by section 6 of the Act. The affidavit follows the Form C and the application is dismissed. INLAND COLLIERIES LIMITED v. COAL CONSUMERS CO-OPERATIVE ASSOCIATION. CANADIAN BANK OF COMMERCE, GARNISHEE. - - **114**

9.——*Judgment—Lapse of over six years—Garnishee order—Necessity for leave before obtaining order nisi—County Court Rules, 1932, Order XII., r. 17—R.S.B.C. 1936, Cap. 17, Secs. 3 and 20.*] On the 15th of October, 1930, the plaintiff obtained judgment in the county court against the defendant for $184.95. On December 8th, 1943, the judgment creditor caused to be issued out of the Court a garnishing order attaching all moneys to the amount of said judgment owing to the judgment debtor by Victoria Machinery Depot Company Limited and under the order $47.89 was paid into Court. Rule 17 of Order XII. of the County Court Rules, 1932, provides that where six years have elapsed since the date of the judgment, the leave of a judge must be obtained before execution may issue. The judgment creditor did not obtain any leave before the issue of the garnishee order. On the application of the judgment debtor to set aside the garnishing order on the ground that it is a form of execution, that said rule 17 applies and that it should not have been issued without leave:—*Held*, that the *ex parte* order issued by the registrar here is an order *nisi* and whatever may be the character of a garnishing order absolute, a garnshing order *nisi* is not a process of execution and if leave to proceed to execution must be obtained under rule 17 of Order XII., it is still open to the judgment creditor to apply for and obtain that leave. *Keats* v. *Conolly*, [1915] W.N. 174, applied. *Held*, further, that if the garnishing order *nisi* is a process of execution, section 20 of the Attachment of Debts Act would have the effect of making rule 17 of Order XII. inapplicable to proceedings under that Act. Said rule 17 would therefore have no application to the rights given without qualification by section 3 of the Act. CAPLE v. CAIRD. - - - - **60**

10.——*Motion for judgment in default of defence—Injunction—Scope of—Statement of claim—Court not bound by wording of prayer of relief—Order XXVII., r. 11—Administrator's order A-891.*] On motion by the plaintiff, on default of the defendants delivering a defence for such judgment as upon the statement of claim in the action the

Court may consider the plaintiff entitled to, it was held that the injunction should stand as against the defendants, limited to their actions under administrator's order A-891, and not holding that there is anything to prevent the defendants taking possession of the premises in question under a proper order. On motion, by way of appeal from the settlement of the order by the registrar, counsel for the plaintiff asserted that the Court was bound by the wording of the prayer for relief in his statement of claim and that the injunction must be general in form and not limited to the taking of possession pursuant to administrator's order A-891. *Held*, that it is the duty of the judge to apply to the admitted facts the law which is applicable. If the law so applied requires a limitation of the relief asked in the prayer, the judge should limit the relief and definitely state his limitation in the order. It is true that he may not go beyond the prayer but the Court refuses to accept the proposal that the right to the relief in the exact language or to the full extent of the prayer must be decreed. THE SOCIETY OF THE LOVE OF JESUS v. SMART AND NICOLLS. (No. 2). - - - - - - - - - **172**

11.—*Motion to vary the minutes of judgment—Whether pledge of shares as collateral security—If no pledge a simple contract debt—Application of Statute of Limitations—Application for rehearing.*] On motion, the appellant alleges that the respondent's position on the appeal was that there was a pledge of the shares in question and to this they submit that the Statute of Limitations was not a defence and in consequence they did not argue that it was. He now claims that the reasons for judgment disclose that there was no pledge. If this is so, they submit the obligation of the appellant was a simple contract debt, that the Statute of Limitations would be a defence and they are entitled to a reargument of this point. *Held*, that while not deciding whether or not the respondent's charge was a mortgage, the late Chief Justice indicated that he was of opinion that it was and he agreed that the judgment should be varied as set out in the reasons for judgment of O'HALLORAN, J.A., who came to the conclusion that there was a pledge. The majority of the Court held that there was a pledge. The judgment as drawn represents the opinion of the majority of the Court and the application fails. BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JR. *et al.* - **364**

PRACTICE—*Continued.*

12.——*Pleading — Reply — Motion to strike out—New claim in reply—Rule 212.*] In his statement of claim the plaintiff set out that he was at all material times the owner of the truck and equipment in question and entitled to immediate possession, that the bailiffs seized the same, acting under written authority from the Industrial Acceptance Corporation Limited, and that such seizure was illegal. On demand for particulars of the illegality, the plaintiff said the seizure was illegal because he was the owner entitled to immediate possession and that the seizure was not effected under any verbal or written authority given by him, nor under any statutory or other authority whatsoever. The defendants pleaded a conditional sale agreement in writing, under which the plaintiff agreed to purchase and one Ellis had agreed to sell to him the truck and equipment and an assignment of the agreement from Ellis to the Industrial Acceptance Corporation Limited, that under the agreement the title to the truck and equipment remained in the vendor until payment in full, that the plaintiff had fallen into default and the Industrial Acceptance Corporation Limited, through its bailiffs and pursuant to the powers contained in the agreement seized the chattels in question. In his reply the plaintiff set up that the alleged agreement was null and void because the truck and equipment had been sold for a price exceeding that which had been fixed by a certain order made by the motor-vehicle controller pursuant to certain orders in council and that such contravention rendered the vendor subject to penalties. On application for an order striking out paragraphs 1 to 7 of the reply on the ground that they raise a new ground of claim or contain allegations of fact inconsistent with the statement of claim was dismissed. *Held*, on appeal, reversing the decision of COADY, J., that the plaintiff sets up in his statement of claim that he was the owner of the truck and had given no authority to seize it nor was there any authority "under any statutory or other authority whatsoever" whereby it might be seized. That is not his case. In his reply he admits the written authority but challenges its validity. The relevant allegations in the statement of claim are inconsistent with those in the reply. Paragraphs 1 to 7 of the reply must be struck out with leave to the plaintiff to amend his statement of claim. RANJIT SINGH MATTU v. INDUSTRIAL ACCEPTANCE CORPORATION LIMITED AND THOMPSON & BINNINGTON LIMITED. - **401**

PRACTICE—*Continued.*

13.——*Pleadings—Statute pleaded—Long and complicated statute—Demand for particulars—Necessity for stating sections relied on—Insurance Act, R.S.B.C. 1936, Cap. 133.*] Where a party relies on a long and complicated Act, he is not entitled to plead the Act as a whole, but should specify the section or sections thereof on which he relies. The plaintiffs in their reply pleaded the Insurance Act (containing 248 sections and divided into XI. Parts), and in answer to a demand for further and better particulars as to the sections on which they rely, replied that they pleaded "each and every section." On the application of the defendant, they were ordered to furnish the defendant with further and better particulars of the sections they relied on under said Act. CATHERINE I. SPENCER *et al.* v. THE CONTINENTAL INSURANCE COMPANY. - - - - - **35**

14.——*The Excess Profits Tax Act, 1940—Order of board of referees—Certiorari—Jurisdiction—Can. Stats. 1940, Cap. 32, Sec. 14—R.S.C. 1927, Cap. 97, Sec. 66.*] Section 66 of the Income War Tax Act provides in part as follows: "66. Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act. . . ." The Nanaimo Community Hotel Limited moved for a writ of *certiorari* to remove into the Court the decision of the board of referees appointed by the Minister of National Revenue pursuant to the provisions of The Excess Profits Tax Act, 1940, whereby the said board purported to ascertain the standard profits of Nanaimo Community Hotel Limited pursuant to said Act and for an order absolute for the writ to be issued forthwith and that the decision be quashed. *Held*, that said section 66 of the Income War Tax Act is sufficient to oust the jurisdiction of this Court to deal with a decision on which an assessment is subsequently made and the motion was dismissed. *In re* APPLICATION BY NANAIMO COMMUNITY HOTEL LIMITED FOR WRIT OF *Certiorari* DIRECTED TO THE BOARD OF REFEREES. **558**

15.——*Third-party proceedings — Claim for indemnity—Directions—Right of third party to appear and cross-examine witnesses—Right of third party to appeal judgment against defendant.*] On settling the directions as to a third-party claim, the third party (J. R. Parmley) should have the right to appear on the trial and cross-examine with the proviso that the cross-examination

TESTATOR'S FAMILY MAINTENANCE ACT—*Continued.*

2.——*Petition by widow of deceased—No provision for widow in will—Disagreement as to terms upon which they would live together—Separation agreement—Substantial estate left to four sisters.*] The applicant and deceased were married in 1927. They lived together for six months when, owing to ill health she went to live with her mother. She returned in six weeks when disagreement arose between them and she went away for two weeks. On her return there followed interviews with failure to agree. A few days later she received a letter from her husband's solicitor in which he stated the husband was willing to take her back, provided she was willing to fulfil all her duties as his wife, but he was not willing to take her back merely in the capacity of a housekeeper and in the event of further disagreement, an action for judicial separation would be commenced. In August, 1928, a separation agreement was entered into. He then paid her $500 and nothing thereafter. The deceased's net estate amounts to about $69,000 all left to his four sisters with the exception of a $1,000 legacy to the executor. The applicant had two children by a former marriage and denies that she ever made it a condition of her return that she was merely to act as his housekeeper. On application by the wife for maintenance under the Testator's Family Maintenance Act:—*Held*, that the testator has not made adequate provision for the proper maintenance and support of his widow. That $20,000 would be a proper sum to allow her and that pursuant to section 6 of the Act, the incidence of payment ordered shall fall rateably upon the whole of the estate, but not to affect the legacy to the executor. *In re* TESTATOR'S FAMILY MAINTENANCE ACT AND *In re* ESTATE OF SAMUEL GEORGE FOXE, DECEASED. - - **77**

3.——*Whole estate bequeathed to brother of petitioner by mother—Ill health of petitioner — Principles applied — R.S.B.C. 1936, Cap. 285, Sec. 3.*] The petitioner has one brother and one sister. His father died in 1942 and by will left all his estate to his wife with remainder over to petitioner's brother Robert L. Dickinson. His mother died in 1943 and, with the exception of a few very minor legacies, left all her estate of about $15,000 to Robert L. Dickinson, who received approximately $22,000 from the two estates. The petitioner is 48 years old, married in 1940, has a house worth $3,500, paid for, less than $300 in the bank and earns about $2,000 a year. In 1926 he was taken

TESTATOR'S FAMILY MAINTENANCE ACT—*Continued.*

ill with gall bladder trouble and from time to time was compelled to lay off from work up to the present time. He lived with his parents from 1926 to 1935, during which time they paid substantial medical bills on his behalf. On petition under the Testator's Family Maintenance Act, that adequate provision had not been made for the proper maintenance and support of the petitioner, the evidence disclosed that the petitioner was making a bare living and was subject to ill health and the testatrix had failed to take into consideration as a just parent these "special" circumstances. *Held*, that in the circumstances an "adequate, just and equitable" provision for the petitioner to be made out of the estate of the testatrix is the sum of $3,000 to be paid in a lump sum to the petitioner. *In re* TESTATOR'S FAMILY MAINTENANCE ACT AND *In re* ISABELLA CAROLINE DICKINSON, DECEASED. - - **214**

4.——*Will—Two sons only next of kin—Estate of $13,000—Three legacies of $200 to three grandchildren—Legacy of $300 to petitioner—Residue to other son—Petitioner suffering from industrial accident—Heart condition—R.S.B.C. 1936, Cap. 285.*] A testatrix was survived by two sons. Of her estate of $13,000 she bequeathed legacies of $200 to each of three grandchildren and a legacy of $300 to her son F. the petitioner. The residue she bequeathed to the executor named in the will in trust to invest and pay to her son W. the sum of $35 per month until the residue and income derived from such investment be disbursed with a direction that upon the death of W. to divide the balance equally among the grandchildren. The petitioner complained that because of his many years of unemployment, his brother is better circumstanced than himself, that he is suffering from an industrial accident for which he received compensation which has been discontinued but left him suffering from a heart condition which prevents him from resuming his former occupation as a shipyard-worker. The evidence disclosed that W. was at all times a steady worker and responsible person, whereas the petitioner was the ne'er-do-well of the family. The petitioner had not communicated with his family since the death of his father in 1941. *Held*, that the petitioner has now become to a degree physically disabled, although not accepting petitioner's evidence that his physical disability wholly prevents him from earning a livelihood; this is the only factor which serves to bring this application within the

cousins. In the first clause of her will was the direction that all her debts and funeral expenses be paid from proceeds of the sale of her £1,250 Canadian Railway Company 4 per cent. non-cumulative preferred sterling stock. The first bequest was a small one to her late husband's brother and a ring to his wife. The next bequest was a life interest in £1,000 security to a cousin Mrs. Martin and on her death the securities were to go to Mrs. Martin's daughter Edna Madigan and her heirs. Then after certain bequests to other parties as outright bequests, a bequest of £1,400 Canadian Pacific Railway $4 debentures followed to a sister of her late husband for life and after her death to go to Edna Madigan for her life and after her death to her children. Then follows a bequest to Mrs. Madigan of five different lots of securities for life with remainder to her children. The will concludes with the following: "My furniture, at present stored with Messrs. White (of 74 Kensington Park Road, London, W. 11, England) to be sold to defray expenses incidental to settling the estate. Any residue to go to Mrs. Edna Madigan who should examine the contents of the boxes in store." The value of the whole estate was slightly in excess of $40,000 and the value of the furniture stored in England was approximately $800. Of this sum, after paying sale costs and expenses involved in settling the estate, a very small amount would be left over. In a careful allocating of specific bequests, only about $22,000 out of the estate of $40,000 was specifically dealt with in the will. As to the balance of about $18,000, if the word "residue" be confined to the balance of the proceeds from the sale of the furniture, there is no testacy. In determining the question as to whether or not such residue so referred to is the residue of the entire estate or is only the residue from the sale of the testatrix's furniture after paying the expenses incidental to settling the estate:—*Held*, that the testatrix intended by the use of the words "Any residue" to refer not to the infinitesimal amount left from the disposal of the furniture, but applies to the residue of the whole estate. *In re* ESTATE OF HILDA CLARICE STOKES, AND *In re* THE ADMINISTRATION ACT AND *In re* THE TRUSTEE ACT. MONTREAL TRUST COMPANY v. HELEN MARIS *et al.* - - - - - - - - **161**

4.——*Construction — Legacies — Duty— "All the proceeds of my estate"—What it includes—Rule 762a—R.S.B.C. 1936, Cap. 270, Secs. 10 and 28.*] Clauses 7 and 8 of a will are as follow: "7. I direct that my

trustees shall pay and divide all the proceeds of my estate in the following proportions, namely, 8. All the rest and residue of my estate both real and personal whatsoever and wheresoever situate I give, devise and bequeath to my son Richard Charles Horatio Hitchen for his own use absolutely." The trustees by originating summons asked the following questions: "1. Are the legatees entitled under the will of the deceased to receive their legacies free of any or all duties? 2. Is there authority under the terms of the will to the trustees to sell shares and stocks belonging to the estate other than oil and mining shares? 3. Having regard to paragraph 7 of the will of the deceased:—(a) what part of the estate is included in the phrase 'all the proceeds of my estate'? (b) do moneys on deposit in the bank to the credit of the testator at the time of his death fall into the residuary estate? (c) do the proceeds derived from the sale by the executors of any shares other than oil and mining shares fall into the residuary estate?" *Held*, as to question 1, that there must be a clear direction in the will before executors are authorized to charge upon the estate generally the liability imposed by section 10 of the Succession Duty Act upon a legatee and the answer is in the negative. As to question 2, the direction for sale is confined to oil and mining shares and the answer is in the negative. As to questions under 3, the intention of the testator is to be collected from a consideration of the whole will. If he intended that clause 7 would operate as a residuary clause and the entire estate would thus be disposed of, there would be no need for the addition of a residuary clause and no effect could be given to clause 8. It follows that the phrase "all the proceeds of my estate" should be interpreted as a disposition only of the sum realized upon sale of the assets of the estate directed to be made under clauses 1 to 6 of the will. *In re* ESTATE OF C. H. HITCHEN, DECEASED. *In re* TRUSTEE ACT. *In re* ADMINISTRATION ACT. - - - - **312**

5.——*Interpretation—Bequest to "Royal Protestant Orphange for Children, New Westminster, B.C."—No such institution—One in New Westminster called "Loyal Protestant Home for Children, New Westminster, B.C."—Whether bequest is void for uncertainty—"The money left in the bank"—What it consists of.*] The testatrix made a bequest in her will to the "Royal Protestant Orphange for Children, New Westminster, B.C." There is no such institution,

plaintiff claimed that the defendant, with knowledge of the said liens and assignment to the plaintiff and without authority, caused the logs upon which the plaintiff had liens to be removed from the premises where they were situate and mixed the said logs together with logs cut by it so that it was impossible for the plaintiffs to realize upon its liens and thereby its liens were lost. They claimed general damages and special damages. On the trial the jury found in favour of the plaintiff and assessed the damages at $2,244.39 for which judgment was entered. *Held*, on appeal, affirming the decision of FARRIS, C.J.S.C., that a proper judgment under the Woodmen's Lien for Wages Act is a judgment *in rem* and good against all the world and accordingly the liens were properly proved by such judgment. There was ample evidence upon which the jury could find that the profit on the sale of the logs in question which had been or could be made by the appellant would equal the amount of their verdict. WAREHOUSE SECURITY FINANCE COMPANY LIMITED AND THE

LIQUIDATOR OF WAREHOUSE SECURITY FINANCE COMPANY LIMITED v. OSCAR NIEMI LIMITED. - - - - - - **321**

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